ROYAL COMMISSION ON THE
DONALD MARSHALL, JR. PROSECUTION

BOOK OF AUTHORITIES USED BY
THE ROYAL CANADIAN MOUNTED POLICE,
CORRECTIONAL SERVICE OF CANADA, AND
THE NATIONAL PAROLE BOARD

APPENDIX "A"

LIST OF AUTHORITIES

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3.	**Lemay v. The Queen** (1951), 102 C.C.C. 1 (S.C.C.)	33
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11.	Stenning, Phillip C., **Legal Status of Police (Criminal Law Series),** Law Reform Commission of Canada, 1981	72, 73
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13.	McMurtry, R. Roy, Address to the 73rd Annual Conference of the Canadian Association of Chiefs of Police "Police Discretionary Powers in a Democratically Responsive Society", R.C.M.P. Gazette (1979), Vol. 41, No. 12	74, 87
14.	**Glinsky v. McIver,** [1962] 1 All E.R. 696 (H.L.)	75, 125

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15. **Clark et al v. Attorney General of Canada** (1978), 81 D.L.R. (3d) 33 (Ont. High Ct.) 125

16. **House of Assembly Act**, R.S.N.S. 1967, c 128, ss. 29-35 125

"thereby have vested in others a right which might become incon-
"sistent with the rights of the inhabitants at some future time."
That the magistrates could do no positive act that was in breach of their duty to the inhabitants is clear. But it does not follow that by tacit acquiescence, indifference, or neglect they might not have allowed a public right of way to be established over the golf links. I know of no authority or principle which would have prevented the public, by appropriate use of a path over the golf links from one public place to another for an uninterrupted period of 40 years, from establishing the existence of a public right of way. The principle of presumed dedication has no place in the law of Scotland and accordingly it is not possible, in my opinion, to build up on the case of *Paterson*[119] any argument favourable to the appellants.

On the facts proved here the assumed inconsistency of the existence of a right of way with the subsidiary powers conferred on the appellants by section 16 of the Railways Clauses Consolidation Act, 1845, seems to me unreal. Whether the appellants could at some future time remove the bridge does not at the moment call for consideration. Even if they could and did, it does not follow that the right of way would disappear, nor has it been shown that the exercise of the right of way would then become incompatible with the running of the railway. Incompatibility is a question of fact, not a question of law, and where the facts are such as would be sufficient to presume dedication to the public of a right of way in all other respects it is, in my opinion, for the statutory undertaker to prove incompatibility, and not for those asserting the right to prove compatibility. The speech of Lord Sumner in *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation*,[120] though given in a somewhat different kind of case, contains passages to the same effect and in this matter I think no distinction can be taken between the two cases.

I would dismiss these appeals.

Appeals dismissed.

Solicitors: *M. H. B. Gilmour; Sharpe, Pritchard & Co. for Clerks to Worcester and Westmorland County Councils.*

F. C.

[119] 6 App.Cas. 833.

[120] [1926] A.C. 355.

MOHAMED FIAZ BAKSH . . . . . APPELLANT;

AND

THE QUEEN . . . . . RESPONDENT.

J. C.*

1958
Feb. 13;
Mar. 11.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF BRITISH GUIANA.

Criminal Law—Appeal—Fresh evidence—Statements by prosecution witnesses to police—Not available at trial—Material discrepancies when compared with oral evidence—Whether new trial should have been ordered—Murder—British Guiana.

British Guiana.

The appellant and his co-accused (who had each relied on an alibi) having been convicted of murder, both appealed to the Court of Criminal Appeal of British Guiana, who permitted to be produced and proved on the hearing of the appeal statements, which had not been available at the trial, made to the police by the three main witnesses for the prosecution. The Court of Criminal Appeal found that a comparison of the statements with the oral evidence given by those witnesses at the trial disclosed material discrepancies. They said in respect of the appellant's co-accused that in the interests of justice the value and weight of the new evidence should be determined by a jury and not by that court, and they quashed his conviction and ordered a new trial. In the case of the appellant, however, they were of opinion that different considerations applied; they considered that nothing favourable to him could have been obtained from the statements which was not obtained at the trial, and held that the jury's verdict in respect of him could not be disturbed on that ground:—

Held, that if the statements afforded material for serious challenge to the credibility or reliability of the witnesses on matters vital to the case for the prosecution, the defence by cross-examination might have destroyed the whole case against both accused or, at any rate, shown that the evidence of those witnesses could not be relied on as sufficient to displace the evidence in support of the alibis. Their credibility could not be treated as divisible and accepted against one and rejected against the other. A new trial should have been ordered in both cases.

The case would be remitted to the Court of Criminal Appeal with the direction that they should quash the conviction of the appellant and either enter a verdict of acquittal or order a new trial, whichever course they considered proper in the interests of justice in the existing circumstances.

APPEAL (No. 26 of 1957), by special leave, from a judgment of the Court of Criminal Appeal of British Guiana (June 7, 1957), dismissing the appellant's appeal from a judgment of the Supreme Court of British Guiana (Clare J. and a jury) (December 5, 1956).

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* *Present*: LORD REID, LORD TUCKER, LORD SOMERVELL OF HARROW,

whereby the appellant was convicted of murder and sentenced to death.

The following facts are taken from the judgment of the Judicial Committee: The appellant had been charged jointly with one Nabi Baksh with the murder of Mohamed Saffie on June 12, 1956. Nabi Baksh was also found guilty.

Both prisoners appealed to the Court of Criminal Appeal of British Guiana (Holder C.J., Stoby and Date JJ.), and on June 7, 1957, that court dismissed the appellant's appeal but quashed the conviction of Nabi Baksh and ordered a new trial in his case.

The appellant appealed by special leave to Her Majesty in Council and his appeal was heard by the Board on February 13, 1958.

The case for the prosecution was that the deceased man was killed shortly after 3 a.m. on June 12, 1956, by shots from a gun fired by one or other of the two accused men acting together with the common design of killing or doing grievous bodily harm to the deceased. The case rested largely on the identification of the accused by three prosecution witnesses named Mohamed Haniff, the deceased's brother-in-law, Mohamed Nazir, brother-in-law of Haniff, and Bebe Mariam, who had been living with the deceased. Haniff at the trial swore that on June 12 he was living with the deceased at a house at Clonbrook, East Bank, Demerara. Also living in the house were Nazir and his wife and Bebe Mariam. He woke about 3 a.m. and helped the deceased and Nazir load a boat with vegetable produce, and then returned to the house with the deceased. Nazir and his wife and Bebe Mariam went away with the boat. He went to lie on his bed, and before Nazir returned with the boat he heard gun-fire from the kitchen direction and went to the window with his torch. He saw two men whom he could identify. He shouted to them: "Alright Fiaz and Jacoob "no use run any more I see you already." Nabi Baksh was known as Jacoob. He saw a gun in the appellant's right hand. He ran downstairs and saw deceased lying at the top of the step leading from the kitchen. Nazir was there, and they lifted the deceased and placed him on his back.

He said that he had been acquainted with both accused for three or four weeks before June 12.

Nazir swore that after he had taken his wife and Bebe Mariam with the vegetable produce to the bus when he reached the spot where he usually tied his boat he heard a shot. He ran underneath his house and from there saw the appellant and Nabi Baksh crossing a trench near the house. He heard Haniff shout

to them "Alright Fiaz and Jacoob, don't run I see you." He turned his torch on them and saw the appellant had a gun.

Bebe Mariam swore that she and the deceased were awakened about 2.30 a.m. on June 12 by the barking of dogs and that by a torchlight she saw the appellant and Nabi Baksh about 48 yards away from the house. She said that she had known them for about two years.

Neither of the accused gave evidence, but in statements from the dock denied that they were anywhere near the scene of the murder. They gave an account of their movements and said that the statements they had given to the police were true. They both called a number of witnesses in support of their alibis.

Both prisoners appealed, and on May 13, 1957, counsel who had appeared on behalf of Nabi Baksh at the trial swore an affidavit stating that at his request the Solicitor-General had allowed him to inspect the statements made to the police by the witnesses Haniff, Nazir and Bebe Mariam on the morning of June 12, 1956, which had not been available to him at the trial, and that these statements showed serious discrepancies and contradictions in vital matters when compared with the evidence given by them at the trial. The Court of Criminal Appeal accordingly allowed these statements to be produced and proved. They were found to contain the following discrepancies—Haniff in his statement had said that after he heard the gunshot he looked out of the window and shone his torch and saw the appellant and another man whom he did not know by name on the parapet of the trench dividing the yard and the rice field; that he ran on the bridge and was all the time shouting "all right "Fiaz, all you run, me see all you two."

Nazir had said that neither he nor Haniff had shouted at the men who were escaping because they were afraid of being shot.

Bebe Mariam had said that when she was awakened by the barking of dogs she saw the appellant by the light of her husband's flashlight running away in the rice field south of her home.

After examining the statements and comparing them with the sworn testimony at the trial the Court of Criminal Appeal in their judgment delivered on June 7, 1957, said: "From an examina-"tion of the additional evidence it will be seen that Bebe Mariam "made no mention of seeing Nabi Baksh on the morning of "June 12 shortly before the shooting; Mohamed Haniff did not "know the name of the man he saw with Fiaz Baksh and there-"fore could not have called it out. Had the jury known these "facts we are unable to say that inevitably they would have

"arrived at the same conclusion. They may have done so "because they may have accepted Mohamed Nazir's evidence "that he saw the two appellants, or the two witnesses already "mentioned may have been able to explain or amplify their "original statements."

They went on to say that in their view, in respect of Nabi Baksh, in the interests of justice the value and weight of the evidence should be determined by a jury and not by that court. They accordingly quashed the conviction in his case and ordered a new trial.

With regard, however, to the present appellant, they considered entirely different considerations applied. They could find a good deal unfavourable and nothing favourable to him in the statements and considered that nothing favourable to him could have been obtained therefrom which was not obtained at the trial. They accordingly held that the jury's verdict in respect of this appellant could not be disturbed on this ground.

1958. Feb. 13. *Bernard Gillis Q.C.* and *J. Lloyd-Eley* for the appellant. The statements having been admitted, at the hearing before the Court of Criminal Appeal the Chief Justice said that the court were of opinion that the discrepancies between the statements and the oral evidence given by those witnesses at the trial were so startling that they struck at the root of the case for the prosecution and justice demanded that they should have been disclosed to the defence. Having quashed the conviction of, and ordered a new trial of, Nabi Baksh, the court said that different considerations applied in the case of the appellant, and pointed out that in each of the three statements the appellant had been positively identified, and they dismissed his appeal. Subsequently the Crown entered a nolle prosequi in respect of Nabi Baksh on the ground that in the opinion of the Law Officers it would be dangerous to ask the jury to accept the evidence of identification, and he was freed. The submission is that the discrepancies disclosed that those witnesses were wholly discredited. They were fundamental discrepancies. That being so, one cannot sever the credit of a witness, and if he has given perjured evidence —which is the consequence of the observations of the Court of Criminal Appeal—the case for the prosecution cannot be allowed to stand as regards another appellant with regard to whom those witnesses have also given incriminating evidence. Had the jury had before them the false information of those witnesses with

regard to one of the accused, it cannot be said that they must inevitably have convicted in the case of the other—they may not necessarily have returned the same verdict.

The appellant has been denied the substance of a fair trial. There was in the possession of the prosecution at the time of his trial evidence of a most cogent character to the effect that the witnesses had given false evidence; he was therefore deprived of the strongest possible weapon when he was seeking to challenge the honesty of the witnesses for the prosecution. It must be admitted that as soon as counsel and the authorities were aware of the discrepancies proper facilities were given for the production of the statements. If material is in the prosecution's possession which will destroy their case, it is their duty to disclose it. A further ground of appeal is that there was misdirection by the trial judge in directing the jury that the onus of proof was on the accused to establish the alibi.

There is a paucity of authority on the main submission, but see *Reg.* v. *Puddick.*[1] The whole of the material is before the Board, and in all the circumstances it is submitted that the conviction should be quashed or that the appellant should be placed in the same position as his co-accused and a new trial ordered. [Reference was also made to *Reg.* v. *Collister.*[2]]

J. G. Le Quesne for the Crown. It was the duty of the Criminal Appeal Court to say: "Would this new evidence affect "the decision of reasonable men in this case?" That is the correct test. For the Crown to succeed, the Board must be satisfied that the Court of Criminal Appeal must with justification have taken the view that no reasonable jury would have returned a different verdict in respect of the appellant if this new material had been used at the trial. The fact that the jury might be affected by these statements as regards Nabi Baksh does not necessarily involve the proposition that a reasonable jury would similarly have been affected in the case of this appellant. The effect of the new evidence was quite different in the case of Nabi Baksh from that of the appellant; the three statements left the appellant implicated by those three witnesses just as he was implicated by the evidence of the Crown. In his case there was no contradiction but consistent testimony of identification all the way through. The Court of Appeal were entitled to say, as they did, that if those statements had been before the jury they would not have been affected in their view of the guilt of the appellant.

[1] (1865) 4 F. & F. 497.

[2] (1955) 39 Cr.App.R. 100.

There is no rule to say that this conviction should be quashed merely because material has been withheld. Further, it would not be the right course for the Board to quash the conviction at this stage.

Feb. 13. LORD REID said: "The appeal will be allowed and "the case remitted to the Court of Criminal Appeal of British "Guiana with a direction that they should quash the conviction "and either enter a verdict of acquittal or order a new trial, "whichever course they may consider proper in the interests of "justice in the existing circumstances. Their Lordships will "give their reasons for their decision at a later date."

March 11. Their Lordships' reasons for allowing the appeal were delivered by LORD TUCKER, who stated the facts set out above and continued: Their Lordships are unable to accept the reasoning of the Court of Criminal Appeal on this matter. If these statements afforded material for serious challenge to the credibility or reliability of these witnesses on matters vital to the case for the prosecution it follows that by cross-examination—or by proof of the statements if the witnesses denied making them—the defence might have destroyed the whole case against both the accused or at any rate shown that the evidence of these witnesses could not be relied upon as sufficient to displace the evidence in support of the alibis. Their credibility cannot be treated as divisible and accepted against one and rejected against the other. Their honesty having been shown to be open to question, it cannot be right to accept their verdict against one and re-open it in the case of the other. Their Lordships are accordingly of opinion that a new trial should have been ordered in both cases.

It remains only to say that their Lordships are in complete agreement with the view expressed by the Court of Criminal Appeal with regard to the criticisms which were made, and which have been repeated before the Board, of the trial judge's summing-up with respect to the onus of proof in connexion with the defence of alibi. Taking the summing-up as a whole, the jury could have been left in no doubt that the onus remained on the prosecution throughout to establish the guilt of the accused.

For the reasons stated above, their Lordships have humbly advised Her Majesty that the appeal should be allowed and the case remitted to the Court of Criminal Appeal of British Guiana with the direction that they should quash the conviction of the

appellant and either enter a verdict of acquittal or order a new trial, whichever course they consider proper in the interests of justice in the existing circumstances.

Solicitors: *Hy. S. L. Polak & Co.; Charles Russell & Co.*

C. C.

MARY NG . . . . . APPELLANT;

AND

THE QUEEN . . . . . RESPONDENT.

J. C.*
1958
March 19.

ON APPEAL FROM THE HIGH COURT OF THE COLONY OF SINGAPORE.

Burden of Proof—Criminal case—Facts especially within knowledge of accused—No burden on accused to prove that no crime has been committed—Onus on prosecution to prove commission of offence—Evidence Ordinance (Laws of Singapore, 1955, *c.* 4), *ss.* 107, 115. *Singapore. Ceylon—Ceylon Evidence Ordinance, s.* 106.

By section 107 of the Singapore Evidence Ordinance: "When "any fact is especially within the knowledge of any person, the "burden of proving that fact is upon him."

The appellant was charged with and convicted of attempting to cheat a man and thereby attempting dishonestly to obtain money from him by representing to him that she was able to induce the magistrate before whom the man was to be charged with a criminal offence to show favour to him. The trial judge held that whether or not the appellant could induce the magistrate to show favour to the accused man was a fact which was especially within the knowledge of the appellant, and that under section 107 of the Evidence Ordinance the onus was on her to prove that she could induce the magistrate to show favour:—

Held, that by reason of section 107 no burden was placed on the appellant to prove that there had been no deceit. The burden was on the prosecution to prove affirmatively that there had been. It should have been made to appear sufficiently on established facts that the appellant had no reason to believe that she could have influenced the magistrate, and that had not been done. There was in fact no evidence against the appellant on a principal ingredient of the charge, namely, deceit, and the case therefore came within the range of cases in which the Board would interfere.

Dictum in *Attygalle* v. *The King* [1936] A.C. 338, 341; 52 T.L.R. 390; [1936] 2 All E.R. 116, that "It is not the law of

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* *Present*: LORD REID, LORD TUCKER, the RT. HON. L. M. D. DE SILVA.

ntil it was inevitable. In the result I think that both the crew of " Rockabill " and the employees of the Dock Board were negligent that their negligence contributed to the collision and that through ı their employers are both liable to the owners of the " King Orry " he damage sustained by her in the collision that resulted from their ıgence.

ıe last question is whether the owners of the " Rockabill " can ver their damages from the second defendants, the Mersey Docks Harbour Board. In my judgment they cannot do so, for as between ı and the Dock Board the rule of the common law and not the rule ıe maritime law as embodied in the Maritime Conventions Act, 1911, applies. The rule of the common law, as I understand it, is that in a case as this, where the claimants have themselves been guilty of gence contributing to their own damage, the loss lies where it and they cannot recover from their co-tortfeasors.

herefore give judgment for the plaintiffs against both the defendants, I dismiss the counterclaim of the first defendants against the second ıdants.

licitors : *Pritchard, Sons, Partington & Holland*, agents for *Batesons* 'o., Liverpool (for the plaintiffs) ; *Botterell & Roche*, agents for *ıhtman, Pedder & Co.*, Liverpool (for the first defendants, the owners he " Rockabill ") ; *Gregory, Rowcliff & Co.*, agents for *E. A. rhouse* (for the second defendants, the Mersey Docks and Harbour rd).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

MAHADEO *v.* R.

[PRIVY COUNCIL (Viscount Hailsham, L.C., Lord Russell of Killowen, Sir Lancelot Sanderson, Sir George Lowndes, Sir Sidney Rowlatt), **April 30, May 1, June 11, 1936.**]

Privy Council—Fiji—Criminal Law—Manslaughter—Conviction of murder—Exclusion of statements—Corroboration.

The appellant, a lad of 16, in separating two boys who were fighting, caused the death of one of them. The only witness was one Sukraj, who was present at the time and was charged as accessory after the fact. At the trial a letter was read from the solicitors acting for the defendants asking for the production of all statements made by the defendants and Sukraj. This was characterised as improper and production was refused. Also at the trial counsel for the defendants agreed that the medical aspect of the case should be argued by one counsel only, and it was agreed that this should be done by counsel for an accessory. This counsel was not allowed to deal with this subject, and was told to confine himself to the question whether his client was an accessory :—

HELD : (i) in the circumstances the killing only amounted to manslaughter, there being no presumption of malice.

(ii) the letter asking for production of the statements was quite a proper one and the statements should have been produced.

(iii) counsel for the accessory was quite entitled to argue whether there had been a murder or not, and this would be so even if the prisoner had pleaded guilty. He was, therefore, fully entitled to discuss the medical aspect of the case.

(iv) Sukraj being an accomplice, his evidence required corroboration. The fact that he kept silence as to the death of the boy was not corroboration.

[**EDITORIAL NOTE.** There is an application here of the qualification of the doctrine of the presumption of malice given in *Woolmington* v. *Director of Public Prosecutions* (2), and applicable to cases of homicide. The restriction of speeches of counsel is another important matter here dealt with, and it is shown that counsel for an accomplice or accessory may argue that the crime was never committed, even though the prisoner has pleaded guilty. It was not necessary to go as far as that here. The counsel for the accessory here only desired to deal with the medical evidence for the prosecution.

AS TO MANSLAUGHTER, see HALSBURY, Hailsham Edn., Vol. 9, pp. 438-440, paras. 752-756 ; and FOR CASES, see DIGEST, Vol. 15, pp. 782, 783, Nos. 8385-8435.]

Cases referred to :

(1) *R.* v. *Baskerville*, [1916] 2 K.B. 658 ; 14 Digest 463, *4934*.
(2) *Woolmington* v. *Public Prosecutions Director*, [1935] A.C. 462 ; Digest Supp.
(3) *Re Dillet* (1887), 12 App. Cas. 459 ; 17 Digest 490, *542*.

APPEAL by special leave in a criminal case from the Supreme Court of Fiji. The facts are fully stated in the judgment.

J. M. Pringle for the appellant.

Kenelm Preedy for the respondent.

The judgment of their Lordships was delivered by SIR SIDNEY ROWLATT.

SIDNEY ROWLATT: This is an appeal *in forma pauperis* by special on the judgment of the Supreme Court of Fiji sitting at the Circuit Court dated May 17, 1934, by which the appellant d guilty of the murder of a boy named Ramautar, and being a rson within the meaning of the Fiji Ordinance No. 37 of 1932 suant to sect. 12, sentenced to be detained as the Governor irect. The appellant is in fact about sixteen years old. r, the boy alleged to have been murdered, was about thirteen l. Pursuant to Ordinance No. 6 of 1875 the trial was held e Chief Justice of Fiji, who is the only judge in the Island, ith assessors, and by sect. 29 of the same Ordinance the decision d solely in the judge. By virtue of sect. 36 of Ordinance No. 4 he trial, for all purposes material to the present appeal, fell to ed by the English common law.

aterials before their Lordships on the hearing of the appeal of the official note (not taking questions and answers verbatim), 's own somewhat abbreviated notes, a resumé of the remarks of Justice to the assessors at the close of the case, in the nature ning up, which resumé was handed by the then Chief Justice to Attorney-General after the institution of this appeal and brought eir Lordships as an exhibit to an affidavit by the Attorney- or Fiji, and lastly a note of the summing up in longhand made f the counsel for the defence at the trial and exhibited to an y him. Certain incidents in the trial to which it will be neces- efer appear from affidavits made by counsel for the defence hen Attorney-General In substance there is no conflict as to dents.

e was tried upon information by the Attorney-General pursuant ocedure in force in the colony, by which the appellant was ith murder, and one Mathura his step-father and another boy, were charged, Sarandas with aiding and abetting and Mathura g an accessory after the fact. In the result Sarandas was l at the close of the case for the prosecution and Mathura, like ant, was convicted. The history of the case can be stated vely briefly. The only evidence as to the actual homicide by one Sukraj, a labourer about twenty-five years of age. of this was as follows: On the morning of Jan. 18, 1934, the the witness Sukraj, the dead boy Ramautar who was teen years of age, and Sarandas, about the same age as , namely thirteen years of age, were weeding in a field belonging a. A quarrel resulting in a struggle arose between Ramautar das, who was the stronger boy. The appellant told Sukraj to hem and on his refusal intervened himself. At this moment d had hold of Sarandas's legs. The appellant released Sarandas

and caught Ramautar by the throat while he was on the ground. The witness and Sarandas were then cutting grass. The appellant called out in a short time and said, "Come and see what has happened to Ramautar." When the witness and Sarandas got up to him the deceased was quivering. That went on for three minutes, when he died. Sukraj then deposed that on the suggestion of the appellant they took the body and put it under a tree with the deceased's turban round his throat and leaving it there returned to Mathura's house. There was independent evidence that the four youths were working together in the field in question and the deceased's dead body was seen by independent witnesses under the tree. As regards what actually happened there is only the evidence of Sukraj. It appears that Sukraj arrived at Mathura's house before the other two and said nothing. The appellant, when he came, told the deceased's mother and her husband who apparently lived in Mathura's stable that Ramautar had hanged himself. Mathura was not then in. On his return he was told, according to Sukraj, everything. He then told the others to say nothing and went himself to Tavua Police Station some miles away from Tagi Tagi where these events happened and reported that a boy had taken his horses out to graze and had not returned. Subsequently Mathura, the appellant, and Sukraj removed the body from under the tree and hid it in broken ground in the bush. A search for the supposed lost boy was maintained in the neighbourhood till Jan. 24, that is for six days. Nothing more happened until Feb. 13 when Sarandas being at Tavua was sent for by a Mr. Powell who had apparently heard some rumours and in consequence of what he said took him to Mr. Probert the sub-inspector of police, where he repeated his statement which was taken down and put in evidence at the trial. This was to the effect that the deceased after the quarrel had left the others and that they had afterwards found him hanging dead. He also disclosed that Mathura had told him that they had since made away with the body.

In consequence of this, on Feb. 14, the police went to Tagi Tagi and saw the appellant under whose guidance they found some 36 human bones not including a head, which medical evidence given at the trial declared to be those of a person of either sex of about the deceased's age. The death of the person whose bones they were might according to the medical evidence have occurred at the time of the disappearance of Ramautar, the remains having been attacked by animals. Curiously enough there were also found at the same place a number of teeth, shown by expert evidence to be without question those of a person in middle life.

That evening the police took the appellant and Mathura to the Police Station and both made statements which were put in evidence. The appellant's statement concurred with Sarandas's previous statement that the deceased had left the others and that they had found him hanged.

He had described how he, Sukraj and his father had subsequently hidden the body in the bush. Mathura denied that he had been told that Ramautar was dead when he reported his alleged loss to the police and had joined in the search during the following days. On the next day Sarandas made another statement to the effect that it was Sukraj who had a quarrel with Ramautar but that the latter's actual death was caused by Mahadeo gripping him by the throat. This statement therefore corresponds with Sukraj's evidence, except that naturally Sukraj substituted Sarandas as the person who had the quarrel with the deceased. This statement was made after Sarandas was charged with being accessory after the fact.

Sukraj was then charged with being accessory after the fact and cautioned as the others had been. He then made a statement which was substantially in accordance with the evidence that he gave. On the previous day he had made a statement confirming the suicide story as up to that time put forward by the others. These statements were not admitted at the trial in circumstances to which it will be necessary to refer hereafter.

On the same day, Feb. 15, the appellant was charged with murder, apparently on the strength of statements of Sukraj, and after being cautioned made a statement in which he alleged that Ramautar had been killed by a stone thrown at him by Sarandas.

Some days after, namely, on Mar. 6, Sarandas being in custody asked to see the District Commissioner, before whom he made a further statement in all material respects so far as the appellant is concerned the same as his previous one. The appellant on that occasion declined to make a statement.

At the trial the prosecution was conducted by the Attorney-General, and Mathura and the appellant were separately defended. At the opening of the proceedings the Attorney-General stated that he had received a letter from the solicitors for the defendants requiring production of all statements made by the three accused and by Sukraj, other than those produced as exhibits in the proceedings. This letter has taken exception to by the Attorney-General as containing insinuations that the prosecution had suppressed documents. In point of fact the Attorney-General was not aware that there were two statements, namely, those by Sukraj, which had not been produced. The Chief Justice characterised the letter as being highly improper. In the result the statements of Sukraj were not produced but they were available at the hearing of this appeal before their Lordships. The refusal of these documents is the subject of the first comment which their Lordships feel bound to make upon the conduct of this trial. The

true that upon cross-examination without the statements Sukraj admitted that he had at first put forward a story of suicide. But it is obvious that counsel defending the appellant was entitled to the benefit of whatever points he could make out of a comparison of the two documents *in extenso* with the oral evidence given and an examination of the circumstances under which the statements of the witnesses changed their purport.

Evidence having been given counsel addressed the court. Defending counsel had arranged between themselves that the counsel defending the appellant should leave to the counsel who appeared for Mathura that part of the defence which consisted in a criticism of the evidence of the death from a medical point of view. This arrangement was not known to the Chief Justice and when counsel for Mathura, counsel for the appellant having finished his address, was proceeding to deal with that part of the case, he was told by the Chief Justice that he must confine himself to the question of the implication of Mathura as accessory, the question as to the guilt of the appellant having already been exhausted by the address of the appellant's counsel. Unfortunately counsel did not then inform the Chief Justice of the arrangement or ask for an adjournment in order that the appellant's counsel might renew his speech on the subject omitted. In the result the court was never addressed on this part of the case on behalf of the appellant although counsel desired that it should be. The view of the Chief Justice was entirely ill-founded. Whether the deceased was murdered by the appellant was in issue as between each prisoner and the Crown, and Mathura's counsel would have been entitled to insist on proof of it and challenge the evidence of it even if the appellant had pleaded guilty.

After counsel had finished their addresses the Chief Justice addressed the assessors, apparently very shortly. He explained that he was not summing up to a jury but intimated that in a case of this kind corroboration was necessary but that he thought that there was corroboration, sufficient to support a conviction. He apparently considered that the circumstance that Sukraj, when he came back to Mathura's house before the others, had said nothing, was corroboration of his story in the witness box as to the manner in which the deceased came by his death, because his silence was due to a knowledge that the death was caused by the son of his master Mathura of whom he stood in fear. It is unnecessary to point out that this is no corroboration at all and in their Lordships' view there was absolutely no other corroboration.

It is well settled that the evidence of an accessory, which Sukraj plainly was on his own showing, must be corroborated in some material

long a rule of practice, is now virtually a rule of law, and in a case like the present it is a rule of the greatest possible importance, the position being that there are three persons all implicated in a crime and one of them or two of them exculpates himself or themselves by fastening the guilt upon the other. In the present case, moreover, all the persons concerned had originally given false statements and belonged to a class of persons who are at the best not reliable witnesses.

In addition to the three comments which their Lordships have already felt bound to make on the conduct of this trial, there is a fourth, which is the most serious of all. The Attorney-General in his address, and the Chief Justice in his observations to the assessors, appear both of them to have treated this case as one of murder or nothing, on the footing that the homicide being proved malice was presumed. Upon the facts of this case as they appear from Sukraj's evidence, there is revealed affirmatively no more than a case of manslaughter. There is nothing to suggest that the appellant appreciated that he was applying a dangerous pressure to the throat of the deceased who was apparently a weakly boy. The view taken by the Chief Justice was based upon a statement of the law as to the presumption of malice long found in textbooks but recently explained and largely qualified by the decision of the House of Lords in *Woolmington's* case (2). But apart altogether from that case it never could be maintained that where the evidence for the prosecution points affirmatively no further than manslaughter the law would enlarge the proof and transform the case into one presumptively of murder.

Their Lordships have not overlooked the limits which the Board observes in dealing with criminal appeals. It is not necessary to repeat once more the rule set forth in *Re Dillet* (3), which has been recalled in several recent decisions. In the present case their Lordships are of opinion that there were really no materials here for a conviction for murder as opposed to manslaughter and in addition the trial was so conducted as in three separate respects, namely, the exclusion of the statements, restriction of the address by counsel, and the neglect of the rule requiring corroboration, to exhibit a neglect of fundamental rules of practice necessary for the due protection of prisoners and the safe administration of criminal justice.

In these circumstances their Lordships have humbly advised His Majesty that this appeal should be allowed and the conviction set aside.

Solicitors: *Barrow, Rogers & Nevill* (for the appellant); *Burchells* (for the respondent).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

TIBBALS v. PORT OF LONDON AUTHORITY.

[COURT OF APPEAL (Slesser and Romer, L.JJ., and Eve, J.), **June 16, 17, 1936.**]

Public Authorities—Superannuation—War bonus—Whether included in calculation of pension.

By a pension scheme which was taken over on its incorporation by the Port of London Authority, it was provided that deductions should be made from the wages paid to a certain employee and for the purpose of computing the pension payable to the employee the wages were to be deemed at the rate of the actual wages paid to him at the time of his retirement "exclusive of any gratuities, allowances for house, or other additions." From 1915 onwards the employee received, in addition to his wages certain bonus payments. The bonus payments were increased from time to time, and in 1918 a part of the bonus was consolidated with the wages. In 1919 a document was left with the employee, which stated "War bonus 15*s.* per week added to wage, counting for pension, plus 11*s.* 6*d.* per week floating war bonus." In the same year the employee in asking for a reconsideration of his wages, added "Present conditions of annual leave, sick pay, and pensions." No deduction was made from the bonus payments in respect of pension. In Mar., 1925, a further revision took place and in a circular the wages were described as "68*s.* 6*d.* per week as a maximum, non-pensionable floating bonus 12*s.*" The employee then demanded that deductions should be made from the bonus payments. This was refused and the employee was informed that "the Authority are prepared to continue the payment of a non-pensionable bonus in addition to your wages in accordance with the terms of the circular, and by accepting that bonus you must be deemed to have agreed to the condition upon which it is granted." The employee did not accept the view of the Authority, but continued to work and to receive the bonus payments. Upon his retirement the employee claimed that in calculating his pension regard should be had to the bonus payments:

HELD: (i) [ROMER, L.J., dissenting on this point] the words "exclusive of any gratuities, allowances for house, or other additions" did not exclude bonus payments from wages for the purpose of calculating the pension.

(ii) upon the evidence the bonus payments were at all times treated as non-pensionable and they should not be included in the wages for the purpose of calculating the pension.

[**EDITORIAL NOTE.** This case would seem to be of importance outside the particular circumstances of the Port of London Authority's superannuation scheme. Though schemes for superannuation vary, it would seem that the question of including war bonus in the calculation of pension will be of general interest.

AS TO SUPERANNUATION, see HALSBURY, 1st Edn., Vol. 24, Revenue, pp. 748-753, paras. 1605-1620; and FOR CASES, see DIGEST, Vol. 39, pp. 307, 308, Nos. 836-841.]

Cases referred to:—

(1) *Salford Union* v. *Dewhurst*, [1926] A.C. 619; 37 Digest 215, *105.*
(2) *Sutton* v. *A.-G.* (1923), 39 T.L.R. 294; 34 Digest 85, *629.*
(3) *Railway Clearing House* v. *Druce* (1926), 42 T.L.R. 663; 34 Digest 85, *630.*
(4) *James* v. *Tees Conservancy Comrs.* (Unreported).
(5) *Adams* v. *Liverpool Corpn.* (1927), 137 L.T. 396; Digest Supp.

Canadian Criminal Cases

Reports of Cases in Criminal and Quasi-Criminal matters decided in the Courts of Canada.

LEMAY v. THE KING

Supreme Court of Canada, Rinfret C.J.C., Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ. December 17, 1951.

Evidence XI D — Trial I A — Whether Crown under duty to call all eye-witnesses—Discretion to decide on material witnesses—

There is no rule of law requiring the Crown in a criminal case to call as witnesses persons who were allegedly eye-witnesses to the events culminating in the charge or who are alleged to be able to give relevant and material evidence on accused's guilt or innocence. The prosecution has a discretion to determine who should be called or who are material witnesses and it will not be interfered with unless exercised with some oblique motive. Thus, the Crown must not hold back evidence because it would assist the accused. It is not, however, bound to present for cross-examination by accused all persons who may be able to offer some evidence in relation to the charge.

Cases Judicially Noted: *Senevirathne v. The King*, [1936], 3 All E.R. 36, 3 W.W.R. 360, expld; *Adel Muhammed El Dabbah v. A.-G. Palestine*, [1944] A.C. 156, apld.

Appeal I B — Crown's appeal from acquittal — Notice of appeal signed by agent of Attorney-General — Power of Court of Appeal to enter conviction—

Where an appeal against acquittal is taken by the Crown under *Cr. Code*, s. 1013(4) [re-enacted 1930, c. 11, s. 28] it is not necessary that the notice of appeal be signed by the Attorney-General personally. It is sufficient if his agent, authorized to lodge the appeal, signs the notice.

On an appeal against acquittal, the Court of Appeal may under s. 1013(5) [re-enacted 1930, c. 11, s. 28] set aside the acquittal and enter a conviction.

Cases Judicially Noted: *Belyea v. The King*, [1932], 2 D.L.R. 88, S.C.R. 279, 57 Can. C.C. 318, folld.

Statutes Considered: *Cr. Code*, s. 1013(4), (5).

APPEAL by accused from a judgment of the British Columbia

Court of Appeal, 100 Can. C.C. 365, setting aside an acquittal and entering a conviction on a narcotics charge. Affirmed.

J. S. Hall, for appellant.

Douglas McKay Brown, for respondent.

RINFRET C.J.C. concurs with KERWIN J.

KERWIN J.:—The appellant Lemay was charged with having sold a drug to Steven Bunyk, on September 21, 1950, at Vancouver contrary to the provisions of the *Opium and Narcotic Drug Act*, 1929 (Can.), c. 49, as amended. Lemay was tried on that charge and acquitted by His Honour Judge Sargent in the County Court Judges' Criminal Court. On an appeal by the Crown to the Court of Appeal for British Columbia [100 Can. C.C. 365] that acquittal was set aside, a conviction entered, and the case remitted to the trial Judge for sentence. Under s-s. (2) of s. 1023 of the *Cr. Code* as enacted by s. 30 of 1947, c. 55, Lemay now appeals to this Court alleging that his conviction was erroneous on two grounds (a) the Court of Appeal erred in finding that it was not essential that the Crown call as a witness one Henry Powell, a Royal Canadian Mounted Police informer, and one Art Lowes, both of whom it was alleged were present throughout the major part of the transaction of selling between the appellant and Bunyk; (b) the notice of appeal to the Court of Appeal, which was signed "Douglas McKay Brown, Agent for the Attorney General of British Columbia", was not proper in form or in accordance with s. 1013(4) of the *Code* as re-enacted by s. 28 of 1930, c. 11. These grounds will be considered in order.

Steve Bunyk, who is a member of the Royal Canadian Mounted Police, testified that he had known Lemay by sight for some time previous to September 21, 1950, having seen him on about twelve occasions and having seen his picture several times. He described Henry Powell as a coloured boy used by the Royal Canadian Mounted Police and paid by them as an informer. Powell had pointed Lemay out to Bunyk on the street, and on September 20th, the two of them went to see Lemay in room 10 in a rooming-house in Vancouver known as the Beacon Rooms. Failing to find Lemay there, Bunyk, still accompanied by Powell, proceeded to depart when he saw Lemay at the head of the stairs leading to the ground floor, whereupon Lemay said to Bunyk: "I thought you were coming

as I saw you pass the cafe several times." Nothing else was said upon that occasion.

On the next day, September 21st (the date of the alleged offence), Bunyk and Powell walked in a westerly direction, on the south side of Hastings St., towards the Malina Cafe. The door to the cafe is on the east side of the cafe with a window immediately to the west. Bunyk looked through that widow and saw Lemay sitting in a booth on the west side of the cafe. Bunyk could not say that Powell saw the accused. Bunyk entered the cafe and sat down near Lemay in the booth and there the transaction occurred, which is the basis of the charge. It is not denied that on that occasion Bunyk paid $3 and received the drug but Lemay denied that he was the man from whom the purchase was made and testified that he was not present. Also sitting in the booth was the other man referred to, known to Bunyk as Art Lowes. The accused denies any knowledge of such a person. He denies knowing Bunyk or seeing or speaking to him on September 20th or 21st. He admits that he lived in room 10 in the Beacon Rooms for some time prior to September 20th but states he moved from there on that date. While he says he was away from Vancouver during parts of August and September, he admits being in the city on September 20th and 21st and that on some occasions he had taken his meals at the Malina Cafe.

Neither Powell nor Lowes was called as a witness. For some time prior to September 20th, Bunyk was acting as an undercover agent and he stated that Powell came from the United States and that he did not know where he was. Then the following question and answer appear in the record:

"Q. Do you know of any inquiries which have been made to locate him? A. Inquiries were made to the Federal Bureau of Narcotics in Seattle but they have failed to locate him."

As to Lowes, Bunyk testified that he knew him to see him but that he had no idea how Lowes happened to be with Lemay on September 21st and that Lowes had no connection with the case as far as the Royal Canadian Mounted Police was concerned and that Lowes was not an operator for that organization.

Prior to the hearing before His Honour Judge Sargent, Lemay had been convicted on the same charge by His Honour Judge Boyd, but that conviction was set aside by the Court of Appeal,

consisting of O'Halloran J.A., Robertson J.A., and Sidney Smith J.A. (dissenting) [100 Can. C.C. at p. 367], on the ground that Powell had not been called as a witness. On the Crown's appeal from the acquittal on the new trial, Sidney Smith J.A. adhered to the view that he had expressed on the prior appeal, while Robertson J.A. decided that on the second trial it appeared that Powell had not looked through the window. As to Lowes, he considered that the fact that that individual was associated with a drug pedlar, as Lemay was found to be, probably convinced the Crown that his evidence would not be reliable. He pointed out that the fact that Lowes was present was made known at the preliminary hearing and, notwithstanding this, counsel for Lemay did not ask that Lowes be subpoenaed or for an adjournment to permit him to have him before the Court, and that the Court was not bound to discharge the functions of the defence. O'Halloran J.A. dissented. He retained the view he had held on the prior appeal as to Powell because he considered the explanation of Powell's absence was of a vague and general character. That view was to the effect that there is a rule whereby the Crown was bound to call Powell as a witness essential to the unfolding of the narrative. He also considered that it was difficult to avoid the reflection that if Lowes could have identified Lemay, the Crown would not have failed to call him, particularly since the Crown knew from the first trial that Lemay denied being in the cafe and, therefore, on the same basis, that the Crown was bound to call him as a witness. He proceeded further to deal with what he described as a fundamental aspect, *viz.*, the trial Judge's attitude towards Lemay's testimony. These views of the learned Justice of Appeal cannot be accepted since it is plain upon a reading of the reasons of the trial Judge that he believed the evidence of Bunyk and certainly he categorically stated that he did not believe the evidence of Lemay. The trial Judge had the witnesses before him and it was not necessary that he itemize the reasons which led him to conclude that Lemay's evidence was not to be believed.

While certain decisions in the British Columbia Courts are referred to in the reasons for judgment in the Court of Appeal, as well on the first appeal as on the second, all the arguments on behalf of Lemay in connection with the first ground of

appeal are garnered from the following statement in the judgment of Lord Roche, speaking on behalf of the Judicial Committee in *Seneviratne* v. *The King*, [1936] 3 All E.R. 36 at p. 49: "Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution." Now, in addition to this statement being *obiter* as Lord Roche clearly stated, it also appears from p. 48 that he was dealing with the case of the maid Alpina (and similar cases) whose good faith was not questioned by the Crown, and pointed out that what she had said was given apparently without previous cross-examination as to other and previous oral statements. It was pointed out that this was both undesirable and not permitted by any sections of the Ceylon Law of Evidence Ordinance. Lord Roche continued [pp. 48-9]: "It is said that the state of things above described arose because of a supposed obligation on the prosecution to call every available witness on the principle laid down in such a case as *Ram Ranjan Roy* v. *R.* ((1914), I.L.R. 42 Calc. 422; 14 Digest 273, *2816(ii)*) to the effect that all available eye-witnesses should be called by the prosecution even though, as in the case cited, their names were on the list of defence witnesses. Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination."

Then follows the statement relied on. In truth Lord Roche was dealing with an entirely different matter, and reading the whole of his reasons it is clear that not only was he not laying down any such rule as that here asserted but one directly contrary to it.

It is made abundantly plain from the subsequent decision of the Judicial Committee in *Adel Muhammed El Dabbah* v. *A.-G. Palestine*, [1944] A.C. 156, delivered by Lord Thankerton (which was not brought to the attention of the Court of Appeal), that no such rule as has been contended for, and apparently applied by the majority of that Court on the first appeal and by the dissenting Judge on the second appeal, has ever been laid down. The earlier cases are referred to in the argument of counsel for the accused in the *Palestine* case but *Senevirathne* v. *The King* is not mentioned. At pp. 167-9 Lord Thankerton deals with the contention that the accused had a right to have the witnesses whose names were on the information but who were not called to give evidence for the prosecution, tendered by the Crown for cross-examination by the defence. Their Lordships agreed with the trial Judge and the Court of Criminal Appeal in Palestine that there was no obligation on the prosecution to tender these witnesses. However, while the Court of Criminal Appeal had held that that was the strict position in law, they expressed the opinion that the better practice was that the witnesses should be tendered at the close of the case for the prosecution so that the defence might cross-examine them if they wished, and the Court desired to lay down as a rule of practice that in future this practice of tendering witnesses should be generally followed. Their Lordships of the Judicial Committee doubted whether that rule of practice as expressed by the Court of Criminal Appeal sufficiently recognized that the prosecutor has a discretion and that the Court will not interfere with the exercise of that discretion unless perhaps it could be shown that the prosecutor had been influenced by some oblique motive. Lord Thankerton referred to the judgment of Baron Alderson in *Reg.* v. *Woodhead* (1847), 2 Car. & K. 520, 175 E.R. 216, that the prosecutor is not bound to call witnesses merely because their names are on the back of the indictment; that they should be in Court but that they were to be called by the party who wanted their evidence. Lord Thankerton also referred to *Reg.* v. *Cassidy* (1858), 1 F. & F. 79, 175 E.R. 634, where Parke B., after consultation with Cresswell J. stated the rule in similar terms. Lord Thankerton does go on to say that it is consistent with the discretion of counsel for the prosecutor, which is thus recog-

nized, that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence, but it remains a matter for the prosecutor's discretion. Reference was also made to an interlocutory remark by Lord Hewart C.J. in *R.* v. *Harris*, [1927] 2 K.B. 587 at p. 590: "In criminal cases the prosecution is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury." Lord Thankerton said that in their Lordships' view, the Chief Justice could not have intended to negative the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are.

In the present case there did not appear on the back of the charge sheet the name of any witness but that fact is unimportant. Powell and Lowes did not give evidence at the preliminary inquiry. There was no obligation on the Crown to call either of them at the trial and we are therefore not concerned with the question whether the explanation of Powell's absence was satisfactory or not. Of course, the Crown must not hold back evidence because it would assist an accused but there is no suggestion that this was done in the present case or, to use the words of Lord Thankerton, "that the prosecutor had been influenced by some oblique motive". It is idle to rely upon such expressions as this or the one used by Lord Roche without relating them to the matters under discussion but the important thing is that unless there are some particular circumstances of the nature envisaged, the prosecutor is free to exercise his discretion to determine who are the material witnesses.

The second ground of appeal may be disposed of in a few words. Subsection (4) of s. 1013 of the *Code* enacts: "Notwithstanding anything in this Act contained, the Attorney General shall have the right to appeal to the court of appeal against any judgment or verdict of acquittal of a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone."

It is not contended that Mr. Brown was not the agent of the Attorney-General of British Columbia or that he did not have the latter's authority to institute the appeal to the British

Columbia Court of Appeal but it is said that at least the Attorney-General personally should have signed the notice of appeal. It is sufficient to say that it is not so expressed in the subsection, either explicitly or inferentially, and that there is no substance to the objection.

In registering a conviction, the Court of Appeal had the authority of this Court in *Belyea* v. *The King*, [1932], 2 D.L.R. 88 at pp. 108-9, S.C.R. 279 at p. 297, 57 Can. C.C. 318 at pp. 339-40. It was there pointed out that by s. 1014 of the *Code*, the powers of a Court of Appeal on hearing an appeal by a person convicted are, under s-s. (3), in the event of the appeal being allowed, to "'(*a*) quash the conviction and direct a judgment and verdict of acquittal to be entered; or (*b*) direct a new trial; and in either case [it] may make such other order as justice requires'".

This section is made applicable on an appeal by the Attorney-General against an acquittal by the provisions of s-s. (5) of s. 1013 as re-enacted by s. 28 of 1930, c. 11, that *mutatis mutandis* on the appeal thereby given, the Court shall have the same powers as it has on an appeal by the accused. Chief Justice Anglin pointed out that while it seemed rather a strong thing to hold that the effect of the words *mutatis mutandis* is that that clause must be made to read "on an appeal by the Attorney-General . . . . to '(*a*) quash the *acquittal* and direct a judgment and verdict of *conviction* to be entered';" yet that apparently was the construction put upon the provision by the Appellate Division of the Supreme Court of Ontario. Chief Justice Anglin continued by stating that while it had occurred to some members of this Court that the correct course would be to apply cl. (*b*) and to direct a new trial, the Court was merely affirming the facts found by the trial Judge and upon them reached the conclusion that the only course open to the Appellate Division was to allow the appeal and convict the accused.

Upon reading the reasons for judgment of His Honour Judge Sargent, I am convinced that not only did he not accept or believe the appellant's testimony but he believed and accepted the evidence of Bunyk and it was only because he considered himself bound by the previous decision of the Court

of Appeal for British Columbia that he dismissed the charge. The appeal should be dismissed.

TASCHEREAU J. concurs with KERWIN J.

RAND J.:—I think it clear from the authorities cited that no such absolute duty rests on the prosecution as the Court of Appeal in the earlier proceeding held. Material witnesses in this context are those who can testify to material facts, but obviously that is not identical with being "essential to the unfolding of the narrative". The duty of the prosecutor to see that no unfairness is done the accused is entirely compatible with discretion as to witnesses; the duty of the Court is to see that the balance between these is not improperly disturbed.

On the other two points also, I concur, and the appeal must be dismissed.

KELLOCK and ESTEY JJ. concur with KERWIN J.

LOCKE J.:—The appellant, Paul Lemay, was in the month of September, 1950, charged with having, at the City of Vancouver, sold a narcotic drug to one Stephen Bunyk, contrary to the provisions of the *Opium and Narcotic Drug Act*, and on that charge, after a preliminary enquiry, was committed for trial by the Deputy Police Magistrate on October 6, 1950.

At the preliminary hearing, evidence for the Crown was given by Bunyk, an officer in the Royal Canadian Mounted Police, to the effect that he had on September 21, 1950, proceeded to a restaurant on Hastings St. in Vancouver, in company with one Powell, and entering the restaurant alone purchased the drug from Lemay in the presence of one Art Lowes.

Thereafter, having elected to take a speedy trial before His Honour Judge Bruce Boyd, a Judge of the County Court at Vancouver, he was found guilty and sentenced to a term of imprisonment and a fine. Powell, an informer in the employ of the Mounted Police, who had not entered the restaurant with Bunyk, was not called by the Crown at the trial before the learned County Court Judge, though the fact that he had accompanied Bunyk to the restaurant was mentioned. I would infer from the reasons for judgment delivered upon this appeal that the name of Lowes was not mentioned at the trial and it is clear that he was not called as a witness. The present appellant appealed to the Court of Appeal for British Columbia and that Court, by a decision of the majority (Sidney Smith

J.A. dissenting), set the conviction aside upon the ground that as, apparently, Powell had seen the accused in the restaurant his evidence was material on the question of identification, and that there was an obligation on the prosecution to call him. Adopting an expression used by Lord Roche, in delivering the judgment of the Judicial Committee in *Seneviratne* v. *The King*, [1936] 3 All E.R. 36 at p. 49, that witnesses essential to the "unfolding of the narratives on which the prosecution is based" must be called by the prosecution, O'Halloran J.A., with whom Robertson J.A. agreed, said in part [100 Can. C.C. at p. 367]: "If all material witnesses are not called by the prosecution the defence is thereby deprived of the opportunity for cross-examination, and to that extent an accused is denied the right of full defence which our Courts have long recognized as essential to a fair trial."

Lemay appeared for trial again before His Honour Judge R. A. Sargent of the County Court of Vancouver on February 8, 1951, and was represented by counsel. Bunyk gave evidence that Powell had accompanied him to the restaurant and had not entered and, while not mentioning in his evidence in chief the presence of Lowes, did so in cross-examination, saying that Lowes was sitting in a booth in the restaurant with Lemay when he had purchased the drug. Describing the transaction he said that Lemay had in his hand a fingerstall containing capsules wrapped in silver paper when he (Bunyk) sat down opposite him in the booth and asked if he could get one, whereupon Lemay took one of the capsules and placed it on the table in front of him and he thereupon paid Lemay $3. Some evidence was given at the hearing of efforts made by the Crown to locate Powell and of their failure but, in the view that I take of this matter, it is unnecessary to consider its sufficiency since if the Crown was under a legal obligation to call Powell or account for his absence, clearly there was the same obligation in respect of Lowes who saw the whole transaction, and no effort was made to account for the failure to call him.

It is of importance to note that while the appellant had known from the date of the preliminary hearing before the Deputy Police Magistrate that Bunyk had, according to his story, been accompanied by Powell to the restaurant and had

purchased the drug in the presence of Art Lowes, no request was made at the commencement of the trial before His Honour Judge Sargent or during the course of the trial for a direction that the Crown should either call them or assist the defence in locating them, or for an adjournment so that they could be located. The only evidence of identification was that of Constable Bunyk who, while a police officer, had been working under cover in Vancouver and who had during a period of weeks before the date of the purchase seen Lemay a number of times. Lemay's defence was simply a complete denial of the whole affair and he swore that he had never seen Bunyk before the latter appeared in the Police Court to give evidence. As to Lowes, he said that while he might know him he did not know him by that name. On the question of credibility, the learned trial Judge, in giving judgment, said in part: "The accused went into the box and categorically denied any sale of narcotics, and the testimony of Bunyk *in toto*. He further states that he did not know Lowes, at least by name. These denials I do not accept, nor do I believe his testimony."

Then saying that he did not feel that there was sufficient evidence to make a finding as to whether Powell did or did not see the transaction, that the evidence had shown that Lowes was not connected with Bunyk or the Royal Canadian Mounted Police and that no explanation had been given as to why he had not been called or what, if any, attempts had been made to find him, after quoting from the judgment of O'Halloran J.A. as to the obligation of the Crown to call all material witnesses, dismissed the charge against the prisoner.

The Attorney-General of the Province of British Columbia appealed to the Court of Appeal under the provisions of s-s. (4) of s. 1013 of the *Code* and that Court, by a decision of the majority (O'Halloran J.A. dissenting) allowed the appeal, set the acquittal aside and directed that a conviction be entered and the case remitted to the trial Judge for sentence.

The appellant alleges two errors in the judgment appealed from: the first, that the notice of appeal to the Court of Appeal which was signed by Douglas McKay Brown, agent for the Attorney-General of British Columbia, was an insufficient compliance with s. 1013(4) of the *Code*, and the second, in finding

that it was not essential to the Crown to call Powell and Lowes as witnesses at the trial.

As to the first of these points there was no disagreement in the Court of Appeal and I respectfully agree with Robertson J.A. that the signature by the agent of the Attorney-General was sufficient.

The contention of the appellant upon the second point is that, as stated by O'Halloran J.A., Lowes and Powell were material witnesses on the question of the identification of Lemay and there was an obligation in law upon the Crown to call them. For the Crown it is said that it is for the Crown prosecutor, as the representative of His Majesty, to decide what evidence is to be called for the prosecution and that, subject to something in the nature of bad faith on his part, such as endeavouring to obtain a conviction by suppressing the truth (in which event the trial Judge could properly intervene), his decision in the matter may not be interfered with. It is perhaps unnecessary to say that there is no suggestion of any such impropriety on the part of those representing the Crown at the preliminary hearing and the trial of this matter.

Since the Criminal Code is silent on the matter, the obligation contended for by the appellant, if it exists, must be part of the common law of British Columbia. The question, or one closely allied to it, has been considered in a number of decisions in England. In *R.* v. *Simmonds* (1823), 1 Car. & P. 84, 171 E.R. 1111, where counsel for the Crown declined to call a witness whose name appeared on the back of the indictment, Hullock B. said that, though the prosecution were not bound to call every witness whose name was on the indictment, it was usual to do so and, if it was not done, he as the Judge would call the witness so that the prisoner's counsel might have an opportunity to cross-examine him. In a note to this case there is a reference to *R.* v. *Whitbread*, where on a trial for larceny the prosecution omitted to call an apprentice of the prosecutor who had been implicated in the theft and who had been examined at the police office and before the grand jury and whose name was on the back of the indictment. Counsel for the prisoner contended that the witness ought to be called but counsel for the prosecution declined, saying that the prisoner's

counsel might himself call him if he chose. Holroyd and Burrough J.J. held that the prosecutor's counsel was not bound to call all the witnesses whose names were on the indictment merely to let the other side cross-examine them. The note further reports, however, that in the case of *R.* v. *Taylor*, tried in the same year, Park J. called all the witnesses whose names appeared on the back of the indictment whom the prosecutor had not called, merely to allow the prisoner's counsel to cross-examine them. In *R.* v. *Beezley* (1830), 4 Car. & P. 220, 172 E.R. 678, Littledale J. said that counsel for the prosecution who had closed his case without calling all of the witnesses whose names were on the indictment should call all of them, in order to give the prisoner's counsel an opportunity of cross-examining them. In *R.* v. *Bodle* (1833), 6 Car. & P. 186, 172 E.R. 1200, where the charge was murder and counsel for the Crown declined to call the father of the prisoner whose name was on the back of the indictment, Gaselee J., having conferred with Mr. Baron Vaughan, said that they were both of the opinion that if counsel for the prosecution declined to call a witness whose name is on the back of the indictment it is in the discretion of the Judge who tries the case to say whether the witness should be called for the prisoner's counsel to examine him, before the prisoner is called on for his defence. In *Reg.* v. *Holden* (1838), 8 Car. & P. 606, 173 E.R. 638, the charge was murder. The Crown did not call the daughter of the deceased person who, apparently, had been present when the offence was committed, whose name was not on the back of the indictment and who was in Court. Patteson J. said that she should be called and that every witness who was present at a transaction of that kind, even if they give different accounts, should be heard by the jury so as to draw their own conclusion as to the real truth of the matter. There had been a post-mortem examination of the body of the deceased in the presence of three surgeons but, of these, only two were called to give evidence for the Crown, though the third was in Court. Patteson J. said that he was aware that the name of this person was not on the back of the indictment but that as he was in Court he would insist on his being examined and said [p. 610]: "He is

a material witness who is not called on the part of the prosecution, and as he is in Court, I shall call him for the furtherance of justice."

In *Reg.* v. *Bull* (1839), 9 Car. & P. 22, 173 E.R. 723, counsel for the Crown said that there was one witness examined before the grand jury whom, on account of information he had since received, it was not his intention to call as a witness for the prosecution; on counsel for the prisoner objecting that it was unfair not to examine all those whose names were on the back of the bill and Crown counsel saying that his intention was to put the witness into the box, Vaughan J. said that the proper course was to put the witness into the box and that "every witness ought to be examined. In cases of this kind counsel ought not to keep back a witness, because his evidence may weaken the case for the prosecution". [p. 23]

In *Reg.* v. *Stroner* (1845), 1 Car. & K. 650, 174 E.R. 976, Pollock C.B. directed the prosecution to call two persons as witnesses for the prosecution whose evidence he considered to be material and whose names were not on the back of the indictment but who were in Court as witnesses for the accused. In *Reg.* v. *Barley* (1847), 2 Cox C.C. 191, where the prosecution did not call two witnesses whose names were on the back of the indictment, Pollock C.B. after consulting with Coleridge J. intimated that the witnesses ought to be called by counsel for the prosecution, whereupon the witnesses were placed in the box and sworn on the part of the Crown and cross-examined on behalf of the prisoner.

The practice in the matter appears to have been clarified in 1847 when in *Reg.* v. *Woodhead*, 2 Car. & K. 520, where counsel for the Crown, after stating the case for the prosecution, had observed that he did not deem it necessary to call all the witnesses whose names were on the back of the indictment, unless counsel for the prisoner should desire it, Alderson B. said: "You are aware, I presume, of the rule which the judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however, should be here, because the prisoner might otherwise be misled; he might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have

them in court, but they are to be called by the party who wants their evidence. This is the only sensible rule."

Counsel for the prisoner then asked whether if he called these persons he would make them his own witnesses, to which Alderson B. replied: "Yes, certainly. That is the proper course, and one which is consistent with other rules of practice. For instance, if they were called by the prosecutor, it might be contended that he ought not to give evidence to shew them unworthy of credit, however falsely the witnesses might have deposed."

In *Reg.* v. *Cassidy*, 1 F. & F. 79, where the prosecutor refused to call a witness whose name was on the back of the indictment and counsel for the prisoner contended that "according to the usual practice" he ought in fairness to do so, Baron Parke said that while the usual course was for the prosecutor to call the witness and, if he declined to examine, the prisoner might cross-examine him, he thought the practice did not stand upon any very clear or correct principle and was supported only on the authority of single Judges on criminal trials, and he should, therefore, follow what he considered the correct principle, that the counsel for the prosecution should call what witnesses he thought proper, and that, by having had certain witnesses examined before the grand jury whose names were on the back of the indictment, he only impliedly undertook to have them in Court for the prisoner to examine them as his witnesses; for the prisoner, on seeing their names there, might have abstained from subpoenaing them. He then said that he would follow the course said to have been pursued by Campbell C.J. in a recent case, who ruled that the prosecutor was not bound to call such a witness and that, if the prisoner did so, the witness should be considered as his own. Upon counsel for the prisoner saying that he believed that Cresswell J. had acted differently, Parke B. consulted with the latter and then said that Cresswell J. had informed him that he had always allowed the prosecutor to take his own course in such circumstances, without compelling him to call the witness if he did not think fit to do so, and that he entirely agreed with what Parke B. proposed to do.

The judgment of Parke B. in *Cassidy's* case was delivered in March, 1858. Section 11 of the *Code* declares that the crim-

inal law of England as it existed on November 19, 1858, in so far as it has not been repealed by any ordinance or Act, still having the force of law, of the colony of British Columbia, or the colony of Vancouver Island, passed before the union of the said colonies, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such ordinance or Act, shall be the criminal law of the Province of British Columbia. Prior to the enactment of the Code the matter had been dealt with and the same date fixed by a proclamation issued under the public seal of the colony of British Columbia by Governor Douglas on November 19, 1858, and by *An Ordinance to assimilate the general application of English Law*, 1867 (Laws of B.C. 1871, No. 70) adopted by the Legislative Council of British Columbia on March 6, 1867. In substantially the same form, the provisions of the Ordinance are continued in the *English Law Act*, R.S.B.C. 1948, c. 111, s. 2. The matter we are considering has not been dealt with by statute. If, therefore, what appears to have been considered as a rule of practice prior to 1858 had become part of the common law of England, the principle was as stated by Alderson B. in *Reg.* v. *Woodhead* and Parke B. in *Reg.* v. *Cassidy*. That these decisions are to be regarded as correctly stating the law of England as it was in 1858 is settled by the decision of the Judicial Committee in *Adel Muhammed El Dabbah* v. *A.-G. Palestine*, [1944] A.C. 156 at p. 168. Lord Thankerton, it will be noted, in delivering the judgment of the Judicial Committee, said in part: "While their Lordships agree that there was no obligation on the prosecution to tender these witnesses, and, therefore, this contention of the present appellant fails, their Lordships doubt whether the rule of practice as expressed by the Court of Criminal Appeal sufficiently recognizes that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive."

While the case was an appeal from the Court of Criminal Appeal of Palestine and the conviction had been made under the Criminal Code Ordinance 1936 of that state, it is apparent that the matter had not been dealt with by statute and that

the law of Palestine was in this respect the same as that of England.

In delivering the judgment in the appeal taken by Lemay to the Court of Appeal from his conviction, O'Halloran J.A. refers to two decisions of the Courts of British Columbia in which the matter was considered. In *R.* v. *Sing* [1936] 1 D.L.R. 36, 64 Can. C.C. 32, 50 B.C.R. 32, where the Crown did not call certain witnesses whose names were on the back of the indictment, Macdonald J., referring to *Reg.* v. *Woodhead* and *Reg.* v. *Cassidy* and to a more recent decision in *Reg.* v. *Wiggins* (1867), 10 Cox C.C. 562, ruled that, unless the Crown saw fit to do so, it was not necessary to call all of the witnesses whose names appeared. Counsel for the prisoner contended that there were two other witnesses called at the preliminary who should be called in order that he might cross-examine them, but the report of the matter does not indicate that any such order was made. In *R.* v. *Hop Lee,* [1941] 2 D.L.R. 229, 75 Can. C.C. 254, 56 B.C.R. 151, where the charge was selling narcotic drugs, the Crown did not call a Chinese witness who was in the employ of the police and who had been a witness to the sale. The accused was convicted and appealed to the Court of Appeal and the report shows that counsel for the Crown there took the attitude that the Crown was under no obligation to call all the witnesses and that this particular man was a "stool pigeon" whose evidence could not be relied upon. The Court unanimously dismissed the appeal and it may be noted that McDonald J.A. (afterwards C.J.B.C.) quoted at length from the judgment of Lord Roche in *Seneviratne* v. *The King,* [1936] 3 All E.R. 36, which has been so much discussed in the present matter, including that passage where it is said that their Lordships could not, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence.

In the present matter the prisoner, who was tried before His Honour Judge Sargent in February, 1951, had known since the previous September that Bunyk would give evidence that he had been accompanied to the restaurant by Powell and that Lowes was sitting in the booth with him when the sale was made to the constable. The proceedings following the

committal were, by reason of the election of the appellant, by way of speedy trial and there was thus no indictment upon which the names of the witnesses proposed to be called would be endorsed and there is no suggestion that any step was taken on the part of the prosecution which would lead counsel for the accused to expect that they would be in Court when the matter came up for hearing and thus available to give evidence, as was the case in *Reg.* v. *Woodhead*. Powell was an informer in the employ of the police and, even had he been available, counsel for the Crown might well have decided not to call him as a witness for the prosecution, as was done in the case of *Hop Lee*. As to Lowes, the only information concerning him in the record is that Constable Bunyk on re-examination said that he (Lowes) had no connection with the matter "as far as the R.C.M.P. is concerned" and that he was not an operator for the R.C.M.P. From the fact that Lowes was, according to Bunyk, sitting at the table in the restaurant with Lemay when the latter produced the fingerstall containing the small packages of the drug and made the sale to Bunyk, it might be inferred that Lowes was a confederate of the latter, since, otherwise, he would be unlikely to commit a criminal offence in his presence. If this be the proper inference to draw, is it to be said that, as a matter of law, the Crown was required to call Lowes as a witness for the prosecution and thus, assuming he should join with Lemay in denying that any such transaction had taken place, assist a guilty person to escape? From a practical viewpoint, if that was the law, far from furthering the due administration of justice it would, in my opinion, actively retard it. In the case of those engaged in the illicit drug traffic, by working in pairs, the one making the sale would be assured at all times of having a witness with him available, in the case of a prosecution, to join in denying that anything of the kind had taken place and whom the Crown would be bound to call. For the appellant, reliance is placed upon that portion of the judgment of Lord Roche, hereinbefore referred to, where it was said that the witnesses essential to the "unfolding of the narrative on which the prosecution is based" must be called. This language must, however, be read together with its context, as was done by McDonald J.A. in *Hop Lee's* case, and so read it does not, in my opinion, sustain the contention

of the appellant. If, indeed, there were any difference between what was said by Lord Roche in that case, which, as the report indicates, was *obiter*, and what was said by Lord Thankerton in the case of *Adel Muhammed* (and I think there is not), it is, in my opinion, the latter view that should be accepted.

The reasons for judgment delivered by His Honour Judge Sargent satisfy me that he believed the evidence of the witness Bunyk and that, had he not considered that he was bound to acquit the accused by reason of the failure of the Crown to call Lowes as a witness or account for his absence, he would have found the accused guilty.

As to the contention that there was error in the judgment appealed from, in that the appellant was found guilty and the case remitted to the trial Judge for sentence, the matter appears to me to be determined against the appellant by the decision of this Court in *Belyea* v. *The King*, [1932], 2 D.L.R. 88, S.C.R. 279, 57 Can. C.C. 318.

I would dismiss this appeal.

CARTWRIGHT J. (dissenting in part) :—This is an appeal from a judgment of the Court of Appeal for British Columbia (100 Can. C.C. 365) dated March 22, 1951, setting aside the judgment of acquittal of a charge of unlawfully selling a drug contrary to the provisions of the *Opium and Narcotic Drug Act* pronounced on February 27, 1951, by His Honour Judge Sargent, ordering a conviction to be entered and remitting the case to the trial Judge to impose sentence.

The respondent was first tried for the said offence before His Honour Judge Boyd and was convicted on November 2, 1950. On December 22, 1950, this conviction was set aside by the Court of Appeal for British Columbia (O'Halloran, Robertson and Sidney Smith JJ.A.) the last named learned Justice of Appeal dissenting, and a new trial was directed.

The evidence mainly relied on by the Crown at the trial with which we are concerned, before His Honour Judge Sargent, was that of Constable Bunyk of the Royal Canadian Mounted Police who testified in chief that on September 21, 1950, at about 9.15 a.m. accompanied by one Powell he approached the Malina Café in Vancouver; that he looked through the window and saw the appellant, who was already known to him, seated at a table in about the fifth booth on the west side

of the café; that he cannot tell whether Powell also looked through the window or saw the appellant; that he (Bunyk) entered the café alone and sat down beside the appellant; that the appellant had in his hand a grey fingerstall containing several capsules wrapped in silver paper and was trying to remove an elastic band from around the top of the fingerstall; that he said to the appellant—"Can I get one?" and the appellant replied "Yes"; that the appellant took one of the capsules from the fingerstall and placed it on the table in front of Bunyk; that he (Bunyk) picked it up and put it in his pocket and handed the appellant $3; that he left the café and rejoined Powell about two doors east of the café. In cross-examination and re-examination Bunyk testified that throughout the transaction which he had described in chief one Art Lowes was sitting in the booth with the appellant and that Lowes was known to him (Bunyk). The following questions and answers are found in the re-examination:

"Q. How did Lowes happen to be with Lemay at the time of this transaction? A. I have no idea. Q. Did the Art Lowes who was with Lemay at the time of the transaction have any connection with this case as far as the R.C.M.P. is concerned? A. None whatever. Q. Is Lowes an operator for the R.C.M.P.? A. No, he is not."

The Crown proved that the capsule purchased by Bunyk contained the drug mentioned in the charge.

The appellant gave evidence. He denied having had anything to do with the matter; stated that he had never seen Bunyk prior to the preliminary hearing; that he did not use drugs and that he had never sold a drug to Bunyk or to anyone else. The learned trial Judge reserved judgment and later dismissed the charge.

In examining the reasons for judgment of the learned trial Judge it is necessary to know something of the earlier trial of the appellant and of the reasons which moved the Court of Appeal to set aside that conviction and direct a new trial.

The only substantial differences between the evidence given at the first trial and that given at the second which were suggested to be relevant to the determination of this appeal appear to be: (i) At the first trial the evidence in the view of the Court of Appeal indicated that Powell was in a position

to see what occurred in the café at the time Bunyk purchased the drug, while the effect of the evidence in this regard at the second trial is summarized by the learned trial Judge as follows: "I do not feel that there is sufficient evidence before me upon which to make any finding, either that Powell did or did not see the transaction between the accused and Bunyk." (ii) At the first trial no evidence was given to show why counsel for the Crown did not call Powell as a witness, while at the second trial evidence was received to the effect that he had disappeared and that inquiries as to his whereabouts were unproductive of result. (It should be mentioned that Mr. Hall argued that the evidence as to the making of these inquiries was inadmissible on the ground that it was hearsay, but as, in my view, this evidence has no bearing on the result of the appeal I do not deal with this question.) (iii) At the first trial there was no evidence of the presence of Art Lowes at the time of the sale, indeed, Lowes was not mentioned at all.

The reasons for judgment of the Court of Appeal on the appeal from the conviction at the first trial are set out in full in the reasons of O'Halloran J.A. in the present case and are reported as Lemay (No. 1) in 100 Can. C.C. pp. 367-8. The question whether that judgment was right in the result is not before us and I express no opinion. That appeal was brought by the accused and under s. 1014(1)(*c*) of the *Code* it was the duty of the Court of Appeal to allow the appeal if of opinion that on any ground there was a miscarriage of justice.

The learned Judge presiding at the second trial appears to me to have interpreted the reasons of the Court of Appeal in Lemay (No. 1) as laying down as a rule of law that the unexplained omission on the part of the Crown to call a witness shown by the evidence to have been in a position to give relevant and material evidence as to the guilt or innocence of the accused necessitates an acquittal. The learned trial Judge appears to have inclined to the view that the failure to call Powell was sufficiently explained. He then proceeds:

"However, there is one other piece of evidence which came out in cross-examination, namely, that a third person, Lowes was present at the sale to Bunyk. Evidence was led by the Crown to show that Lowes was not connected with Bunyk or the Royal Canadian Mounted Police, but no explanation was

given as to why he had not been called, or what, if any, attempts were made to find him.

"On these facts I am faced with the principle laid down by the Court of Appeal in *R.* v. *Lemay* [100 Can. C.C. at p. 367]. In that case, Mr. Justice O'Halloran said in the course of his judgment: 'If all material witnesses are not called by the prosecution the defence is thereby deprived of the opportunity for cross-examination, and to that extent an accused is denied the right of full defence which our Courts have long recognized as essential to a fair trial.'

"The judgment is binding on me in this case. Therefore, the motion to dismiss will be allowed and the charge dismissed."

The right of appeal against a judgment of acquittal is given to the Attorney-General by s. 1013(4) and is, of course, restricted to grounds of appeal which involve a question of law alone.

In my respectful opinion the learned trial Judge erred in law in instructing himself that there is a rule of law such as he deduced from the judgment of the Court of Appeal in Lemay (No. 1) *viz*: That the unexplained omission on the part of the Crown to call a witness shown by the evidence to have been in a position to give relevant and material evidence as to the guilt or innocence of the accused necessitates an acquittal.

I do not propose to examine the authorities at length. I think it sufficient to refer to the judgment of their Lordships of the Judicial Committee delivered by Lord Thankerton in *Adel Muhammed El Dabbah* v. *A.-G. Palestine*, [1944] A.C. 156 and particularly at pp. 167-9, where it is laid down that the Court will not interfere with the exercise of the discretion of the prosecutor as to what witnesses should be called for the prosecution unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive. I find no conflict between this judgment and that pronounced by Lord Roche, also speaking for the Judicial Committee in *Seneviratne* v. *The King*, [1936] 3 All E.R. 36. Counsel for the appellant laid emphasis on the following passage at p. 49: "Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution."

It must be remembered that *Seneviratne* v. *The King* was a case in which the accused had been convicted of murder on purely circumstantial evidence. In the passage just quoted it appears to me that Lord Roche was referring to the duty which clearly rests upon the prosecutor to place before the Court evidence of every material circumstance known to the prosecution including, of course, those circumstances which are favourable to the accused. It must also be remembered that Lord Roche was not dealing with an argument of counsel for the accused that the prosecutor had failed to call witnesses that he should have called, but with the reply of counsel for the Crown to the argument of counsel for the defence that the prosecutor had called a number of witnesses who gave irrelevant and inadmissible evidence and whose evidence ought not to have been received.

I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise; nor do I intend to suggest that there may not be cases in which the failure of the prosecutor to call a witness will cause the tribunal of fact to come to the conclusion that it would be unsafe to convict. The principle stated by Avory J. in *R.* v. *Harris*, [1927] 2 K.B. 587 at p. 594, that in a criminal trial where the liberty of a subject is at stake, the sole object of the proceedings is to make certain that justice should be done between the subject and the state, is firmly established.

While it is the right of the prosecutor to exercise his discretion to determine who the material witnesses are, the failure on his part to place the whole of the story as known to the prosecution before the tribunal of fact may well be ground for quashing a conviction. Such a case is that of *R.* v. *Guerin* (1931), 23 Cr. App. R. 39.

For the above reasons I am of opinion that the learned trial Judge erred in directing himself that he was bound as a matter of law to acquit the appellant because of the fact that the Crown did not call Art Lowes as a witness; and that the Court of Appeal were right in deciding that the judgment of acquittal should be set aside.

As to the second ground of appeal argued before us—that the notice of appeal to the Court of Appeal was not in accordance with s. 1013(4) of the *Code*—I agree with what has been said by my brother Kerwin.

It remains to consider Mr. Hall's final argument that the Court of Appeal erred in directing a conviction to be entered and that if the setting aside of the acquittal is upheld a new trial should be directed.

We are bound by the judgment of this Court in *Belyea v. The King*, [1932]. 2 D.L.R. 88, S.C.R. 279, 57 Can. C.C. 318, which decided that the wording of s. 1013(5) of the *Code* is apt to confer jurisdiction on the Court of Appeal in an appeal brought by the Attorney-General under s. 1013(4) not only to set aside the judgment of acquittal and to direct a new trial but, in a proper case, to direct a conviction to be entered, and it is irrelevant to inquire whether, if the matter were *res integra* I would have found the wording of the section sufficiently plain and unambiguous to effect so revolutionary a change in the pre-existing law.

In my opinion the power to direct that a conviction be entered after an acquittal by a trial Judge has been set aside can be exercised only if it appears to the Court of Appeal from the judgment of the trial Judge that he must have been satisfied of facts which proved the accused guilty of the offence charged. In the case at bar I do not think that this appears. It is quite true that the learned trial Judge says: "The accused went into the box and categorically denied any sale of narcotics, and the testimony of Bunyk *in toto*. He further states that he did not know Lowes, at least by name. These denials I do not accept, nor do I believe his testimony." But he nowhere states expressly, or does it follow by irresistible inference from anything he does say, that he accepts the evidence of Bunyk. He does not say that, but for the supposed rule of law which he applied, he would have found the accused guilty. He does not indicate that he is left without any reasonable doubt as to his guilt. In the view he took of the law, it was, indeed, no more necessary for the learned trial Judge to express himself upon any of these vital matters than it would have been for a jury to do so after being directed that in view of a point of law taken by the defence they must

return a verdict of "not guilty". It is not, I think, sufficient that, from the reasons of the learned trial Judge, it should appear to the Court of Appeal in the highest degree probable that he would have convicted but for his erroneous ruling on the point of law; it must appear certain that he would have done so.

I would allow the appeal to the extent of setting that part of the order of the Court of Appeal which directs a conviction to be entered and would order a new trial.

FAUTEUX J. concurs with KERWIN J.

Appeal dismissed.

REGINA v. DOIRON

Nova Scotia Supreme Court, Appeal Division, Macdonald, Hart and Jones JJ.A. March 13, 1985.

Evidence — Production — Statements to police — Crown witnesses having given statements to police — Defence counsel seeking production of such statements but Crown counsel refusing — Trial judge adopting procedure of reviewing statements after witness giving evidence-in-chief and only giving statement to defence counsel if found contradiction between statement and testimony — Procedure improper — Trial judge has general power to order production of statements in order to ensure fair trial and discretion should be exercised in favour of production in absence of any cogent reason to contrary — Inappropriate that decision as to value of statement be left solely to trial judge — Canada Evidence Act, R.S.C. 1970, c. E-10, s. 10.

There is an overriding obligation on the part of counsel for the Crown to inform the defence of any evidence which may be helpful to the accused. As well, the trial judge has a power at trial to require the production of statements made by Crown witnesses for use by the defence in order to ensure a fair trial and guarantee that an accused can make full answer and defence. The trial judge's discretion should be exercised in favour of production in the absence of any cogent reason to the contrary. There is also a power of production under s. 10(1) of the *Canada Evidence Act*, R.S.C. 1970, c. E-10, and where it is established that a statement has been made within the meaning of that section, then generally counsel for the accused is entitled to a copy of the statement. There is a broad right of cross-examination under s. 10(1), the exercise of which must be left in the hands of counsel for the accused. The statement given by a witness is important not only for purposes of cross-examination, but it may also disclose information which the witness has forgotten. While s. 10(1) seems to imply that the trial judge may examine the statement without disclosing it to counsel, it is not appropriate that the decision should be left solely to the trial judge to determine whether the statement is contradictory or of any use to the defence. The trial judge is not privy to information available to the defence. Thus, on the trial of the accused where it was shown that witnesses for the Crown had given statements to the police which were in the hands of Crown counsel, it was improper for the trial judge to examine the statements himself and only disclose them to defence counsel where he had determined, following their examination-in-chief, that there was a contradiction between the statement and the testimony given.

R. v. Savion and Mizrahi (1980), 52 C.C.C. (2d) 276, 13 C.R. (3d) 259, **apld**

R. v. Weigelt (1960), 128 C.C.C. 217, 33 C.R. 351, 32 W.W.R. 499; *R. v. Lantos*, [1964] 2 C.C.C. 52, 42 C.R. 273, 45 W.W.R. 409, **discd**

Mahadeo v. The King, [1936] 2 All E.R. 813; *Patterson v. The Queen* (1970), 2 C.C.C. (2d) 227, 9 D.L.R. (3d) 398, 10 C.R.N.S. 55, [1970] S.C.R. 409, 72 W.W.R.

35; *R. v. Cherpak* (1978), 42 C.C.C. (2d) 166, [1978] 5 W.W.R. 315, 9 A.R. 596; leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, consd

Other cases referred to

R. v. Tousigant et al. (1962), 133 C.C.C. 270, 38 C.R. 319, 39 W.W.R. 574; *Cormier v. The Queen* (1973), 25 C.R.N.S. 94; *R. v. Milgaard* (1971), 2 C.C.C. (2d) 206, 14 C.R.N.S. 34, [1971] 2 W.W.R. 266; leave to appeal to S.C.C. refused 4 C.C.C. (2d) 566*n*, [1971] S.C.R. x; *R. v. Sinclair* (1974), 19 C.C.C. (2d) 123, 16 C.L.Q. 452, 28 C.R.N.S. 107, [1974] 5 W.W.R. 719; *Re Cunliffe and Law Society of British Columbia* (1984), 13 C.C.C. (3d) 560, 11 D.L.R. (4th) 280, 40 C.R. (3d) 67, [1984] 4 W.W.R. 451

Statutes referred to

Canada Evidence Act, R.S.C. 1970, c. E-10, s. 10(1)
Criminal Code, s. 84(2)(*b*) (rep. & sub. 1976-77, c. 53, s. 3)

APPEAL by the accused from the dismissal of his appeal from conviction and sentence on a charge of using a firearm in a careless manner contrary to s. 84 of the *Criminal Code*.

M. F. Walden, for accused, appellant.
D. W. Giovannetti, for the Crown, respondent.

The judgment of the court was delivered by

JONES J.A.:—This is an application by Edmond James Doiron for leave to appeal his conviction and sentence on a charge of using a firearm in a careless manner contrary to s. 84(2)(*b*) of the *Criminal Code*.

On the evening of October 17, 1982, there was a dance in the parish hall at Charlos Cove, Guysborough County. Lionel David, Cecil Cashin, Philip Cashin, Roland Richard and Janet Levangie were in attendance at the dance. The appellant Edmond Doiron, his brother Frank, his brother-in-law Joseph Pettipas and Richard Murray were also at the dance. There was an altercation at the dance around midnight between Joseph Pettipas and Roland Richard in which Mr. Richard struck Mr. Pettipas in the mouth. As a result of this incident Edmond and Frank Doiron, Joseph Pettipas and Richard Murray left the dance in Frank Doiron's truck. As they were leaving the scene Cecil Cashin hit the truck with a stick. Shortly thereafter Lionel David, Cecil and Philip Cashin and Roland Richard left the center in Cecil Cashin's half-ton truck which was operated by Janet Levangie. They were allegedly proceeding home to Port Felix. They had to pass the Pettipas home which is a short distance from the parish hall and the place where the Doiron party had stopped.

Janet Levangie, Lionel David, the Cashin brothers and Roland Richard were witnesses on the trial before His Honour Judge

R. A. MacDonald. The proceedings were by way of summary conviction.

These individuals testified that they stopped on the road by the Pettipas residence as they heard shouts from persons standing in front of the residence apparently challenging them to fight. They denied that they stopped with the intention of fighting. Just as they were leaving the vehicle they heard shooting. There was a conflict in their evidence but, generally, there was testimony that there were several persons on or near the front steps of the house and that Edmond Doiron had a gun from which three or four shots were fired in quick succession. While there was evidence that the gun was pointed in the air, shot-gun pellets struck the side of the Cashin truck causing damage. The passengers ran from the scene back to the hall where they telephoned the police.

Constable Nymark received a call at approximately 1:00 a.m. and proceeded to the parish hall in Charlos Cove. After observing the damage to the truck he proceeded to the Pettipas reisdence where he asked that any weapons in the house be turned over to him. He testified that he received a .20-gauge shot-gun and a .30-.30 rifle. The shot-gun was taken to Halifax for examination by Staff Sergeant Swim, a firearms expert. The officer testified that it was 15 metres from the front of the house to the road. Edmond Doiron was arrested and when searched had nine .12-gauge shot-gun shells on his person. Constable Glendon Morash searched in front of the Pettipas residence at 2:15 a.m. and found three .20-gauge shot-gun shells: one on top of the front steps, one to the right of the steps and the third on the left-hand side of the steps. He did not find any shells at the side of the house. Staff Sergeant Swim testified that the gun received from Constable Nymark was a .12-gauge shot-gun in working order and that the three .20-gauge shells found by Constable Morash had been fired from the gun. No explanation was offered on the trial as to the varying descriptions of the shot-gun.

Edmond Doiron, Richard Murray, Shirley Pettipas and Joseph Pettipas testified on behalf of the defence. Again, there were conflicts in the evidence. When they arrived at the Pettipas residence the men were in the kitchen and the women were in the living-room. There were two children in the house and the lights were out. There was evidence that in the evening of September 4 or 5, 1982, a large crowd of people gathered outside the Pettipas residence, including Roland Richard, the Cashin brothers and Lionel David. Considerable damage was done to the Pettipas residence and as a result charges were laid. On October 17, 1982,

the occupants of the Pettipas residence were aware of the earlier incident.

Mrs. Pettipas observed the Cashin truck stop and heard the occupants hollering. Edmond Doiron and some of the other men went out the back door to the deck which extended some five feet to the side of the house. Edmond Doiron testified that he was handed a .12-gauge shot-gun by Mr. Pettipas and that he fired three shots from the back doorstep. He said it was not the gun exhibited in court. He fired twice in the air and once into the ground in a general direction parallel to the highway. He also testified that his brother Frank had a shot-gun which he fired. He denied that he fired from the front of the house or in the direction of the truck. The other witnesses also insisted that no one fired from the front of the house and that when the first shots were fired the passengers were approaching the front of the house and that the shooting was merely intended to scare them away and succeeded in doing so.

There was a conflict in the evidence as to where the guns were kept in the house. Mrs. Pettipas testified that there were only two guns kept in the house, including the exhibit shot-gun and her husband's rifle. Mr. Pettipas, when asked how many guns were in the house that evening, answered, "Probably four, four I think".

Carmen Casey was at the dance on October 17, 1982. he said that Richard Murray, who testified for the defence, was in the hall "sort of passed out" at 12:30 a.m. and that he saw Mr. Murray in the hall again after the Cashin vehicle had left the scene.

At the commencement of the trial defence counsel asked the court to direct the prosecutor to produce statements of the Crown witnesses. No particular reason was given except that they might be required for cross-examination. Counsel for the Crown opposed the motion. Argument took place regarding the power of the court to order the production during which reference was made to s. 10(1) of the *Canada Evidence Act*, R.S.C. 1970, c. E-10. Counsel for the defence stated that his application was "based on the general principle that the accused is entitled to a fair trial". In the course of the argument, the trial judge stated:

> We're dealing with the more important area of criminal law and there should be the same kind of openness for the purposes of justice in general. I can't think of a reason why, if somebody said something or made a statement to a police officer, why it should be the option of the Crown to decide whether to have that introduced or not.

Apparently, based on this principle, as each of five Crown witnesses completed his or her evidence-in-chief, the trial judge

examined the witness's written statement as given to the police to determine whether it was in any way contradictory to their testimony. Where he was satisfied that it was not contradictory he simply stated that fact and the cross-examination proceeded. He showed a copy of a witness's statement to the defence in only one instance.

After reviewing the evidence at the end of the trial, the trial judge entered a conviction. In giving his reasons, the trial judge stated:

> I cannot find that a shot-gun shot at the back of a half-ton truck within which there was an occupant was a prudent and careful use of a firearm. There is a real question as to whether it was merely careless or whether there was something greater than that, that is, whether there was an intentional use but here we have an individual using that gun and the question is whether he or someone else shot at the back of the truck and that evidence essentially that it was Mr. Doiron that was doing the shooting and the weight of the Crown evidence as to what I have to accept in light of the fact that I am basically rejecting the defence evidence . . . the evidence is that Mr. Doiron was doing the shooting and that accordingly, I find, as a matter of fact, that he, in fact, did pull the trigger that unleashed the buckshot that hit the back of the half-ton truck and I cannot find that that is a legitimate defence of property.

The appellant was sentenced to serve a term of one month, to be served intermittently on week-ends.

An appeal was taken to the County Court of District Number Six and dismissed. Essentially, the learned county court judge found that there was no basis for disturbing the findings of fact of the trial judge and that there was no error of law which would warrant allowing the appeal. The present appeal is from that decision.

There were three issues raised on the argument of the appeal. I will deal with the second issue first, namely, that there was no evidence to support the conclusion that the appellant fired the shot which hit the truck. In view of the conflict in the evidence it was necessary to decide issues of credibility which the trial judge determined against the defence. That was a matter within his exclusive prerogative and there was ample evidence to support his conclusions. There was evidence by the Crown witnesses that the appellant fired three or four shots, one of which struck the truck. The appellant admitted firing three shots from a .12-gauge shot-gun. The police only recovered three shells which the firearms expert said were fired from the exhibit shot-gun which he described as a .12-gauge shot-gun. No other shot-gun was given to the police from the house and Mrs. Pettipas tetified that it was the only shot-gun in the house. Frank Doiron, whom the appellant

alleged was firing the shot-gun, never testified. As there was evidence to support the conclusions of the trial judge this ground of appeal cannot be sustained.

The first ground of appeal, which is the main issue, raises the question as to the entitlement of the defence to statements given to the Crown by witnesses testifying on a trial. There are two lines of authority in Canada: first, that there is a general power in a court to order the production of statements in order to ensure that the accused has a fair trial, and secondly, that s. 10(1) of the *Canada Evidence Act* provides for the production of previous statements for purposes of cross-examination. *R. v. Weigelt* (1960), 128 C.C.C. 217, 33 C.R. 351, 32 W.W.R. 499, is a decision of the Appeal Division of the Alberta Supreme Court. In that case defence counsel made reference in cross-examination to a statement made by Mrs. Weigelt to the police. The Crown did not produce the statement and no order was made for its production. Ford C.J.A., after reviewing the authorities, stated, at p. 220 C.C.C., p. 354 C.R.:

> However, I would hold — and this does not differ from anything said by the learned Judge in the above judgment about Crown practice — that, if the Crown prosecutor does not decide to produce a statement such as the one here to counsel for the defence, the latter is entitled to apply to the trial Judge during the trial for an order that it be produced for the purpose purely of cross-examination to test the credibility of the witness who made the statement. The trial Judge is, on such application, entitled to order that it be produced if, in his opinion, it is in the interests of justice to do so. With respect to this I refer with approval to the statement in *R. v. Bohozuk* (1947), 87 Can. C.C. 125 at pp. 126-7, made by Mckay J. as follows: "It is well to remember that in seeing to the interests of justice, it is the duty of the Court to see that all rights of the accused are safeguarded, but in considering the interests of the accused the interests of justice must not be overlooked — they are the interests of the proper administration of justice, and justice must be and remains paramount."
>
> I have looked for further authority but have not been successful in finding anything bearing more nearly upon the question to be decided here than the cases to which I have referred.
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> At the hearing of this appeal, Crown counsel produced a copy of the statement, and the Court had the opportunity of reading it if the members so desired. From the nature of its contents, I concluded that no miscarriage of justice has resulted from its non-production. I am also strongly of opinion that an application for its production should have been made if non-production is now to be relied on as ground for a new trial. As stated before, no such application was made.

Johnson J.A., with Smith J.A. concurring, stated, at p. 221 C.C.C., p. 356 C.R.:

> While it is probably not necessary to decide the point, I am of the opinion

> that the statement not having been prepared, at least primarily, for counsel's brief at trial [I understand it was made to be used in proceedings under the *Child Welfare Act*] and a copy being in possession of Crown counsel, it should have been produced to defence counsel to make such use of in cross-examination as he saw fit.

No reference was made in the decision to the provisions of s. 10 of the *Canada Evidence Act*.

An annotation immediately following the *Weigelt* case in 33 C.R., by A. E. Popple, summarizes the Canadian and English cases to that point. Mr. Popple refers to s. 10(1) of the *Canada Evidence Act* as providing a means at the trial for the production and inspection of statements.

The decison of the Privy Council in *Mahadeo v. The King*, [1936] 2 All E.R. 813, was referred to by the Alberta Appellate Division in *Weigelt*. Sir Sidney Rowlatt, in delivering the judgment of the Privy Council, stated at pp. 816-7:

> At the trial the prosecution was conducted by the Attorney-General, and Mathura and the appellant were separately defended. At the opening of the proceedings the Attorney-General stated that he had received a letter from the solicitors for the defendants requiring production of all statements made by the three accused and by Sukraj, other than those produced as exhibits in the proceedings. This letter was taken exception to by the Attorney-General as containing insinuations that the prosecution had suppressed documents. In point of fact the Attorney-General was not aware that there were two statements, namely, those by Sukraj, which had not been produced. The Chief Justice characterised the letter as being highly improper. In the result the statements of Sukraj were not produced but they were available on the hearing of this appeal before their Lordships. The refusal of these documents is the subject of the first comment which their Lordships feel bound to make upon the conduct of this trial. There is no question but that they ought to have been produced, and their Lordships can find no impropriety in the letter asking for their production. It is true that upon cross-examination without the statements Sukraj admitted that he had at first put forward a story of suicide. But it is obvious that counsel defending the appellant was entitled to the benefit of whatever points he could make out of a comparison of the two documents *in extenso* with the oral evidence given and an examination of the circumstances under which the statements of the witnesses changed their purport.

In *Patterson v. The Queen* (1970), 2 C.C.C. (2d) 227, 9 D.L.R. (3d) 398, 10 C.R.N.S. 55, the defence on a preliminary inquiry sought the production of a statement given to the police by a witness for the prosecution. Judson J., in delivering the judgment for the majority in the Supreme Court of Canada, in referring to s. 10(1) of the *Canada Evidence Act*, stated, at p. 230 C.C.C., p. 57 C.R.N.S.:

> This power is given explicitly to a Judge "at any time during the trial". It is not given to a Magistrate during the conduct of a preliminary hearing. There

is a real distinction here. The purpose of a preliminary inquiry is clearly defined by the *Criminal Code* — to determine whether there is sufficient evidence to put the accused on trial. It is not a trial and should not be allowed to become a trial. We are not concerned here with the power of a trial Judge to compel production during the trial nor with the extent to which the prosecution, in fairness to an accused person, ought to make production after the preliminary hearing and before trial. This is a subject which received some comment in the British Columbia Court of Appeal in *R. v. Lantos*, [1964] 2 C.C.C. 52, 42 C.R. 273, 45 W.W.R. 409, and Archbold, *Criminal Pleading, Evidence and Practice*, 37th ed., para. 1393.

In *R. v. Lantos*, [1964] 2 C.C.C. 52, 42 C.R. 273, 45 W.W.R. 409, the British Columbia Court of Appeal held that an accused was not entitled under s. 512(*a*) of the *Code* to the production of statements taken from prospective witnesses. Tysoe J.A., in delivering the judgment of the court, went on to say at pp. 53-4:

Nothing I have said is to be taken to mean that under no circumstances and at no time may an accused become entitled to inspect a statement in writing given by a Crown witness. Section 10(1) of the *Canada Evidence Act*, R.S.C. 1952, c. 307, is as follows:

> "10(1) Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shown to him; but, if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing that are to be used for the purpose of so contradicting him; the judge, at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit."

Apart altogether from this section the trial Judge or Magistrate has power to require the prosecution to produce to the accused for his inspection during the course of the trial any statement in writing made by a Crown witness who is giving, or who has given evidence, and to permit the accused to use the statement for cross-examination purposes. I do not doubt that power would be exercised if the interests of justice required it. It is, of course, the duty of the Court to see that all rights of the accused are safeguarded. I refer to *Mahadeo v. The King*, [1936] 2 All E.R. 813 at p. 816; *R. v. Finland* (1959), 125 C.C.C. 186, 31 C.R. 364, 29 W.W.R. 354; *R. v. Silvester and Trapp* (1959), 125 C.C.C. 190, 31 C.R. 190, 29 W.W.R. 361; *R. v. Weigelt* (1960), 128 C.C.C. 217, 33 C.R. 351, 32 W.W.R. 499; *R. v. Torrens*, [1963] 1 C.C.C. 383, 40 W.W.R. 75. Also see: *R. v. McNeil* (1960), 127 C.C.C. 343, 33 C.R. 346, 31 W.W.R. 232. I should point out that counsel for the accused did not, at any time during the course of the trial, request the learned Magistrate below to exercise the power given by s. 10(1) of the *Canada Evidence Act* nor the other power which I have mentioned above.

I would add only that, in my opinion, an accused is not entitled, as a matter of right, to have produced to him for his inspection before trial, statements or memoranda of evidence of Crown witnesses or prospective witnesses, whether signed or unsigned. That is a matter within the discretion of the Crown prosecutor who may be expected to exercise his discretion fairly, not only to the accused, but also to the Crown. What might be thought to be

proper in one set of circumstances may not be thought to be proper in another.

No reference was made to the views expressed earlier by the British Columbia Court of Appeal in *R. v. Tousigant et al.* (1962), 133 C.C.C. 270, 38 C.R. 319, 39 W.W.R. 574.

In *R. v. Cherpak* (1978), 42 C.C.C. (2d) 166, [1978] 5 W.W.R. 315, 9 A.R. 596, the court was concerned with the production of a police officer's report as to the witness's statement. Clement J., in delivering the judgment of the court, held that the report itself was not a statement subject to production. He went on to add, however, at p. 172:

> In a proper case and at an appropriate time in the cross-examination of a witness, I am of opinion that counsel can apply for an inquiry similar to a *voir dire* to establish whether or not the witness made a statement within the purview of s. 10, such as is recommended by Culliton, C.J.S., under s. 9(2). If such a statement is found to have been made, it is plain that counsel is not entitled to it in law. It is produced to the Judge for his inspection and to "make such use of it for the purpose of the trial as he sees fit". This is affirmed by Bird, J.A., speaking for the Court of Appeal of British Columbia in *R. v. Tousigant* (1962), 133 C.C.C. 270 at p. 274, 38 C.R. 319, 39 W.W.R. 574:
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> > "In my judgment the true effect and intent of the latter part of the section is to give the Judge power in his discretion to require production of the statement for inspection by himself. The section confers no right upon a party or his counsel to require production of such a statement."
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> It is well to note some judicial comment on the proper exercise of this discretion. In *R. v. Weigelt* (1960), 128 C.C.C. 217, 33 C.R. 351, 32 W.W.R. 499, Ford, C.J.A. with whom Macdonald, J.A., concurred, had this to say at p. 220:
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> > "The trial Judge is, on such application, entitled to order that it be produced if, in his opinion, it is in the interests of justice to do so. With respect to this I refer with approval to the statement in *R. v. Bohozuk* (1947), 87 Can. C.C. 125 at pp. 126-7, made by McKay, J., as follows: 'It is well to remember that in seeing to the interests of justice it is the duty of the Court to see that all rights of the accused are safeguarded, but in considering the interests of the accused, the interests of justice must not be overlooked — they are the interests of the proper administration of justice, and justice must be and remains paramount.' "
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> The passage from *R. v. Bohozuk* was also referred to with approval in this connection by Haines, J., in his wide-ranging and useful judgment in *R. v. Lalonde* (1971), 5 C.C.C. (2d) 168, [1972] 1 O.R. 376.

Clement J. would apply the same practice to both ss. 9 and 10 of the *Canada Evidence Act*. In *Cormier v. The Queen* (1973), 25 C.R.N.S. 94, the Quebec Court of Appeal held that the right of cross-examination under s. 10(1) of the Act is not limited and that the guidelines referred to in *R. v. Milgaard* (1971), 2 C.C.C. (2d) 206, 14 C.R.N.S. 34, [1972] 2 W.W.R. 266, have no application.

Kaufman J.A., in delivering the judgment of the court, stated at pp. 98-9:

> Apart from the fact that a voir dire is *not* the trial Judge's inquiry but rather a trial within the trial in the full sense of the word, I think, with respect, that the Judge erred in requiring counsel to obtain his permission before cross-examining a witness "as to previous statements made by him in writing or reduced to writing, relative to the subject-matter of the case".
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> As I see it, the only limitation to this type of cross-examination is that contained in s. 10(1), that is to say that, "if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing that are to be used for the purpose of so contradicting him". That is a long way from saying that counsel must first satisfy the Judge that there are, in fact, contradictions.
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> In this respect s. 10(1) differs completely from s. 9, which deals with adverse witnesses, and which provides as follows:
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>> "9. (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony: but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.
>>
>> "(2) Where the party producing a witness alleges that the witness made at other times a statement in writing, or reduced to writing, inconsistent with his present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider such cross-examination in determining whether in the opinion of the court the witness is adverse."
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> The great distinction is, of course, that s. 9 permits a party, under very strict conditions, to contradict *his own witness*, and one of the means of doing this is by proof "that the witness made at other times a statement inconsistent with his present testimony". But, before doing so, leave of the court must be obtained.
>
> The trial Judge clearly took the view that the rules of s. 9 could be applied to cases falling within s. 10, and he therefore applied the guidelines set out by Culliton C.J.S. in *Regina v. Milgaard*, 14 C.R.N.S. 34, [1971] 2 W.W.R. 266, 2 C.C.C. (2d) 206 at 221 . . .

He continued at p. 100:

> Nothing that was said by the Chief Justice in *Milgaard* can in any way be construed so as to justify the application of these rules to s. 10 of the Canada Evidence Act, where the wording is quite different. In my view, the proper rule remains the one enunciated by this Court in *Abel v. The Queen* (1955), 23 C.R. 163, 115 C.C.C. 119, where Taschereau J. concluded as follows at p. 176:
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> "I am of the opinion that the judge illegally refused appellant's counsel the right to cross-examine a Crown witness, Captain Gelinas, as to a statement that he had made the day before on the *voir dire* which was inconsistent with

that which he made before the jury. Accused may have suffered very serious prejudice therefrom."

In *R. v. Sinclair* (1974), 19 C.C.C. (2d) 123, 16 C.L.Q. 452, 28 C.R.N.S. 107, Wilson J., of the Manitoba Queen's Bench, had to consider whether the Crown could be forced on a preliminary to produce a previous statement given by a Crown witness. In *Sinclair*, the Crown made an application to proceed under s. 9(2) of the *Canada Evidence Act* at which time the defence asked to see the statement. Wilson J., in the course of his judgment, stated [at pp. 127-8]:

> But here, the demand for production and perusal came after the Crown itself had disclosed the existence of the statements, and had tendered them for perusal by the Court. Of that, accused reasonably observes, his preliminary hearing, like the trial itself, may not be conducted, as it were, as if he was not present. Or, putting it another way, the outcome of the preliminary hearing is not to depend, in however minor a degree, upon a consideration of evidence (or proffered evidence) as to the relevance or significance of which he may not inquire, or may inquire subject only to the severe handicap of now knowing the language of the statements in question.
>
> Without denying the right of the Crown, in its discretion, to present the case as it will, surely, the associated right to withhold statements, for whatever reason, does not extend to producing the statements, and inviting their use by the Court, without making them available for examination by the accused as well. The right of Crown counsel to contradict, or to treat as hostile, his own witness, is subject to the corresponding right of the accused to satisfy himself that such contradiction, or "hostile" examination, is in accord with the circumstances of the case, and to address the Court upon the point, if thought necessary. How may this be done, except in the light of full disclosure of the statement or statements from which, it is said, follows Crown's right to so proceed? Nor is the dilemma improved by the bargain proposed here, that should the Court agree with the contention of the Crown, its counsel would then — and only then — make the statements in question available to the accused.
>
> To assent to that much would be to say that it is inconceivable that accused or his counsel could have any useful comment to offer upon a matter offered by way of evidence before the Court. Whether the accused wishes to offer comment, or lead evidence on the question, is another matter: the point is that, if he is indeed to be allowed the "full answer and defence" so proudly assured to every person accused, the case must proceed upon another basis.
>
> The matter will be remitted to the learned Provincial Judge to continue the preliminary hearing in light of these observations.

The most recent decision dealing with the issue is the decision of the Ontario Court of Appeal in *R. v. Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276, 13 C.R. (3d) 259. At issue in that case were statements by the accused. The court held that an accused was entitled to receive a copy of his own statement under s. 531 of the *Code*. In delivering the judgment of the court, Zuber J.A. stated at p. 283:

I turn now to the alternative argument respecting the production of the appellants' statements. It is the assertion of the appellants that, entirely apart from s. 531, there reposes in the trial Judge a discretionary power to order production by the Crown and that it ought to have been exercised in this case.

Zuber J.A. then referred to the decisions in *R.v. Lantos*, *R. v. Lalonde* and *R. v. Weigelt*, *supra*. He then continued at pp. 284-5:

I have not been referred to, nor have I been able to find a Canadian case dealing with the power of a Court to order production where what was sought was the accused's own statement. However, I cannot conceive that the power to compel the Crown to produce the statement of a witness is a narrow and isolated power; I conceive it to be but one facet of a wider power to order production that flows from the ability of the Court to control its process so as to manifestly ensure fundamental fairness and see that the adversarial process is consistent with the interests of justice. Such a power must include the power to order production of the statement of an accused.

The further question then is: should such discretionary power to order production have been exercised? I can think of no reason why production should not have been ordered.

As is often the case, when our own experience is slim or non-existent, one looks to American case law. Unfortunately in this instance the American case law is not particularly helpful. The cases differ procedurally, often turning on specific rules, and those that I have found deal with the pre-trial disclosure. It may be said as well that the results of those cases disclose a healthy difference of opinion. The cases do, however, underline the competing principles. The principle of fairness and the right of an accused to know the case he has to meet compete with a fear of fabricated defences, tailored to accommodate the statements.

When, however, as is the case here, the production sought is production at trial the danger of defences tailored to accommodate the statement must be substantially diminished and must be outweighed by the need for fundamental fairness in the trial process. Entirely apart from s. 531 of the *Criminal Code*, in the absence of any cogent reason to the contrary, a trial Judge should exercise his discretion and order production to an accused of his own statement. Thus, the appellants succeed on both of the foregoing arguments, either one of which entitled them to production of their statements.

With reference to English practice, the following passage is from *Archbold, Pleading, Evidence and Practice in Criminal Cases*, 40th ed. (1979), p. 282, para. 443a:

Where a witness whom the prosecution call or tender gives evidence in the box on a material issue, and the prosecution have in their possession an earlier statement from that witness which is materially inconsistent with such evidence, the prosecution should, at any rate, inform the defence of that fact: *R. v. Howes*, March 27, 1950, C.C.A. (unreported). Although the discrepancy relates to that part of a witness's evidence which is evidence against one defendant only, the information should be supplied to any other co-defendant against whom the witness also gives evidence, as it goes to the credibility of the witness: *Baksh v. R.* [1958] A.C. 167. In certain cases, particularly where the discrepancy involves detail, as in identification by description, it may be

difficult effectively to give such information to the defence without handing to them a copy of the earlier statement: *R. v. Clarke* (1930) 22 Cr. App. R. 58; see also *Baksh v. R., ante*. Once again the question arises as to whether the defence are entitled to see the statement in order to be able to judge for themselves whether there is a discrepancy, and if so whether it is material. Implicit in the observations of Humphreys J. and Avory J. in *R. v. Clarke* (1930) 22 Cr. App. R. 58, is the view that the defence are so entitled, but that case was concerned with a previous written description of the accused given by a police officer to his superior.

Further, there have been cases where, in view of their particular circumstances, judges have ruled that the defence should be allowed to see statements made to the police by witnesses for the prosecution: see *R. v. Hall* (1958) 43 Cr. App. R. 29, C.C.C.; *R. v. Xinaris* (1955) 43 Cr. App. R. 30n. (Byrne J.). In the absence of any authority to the contrary it is submitted that the practice of revealing to the defence the previous statements of prosecution witnesses which are relevant to their evidence is not only wholly unobjectionable but is very much in the interests of justice. This practice is eagerly followed at the Central Criminal Court. Oral as well as written inconsistent statements of witnesses can be both put in cross-examination and, if not admitted, proved by the opposing party under *Denman's Act, post*, §§528 *et seq*. It is submitted that it is wholly wrong for the Crown not to furnish the defence with such material and thus prevent them from exercising their rights under that Act. Quite apart from the "inconsistency" point there is the further consideration that a witness may have forgotten or omitted in evidence some part of his statement which may, unbeknown to the prosecution, be most material to the defence case. As to the duty of the prosecution with regard to a prison medical officer's report or statement on the question of insanity, see *post*, §1447i, and for the obligation to supply details of the defendant's previous convictions to his solicitor or counsel see *Practice Direction* [1966] 1 W.L.R. 1184; [1966] 2 All E.R. 929, *post*, §631.

The following passage is from *Phipson on Evidence*, 13th ed. (1982), p. 754:

(2) *Statement of prosecution witness*. A similar reluctance to reveal to the defence the previous statements of witnesses actually called for the prosecution is not infrequently displayed by prosecuting authorities, and by some prosecuting counsel. It is well settled that where such a witness gives evidence which is materially inconsistent with an oral or written statement made by him the prosecution should inform the defence. The difference of practice arises as to whether or not the defence should be entitled to see the written, or reports of oral, statements of prosecution witnesses in order to be able to judge for themselves whether there is a discrepancy and if so whether it is material.

There is the authority of Avory, Humphreys and Byrne JJ., all former senior prosecuting counsel for the Crown at the Central Criminal Court, that the defence are so entitled. *R. v. Clarke* (1931) 22 Cr. App. R. 58 was concerned with previous descriptions, but it is clear from their remarks during the course of argument that Avory and Humphreys JJ. considered that the defence had a right to see such statements in order to discover whether there was an inconsistency of any kind. The report of Byrne J.'s ruling in *R. v. Xinaris* (1959) 43 Cr. App. R. 30 note. See also *R. v. Hall* (1959) 43 Cr.

> App. R. 29 *per* Judge Maude at the C.C.C., is short, but the writer had the advantage of discussing the point with Byrne J. and can confirm that Byrne J. agreed with Avory and Humphreys JJ. on the general proposition.
>
> In the absence of any authority to the contrary it is submitted that the practice of revealing to the defence all previous statements of prosecution witnesses relevant to their evidence, already largely followed at the Central Criminal Court, is both correct and in the interests of justice.
>
> Indeed it is difficult to see why objection is never made to their production. If there is no material inconsistency no harm is done. If there is material inconsistency there is no question but that it must be disclosed to the defence. Moreover the prosecution often does not know the defence case and may not therefore be in a position to know that an inconsistency is material.
>
> Apart from inconsistency, there is the further point that a witness may have forgotten or omitted in his evidence some part of his statement which may be most material to the defence case, although the prosecution may not realise this.

The cases point out the overriding obligation on the part of counsel for the Crown to inform the defence of evidence which may be helpful to an accused: see *Re Cunliffe and Law Society of British Columbia* (1984), 13 C.C.C. (3d) 560, 11 D.L.R. (4th) 280, 40 C.R. (3d) 67. In its report on disclosure by the prosecution the Law Reform Commission of Canada has recommended that the *Criminal Code* be amended to require the Crown to furnish a copy of any relevant statement made by a prospective witness at any stage of the proceedings unless the Crown can show that disclosure will probably endanger life or safety or interfere with the administration of justice.

It is clear from the authorities that a trial judge has the power at trial to require the production of statements made by Crown witnesses for use by the defence. With respect, I agree with the decision of the Ontario Court of Appeal in *R. v. Savion and Mizrahi, supra*, that a trial judge has the general power to order the production of statements in order to ensure a fair trial and guarantee that an accused can make full answer and defence. The discretion should be exercised in favour of production in the absence of any cogent reason to the contrary. The power of production also exists under s. 10(1) of the *Canada Evidence Act*. The only issue is whether the court can examine statements without showing them to counsel. While s. 10(1) seems to impart such discretion, a wider view has been taken of the exercise of the general power. In my view, under s. 10(1) of the *Canada Evidence Act*, while there may be a preliminary question as to whether a statement was made, when that issue has been determined in favour of the accused counsel is generally entitled to a copy of the statement. I agree with the decision of the Quebec

Court of Appeal in *Cormier v. The Queen*, *supra*, that ther broad right of cross-examination under s. 10(1) of the *Co Evidence Act* and, accordingly, the exercise of that right mu left in the hands of counsel for an accused; s. 10(1) doe prohibit giving a copy of the statement to counsel. The state is important, not only for purposes of cross-examination, may also disclose information which the witness has forgott is not appropriate that the decision should be left solely to th judge to determine whether the statement is contradictory any use to the defence. He is not privy to information availa the defence. Nor is it appropriate that the court and couns the Crown should have access to a statement to the exclus the accused or his solicitor.

It follows that I respectfully disagree with those decisions hold that a trial judge has a broad discretion on the trial to counsel the right to see the statement of a Crown witnes noted by the author of *Phipson on Evidence*, if there is no contradictory in the statement no harm is done to the Cr case. On the other hand, if the statement is contradicto contains evidence not disclosed then it is material to the de With respect, the trial judge was in error when he failed to all of the statements available to the defence in his case.

The court has requested and received copies of the state since the argument of the appeal. The court has also directe the statements be forwarded to appellant's counsel. An e nation of the statements shows no additional information could have materially affected the decision. In the circumst I am satisfied that no substantial wrong or miscarriage of j occurred. In the result, the appeal against conviction mu dismissed.

In so far as the appeal against sentence is concerned, I ca no error on the part of the trial judge. Needless to say, the a firearm in these circumstances must be viewed as a s matter, particularly where one shot was fired at the vehicle.

While I would grant leave to appeal, the appeal shou dismissed.

Appeal dism

CUNLIFFE v. LAW SOCIETY OF BRITISH COLUMBIA; BLEDSOE v. LAW SOCIETY OF BRITISH COLUMBIA

British Columbia Court of Appeal, Nemetz C.J.B.C., Hinkson and Macdonald JJ.A.

Judgment — March 7, 1984.

Procedure — Disclosure by Crown — Inspection of statements, evidence and exhibits — Crown having duty to advise defence in timely manner of witnesses whose evidence is deemed adverse to prosecution — In circumstances, Crown counsel taking over prosecution entitled to assume defence counsel knew of favourable witnesses.

Procedure — Disclosure by Crown — Inspection of statements, evidence and exhibits — Crown having discretion respecting giving to defence statements of witnesses favourable to defence — Crown acting properly in producing statements to court after defence applying for order for production.

Evidence — Calling witnesses — Crown having no duty to call witnesses favourable to defence — Trial judge erring in directing Crown to call such witnesses.

The appellants, B. and C., were Crown counsel at various times in charge of a murder prosecution. Prior to the trial it became known to B. that there were witnesses capable of providing the accused with an alibi defence. B. failed to inform defence counsel as to their existence. After the declaration of a mistrial C. took over the prosecution without knowing that the defence did not know

about these witnesses. C. thought that B. had disclosed the statements of the witnesses to counsel for the defence. When the defence counsel became aware of the possibility that the Crown was suppressing favourable evidence, he made an unsuccessful motion for adjournment to investigate the conduct of the Crown. He then made a second motion that the court direct the Crown to deliver the statements of all the alibi witnesses to him and that the Crown call them for cross-examination. Referring to s. 10 of the Canada Evidence Act, C. handed over the available statements of the alibi witnesses to the judge, who directed that they be delivered to the defence counsel. C. obtained the statements of additional alibi witnesses for the judge, who also ordered them to be delivered to the defence counsel. The trial judge further directed the Crown to call the alibi witnesses for cross-examination by defence counsel. Following the acquittal of the accused on the murder charge, the defence counsel lodged a complaint against B. and C. to the discipline committee of the benchers of the Law Society of British Columbia, who held that B. and C. were guilty of conduct unbecoming a member of the society and of professional misconduct. B. and C. appealed the verdicts of the committee.

Held — B.'s appeal dismissed; C.'s appeal allowed.

There is a duty on prosecuting counsel to advise the defence in a timely manner of the existence of witnesses whose evidence is deemed to be adverse to the prosecution or supportive of the defence. The prosecutor has a duty to see that all available legal proof is fairly presented. The committee had not erred in holding that the Crown had a duty to ensure that the defence counsel knew of the existence of the alibi witnesses and that those witnesses had made written statements to the police. The committee had not erred in finding that B., despite his limited experience at the bar, had breached his duty in not advising the defence counsel or the prosecutor that replaced him. However, the committee had erred in finding that C. had failed to fulfil his duty, as he was unaware of the ignorance of the defence about the witnesses until he was responding to defence motions in court, at which point it was proper to answer through the court.

There is no absolute duty on prosecuting counsel to give the defence statements of witnesses whose evidence is deemed to be adverse to the prosecution or supportive of the defence. Crown counsel must have some discretion. Here, the discipline committee had wrongly criticized C. for not immediately volunteering to turn over the statements in court to the defence. He had produced them to the court as soon as the defence had applied for them, and had not breached his duty.

There is no duty on prosecuting counsel to call witnesses whose evidence is deemed to be adverse to the prosecution or supportive of the defence. The prosecution has a discretion as to which witnesses it will call, and the court will not interfere with the exercise of its discretion unless it can be shown that the prosecution has been influenced by some oblique motive. Here, the committee had been satisfied that there was no such motive, and they had erred in holding that the Crown was under a duty to call the alibi witnesses. If the trial judge thought that it was unfair to the defence to leave it to the defence to call the witnesses, the proper course was for the trial judge to call the witnesses and to permit them to be cross-examined by both the Crown and the defence. The trial judge had erred in directing the Crown to call the witnesses.

There is a burden on defence counsel to gain a working knowledge of the charges and the evidence in support of them by ensuring that the defence knows

in broad outline the case to be made against the accused. Here, defence counsel had not made the kind of inquiry of the Crown which competent defence counsel should do.

Editor's note

For an argument that our courts should recognize that ss. 7 and 11(*d*) of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Pt. I, have enshrined a constitutional right to discovery, see David Finley, "Is There Now A Constitutional Right to Discovery?" (1984), 36 C.R. (3d) 41. However, in *R. v. Kristman*, [1984] A.W.L.D. 740, [1984] W.C.D. 197 (Q.B.), McBain J., 21st June 1984 (not yet reported), it was held that neither s. 7 nor s. 11(*d*) conferred upon an accused facing a summary conviction prosecution for driving offences the right to full pre-trial disclosure of all evidence available from the police officers involved in the investigation. Defence counsel had sought their names so that he could interview them. The Crown had provided "normal oral particulars". McBain J. held that he ought not to offer an opinion on whether the criminal law system should be changed to provide fuller discovery.

Publication of this judgment was delayed at the request of the court.

Cases considered

Adel Muhummed El Dabbah v. A.G. (Palestine), [1944] A.C. 156, [1944] 2 All E.R. 139 (P.C.) — referred to.

Boucher v. R., [1955] S.C.R. 16, 20 C.R. 1, 110 C.C.C. 263 — considered.

Caccamo v. R., [1976] 1 S.C.R. 786, 29 C.R.N.S. 78, 21 C.C.C. (2d) 257, 54 D.L.R. (3d) 685, 4 N.R. 133 — considered.

Lemay v. R., [1952] 1 S.C.R. 232, 14 C.R. 89, 102 C.C.C. 1 — considered.

R. v. Seneviratne, [1936] 3 W.W.R. 360, [1936] 3 All E.R. 36 (P.C.) — referred to.

Statutes considered

Canada Evidence Act, R.S.C. 1970, c. E-10, s. 10.

Authorities considered

Canadian Bar Association, Code of Professional Conduct, p. 29.

[Note up with 4 Can. Abr. (2d) *Barristers and Solicitors*, IX, 2; R11A Can. Abr. (2d) *Criminal Law (Revised)*, IV, 46, a, i; 15 Can. Abr. (2d) *Evidence*, XV, 3.]

APPEALS from decision of discipline committee of British Columbia Law Society finding lawyers guilty of conduct unbecoming and professional misconduct.

J.D. McAlpine, Q.C., and *C.J. Ross*, for appellant Cunliffe.

L.T. Doust and *W.B. Smart*, for appellant Bledsoe.

E.D. Crossin, for respondent.

(Vancouver Nos. CA000829, CA000886)

7th March 1984. The judgment of the court was delivered by

HINKSON J.A.:— The two appeals in this matter were heard together. They involve appeals from verdicts of the discipline committee of the benchers of the Law Society of British Columbia.

Each of the appellants was found to be guilty of conduct unbecoming a member of the Law Society of British Columbia and of professional misconduct.

The citations issued in respect of each of the appellants were as follows:

"B. THAT Richard Carrol Bledsoe between on or about May 11, 1977 and on or about January 23rd, 1978 knew or ought to have known of the existence of all or some witnesses; namely, Shelley Henderson, Earl Wilkinson, Nancy Connelly, Peter Connelly, Joseph Richard, Thomas Arthur Pimlott, Tanya Henn, Trudy Froystad, Larry Welsh, Nora Welsh, May Winnig, Ann Hogue and Margaret Ritchie; which witnesses made certain statements to the police or Crown Counsel as specified, that the said Drake was or may have been seen alive on March 25th, 1976, all or some of which were not disclosed to Mr. Taylor and/or Mr. Ritchie and/or Mr. Libby.

"C. THAT Donald Moore Cunliffe, Q.C., and Christopher Gordon Green between on or about September 23, 1977 and on or about May 2nd, 1978 knew or ought to have known of the existence of all or some witnesses; namely, Shelley Henderson, Earl Wilkinson, Nancy Connelly, Peter Connelly, Joseph Richard, Thomas Arthur Pimlott, Tanya Henn, Trudy Froystad, Larry Welsh, Nora Welsh, May Winnig, Ann Hogue, and Margaret Ritchie; which witnesses made certain statements to the police or Crown Counsel as specified, that the said Drake was or may have been alive on March 25, 1976, all or some of which were not disclosed to Mr. Taylor and/or Mr. Ritchie and/or Mr. Libby.

"THAT Donald Moore Cunliffe, Q.C., at a time or times during the so-called 'third trial' of the herein matter failed in his duty as Crown Counsel by taking the position at trial that the Crown need not and will not call the above witnesses as Crown witnesses, such failure of duty, in the circumstances of this particular case, amounting to conduct unbecoming a member of the Law Society."

These citations arose out of the prosecution of a charge of murder following the death of one Owen Roy Drake on either Wednesday, 24th March 1976, or Thursday, 25th March 1976, at the city of Campbell River.

In order to appreciate the circumstances which gave rise to the citations it is necessary to understand the history of the events

with respect to the charges that flowed from the death of Drake.

On 28th March 1976 Alfred Lee McLemore was charged with the non-capital murder of Drake. The date of the offence on the information charging McLemore was Thursday, 25th March 1976.

At the outset of the police investigation into the death of Drake numerous statements were taken from various persons and several of them stated that the deceased was alive on Thursday, 25th March 1976. Initially, therefore, the police concluded that 25th March 1976 was the correct date to place on the information.

From the outset of their investigation the police were aware of an individual named James Harvey Ouelette. The police knew that Ouelette had been taken into custody as a result of certain unlawful actions which occurred on the evening of Wednesday, 24th March 1976. Therefore, if Drake was alive on 25th March 1976 Ouelette could not have caused the death.

The charge against McLemore was brought before the Provincial Court for a preliminary hearing at Campbell River on 16th August 1976. Mr. Sinnott appeared for the Crown and Mr. Young represented the accused. At the conclusion of the fifth day, the hearing was adjourned to December 1976 for continuation.

In the meantime the Crown reconsidered its position and laid a new information charging both Ouelette and McLemore with the murder of Drake. The date of the offence on the second information was Wednesday, 24th March 1976.

A second preliminary hearing was then conducted. It commenced on 14th March 1977. Mr. Sinnott appeared for the Crown, Mr. Brindle appeared for McLemore and Mr. Taylor appeared for Ouelette. At the conclusion of this preliminary hearing both accused were committed for trial before a Supreme Court of British Columbia judge and jury.

After the conclusion of the second preliminary hearing Mr. Sinnott passed the case for the Crown to the appellant Bledsoe. At that time Mr. Bledsoe was a member of the regional Crown counsel office for the province of British Columbia at Nanaimo. In May 1977 Mr. Sinnott sent his file of material to Mr. Bledsoe. A trial date was set for the hearing of the McLemore-Ouelette case for the Supreme Court assize to be held at Nanaimo in September 1977.

After Mr. Bledsoe took over the conduct of the case for the

Crown he decided that the charge against McLemore should be dropped and a charge of being an accessory after the fact should be preferred against him on the understanding that McLemore would appear as a witness for the Crown against Ouelette.

During July 1977 Mr. Taylor, representing Ouelette, had discussions with Mr. Bledsoe with respect to the possibility of the Crown accepting a plea of guilty to manslaughter. Ultimately Mr. Taylor was discharged by Ouelette because he was not prepared to make such a plea. On 17th August 1977 Mr. Taylor informed the court registry at Nanaimo that he was no longer acting for Ouelette.

When Mr. Bledsoe initially assumed the responsibility for the conduct of the prosecution it was not his intention to appear as counsel at trial. He had anticipated obtaining guilty pleas from Ouelette and McLemore. Mr. Bledsoe had arranged a holiday from 20th August to 5th September. Before leaving on his holiday he spoke to Mr. Sinnott's secretary and was under the impression that Mr. Sinnott would be able to prosecute the case at the Nanaimo assize which was scheduled to begin on 19th September 1977. On 15th August 1977 Mr. Bledsoe had his staff issue subpoenas to all witnesses called at the second preliminary hearing as a precaution because he had not then received a definite answer from Mr. Taylor.

Throughout the course of these proceedings the witnesses who gave statements to the effect that Drake was seen alive on Thursday, 25th March 1976, have been referred to as the "Thursday witnesses". Four of these witnesses testified at the first preliminary hearing. The Crown also had statements from other Thursday witnesses but they were not called at the first preliminary hearing. In August 1977 Mr. Bledsoe believed that both Mr. Brindle and Mr. Taylor were aware of all Thursday witnesses.

When Mr. Bledsoe returned to his office on 6th September 1977 he became aware for the first time that Mr. Sinnott would not be able to conduct the trial. He decided that he would prosecute the case himself.

Early in September Mr. Peter Ritchie had been retained to defend Ouelette. Mr. Taylor bundled up his material and mailed it to Mr. Ritchie's office in Vancouver. Mr. Taylor did not have a transcript from the first preliminary hearing. He sent Mr. Ritchie a copy of the transcript from the second preliminary hearing. The Crown had not called any of the Thursday witnesses at the second

preliminary hearing. Between 9th September and 12th September Mr. Bledsoe became aware that Mr. Ritchie was now acting for Ouelette. He received a note in his office which read:

"Dick, Jim Taylor advises Peter Ritchie is defending Ouelette. He has sent him transcripts and particulars."

Prior to the commencement of the trial on 19th September 1977 Mr. Bledsoe was not aware that Mr. Ritchie did not know of the Thursday witnesses. He thought that Mr. Ritchie would be aware of these witnesses from his discussions with Mr. Taylor but that was not the fact.

The evidence before the discipline committee showed that Mr. Ritchie had only a perfunctory discussion by telephone with Mr. Taylor after assuming the defence of Ouelette. In his discussion with Mr. Bledsoe before the commencement of the trial, again he sought no information from Mr. Bledsoe about the witnesses to be called by the Crown nor any information about what the witnesses might say. Indeed, before the discipline committee Mr. Ritchie conceded that before the commencement of the trial Mr. Bledsoe was entitled to assume that Mr. Ritchie was knowledgeable about the case for the defence.

During the trial which commenced on 19th September 1977 Mr. Ritchie's associate, Mr. Libby, discovered a transcript of the first preliminary hearing on the counsel table. As a result of perusing it defence counsel learned for the first time of the existence of witnesses who would say that Drake was alive on Thursday, 25th March 1976. At Mr. Ritchie's request two of those witnesses, Mrs. Ritchie and Trudy Froystad, were subpoenaed by the Crown on 22nd September. At that point in the trial, however, Mr. Bledsoe realized that Mr. Ritchie did not know that there were other Thursday witnesses in addition to the four that had testified at the first preliminary hearing.

Mr. Bledsoe did not immediately inform Mr. Ritchie of this fact. He was concerned about the problem but he decided to wait until the weekend to consult senior counsel as to what he should do in these circumstances. On Friday, 23rd September 1977, the presiding trial judge declared a mistrial.

Thereafter Mr. Bledsoe did not inform Mr. Ritchie of the existence of the additional Thursday witnesses. He decided to retain ad hoc Crown counsel to prosecute the next trial of the charges against Ouelette and refrained from disclosing the fact

that there were additional Thursday witnesses to Mr. Ritchie. Instead he decided to leave the decision to the next prosecutor.

In late November 1977 the appellant Cunliffe was retained by Mr. Bledsoe to act as Crown counsel at the second Ouelette trial, which was set for 23rd January 1978. On 16th December 1977 Mr. Bledsoe met with Mr. Cunliffe to discuss the cases which the appellant Cunliffe was to conduct at the January assize. At the meeting Mr. Cunliffe received only portions of the files and not all of the statements in the Ouelette case. Mr. Bledsoe brought the existence of the Thursday witnesses to Mr. Cunliffe's attention at that time.

Before the discipline committee it was the evidence of Mr. Cunliffe that at no time did Mr. Bledsoe bring to his attention the fact that counsel for Ouelette was unaware of the existence of the Thursday witnesses. Mr. Cunliffe testified that Mr. Bledsoe indicated to him that the Wednesday-Thursday defence was the obvious defence and that Mr. Ritchie was well aware of this. Mr. Cunliffe stated that he was left with the impression, as a result of his discussions with Mr. Bledsoe, that Mr. Ritchie was aware of the existence of the witnesses who could testify as to seeing Drake alive on Thursday, 25th March. On the other hand the discipline committee found that Mr. Bledsoe was uncertain as to whether or not he conveyed to Mr. Cunliffe the fact that the defence lawyers were unaware of the Thursday witnesses. The discipline committee preferred the evidence of Mr. Cunliffe on this point to that of Mr. Bledsoe.

The second trial commenced on 23rd January 1978. After four days of trial a mistrial was declared and the case was put over to 10th April 1978.

The third trial commenced on 10th April 1978. On the evening of 17th April 1978 Mr. Ritchie and Mr. Libby had occasion to be in the exhibit vault at the courthouse in Nanaimo and discovered by chance that there was an occurrence report written by a witness, Mr. Flebbe. Mr. Flebbe was the ambulance driver who was at the scene of the crime. He stated in his report that at the scene of the murder he had spoken to a person named Mrs. Ann Hogue, who indicated that the deceased was alive on Thursday. Mr. Ritchie immediately communicated with Mr. Bledsoe to obtain a copy of the Flebbe report as the registry officials in Nanaimo had declined to permit him to copy it. Mr. Bledsoe in turn communicated with Mr. Cunliffe, who agreed that Mr. Ritchie should

receive a copy of that report, and he did so.

Although Mr. Ritchie had become aware of four of the Thursday witnesses at the first trial in September 1977, he had never inquired of Crown counsel whether there were any other Thursday witnesses. After learning of the existence of Mrs. Hogue on 17th April 1978 Mr. Ritchie did not choose to make any inquiries of Mr. Bledsoe or Mr. Cunliffe with respect to the existence of any other Thursday witnesses.

Mr. Ritchie's suspicions had been aroused. He concluded that the Crown was deliberately suppressing evidence favourable to the defence. On 17th April 1978 the Crown had called one of the Thursday witnesses, Mrs. May Winnig. She was asked by Crown counsel to relate what she knew about the incident involving the death of Drake. In direct examination she recounted that she had seen two men jumping her fence from the deceased's yard. She was never asked by Crown counsel on what date this event occurred. With respect to the identification of either of the two persons she saw jumping the fence, she stated that "Ouelette looked like one of them".

Mr. Ritchie's first question in cross-examination to Mrs. Winnig was as to the day on which the events she described had taken place. She responded that it was "Thursday afternoon". On further cross-examination Mr. Ritchie elicited from her that she was asked to identify the men she had seen climbing the fence at a police line-up shortly after the murder and that she picked out someone who was neither Ouelette nor McLemore. McLemore, however, was one of the men in the line-up.

Prior to calling Mrs. Winnig Mr. Cunliffe did not make Mr. Ritchie aware of the fact of Mrs. Winnig's incorrect identification. Mr. Cunliffe was aware of the fact that Mrs. Winnig did appear at the line-up shortly after the murder and did identify a third person. The discipline committee concluded that Mr. Ritchie was not aware of this useful identification evidence from the defence perspective until his cross-examination of Mrs. Winnig. As I have indicated Mr. Ritchie did not seek any assistance from Crown counsel with respect to what witnesses might be available, nor seek any statements of such witnesses during the course of these proceedings. Something of the atmosphere in which the third trial proceeded may be gathered from the finding of the discipline committee. Its report said:

"It is clear that even before the discovery of the Flebbe report Mr. Cunliffe and Mr. Ritchie had not been exchanging the usual courtesies towards one another that one expects of members of the Bar."

Despite the developments on 17th April 1978 Mr. Ritchie refrained from discussing the matter with Mr. Cunliffe. He chose rather to make allegations in court on 18th April 1978 because, he testified, it was in the best interests of his client to do so. He appeared before the trial judge on 18th April and made a motion to adjourn the trial for a lengthy period in order that the Department of the Attorney General could investigate the conduct of the Crown up to that point in these lengthy proceedings. In the course of that motion, Mr. Ritchie brought to the attention of the trial judge his discovery of the existence of Mrs. Hogue. The trial judge dismissed the motion to adjourn the trial. Then Mr. Ritchie made a second motion seeking to have the Crown deliver to him the statements of all Thursday witnesses and a direction that the Crown call the Thursday witnesses for cross-examination by defence counsel. In response to that motion Mr. Cunliffe made reference to s. 10 of the Canada Evidence Act, R.S.C. 1970, c. E-10, and handed to the trial judge the statements of the Thursday witnesses then in his possession. After perusing these statements the trial judge directed that he deliver them to Mr. Ritchie. Mr. Cunliffe undertook to immediately obtain the statements of additional Thursday witnesses not in his possession and produce them to the trial judge. He did so over the course of the next day and after perusing them the trial judge directed that they also be delivered to Mr. Ritchie. Further, the trial judge directed that the Crown call the Thursday witnesses for cross-examination by defence counsel.

The trial proceeded and on 2nd May 1978 the jury acquitted Ouelette.

On 8th May 1978 Mr. Ritchie wrote to the law society lodging a complaint against the five prosecutors who had been involved in the Ouelette matter. Before the discipline committee Mr. Ritchie testified that, at the time of lodging his complaint and, indeed, at the time he testified before the discipline committee, he believed that the prosecutors had deliberately suppressed the evidence with respect to the existence of the Thursday witnesses.

The discipline committee stated that the following issues arose to be determined:

"1. Is there a duty on prosecuting counsel to advise the defence in a timely manner of the existence of witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence?

"2. Is there a duty on prosecuting counsel to give to the defence statements of witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence?

"3. Is there a duty on prosecuting counsel to call witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence?"

In determining the first issue the discipline committee made reference to a number of authorities. It cited with approval the decision in *Boucher v. R.*, [1955] S.C.R. 16, 20 C.R. 1 at 8, 110 C.C.C. 263, where Rand J. stated:

"It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings."

Among other references the discipline committee cited the Canadian Bar Association's Code of Professional Conduct, at p. 29, as follows:

"When engaged as a prosecutor the lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial upon merits. The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately . . . [H]e should make timely disclosure to the accused or his counsel (or to the court if the accused is not represented) of all the relevant facts and witnesses known to him, whether tending towards guilt or innocence."

The discipline committee concluded in respect of the first issue:

"For the purposes of a defence in such a serious charge as

this, and where the evidence of the 'Thursday' witnesses is so crucial, Crown counsel had a duty in our opinion to ensure that defence counsel knew of the existence of those witnesses and that the witnesses had made statements in writing shortly after the crime to members of the R.C.M.P."

The discipline committee concluded that both Mr. Bledsoe and Mr. Cunliffe failed to fulfil their duty in not disclosing the Thursday witnesses to the defence. The basis for that conclusion was the finding of the discipline committee that:

". . . Mr. Bledsoe knew of the existence of the 'Thursday witnesses' but did not ensure that counsel for the defence knew of them. In addition Mr. Bledsoe did not inform Mr. Cunliffe that counsel for the defence was unaware of the 'Thursday witnesses' Mr. Cunliffe knew of the [sic] them but did not ensure that counsel for the defence knew of them, did not make their statements available to counsel for the defence, and did not call them as witnesses until so ordered by the court."

Upon the basis of the findings of fact made by the discipline committee it is clear that Mr. Bledsoe failed in his duty to advise Mr. Ritchie in a timely manner of the existence of additional Thursday witnesses once he learned of Mr. Ritchie's ignorance of such witnesses. Mr. Bledsoe was clearly in breach of his duty because he never informed Mr. Ritchie that such witnesses existed. Upon becoming aware that Mr. Ritchie was ignorant that such witnesses existed, Mr. Bledsoe's first decision was to postpone performing his duty until the weekend, when he could consult senior counsel. When the mistrial occurred he then decided to leave it to the prosecutor who would take the second trial to inform Mr. Ritchie. By the time he instructed Mr. Cunliffe on 16th December 1977 he was clearly in breach of his duty but he could have remedied that breach by informing Mr. Cunliffe that Mr. Ritchie was unaware of the existence of the additional Thursday witnesses. Mr. Bledsoe failed to do so therefore he never performed his duty as Crown counsel.

Counsel for Mr. Bledsoe sought to contend that in view of his limited experience at the bar and the very complicated nature of the case it was understandable that Mr. Bledsoe deferred a decision to reveal the existence of the Thursday witnesses to Mr. Ritchie. Then it was contended that having decided to do so it was a mere oversight on Bledsoe's part that he did not bring home to Cunliffe the fact that Ritchie was unaware of the additional Thurs-

day witnesses. In this way counsel for Mr. Bledsoe sought to diminish the magnitude of his breach of duty to be fair. Based on that approach it was contended that the discipline committee had erred in reaching its verdict that Mr. Bledsoe was guilty of conduct unbecoming a member of the Law Society of British Columbia and of professional misconduct.

The discipline committee fully canvassed the authorities dealing with the type of conduct that would result in a finding of guilty of conduct unbecoming a member of the law society and of professional misconduct. Counsel for Mr. Bledsoe did not challenge the authorities relied upon by the discipline committee but rather sought to contend that the breach of duty in this case was not serious enough to attract the findings made by the discipline committee.

I am not persuaded that the discipline committee erred in treating Mr. Bledsoe's breach of duty in that way. It is extremely important to the proper administration of justice that Crown counsel be aware of and fulfil their duty to be fair. Therefore I would dismiss the appeal of Mr. Bledsoe.

In my opinion entirely different considerations apply to the appellant Cunliffe. Until the morning of 18th April 1978 he was not aware that Mr. Ritchie was ignorant of the existence of additional Thursday witnesses. The discipline committee held that "Mr. Cunliffe knew of them but did not ensure that counsel for the defence knew of them". In my opinion there was no duty on Mr. Cunliffe prior to 18th April 1978 to ensure that counsel for the defence knew of the additional Thursday witnesses. He had been left by Mr. Bledsoe with the impression that Mr. Ritchie was aware of them and Mr. Ritchie had not made any inquiries of Mr. Cunliffe as to whether there were any additional Thursday witnesses which might have alerted Mr. Cunliffe to the fact that he was ignorant of their existence.

When Mr. Cunliffe realized that Mr. Ritchie was unaware of the additional Thursday witnesses he was in the courtroom responding to motions being made by Mr. Ritchie to the presiding trial judge. It was Mr. Ritchie who chose to proceed with the matter in that fashion. In my opinion Mr. Cunliffe is not open to criticism for not, at that stage in the trial, immediately delivering a list of the additional Thursday witnesses to Mr. Ritchie but rather proceeding to answer the submissions being made by him. If defence counsel request a list of Crown witnesses and it is not forthcoming

the remedy is to apply to the court for a direction that it be provided. Mr. Ritchie never made such a request to Mr. Cunliffe. He chose to apply to the court. In those circumstances it was proper for Mr. Cunliffe to respond to the application and comply with the direction of the presiding trial judge.

In those circumstances I conclude that the discipline committee erred in finding that Mr. Cunliffe failed to fulfil his duty in not disclosing the Thursday witnesses to the defence.

The second issue dealt with by the discipline committee was whether there is a duty on prosecuting counsel to give to the defence statements of witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence. On this issue the discipline committee found, quite properly:

"A review of all the authorities indicates that no hard and fast obligation exists. Crown counsel must have some discretion in that regard. Such an absolute duty does not appear to exist within the scope of the decided cases".

I respectfully agree with that statement of the law. However, the discipline committee went on to criticize Mr. Cunliffe for the position he adopted in response to Mr. Ritchie's motions on 18th April 1978 because they perceived in his submissions a determination to keep the statements from the defence. They were critical of Mr. Cunliffe having purported to adopt the procedure based on s. 10 of the Canada Evidence Act.

In my opinion the course followed by Mr. Cunliffe on this occasion is above reproach. Rather than asking Mr. Cunliffe for the statements Mr. Ritchie applied to the presiding trial judge for an order that Mr. Cunliffe produce the statements to him. In view of Mr. Ritchie's position Mr. Cunliffe made reference to s. 10 of the Canada Evidence Act and immediately produced the statements then in his possession to the presiding trial judge. After perusing them the presiding trial judge directed Mr. Cunliffe to deliver them to Mr. Ritchie, which he immediately did.

In those circumstances it is difficult to appreciate the reasoning of the discipline committee which led to its conclusion on the second issue. Counsel for the law society threw some light on the matter by contending that it was apparent from the record of proceedings on 18th April 1978 that Mr. Cunliffe was "stonewalling" the defence with respect to the production of the statements in question. It is by reason of the fact that Mr. Cunliffe did not, in

Then the discipline committee turned to a consideration of the cases which refer to "an oblique motive" and particular reference was made to the decision of the Supreme Court of Canada in *Caccamo v. R.*, [1976] 1 S.C.R. 786, 29 C.R.N.S. 78, 21 C.C.C. (2d) 257, 54 D.L.R. (3d) 685, 4 N.R. 133, and to the judgment of de Grandpré J., at pp. 275-76, where he said:

"The basic rule is that expressed in *Lemay v. R.* [supra] where it was held (S.C.R. headnote):

" '. . . that counsel acting for the prosecution has full discretion as to what witnesses should be called for the prosecution and the Court will not interfere with the exercise of that discretion unless it can be shown that the prosecutor has been influenced by some oblique motive (of which there is here no suggestion). This is not to be regarded as lessening the duty of the prosecutor to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise. The appeal should be dismissed since there was no obligation on the Crown to call either Powell or Lowes at the trial.'

"It is within the framework of the adversary system under which our criminal law is administered, that the accused must be guaranteed a fair trial."

After correctly instructing themselves on the law the discipline committee then went on to make a significant finding as follows: "There is no evidence to indicate 'an oblique motive' in these proceedings."

The effect of that finding was to reject the belief of Mr. Ritchie that any of the Crown counsel had deliberately suppressed evidence of the existence of the additional Thursday witnesses. Then the discipline committee went on to consider, in particular, the duty of Mr. Cunliffe to call witnesses whose evidence would be adverse to the prosecution and supportive of the defence. It said:

"It is apparent that the Crown must have a right to manage its own case and call the evidence of witnesses it deems to be relevant. However, underlying all of the Crown's discretion is the duty of the Crown to be fair.

"In this particular case, because of its serious nature and the direct conflict of the alibi evidence, and in exercise of the duty to be fair, the Crown should have exercised its discretion and called the 'Thursday' witnesses. Failing to call them could easily have

response to Mr. Ritchie's application, voluntarily turn over the statements to him immediately that the discipline committee concluded that his conduct evinced a determination to keep the statements from the defence.

In my opinion the record of the proceedings on 18th April 1978 does not support that conclusion. On that day Mr. Cunliffe was met with the motions made by Mr. Ritchie. He dealt with them as best he could and in doing so made reference to s. 10 of the Canada Evidence Act. I find no fault whatsoever in the course followed by Mr. Cunliffe on that occasion. Mr. Ritchie was seeking the assistance of the court to obtain the names of the additional Thursday witnesses and copies of their statements and Mr. Cunliffe was meeting the application by immediately producing the statements to the trial judge and making submissions with respect to the production of the statements. As Mr. Ritchie was seeking the assistance of the court it was proper for Mr. Cunliffe to deal with the matter upon the basis upon which he did. The criticism of the discipline committee on this aspect of the matter is unfounded.

The third issue dealt with by the discipline committee was whether there was a duty on prosecuting counsel to call witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence. The discipline committee made reference to a number of authorities, including: *Lemay v. R.*, [1952] 1 S.C.R. 232, 14 C.R. 89, 102 C.C.C. 1; *R. v. Seneviratne*, [1936] 3 W.W.R. 360, [1936] 3 All E.R. 36 (P.C.); and *Adel Muhummed El Dabbah v. A.G. (Palestine)*, [1944] A.C. 156, [1944] 2 All E.R. 139 (P.C.).

Those decisions make it plain that the prosecution has a discretion as to what witnesses it will call to support its case. Thus in *Lemay* Rand J. said at p. 9:

"I think it is clear from the authorities cited that no such absolute duty rests on the prosecution as the Court of Appeal in the earlier proceeding held. Material witnesses in this context are those who can testify to material facts, but obviously that is not identical with being 'essential to the unfolding of the narrative'. The duty of the prosecutor to see that no unfairness is done the accused is entirely compatible with discretion as to witnesses; the duty of the Court is to see that the balance between these is not improperly disturbed."

meant that the narrative could have unfolded inaccurately and with potentially serious consequences.

"In addition, in a case such as this where the theory of the Crown is solely directed toward a crime which, if the accused is to be found guilty, could not have been committed on a Thursday and the Crown at the same time has in its possession statements in writing from witnesses whose evidence would tend toward the commission of the offence on the Thursday, the Crown is duty-bound in our view to *ensure* that the defence has in hand at the earliest possible date copies of these statements."

Upon the basis of that reasoning the discipline committee reached a conclusion with respect to the appellant Cunliffe as follows:

"It is our further conclusion that Mr. Cunliffe breached his duty as prosecutor in the circumstances of this case by not advising the defence in a timely manner of the existence of the Thursday witnesses and providing a summary of their evidence, in not providing defence counsel with copies of the statements and then by not voluntarily calling the 'Thursday' witnesses."

In the present case Mr. Ritchie applied to the trial judge to compel the Crown to produce the statements and to call the additional Thursday witnesses in order that they could be cross-examined by the defence. I have already discussed the duty of Crown counsel to give to the defence statements of witnesses whose evidence he considers to be adverse to the prosecution or supportive of the defence. This issue deals with the obligation of the Crown to call witnesses favourable to the defence in order that defence counsel may cross-examine them.

At trial Mr. Cunliffe intended to call some of the Thursday witnesses. He did not intend to call others on behalf of the Crown because he considered them to be ambivalent, that is, he was not certain whether they would say they had last seen the deceased alive on 24th March or on 25th March 1976.

In my opinion in those circumstances there was no duty on the Crown to call those witnesses. Mr. Cunliffe had exercised his discretion and decided not to call them. In those circumstances it was not appropriate for the trial judge to direct the Crown to call those witnesses. The proper course for the trial judge in those circumstances, if he felt that it was unfair to the defence to leave it to the defence to call those witnesses, was for the trial judge to call

the witnesses and permit them to be cross-examined by both th Crown and the defence. Thus, in my opinion, the trial judge erre in directing the Crown to call such witnesses.

It will be apparent therefore that I do not share the views o the discipline committee as to the duty of Mr. Cunliffe to call th Thursday witnesses referred to by the discipline committee. He i not open to any criticism for not "voluntarily" calling such witnesses

Before the discipline committee Mr. Ritchie stated that th course he adopted on 18th April 1978 was designed to achieve a advantage for the defence. Clearly he was successful in tha endeavour. In my opinion the motive of Mr. Ritchie in adoptin that course should have had some bearing on the views of th discipline committee. Apparently it did not. As a result Mr Cunliffe has faced charges which in my opinion were unfounded and criticism by the discipline committee which was unwarranted.

By its decision the discipline committee has sought to impose obligations upon Crown counsel which the law does not countenance and has failed to deal with the burden upon defence counse to gain a working knowledge of the charges and the evidence i support of them by ensuring that the defence knows in broad outline the case to be made against the accused. The record in this matter discloses that Mr. Ritchie simply stumbled from one event to the next without ever making the kind of inquiry of the Crown which a competent defence counsel should do. In those circumstances his charges against Mr. Cunliffe are to be regretted.

I would dismiss the appeal of Mr. Bledsoe and allow the appeal of Mr. Cunliffe.

Judgment accordingly.

The provisions of subsec. (2) are mandatory and require that the person arrested be personally brought before the justice for the identity hearing. On the hearing the onus is on the Crown. In calculating the six-day period in para. (*b*) neither the remand date nor the release date should be excluded. The remand order under para. (*b*) should provide for the accused's release unless a warrant is executed within that six-day period: *Re MARSHALL and THE QUEEN* (1984), 13 C.C.C. (3d) 73 (Ont. H.C.J.).

Information, Summons and Warrant

IN WHAT CASES JUSTICE MAY RECEIVE INFORMATION.

455. Any one who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

(a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

(i) is or is believed to be, or

(ii) resides or is believed to reside, within the territorial jurisdiction of the justice;

(b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

(c) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or

(d) that the person has in his possession stolen property within the territorial jurisdiction of the justice. **R.S.C. 1970, c. 2 (2nd Supp.), s. 5.**

This provision is *intra vires* Parliament and provincial provisions such as those contained in the Youth Protection Act, 1977 (Que.), c. 20, which attempt to prevent anyone from laying an information unless the person has consent of a government official are inoperative: *A.-G. QUE. et al. v. LECHASSEUR et al.* (1981), 63 C.C.C. (2d) 301, 128 D.L.R. (3d) 739 (S.C.C.) (9:0).

In *R. v. SOUTHWICK, Ex p. GILBERT STEEL LTD.*, [1968] 1 C.C.C.356, 2 C.R.N.S.46 (Ont. C.A.) it was held that on the swearing of the written complaint the information is "laid" and becomes the commencement of criminal proceedings.

It does not affect the validity of either information to have two separate informations charging the same offence outstanding at the same time: *R. v. POLICHA, Ex p. HRISCHUK*, [1970] 5 C.C.C.165, 11 C.R.N.S.99 *sub nom. HRISCHUK v. CLARK AND POLICHA*. (Sask. Q.B.).

In *ZASTAWNY v. THE QUEEN* (1970), 10 C.R.N.S.155, 72 W.W.R. 537 (Sask. Q.B.) an information that failed to state on its face the site of the offence was quashed as not disclosing an offence within the territorial jurisdiction of the Magistrate.

An information which omits the date it was sworn in the jurat is a nullity: *PLATT v. THE QUEEN; R. v. COWAN*, [1981] 4 W.W.R. 601, 9 Man. R. (2d) 75 (Q.B.).

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(a) an indictable offence mentioned in section 483,

(b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction,

(c) an offence punishable on summary conviction, or

(d) any other offence that is punishable by imprisonment for five years or less,

authorize the release of the accused pursuant to section 453.1 by making an endorsement on the warrant in Form 25.1. 1985, c. 19, s. 79(3).

(7) Where, pursuant to subsection (6), a justice authorizes the release of an accused pursuant to section 453.1, a promise to appear given by the accused or a recognizance entered into by the accused pursuant to that section shall be deemed, for the purposes of subsection 133(5), to have been confirmed by a justice under section 455.4. R.S.C. 1970, c. 2 (2nd Supp.), s. 5; 1972, c. 13, s. 35(2).

(8) Where, on an appeal from or review of any decision or matter of jurisdiction, a new trial or hearing or a continuance or renewal of a trial or hearing is ordered, a justice may issue either a summons or a warrant for the arrest of the accused in order to compel the accused to attend at the new or continued or renewed trial or hearing. 1985, c. 19, s. 79(4).

The issuance of a summons by a justice of the peace other than the Justice before whom the complaint was sworn is legal: *R. v. SOUTHWICK, ex p. GILBERT STEEL LTD.*, [1968] 1 C.C.C.356, 2 C.R.N.S. 46 (Ont.C.A.).

In determining whether to issue a summons or a warrant a Magistrate exercises his discretion and accordingly *mandamus* cannot lie against him: *R. v. COUGHLAN, ex p. EVANS*, [1970] 3 C.C.C.61, 8 C.R.N.S. 201 (Alta. S.C.). In any event the supervisory court may only order the inferior court to hear the matter again: *R. v. JONES, ex p. COHEN*, [1970] 2 C.C.C.374 (B.C.S.C.).

A justice has jurisdiction to withdraw and annul his warrant where he issued it under a misconception of the facts: *Re ECKERSLEY and THE QUEEN* (1972), 7 C.C.C. (2d) 314 (Que.Mun.Ct.).

The justice's failure to hold an inquiry as required by this section prior to issuing the summons does not affect the jurisdiction of the magistrate: *R. v. POTTLE* (1979), 49 C.C.C. (2d) 113 (Nfld. C.A.); *R. v. BACHMAN*, [1979] 6 W.W.R. 468 (B.C.C.A.). It would seem that the law in Ontario is to the contrary: *R. v. GOUGEON; R. v. HAESLER; R. v. GRAY* (1980), 55 C.C.C. (2d) 218 (Ont. C.A.), leave to appeal to S.C.C. refused 35 N.R. 83*n*.

If the Justice's refusal to issue process was based on extraneous considerations, or if his discretion was not exercised judicially following a proper hearing, *mandamus* will lie: *RE BLYTHE AND THE QUEEN* (1973), 13 C.C.C. (2d) 192 (B.C.S.C.); *Re SWAN and TAVRYDAS and THE QUEEN, ex p. SYME* (1979), 48 C.C.C. (2d) 501 (Ont. H.C.J.).

A Justice acts judicially in determining whether or not he will issue a process requiring attendance in Court. A refusal does not invalidate an information; the informant is entitled to re-apply before the same or another Justice for process to be issued: *R. v. ALLEN* (1974), 20 C.C.C. (2d) 447 (Ont.C.A.).

Although the justice presiding at a preliminary hearing has no power to order production of any statements given before a justice under this section,

as a matter of fairness such statements should be made available to the accused notwithstanding the proceedings under this section are conducted *ex parte* and *in camera*. If the defence has these statements he may cross-examine the witness on them in the same manner as any other prior statement: *Re COHEN and THE QUEEN* (1976), 32 C.C.C. (2d) 446, 34 C.R.N.S. 362 *sub nom. A.-G. QUE. v. COHEN* (Que.C.A.). An appeal by the Crown to the S.C.C. was allowed 46 C.C.C. (2d) 473, 13 C.R. (3d) 36, the Court holding that the decision of the justice refusing such cross-examination was not reviewable on *certiorari*. In the result the Court did not consider the correctness of the justice's ruling.

Although the information may not comply with the requirements as to sufficiency in s. 510(3) such a defect does not render the information null and void *ab initio* and incapable of founding jurisdiction to compel the appearance of the accused before the Court to answer the allegation that he committed an indictable offence: *Re BAHINIPATY and THE QUEEN* (1983), 5 C.C.C. (3d) 439, 23 Sask. R. 36 (C.A.).

To be valid, an information cannot be laid against an unknown person but must be sworn against a named person or against a person who can be sufficiently described so as to be identifiable. As a pre-condition to the exercise of the power to hear and consider the evidence of witnesses under this section, the information must comply with ss. 455 and 510 and the name or sufficient description of the accused is an essential part of an information. The justice of the peace has no power to embark on an inquiry on an information which does not conform with the provisions of s. 510 in order to obtain sufficient information to take a proper information: *Re BUCHBINDER and THE QUEEN* (1985), 20 C.C.C. (3d) 481, 47 C.R. (3d) 135 (Ont. C.A.).

Where there has been non-compliance with the mandatory provisions of s. 455.1, it is open to the Crown to proceed by way of an information laid under s. 455 and the justice may issue either a summons or a warrant under this section in order to compel the accused's attendance unless it can be said that the subsequent proceedings constitute an abuse of process: *Re RILEY and THE QUEEN* (1981), 60 C.C.C. (2d) 193 (Ont. C.A.).

Where the provisions of s. 455.1 have not been complied with, the information having been sworn after the return date in the appearance notice, a warrant or summons may issue under this section. There is no necessity to cancel the appearance notice and in fact no jurisdiction to do so: *Re TREMBLAY and THE QUEEN* (1982), 68 C.C.C. (2d) 273, 28 C.R. (3d) 262 (B.C.C.A.).

A summons may also issue under this section although the appearance notice was invalid for failure to comply with s. 453.3(4) and the information laid under s. 455.1 was neither cancelled nor confirmed by the justice: *Re THOMSON and THE QUEEN* (1984), 11 C.C.C. (3d) 435, 51 A.R. 273 (C.A.).

Until such time as the accused comes before a Judge capable of taking his election and plea, the Court has not assumed any jurisdiction in the matter and should any error be made in the method of summoning the accused to Court then it may be corrected by the issuance of a new summons or warrant. It is only when the accused has appeared in Court and made his election or plea that the Court has become seized with jurisdiction which can be lost if nothing is done on a Court date: *R. v. MacASKILL* (1981), 58 C.C.C.

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(2d) 361, 45 N.S.R. (2d) 181 (S.C. App. Div.). Similarly, *Re KENNEDY and THE QUEEN* (1983), 8 C.C.C. (3d) 322, [1983] 6 W.W.R. 673 (B.C.C.A.).

JUSTICE TO HEAR INFORMANT AND WITNESSES—Procedure when witnesses attend.

455.4 (1) A justice who receives an information laid before him under section 455.1 shall

(a) hear and consider, *ex parte*,

(i) the allegations of the informant, and

(ii) the evidence of witnesses, where he considers it desirable or necessary to do so;

(b) where he considers that a case for so doing is made out, whether the information relates to the offence alleged in the appearance notice, promise to appear or recognizance or to an included or other offence,

(i) confirm the appearance notice, promise to appear or recognizance, as the case may be, and endorse the information accordingly, or

(ii) cancel the appearance notice, promise to appear or recognizance, as the case may be, and issue, in accordance with section 455.3, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence and endorse on the summons or warrant that the appearance notice, promise to appear or recognizance, as the case may be, has been cancelled; and

(c) where he considers that a case is not made out for the purposes of paragraph *(b)*, cancel the appearance notice, promise to appear or recognizance, as the case may be, and cause the accused to be notified forthwith of such cancellation. 1985, c. 19, s. 80.

(2) A justice who hears the evidence of a witness pursuant to subsection (1) shall

(a) take the evidence upon oath; and

(b) cause the evidence to be taken in accordance with section 468 in so far as that section is capable of being applied. R.S.C. 1970, c. 2 (2nd Supp.), s. 5.

Subsec. (1)*(a)*. The Justice who receives an information must actually hear and listen to the informant's allegations in order to satisfy himself that a case has been made out. Failure to follow the procedure in this subsection will mean that the appearance notice has not been properly confirmed. The accused then is not bound by it and a charge of failing to appear contrary to s. 133(5) must be dismissed: *R. v. BROWN* (1975), 28 C.C.C. (2d) 398 (Ont. Prov. Ct.).

Failure to confirm the appearance notice has relevance only to any proceedings taken against the accused should he fail to attend Court as required therein. Such failure does not void the information and once the accused appears there is no necessity that the appearance notice be confirmed: *R. v. WETMORE* (1976), 32 C.C.C. (2d) 347 (N.S.S.C. App. Div.); *Re MAXIMICK and THE QUEEN* (1979), 48 C.C.C. (2d) 417, 10 C.R.

d) 97, [1979] 6 W.W.R. 731 (B.C.C.A.); *Re McGINNIS and THE QUEEN* 979), 51 C.C.C. (2d) 301, [1980] 2 W.W.R. 89, 19 A.R. 249 (C.A.). *Contra: v. HARRIS* (1978), 39 C.C.C. (2d) 256 (Ont. Prov. Ct.) and *semble, R. v. OUGEON; R. v. HAESLER; R. v. GRAY* (1980), 55 C.C.C. (2d) 218 (Ont. A.), at least where timely objection is made.

MMONS—Service on individual—Proof of service—Contents of summons—tendance for purposes of *Identification of Criminals Act*.

455.5 (1) A summons issued under this Part shall

(a) **be directed to the accused;**

(b) **set out briefly the offence in respect of which the accused is charged; and**

(c) **require the accused to attend court at a time and place to be stated therein and to attend thereafter as required by the court in order to be dealt with according to law. 1985, c. 19, s. 81.**

(2) A summons shall be served by a peace officer who shall deliver it rsonally to the person to whom it is directed or, if that person cannot nveniently be found, shall leave it for him at his last or usual place of ode with some inmate thereof who appears to be at least sixteen years age.

(3) Service of a summons may be proved by the oral evidence given der oath, of the peace officer who served it or by his affidavit made fore a justice or other person authorized to administer oaths or to take fidavits.

(4) A summons shall set out therein the text of subsection 133(4) and ction 455.6.

(5) A summons may, where the accused is alleged to have committed indictable offence, require the accused to appear at a time and place ted therein for the purposes of the *Identification of Criminals Act*, and person so appearing is deemed, for the purposes only of that Act, to be lawful custody charged with an indictable offence. R.S.C. 1970, c. 2 nd Supp.), s. 5.

There is no jurisdiction in a Court to proceed *ex parte* against a defendant rved with a summons outside Canada: *Re SHULMAN and THE QUEEN* 975), 23 C.C.C. (2d) 242, 58 D.L.R. (3d) 586 (B.C.C.A.).

Subsection (5) and like provisions requiring the fingerprinting of the cused have been held not to violate the Charter of Rights and Freedoms: *JAMIESON and THE QUEEN* (1982), 70 C.C.C. (2d) 430, 142 D.L.R. (3d) (Que. S.C.); *R. v. McGREGOR* (1983), 3 C.C.C. (3d) 200 (Ont. H.C.J.).

A justice has no power to issue a summons to an accused solely for the rpose of the Identification of Criminals Act and not in conjunction with ocuring his attendance at Court: *Re MICHELSEN and THE QUEEN* 983), 4 C.C.C. (3d) 371, 33 C.R. (3d) 285 (Man. Q.B.).

ILURE TO APPEAR.

455.6 Where an accused who is required by a summons to appear at a ne and place stated therein for the purposes of the *Identification of iminals Act*, does not appear at that time and place, a justice may issue warrant for the arrest of the accused for the offence with which he is arged. R.S.C. 1970, c. 2 (2nd Supp.), s. 5.

ATTORNEY-GENERAL OF QUEBEC et al. v. LECHASSEUR et al.

Supreme Court of Canada, Laskin C.J.C., Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ. November 3, 1981.

Constitutional law — Distribution of legislative authority — Criminal jurisdiction — Criminal Code provision permitting any person having reasonable and probable grounds to lay information charging indictable offence — Quebec Youth Protection Act providing that charges against juvenile may only proceed to Court through director of youth protection — Whether Criminal Code provision intra vires Parliament — Whether Quebec legislation inoperative by reason of conflict with federal legislation — Cr. Code, ss. 455, 129 — Juvenile Delinquents Act, R.S.C. 1970, c. J-3, ss. 3, 39 — Youth Protection Act, 1977 (Que.), c. 20, ss. 38, 40, 60, 61, 74, 75 — British North America Act, 1867, ss. 91(27), 92(14).

Constitutional law — Distribution of legislative authority — Juvenile delinquents — Criminal Code provision permitting any person having reasonable and probable grounds to lay information charging indictable offence — Quebec Youth Protection Act providing that charges against juvenile may only proceed to Court through director of youth protection — Whether Criminal Code provision intra vires Parliament — Whether Quebec legislation inoperative by reason of conflict with federal legislation — Cr. Code, ss. 455, 129 — Juvenile Delinquents Act, R.S.C. 1970, c. J-3, ss. 3, 39 — Youth Protection Act, 1977 (Que.), c. 20, ss. 38, 40, 60, 61, 74, 75 — British North America Act, 1867, ss. 91(27), 92(14).

Sections 40, 60, 61 and 74 (rep. & sub. 1979, c. 42, s. 14) of the *Youth Protection Act*, 1977 (Que.), c. 20, which, in effect, provide that where any person has reasonable cause to believe a child has committed an offence then a director of youth protection becomes seized of the case which may only proceed to Court with his consent, are inoperative by reason of their conflict with paramount valid federal legislation, namely, the *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3, and s. 455 (rep. & sub. R.S.C. 1970, c. 2 (2nd Supp.), s. 5) of the *Criminal Code*. This latter provision permits any person who has reasonable and probable grounds, to initiate judicial process by laying an information charging an indictable offence and is validly enacted under Parliament's power in s. 91(27) of the *British North America Act, 1867* to legislate for criminal procedure. Section 455 is an integral part of the criminal process and the Province's authority to legislate in relation to the administration of justice in the Province under s. 92(14) of the *British North America Act, 1867* cannot be invoked to interfere with Parliament's legislative authority in the area of criminal procedure.

[*A.-G. B.C. v. Smith*, [1969] 1 C.C.C. 244, 65 D.L.R. (2d) 82, [1967] S.C.R. 702, 2 C.R.N.S. 277, 61 W.W.R. 236; *Lund v. Thompson*, [1958] 3 W.L.R. 594; *R. v. Hauser et al.* (1979), 46 C.C.C. (2d) 481, 98 D.L.R. (3d) 193, [1979] 1 S.C.R. 984, 8 C.R. (3d) 89, [1979] 5 W.W.R. 1, 16 A.R. 91, 26 N.R. 541; *R. v. Aziz* (1981), 57 C.C.C. (2d) 97, 119 D.L.R. (3d) 513, 19 C.R. (3d) 26, 35 N.R. 1, refd to]

APPEAL by the Attorney-General of the Province of Quebec from a judgment of the Quebec Court of Appeal, 22 R.F.L. (2d) 76, affirming a judgment of Legault J., 19 C.R. (3d) 1, [1980] Que. S.C. 662, refusing to grant prohibition.

H. Brun, *L. Crête* and *P. Monty*, for appellant, Attorney-General of Quebec.

D. L. Clancy and *P. A. Insley*, for appellant, Attorney-General of British Columbia.

W. Henkel, Q.C., for appellant, Attorney-General of Alberta.

B. Schwartz, for appellant, Attorney-General of Saskatchewan.

D. Piché, for respondent, Yolande Touchette.

Y. Cousineau, for respondent, Director of Youth Protection.

R. Langlois, *J. Mabbutt* and *B. Gravel*, for respondent, Attorney-General of Canada.

The judgment of the Court was delivered by

LASKIN C.J.C.:—This appeal, which is here by leave, arises out of an information laid by the mise-en-cause, Yolande Touchette, charging one Jean Bergeron, then under age 18, with robbery. The information invoked *Criminal Code*, s. 302(*b*), and s. 3 of the *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3. Judge Lechasseur of the Quebec Youth Court rejected a defence contention that the *Youth Protection Act*, 1977 (Que.), c. 20, applied to preclude consideration of a complaint against a person under age 18 not brought in accordance with that Act. He held that the *Juvenile*

Delinquents Act prevailed in the circumstances and that he was entitled to act on the information laid by the victim of the robbery.

The Attorney-General of Quebec, who had intervened in the proceedings before Judge Lechasseur, sought prohibition which was denied by Legault J. of the Quebec Superior Court [19 C.R. (3d) 1, [1980] Que. S.C. 662]. An appeal to the Quebec Court of Appeal was dismissed [22 R.F.L. (2d) 76]. On leave being given to come here, four questions were posed for this Court's determination, as follows:

1. Are sections 40, 60, 61 and 74 of the Quebec *Youth Protection Act* (S.Q. 1977, Chap. 20) ultra-vires the Legislature of Quebec?
2. Is section 455 of the *Criminal Code* (R.S.C. 1970, Chap. C-34) ultra-vires the federal Parliament?
3. If sections 40, 60, 61 and 74 of the Quebec *Youth Protection Act* and section 455 of the *Criminal Code* are held valid, are the aforementioned sections of the Quebec *Youth Protection Act* constitutionally operative?
4. Does section 129 of the *Criminal Code* render sections 40, 60, 61 and 74 of the Quebec *Youth Protection Act* inoperative?

The *Youth Protection Act* is a comprehensive statute directed to the protection of children, defined to mean persons under age 18. It provides for the appointment of directors of youth protection who are given broad powers to take protective measures in the interests of children whose security or development is considered to be in danger as delineated in s. 38. Sections 40, 60, 61 and 74 [rep. & sub. 1979, c. 42, s. 14], referred to in the first and third questions before this Court, are as follows:

> 40. If a person has reasonable cause to believe that a child has committed an offence against any act or regulation in force in Quebec, the director shall be seized of the case before the institution of any judicial proceeding.
>
> . . . . .
>
> 60. Any decision concerning the directing of a child shall be taken jointly by the director and a person designated by the Ministre de la justice in the following cases:
>
> (*a*) where an act contrary to any law or regulation in force in Quebec is imputed to the child;
>
> (*b*) where the parents of the child or the child himself, if he is fourteen years of age or older, disagree on the voluntary measures proposed;
>
> (*c*) where the director believes it advisable to seize the Court of the case of the child except where he must compel the parents or the child to consent to the application of an urgent measure contemplated in the second paragraph of section 47.
>
> The director and the person designated by the Ministre de la justice under the first paragraph, the Comité or the arbitrator designated by it in the case contemplated in paragraph *f* of section 23 shall not seize the Court of the case of a child less than fourteen years of age for an act contrary to any act or regulation in force in Québec.

The person designated by the Ministre de la justice under the first paragraph shall not act in any capacity whatever in a judicial proceeding involving a child about whom a decision in which he participated was taken.

61. In the cases provided for in section 60, the director and the person appointed by the Ministre de la justice shall decide

(*a*) to commit the child to the care of the director for the application of voluntary measures;

(*b*) to seize the Court of the case; or

(*c*) to close the record.

. . . . .

74. Except in the cases of urgency contemplated in section 47, the Court shall be seized of the case of a child whose security or development is considered to be in danger or to whom an act contrary to any act or regulation in force in Quebec is imputed, only by the director acting in cooperation with a person designated by the Ministre de la justice, by the Comité or by the arbitrator designated by it in the case contemplated in paragraph *f* of section 23.

The Court may be seized of the case of a child by the child himself or his parents if they disagree with

(*a*) a joint decision of the director and a person designated by the Ministre de la justice or a decision of the arbitrator designated by the Comité under paragraph *f* of section 23, or

(*b*) the decision to prolong the period of voluntary foster care in a reception centre or a foster family.

Judge Lechasseur, in his reasons denying the provincial contention, agreed that the protection and welfare of children fell within provincial legislative competence but, at the same time, such provincial provisions as were set out in ss. 60, 61 and 74 of the *Youth Protection Act* could not operate where competent federal juvenile delinquency legislation applied, as it did in the case before him. The validity of the *Juvenile Delinquents Act* had been upheld by the Supreme Court of Canada in *A.-G. B.C. v. Smith*, [1969] 1 C.C.C. 244, 65 D.L.R. (2d) 82, [1967] S.C.R. 702. Moreover, the right to lay an information in respect of an alleged indictable offence was one of the rights recognized by Parliament in *Criminal Code*, s. 455 [rep. & sub. R.S.C. 1970, c. 2 (2nd Supp.), s. 5], reading as follows:

455. Any one who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

(*a*) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

(i) is or is believed to be, or

(ii) resides or is believed to reside,

within the territorial jurisdiction of the justice;

(*b*) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

(*c*) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or

(*d*) that the person has in his possession stolen property within the territorial jurisdiction of the justice.

In the result, Judge Lechasseur held that the *Youth Protection Act* was unconstitutional in respect of those of its aspects that were before him.

Legault J. of the Quebec Superior Court, in refusing the request for prohibition to Judge Lechasseur, held similarly, in extensive reasons that ss. 40, 60, 61 and 74 of the *Youth Protection Act* were invalid in the face of the *Juvenile Delinquents Act* and *Criminal Code*, s. 455. In affirming the refusal of prohibition, Turgeon J.A. of the Quebec Court of Appeal, Lajoie J.A. concurring, pointed out that although the *Youth Protection Act* has a valid provincial object, it cannot in its application abrogate or supersede the application to juveniles of the federal *Juvenile Delinquents Act* in respect of criminal matters, as in this case, arising out of an information charging an indictable offence. It was not open to the Province to deal with this particular matter non-judicially when the federal enactment prescribed judicial treatment. There was, in his view, a direct conflict between the provincial Act and the federal Act and the former must give way. McCarthy J.A., in concurring reasons, referred to the validity of *Criminal Code*, s. 455, and to the incompatibility of the relevant provisions of the *Youth Protection Act* with s. 455. This was enough to dispose of the appeal without challenging the intrinsic validity of the *Youth Protection Act*.

Two central issues emerged in the course of the hearing in this Court, issues similar to those that engaged the Courts below. The first was whether the *Youth Protection Act*, and especially the four sections set out above, could operate in the face of the *Juvenile Delinquents Act* where a young person who, by reason of age, was within both Acts under a charge of an indictable offence. The second issue, related to the first, was whether *Criminal Code*, s. 455, authorizing the laying of an information respecting the alleged commission of an indictable offence, was valid federal legislation or, even if valid, could have effect as against the *Youth Protection Act* and the particular provisions thereof set out above.

No attack is made against the validity of the federal *Juvenile Delinquents Act*. It is enough to refer here to one of its key provisions, s. 3(1), reading as follows:

> 3(1) The commission by a child of any of the acts enumerated in the definition "juvenile delinquent" in subsection 2(1), constitutes an offence to be known as a delinquency, and shall be dealt with as hereinafter provided.

If it applies to the facts herein, in association with *Criminal Code*, s. 455, it must follow that the specified sections of the *Youth Protection Act* become inoperative. That there would be a conflict between the two enactments is, to me, obvious. Although Q. 1 poses a direct issue of validity or invalidity, I do not think such an assessment is required in the present case. The impugned provisions are part of a statute which, in its relation to child welfare and child protection, appears to be within provincial legislative competence. I would be loath to fasten on any particular provisions as being *per se* unconstitutional rather than as courting inoperability because they cannot, under the circumstances herein, stand consistently with relevant and valid federal prescriptions.

It was suggested in the factum of the intervening Attorney-General of Canada that the *Youth Protection Act* itself yields to the paramountcy of the *Juvenile Delinquents Act* by reason of the second paragraph of s. 75 of the former *Act*. Section 75 is as follows:

> 75. Where an act contrary to any act or regulation of Quebec is imputed to a child, the provisions of the Summary Convictions Act (Revised Statutes, 1964, chapter 35) not inconsistent with this division apply, *mutatis mutandis*.
>
> Where an act contrary to any act or regulation of Canada is imputed to a child, the Juvenile Delinquents Act applies.
>
> In the other cases, the Court shall be seized by the filing of a sworn declaration containing, if possible, the names of the child and of his parents, their address, their ages and a summary of the facts justifying the intervention of the Court.
>
> Every officer of the Court and every person working in an establishment must, when so required, assist a person who wishes to file a declaration under the third paragraph.

I do not have to come to a conclusion on the merit of this contention but I am bound to say that the explanation of the second paragraph of s. 75 given by counsel for the Attorney-General of Quebec is appealing. The explanation, shortly put, is that s. 75 does not come into play until Court proceedings are taken and that it has no application where the provincial authorities intervene before the institution of judicial proceedings. This, of course, is the main contention of the Attorney-General of

Quebec and it requires consideration of whether it is open to a Province to preclude federally authorized proceedings by introducing provincial adjustment or corrective machinery of its own in place of or in advance of judicial proceedings. On this view of the matter, it is unnecessary to pursue the application of s. 75 either in the terms advanced by the Attorney-General of Canada or by the Attorney-General of Quebec.

Criminal Code, s. 455, thus becomes the pivotal provision, leading as it does to the application of s. 3(1) of the *Juvenile Delinquents Act* and other associated provisions which it is unnecessary to set out. Section 455 has already been set out above. The validity of this provision is challenged as being an invasion of provincial legislative authority in relation to "the administration of justice in the Province" under s. 92(14) of the *British North America Act, 1867*. Whatever this provision encompasses it cannot be invoked to interfere with the legislative authority of Parliament in relation to the criminal law, including the procedure in criminal matters, bestowed by s. 91(27) of the *British North America Act, 1867* and so bestowed notwithstanding, *inter alia*, anything in s. 92. Is, then, s. 455 a provision respecting criminal procedure as included in the governing grant of authority in relation to the criminal law?

Criminal Code, s. 455, is a long standing provision. It was in the original *Code* of 1892 as s. 558 and, as federal legislation, had its origin in 1869 (Can.), c. 30, s. 1, and see also the *Criminal Procedure Act*, R.S.C. 1886, c. 174, s. 30. Beyond this, it has its roots in English criminal law (see the *Indictable Offences Act*, 1848 (U.K.), c. 42, s. 1, replaced by the *Magistrates' Courts Act*, 1952 (U.K.), c. 55, s. 1 ("Criminal Jurisdiction and Procedure"), and reflects a fundamental precept in the right of an ordinary citizen, the victim of a criminal offence, to lay an information against the offender: see *Lund v. Thompson*, [1958] 3 W.L.R. 594, *per* Diplock J. Members of the community were thus given a role in the enforcement of public order, and their involvement in the criminal process carried over into Canadian prescriptions adopted by the Parliament of Canada.

That the present s. 455, no less than its forerunners, is within federal competence as an exercise of power in relation to the criminal law, including procedure in a criminal matter, appears to me to be incontestable. The section makes it possible for a charge of an indictable offence to be brought before a Justice of the Peace or a Magistrate to consider the issue of a summons or a warrant in respect of the charge. The criminal process is thus initiated and this initiation is integral to the process.

It is beside the point that an Attorney-General may stay proceedings initiated by the victim of a crime. That does not tell in favour of the provincial jurisdiction asserted in the present case, nor does it impeach the validity of s. 455. Nothing in this case engages the issues canvassed in *R. v. Hauser et al.* (1979), 46 C.C.C. (2d) 481, 98 D.L.R. (3d) 193, [1979] 1 S.C.R. 984, or in *R. v. Aziz* (1981), 57 C.C.C. 2d 97, 119 D.L.R. (3d) 513, 19 C.R. (3d) 26.

Although a question was put as to whether *Criminal Code*, s. 129, rendered ss. 40, 60, 61 and 74 of the *Youth Protection Act* inoperative, that issue fell away during the course of the argument in this Court. Indeed, I can see no ground upon which s. 129 could be brought into account to challenge the administration by provincial public officials of the aforementioned provisions of the *Youth Protection Act*. This can readily be seen from a mere perusal of s. 129 which reads as follows:

> 129. Every one who asks or obtains or agrees to receive or obtain any valuable consideration for himself or any other person by agreeing to compound or conceal an indictable offence is guilty of an indictable offence and is liable to imprisonment for two years.

The situation is, of course, different with respect to the conjoint application of the *Juvenile Delinquents Act* and *Criminal Code*, s. 455. Their effect is to make the provincial provisions inoperative in the present case.

One further point should be mentioned. Emphasis was laid upon s. 39 of the *Juvenile Delinquents Act* as itself making way for the application of otherwise valid provincial legislation. Section 39 is as follows:

> 39. Nothing in this Act shall be construed as having the effect of repealing or overriding any provision of any provincial statute intended for the protection or benefit of children; and when a juvenile delinquent, who has not been guilty of an act that is under the provisions of the *Criminal Code* an indictable offence, comes within the provisions of a provincial statute, he may be dealt with either under such statute or under this Act as may be deemed to be in the best interests of the child.

I can construe this provision in no other way than as preserving the paramountcy of the *Juvenile Delinquents Act* in the case of a charge of an indictable offence. The fact that the section speaks of a juvenile who has not been guilty of an indictable offence under the *Criminal Code* cannot mean that prior guilt is a condition of the application of the federal Act. Such a construction would erode it before it could have any effect.

Perhaps it would be a fitting opportunity for us to learn how far it is considered desirable to keep the power of private prosecution in serious crimes of this nature, and how far the Director of Public Prosecutions should, when a private prosecution is started, be permitted or encouraged to take over the prosecution. I hope I have indicated the nature of the inquiries that arise in connection with this responsibility. I hope we shall have from the Attorney-General a comprehensive statement on his powers and the principles upon which he exercises them.

8.51 p.m.

The Attorney-General (Sir Hartley Shawcross): I am glad to have the opportunity of talking about the position of the Attorney-General in connection with prosecutions because, as my hon. and learned Friend the Member for Leicester, North-East (Mr. Ungoed-Thomas), said, there has been some criticism that my enforcement of the criminal law was a matter of expediency. Indeed, it was seriously suggested that the operation of the law should be virtually automatic where any breach of it was known or suspected to have occurred. The truth is, of course, that the exercise of a discretion in a quasi-judicial way as to whether or when I must take steps to enforce the criminal law is exactly one of the duties of the office of the Attorney-General, as it is of the office of the Director of Public Prosecutions, who works under the direction of the Attorney-General.

It has never been the rule in this country—I hope it never will be—that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should intervene to prosecute, amongst other cases:

"wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest."

That is still the dominant consideration. I should perhaps say that, although he is called the Director of Public Prosecutions, constitutionally I am responsible for all his decisions, and as a Minister of the Crown I am answerable to the House for any decision he may make in particular cases.

So, under the tradition of our criminal law the position is that the Attorney-General and the Director of Public Prosecutions only intervene to direct a prosecution when they consider it in the public interest so to do. Lord Simon, who was once himself a most distinguished Attorney-General, put the position very clearly when he said in debate in this House:

"there is no greater nonsense talked about the Attorney-General's duty than the suggestion that in all cases the Attorney-General ought to decide to prosecute merely because he thinks there is what the lawyers call 'a case' It is not true, and no one who has held that office supposes it is."—[OFFICIAL REPORT, 1st December, 1925; Vol. 188; c. 2105.]

My hon. and learned Friend then asked me how I direct myself in deciding whether or not to prosecute in a particular case. That is a very wide subject indeed, but there is only one consideration which is altogether excluded, and that is the repercussion of a given decision upon my personal or my party's or the Government's political fortunes; that is a consideration which never enters into account. Apart from that, the Attorney-General may have to have regard to a variety of considerations, all of them leading to the final question—would a prosecution be in the public interest, including in that phrase of course, in the interests of justice?

Usually it is merely a question of examining the evidence. Is the evidence sufficient to justify a man being placed on his trial? The other day, in a case of murder to which the hon. and learned Gentleman referred—a case which became the subject of a good deal of publicity—I personally decided not to prosecute. I examined the papers myself, and I came to the conclusion that it was not an appropriate case in which I should instruct the Director of Public Prosecutions on behalf of the Crown.

It is not in the public interest to put a man upon trial, whatever the suspicions may be about the matter, when the evidence is insufficient to justify his conviction, or even to call upon him for an explanation. So the ordinary case is one where one has to review the evidence, to consider whether the evidence goes beyond mere suspicion and is sufficient to justify a man being put on trial for a specific criminal offence.

[THE ATTORNEY-GENERAL.]

In other cases wider considerations than that are involved. It is not always in the public interest to go through the whole process of the criminal law if, at the end of the day, perhaps because of mitigating circumstances, perhaps because of what the defendant has already suffered, only a nominal penalty is likely to be imposed. And almost every day in particular cases, and where guilt has been admitted, I decide that the interests of public justice will be sufficiently served not by prosecuting, but perhaps by causing a warning to be administered instead.

Sometimes, of course, the considerations may be wider still. Prosecution may involve a question of public policy or national, or sometimes international, concern; but in cases like that, the Attorney-General has to make up his mind not as a party politician; he must in a quasi-judicial way consider the effect of prosecution upon the administration of law and of government in the abstract rather than in any party sense. Usually, making up my mind on these matters, I have the advice of the Director of Public Prosecutions and very often of Treasury Counsel as well. I have hardly ever, if ever, refused to prosecute when they have advised prosecution. I have sometimes ordered prosecution when the advice was against it.

I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.

In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.

Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which, in the broad sense that I have indicated, affect government in the abstract arise, it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations.

That was the view that Lord Birkenhead once expressed on a famous occasion, and Lord Simon stated that the Attorney-General:

> ". . . should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute."

I would add to that that he should also decline to receive orders that he should not prosecute. That is the traditional and undoubted position of the Attorney-General in such matters.

Questions have been raised, I know, in regard to prosecutions in respect of illegal strikes under the Conditions of Employment and National Arbitration Order—Order No. 1305, as it is more familiarly called. The law laid down by that Order, as the hon. and learned Gentleman said, is not always easy to apply to all industrial disputes in peace-time. If one prosecutes too soon, it may only exacerbate the difficulties and impede the opportunities of settling the dispute by negotiation or arbitration. Prosecution may result in the individuals proceeded against being made martyrs in the opinion of their colleagues, and instead of leading to the observance of the law it may produce even greater disregard of it and so bring the law further into disrepute. But whilst I would never allow a threat of criminal action to be used as a kind of pawn in industrial relations, I shall not hesistate to prosecute in what "The Times" described as "appropriate cases" "and at the appropriate time." The public cannot be held to ransom nor the law as it is at present be brought into complete disrepute.

On the other hand, there may well be circumstances in which the public convenience is not affected by the strike or in which, for other reasons, the public interest is not served by prosecution. Lord Birkenhead, again, in one case felt that the public interest was best met by a withdrawal of proceedings which had

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already been started, on an undertaking by the individuals concerned to resume work. I cannot pretend to lay down in advance any rules on which I should act in these matters. I am always loth to proceed against the rank and file in an industrial dispute where the real inciters and leaders have succeeded in covering up their activities.

There have been some strikes in the past in which I could not prosecute under this Order because technically there was no trade dispute. There have been several where I was about to prosecute when the strike collapsed. I prosecuted in the case of the gas strike in North London recently because the public were being caused great inconvenience and hardship. Moreover, the information available to me showed that, whilst there was a pretence being made of urging strikers to return to work, the truth was that the Communists were anxious to see the strike continue.

There was a Mr. Berridge, who was the North London organiser for the Amalgamated Engineering Union, an avowed Communist, whose official duty it was to his union to secure a return to work, but who bent his unofficial efforts in the opposite direction. In his office, whether as a mere clerk, as nominally he is, or as an invigilator over Mr. Berridge, as in accordance with Communist technique he may be, was a Mr. Glading, a gentleman who was implicated in the Communist conspiracy in Meirut and who in this country in 1938 got six years' penal servitude for acting as a professional spy for Russia. In that case, the strike prosecution brought home to everybody that what was in point was not merely some matter of industrial regulation, but that the criminal law was being broken; and the prosecution had a salutary effect.

In the printing trade dispute which occurred recently, where both parties were in breach of the law, although I think the initial illegality was on the part of the compositors, I did not in the earlier stages consider that the criminal law should be invoked, but as the strike went on, I caused police inquiries to be made with a view to prosecuting the leaders on both sides, and the dispute then came to an end. I just mention these as examples of particular cases in recent times. One has to look at each case on its merits as it arises. I shall apply my unfettered discretion to all these cases, prosecuting when, with a knowledge of all the circumstances, it seems in the public interest so to do.

Those who criticise me for prosecuting in one case and not in another are either unfamiliar, as they may very easily be, with all the facts and circumstances, or they are really saying that I should be influenced by political considerations in this matter, but that, of course, no Attorney-General could possibly allow himself to be, even if the course of pursuing that duty might involve him in personal unpopularity.

There was a case the other day in which I was asked whether or not something which had been published in one of the newspapers amounted in law to treason, and I said that I thought that what had been done was legally treason, but that, as at present advised, I did not propose to prosecute. That may sound very startling, but although the sentence for treason is always death, the offence itself is of varying degrees of gravity. In some ways it is akin to sedition. There, again, if I may quote Lord Simon, who was himself quoting that great constitutional authority Professor Dicey:

> "The legal definition of sedition might easily be used to assist to check a great deal of what is ordinarily considered allowable discussion, and would, if rigidly enforced, be inconsistent with the prevailing forms of political agitation."—[OFFICIAL REPORT, 1st December, 1925; Vol. 188, c. 2107.]

I do not think myself that law and order are necessarily promoted by prosecution in every case, but, of course, in talking of treason, it must be said that treason is a very grave offence, and nobody should think that I would lightly refrain from prosecuting in properly established cases.

The existence of this discretion and the utility of this discretion in the Attorney-General whether or not to prosecute in particular cases has been so well recognised that there has been an increasing tendency in recent years to provide that there shall be no proceedings as to particular classes of offences created by Statute without the consent of the Attorney-General or the Director of Public Prosecutions. That kind of provision has been made to ensure that there will be no automatic prosecutions and that there will be no frivolous and unnecessary prosecutions in such cases. That is a Parliamentary recognition, if any such recognition were required, that

[THE ATTORNEY-GENERAL.]
it is the duty of the Attorney-General and the Director to exercise their discretion in every case whether or not to invoke the machinery of the criminal law.

But where a provision of that kind does not exist, where it is not expressly provided that there shall not be any prosecution without the consent of the Attorney-General or the Director of Public Prosecutions, the general position in English law—I think it is different in Scotland where my right hon. and learned Friend the Lord Advocate prosecutes at his discretion in all cases—is that any private citizen can come along and set the criminal law in motion. That is really the safeguard if the Attorney-General and the Director of Public Prosecutions and the police all neglect their duties and do not prosecute in cases where, manifestly, prosecutions ought to take place.

That was how in the recent case, to which my hon. and learned Friend referred, it was possible to start a private prosecution in that case of murder. My hon. and learned Friend referred to the fact that the private prosecution having been initiated in that case, the Director of Public Prosecutions subsequently took over the conduct of the case, and that eventually the case was dismissed by the magistrates. In a case of murder, although a private citizen may initiate proceedings to the extent of applying for and obtaining a warrant for the arrest of some named individual, it is the statutory duty of the Director of Public Prosecutions to step in and take over the conduct of the case, no doubt because Parliament has thought that in cases of such gravity it is important that the prosecution should be conducted with all possible safeguards by an experienced official such as the Director of Public Prosecutions. He took over that particular case, he instructed Treasury Counsel of standing to conduct the proceedings, and, in the end, the magistrates, having heard the whole of the facts, decided that there was no *primâ facie* case for the defendant to be called upon to answer.

But, apart from certain particular cases where, if proceedings are started, the Director of Public Prosecutions must intervene and take them over, the general rule of law is that if the Director, the Attorney-General or the police do not institute criminal proceedings themselves, then it is open to any private individual so to do. On the whole, I think that is a safeguard which we have to maintain in this country so long as the Attorney-General and the Director retain, as they always must, a discretion whether or not they are going to set the law in motion. They may make mistakes and may not initiate prosecutions when they ought to be initiated. I do not think that is likely to happen, but the safeguard against its happening is that anybody else can step in, and, if the justices think right, proceedings can be initiated and a criminal prosecution started.

Summing up the whole matter, I can only say that so long as I hold my present office, I shall try to the best of my ability to continue to administer the duties of the office in what appears to me to be the public interest, and to do whatever I can at least to maintain, if not to strengthen, the influence of the office in the promotion of justice, as well as its traditional independence and integrity.

9.13 p.m.

Mr. Lionel Heald (Chertsey): I think that the statement which the right hon. and learned Attorney-General has just made about the principles upon which he exercises his powers is one which will commend itself to the House. I can certainly say that it is one which commends itself very much to those who, like myself, have the privilege of belonging to the same great profession as he does, because, he being the head of our profession, we are always most insistent that he should proceed in precisely the way he has explained to us tonight.

My only reason for intervening is that I should like to pay my personal tribute to the way in which he does exercise those functions. Shortly before the Recess I asked him if he would inquire into certain happenings which had taken place at a large works at Park Royal outside London, with a view possibly to taking action with regard to intimidation. He promptly replied that he would inquire into the matter. The sequence of the matter was that he later informed me that, having inquired into the matter, he was satisfied that although there was certainly ground for the complaint that had been made, he was equally satisfied that the prompt action which had been taken, and with which I was glad to have been able to

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THE ATTORNEY GENERAL, POLITICS AND THE PUBLIC INTEREST

by

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13

Discretionary Factors in the Decision to Prosecute

The factors that control the outcome of discretionary authority in the area of law enforcement and criminal prosecutions have been aptly described as exhibiting the quality of low visibility.[1] Calls for the public disclosure of the reasons behind individual decisions is symptomatic of a growing unwillingness to accept unquestioningly the exercise of authority whether by government, statutory bodies or other public institutions. The model frequently invoked as epitomising openness and public accountability is the long established tradition of the judiciary in giving reasons in open court for their decisions. The nature of the adversary system supports judicial commitment to this ideal with its concern for identifying the legal issues before the trial commences and for confining the admissibility of evidence to what is relevant in accordance with well established rules. Far less certainty prevails in those other areas of the administration of justice that are concerned with the preliminary steps leading up to the actual trial of a criminal case.[2]

[1] J. Goldstein, "Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice" (1960) 69 Yale L.J. 543 and see, too, W.R. La ave, *Arrest: The Decision to Take a Subject into Custody*, (1965), pp. 67–143, and J. orenberg, "Narrowing the Discretion of Criminal Justice Officials" (1976) 4 Duke L.J. 651.

[2] For general discussions of the exercise of discretionary authority and the governing iteria pertaining thereto, see Glanville Williams, "Discretion in Prosecuting" [1956] Crim. .R. 222–231 (one of the earliest examinations in the English literature of this growing topic); .F. Wilcox, *The Decision to Prosecute*, (London, 1972), *passim.*, (written from the erspective of a former chief constable of a county police force); D.G.T. Williams, Prosecution Discretion and Accountability of the Police" in *Crime, Criminology and Public olicy* (Ed. Hood), (1966), pp. 161–195; B.A. Grosman, *The Prosecutor*, Toronto 1969 (a anadian perspective of the problem); K.C. Davis, *Discretionary Justice: A Preliminary quiry*, and a collection of essays edited by the same author, *Discretionary Justice in Europe d America*, (1976), particularly Chapter 2 which describes the highly formalised system of ntrolled discretion that prevails in West Germany, pp. 16–74. See, too, L.H. Leigh and J.E. all Williams, *The Management of the Prosecution Process in Denmark, Sweden, and the etherlands*, (1982). For the most comprehensive examination of various aspects of osecutorial discretion in the Australian context, see Enid Campbell and Harry Whitmore, *eedom in Australia* (2nd ed.) (Sydney, 1973), pp. 96–124.

These manifold steps include decisions by the police whether or not to charge a citizen, whether to issue a summons or to arrest a suspect to ensure his appearance before the court, whether to support or oppose a bail application, and most importantly, whether and when to lay an information before a justice of the peace that sets the formal process of the criminal courts in motion. There may be some inexperienced police officers who believe that no discretion exists in the face of evidence that discloses the commission of a criminal offence. It is certainly not unknown to hear senior officers publicly claim that no discretion is exercisable by the police when confronted with otherwise unexplained circumstances pointing to an offence having taken place.[3] In truth, however, neither the law nor the practice of police forces recognises an inflexible rule that requires a prosecution to be launched irrespective of the particular circumstances surrounding the crime, the victim and the perpetrator. Whether the question arises at the initial contact of the police with the crime or at the level of intervention by the Director of Public Prosecutions or a Law Officer of the Crown, the basic principle that applies is enshrined in the passage from Sir Hartley Shawcross's speech in the House of Commons in 1951 when he declared[4]: "It has never been the rule in this country—I hope it never will be—that suspected criminal offences must automatically be the subject to prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should . . . prosecute . . . wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest. That is still the dominant consideration." In deciding whether or not to authorise a prosecution, Shawcross added, the Director's office must have regard to "the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations of public policy."[5] These views continue to represent the proper theory of criminal prosecution.

Whilst the general principle is correctly expressed in Shawcross's dictum it would be unrealistic to equate in any exact sense the evaluation of the relevant factors at every level of the criminal process. Thus, the exercise of judgment by uniformed police officers on the street or by detectives in the interrogation room is likely to be somewhat circumscribed by the knowledge that their initial response will be reviewed by senior officers in the force.[6] In difficult, important or highly sensitive cases this review will

[3] See Edwards, "Discretionary Powers by the Police and Crown Attorneys in the Criminal Law" (1970) 59 *Canadian Police Chief* 36.

[4] H.C. Deb., Vol. 483, col. 681, January 29, 1951 and see *ante*, pp. 318–324.

[5] *Ibid.*

[6] Among the important empirical studies of police work, to which reference should be made, are J. Skolnick, *Justice Without Trial*, (New York, 1966); P. Greenwood et al., *The Criminal Investigation Process*, Vol. III, 1975; and R.V. Ericson, *Making Crime A Study of Detective Work*, (Toronto, 1981).

likely extend upwards to include the chief constable. We have discussed at length in an earlier chapter the relationship that exists in English constitutional law between the chief constable and the local prosecuting solicitor.[7] It was noted then that the solicitor-client characterisation of their respective roles means that the final decision whether or not to prosecute is firmly in the hands of the chief constable, or such subordinate officer to whom the delegated power is given to make decisions of this kind. If the recommendations of the recent Royal Commission on Criminal Procedure are adopted and translated into legislation the authority of the prosecuting solicitor will change dramatically but that struggle for supremacy is essentially concerned with the location of the final decision-making power.[8] Our present concern is with identifying the considerations that guide those who have to make the decisions to prosecute or not to prosecute.

DISCRETION AND THE BALANCING OF COMPETING VALUES

Only in very recent years has there been any serious public airing of the discretionary factors that are taken into account by prosecutors. We have now had revealed for public examination some inkling of the balancing of competing values that is the hallmark of discretionary power. The major initiative in opening the windows of disclosure is attributable to the present holder of the office of Director of Public Prosecutions. Since assuming office in 1977 Sir Thomas Hetherington, unlike his predecessors,[9] has gone out of his way to explain in considerable detail how decisions are made in his department. National and regional newspapers,[10] the radio and television media,[11] and occasionally professional bodies and universities,[12] have afforded the Director opportunities to convey a better understanding of the role of the public prosecutor and his relationship to the police forces and to the Attorney General. The precedents set by Hetherington in England have been paralleled in other countries of which the United

[7] *Ante*, pp. 87–89.

[8] *Ante*, pp. 98–104.

[9] Comparison should be made with the contents of the public lectures given by Sir Theobald Mathew—see *The Office and Duties of the Director of Public Prosecutions*, (1950, University of London, Athlone Press) and *The Department of the Director of Public Prosecutions*, (1952, The Law Society). See, too, Sir Norman Skelhorn's interview "Between the Devil and the D.P.P.", *Punch*, November 24, 1976 and his chapter on "The Machinery of Prosecution" in *English Criminal Law: The Way a Briton Would Explain it to an American*, pp. 32–36.

[10] See, *e.g.* the extended interviews reported in the *Daily Mirror*, November 1, 1979; *The Times*, May 11, 1980; the *Sheffield Morning Telegraph*, May 19, 1980 and the *Sunday Times*, January 13, 1980.

[11] BBC Radio 4, *The World This Weekend*, April 19, 1981, and BBC Radio 4, *Inside Parliament*, February 16, 1980.

[12] Examples of Hetherington's public lectures include the Upjohn Memorial Lecture at King's College, University of London (November 2, 1979—see *post*, fn. 30); to Gray's Inn Moots (April 24, 1980) and to the Media Society (May 22, 1980).

States,[13] Canada,[14] Australia,[15] and New Zealand[16] can be cited for individual examples of releasing prosecution guidelines or *ex post facto* explanations for public scrutiny. Former Directors in charge of the Department of Public Prosecutions revealed as little as possible as to the actual operations of the institution and this approach was accepted as invevitable if the integrity of the system was to be maintained. The change of policy, instituted by the present Director, has now been in operation for sufficient years to demonstrate that the integrity of the Public Prosecutions' office can remain unimpaired notwithstanding the Director's determination to take the public into his confidence by frankly admitting his mistakes, when called for, or otherwise explaining repeatedly how complex and subjective is the process of reaching an impartial decision as to the enforcement of the criminal law.

In the main, the Director's remarks have been associated with the exercise of his "consent" powers or those conferred upon the Attorney General but with respect to which the Director of Public Prosecutions would normally be involved in advising the Attorney. The focus of these "revelations" has usually depended on the current *cause célèbre*, so that the involvement of a public figure or the contentious nature of prosecutions involving riots, obscenity, race relations, deaths in police custody, or corruption have all tended to figure prominently in the public discussion of the Director's activities. The opportunity for a more dispassionate analysis of the Director of Public Prosecutions' discretion arose in connection with the appearance of Sir Thomas Hetherington before the Royal Commission on Criminal Procedure. Prior to doing so, Hetherington had submitted a

[13] See (1978) 24 *The Criminal Law Reporter* 3001 which contains, in their entirety, United States Justice Department documents issued under the authority of a memorandum by Attorney General Edward H. Levi (January 18, 1977) on the exercise of prosecutorial discretion in such areas as decisions to prosecute, selection of charges, plea agreements and agreements to forego prosecution in return for cooperation. See, also, John T. Elliff, *The Reform of F.B.I. Intelligence Operations* (1979, Princeton), Appendices I, II, III and IV.

[14] *e.g.* in the province of Ontario 21 directives to the Crown Attorneys have been issued by, or in the name of, the Attorney General during the period from 1972 up to the present time. These cover a wide range of subjects including: plea discussions, disclosures to the defence, strict enforcement of new Criminal Code provisions relating to firearms, drinking and driving offences, child abuse prosecutions, prosecution of police officers who lie under oath, pornography and obscenity prosecutions, high speed police pursuits, child abduction, hockey violence, vandalism, sentences in sexual cases and preferring indictments for offences founded on evidence taken at a preliminary inquiry. Most of the directives are issued under the signature of the provincial Attorney General, with the others emanating from the Director of Crown Attorneys or the Assistant Deputy Attorney General.

[15] In early 1982 the Commonwealth Attorney General, Senator Peter Durack Q.C., announced that he would be tabling in the Australian Senate during the current session a statement setting out "the Australian Government's (*sic*) prosecution policy." Australia had decided to make public the principles which would guide it in such matters—see (1982) 8 *Commonwealth Law Bulletin* 826. The statement, *Prosecution Policy of the Commonwealth*, was tabled in the Australian Senate on December 16, 1982—see *post*, p. 432, fn. 25.

[16] See the numerous instances in recent years, referred to in the previous chapter, wherein both the Attorney General and the Solicitor General of New Zealand have provided elaborate *ex post facto* explanations of prosecution decisions that became the subject of public debate.

volume of written evidence which includes the most authoritative exposition of the factors underlying the decision to prosecute, as practised within the Department of Public Prosecutions.[17] It would be a signal omission, however, when dealing with this subject, not to recognise the even earlier exposure of the inner workings of the office of Director of Public Prosecutions prepared by Mr. Peter Barnes, then an Assistant Director, and delivered to a conference on the prosecution process held at the University of Birmingham in 1975.[18] Perhaps it was the cosy setting that prompted the latter to open his remarks by describing the view of the department probably entertained by the police as being rather like "a sort of voracious Whitehall monster which demands to be fed an unending flow of files and, what is more, sometimes repays all their hard work and kindness by flatly refusing the fare it is offered."[19]

As we have already noted, the police are obligated to submit to the Director of Public Prosecutions full reports, including witness statements and material documents, in all consent cases that require the statutory approval of the Director, the Solicitor General or the Attorney General before criminal proceedings can be commenced.[20] And, in accordance with the Prosecution of Offences Regulations, chief officers of police are also required to provide the Director's office with the same kind of information concerning those categories of offences that are specifically listed in the regulations or which the Director may direct to be the subject of reports to his office because of their individual importance or difficulty.[21] In all, these statutory directives generate some 14,000 cases annually that flow into the Department of Public Prosecutions to be assessed by the relatively small establishment of 53 barristers and 17 solicitors who comprise its full time professional officers.[22]

[17] *Written Evidence of the Director of Public Prosecutions*, December 1978.

[18] *The Prosecution Process*, an edited transcript of the proceedings of a conference held under the auspices of the Institute of Judicial Administration, University of Birmingham, in April 1975. Mr. Barnes' address on "The Office of the Director of Public Prosecutions" and the ensuing discussion is at pp. 22–36 of the *Proceedings*.

[19] *Ibid.* p. 22.

[20] See *ante*, p. 13.

[21] *Ante*, pp. 14–16. An interesting insight into the changing character of the Director's advisory and prosecuting roles was provided in Sir Thomas Hetherington's *Written Evidence* where it was pointed out that, whilst the total number of cases referred to the D.P.P. has increased steadily over the years (see *post*, fn. 22) the actual proportion of cases in which the Director has undertaken the prosecution, either directly or through a local agent, has declined. In 1977, the percentage of cases in which the Director assumed the conduct of the prosecution was 13·55 per cent., or 2130 cases out of the total of 15,724 cases referred to the D.P.P. The current feature emphasised by the D.P.P. was the increasing number of court days required to complete the more complex cases that are earlier processed through the department. "During the last three years at the Central Criminal Court" Hetherington wrote "I have prosecuted 37 cases lasting between 5 and 10 weeks; 17 cases which took 11 to 20 weeks and 3 cases which lasted far more than 20 weeks—one of the latter occupied 135 court days or 27 weeks in all." A not dissimilar trend was evident in the provinces—*op. cit.* pp. 69–70.

[22] A chart showing the professional staff structure as of October 1978 is included as Appendix 8 of the D.P.P.'s *Written Evidence* to the Royal Commission on Criminal Procedure (*ante*, fn. 17). Appendix 13 gives an overall summary of the volume of work

DECISION MAKING IN THE DEPARTMENT OF PUBLIC PROSECUTIONS

At the apex of this organisation, of course, is the Director, with a Deputy Director immediately beneath him.[23] The Department is divided into nine divisions, the responsibility for which is shared between two Principal Assistant Directors. Metropolitan London police cases occupy the attention of two of these divisions, the work of the central office being separated from that of the Metropolitan divisions. Three other divisions take care of police cases that emanate from the rest of England and Wales, which is divided into three parts, east, west and south, for purposes of administrative orderliness and an even distribution of case loads.[24] The remaining divisions are designed to deal with specialised work that has expanded in recent years. One of these, the research division, handles requests for advice from police forces, coroners and magistrates' clerks as well as preparing submissions, for example, to the Law Commission, the Criminal Law Revision Committee, or to the Parliamentary Counsel on points that arise in draft Bills and which impinge upon the Director's functions.[25] Another division, the fraud and bankruptcy division, concerns itself with major company frauds and the Director's responsibilities in connection with the making of criminal bankruptcy orders by the Crown Courts under the provisions of sections 39 to 41 of the Powers of the Criminal Courts Act 1973.[26]

Finally, there are two divisions of the Department of Public Prosecutions entirely devoted to the handling of public complaints of alleged offences committed by police officers. Under section 49(3) of the Police Act 1964[27] complaints made by a member of the public have to be reported to the Director of Public Prosecutions unless the chief officer of police is satisfied that no criminal offence has been committed. The number of such reports has risen steadily since 1964 and shows no sign of diminishing.[28] To gain a true appreciation of the significance of this development, in 1977 (the latest year for which statistics are available) the Director's office received 9068

processed through the department for the years 1950, 1955, 1960, 1965, 1970 and each of the succeeding years to 1977. For a comparison with the number of applications received and prosecuted by the Office of Public Prosecutions between 1895 and 1907, and 1949 and 1961, see Edwards, *Law Officers of the Crown*, p. 387, fn. 77.

[23] The description that follows draws heavily on both Hetherington's *Written Evidence* (*ante*) and Barnes' paper to the University of Birmingham Conference (*ante*, fn. 18).

[24] See Appendix 9 of the Director's *Written Evidence* which shows geographically the distribution of police forces in England and Wales among the respective divisions of the D.P.P.'s office.

[25] The D.P.P.'s role in handling extradition applications, which falls within the assigned responsibilities of the research division, rarely merits attention. Occasionally the foreign government will instruct its own solicitor but that practice is changing and the Director may find himself increasingly representing the foreign state involved or acting as *amicus curiae* in the Divisional Court in habeas corpus applications by the fugitive. *Written Evidence*, *op. cit.*, pp. 63–64.

[26] c. 62.

[27] c. 48.

[28] The relevant statistics for each of the years 1970–77 are usefully collected in Appendix 14 of the D.P.P.'s *Written Evidence*, *op. cit.*

such complaints, which accounted for just over half the department's total intake in terms of numbers of files received from every outside source. Not all of these complaints involved allegations of assaults, corruption of other serious crimes. On the contrary, the bulk of the complaints were concerned with relatively trivial matters such as careless driving and other minor infringements of the traffic laws. This burden on the Director's office is accepted as inevitable[29] and involves a very special category of discretionary power in the area of criminal prosecutions, to which we shall return in due course.

Whatever the assigned responsibilities of each division may be it is headed by an Assistant Director. The remainder of the professional officers, who may be solicitors or barristers, are distributed among the respective divisions according to the volume of work. The important thing to remember is that, by virtue of section 1(5) of the Prosecutions of Offences Act 1908, "an Assistant Director of Public Prosecutions may do any act or thing which the Director of Public Prosecutions is required or authorized to do by or in pursuance of any Act of Parliament or otherwise." Consequently, in any discussion of the decision to prosecute it is necessary to bear in mind that the Director's direct involvement in the assessment of the varying factors involved will be truly exceptional and not the normal course of procedure. Speaking in the course of delivering the Upjohn Memorial Lecture in 1979,[30] the present holder of the office of Director revealed that in the two and a half years during which he had been

[29] According to the present Director, the nature of most of the offences contained in complaints against the police are relatively trivial and are inconsistent with his policy of dealing only with major crime. Nevertheless, he added: " . . . in view of the anxiety of both the police and the public that all cases involving police officers should be considered by an independent body, I can see no viable alternative at the moment to the present practice continuing"—*Written Evidence*, p. 55. Changes, however, appear inevitable following the recommendations contained in the *Fourth Report of the Select Committee on Home Affairs* (H.C. 98–1 (1981–82)). In its considered reply to this report the Government has proposed a new set of police complaints procedures, the net effect of which, if adopted, will be a severe curtailment on the present burdensome involvement of the D.P.P.—see Cmnd. 8681 of 1982 and the comment in [1982] *Public Law* pp. 509–511. Moreover, an increasing body of opinion is being heard to the effect that the responsibilities of the Police Complaints Board are independent of, and not subject to the final disposition of a case by, the Director of Public Prosecutions—see *R.* v. *Police Complaints Board, ex p. Madden*, [1983] 1 W.L.R. 447 *per* McNeill J., who held that the board had wrongly concluded that the Police Act 1976, precluded the institution of criminal proceedings where the D.P.P. has determined not to bring criminal proceedings on the same or similar evidence. After receiving McNeill J.'s ruling, the Board issued a public statement expressing its view that the effect of the judgment in *Madden* is that the conduct of police officers may be subjected to disciplinary proceedings and notwithstanding the Director's view the Board may recommend or direct the preferment of a disciplinary charge on their own evaluation of the evidence—see *The Times*, February 11, 1983. See, too, the well informed discussion paper on "Complaints against the Police" by Professor Sir Roy Marshall (a member of the Complaints Board) prepared for the 1983 Meeting of Commonwealth Law Ministers, especially paras. 52–63.

[30] The Ninth Upjohn Lecture given at King's College, University of London, on November 2, 1979, and subsequently published in (1981) 14 *The Law Teacher* paras. 92. In it, Hetherington essays a biographical portrait and assessment of his predecessors, Sir Archibald Bodkin and Sir Theobald Mathew, and their handling of some of the prominent obscenity cases that occurred during their respective regimes.

in office he had never been required to take any decision on whether to prosecute in a murder case.[31] He added: " . . . in all I have taken the decision to prosecute, or been concerned in consultations with the police and with counsel, in not more than 10 or 12 cases a year—usually when they are exceptionally sensitive because of the subject matter or because of the persons involved."[32] The majority of cases brought to the attention of the Department of Public Prosecutions, either by way of mandatory edict, to obtain the formal consent of the Director or one of the Law Officers, or to be subject to the guiding discretion of the Director, will not proceed beyond the Assistant Director in charge of the appropriate division or the Principal Assistant Director responsible for co-ordinating the cluster of divisions assigned as his mandate within the department.

The fullest description of the actual functioning of the decision-making process in the Department of Public Prosecutions is contained in the address given to the conference on "The Prosecution Process" by Mr. Peter Barnes, presently the Deputy Director of Public Prosecutions.[33] In it, Barnes emphasised the high level at which decisions to prosecute are taken in the office, decisions which, in his words, "should only be taken after a very careful consideration of all the available evidence, quite calmly and in the light of day because a wrong decision either way can have pretty disastrous consequences."[34] He may well have had in mind the handling of the *Confait* case in 1972 and the strong criticisms subsequently levelled against the professional staff in the Department of Public Prosecutions by Sir Henry Fisher, the former High Court judge, who was appointed by the Home Secretary to conduct a public inquiry into the affair.[35] Three youths, aged 18, 15 and 14 years respectively, were convicted in 1972 of the killing of Maxwell Confait, a homosexual prostitute. They were freed three years later after a successful public campaign to prove their innocence. The entire case depended on confessions by the accused in which they admitted having gone to Confait's home for the purpose of stealing. The victim had been strangled and the three accused were said to have sprinkled paraffin about the home in order to destroy any fingerprints they may have left. At the conclusion of the trial, verdicts of murder, manslaughter by reason of diminished responsibility, and arson were returned by the jury. Leave to appeal against conviction was refused by the Court of Appeal but the case

[31] *Ibid.* p. 101.
[32] *Ibid.*
[33] See *ante*, fn. 18.
[34] *Ibid.* p. 26.
[35] *Report of the Inquiry into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London S.E.6*—H.C. Paper 90 of 1977. The original trial took place in November 1972. Applications for leave to appeal were refused by the Court of Appeal in July 1973. Following fresh police enquiries instigated by the Home Office the Secretary of State in June 1975 referred the case back to the Court of Appeal under the terms of s.17(1)(*a*) of the Criminal Appeal Act 1968. As a result, the original convictions were quashed and a warrant issued setting up the Fisher Inquiry in November 1975.

was referred back to the court three years later following the emergence of fresh pathological evidence. It informed the court that a substantial amount of time had elapsed between the setting fire to the house and the death of the victim. In direct contradiction to the confessions obtained by the police there was incontestable evidence that the three youths were elsewhere at the time of the fire. The prime suspect for the murder, a transvestite who lived in the same house as Confait, hanged himself in 1974. He gave evidence at the original trial about the time the fire had started.

Evidence adduced before the Fisher inquiry as to the handling of the papers in the *Confait* case indicated that the professional officer concerned in the Department of Public Prosecutions had treated the case as straightforward because of the independent nature of the respective confessions and their having been repeated in the presence of the youths' parents.[36] He was not aware that there had been another suspect. Sir Norman Skelhorn, the then Director of Public Prosecutions, expressed doubts as to whether the discrepancies, revealed later, should have been spotted and regarded as important by the professional officer who first reviewed the file and whose recommendations were adopted by his superiors.[37] This view was rejected in forthright terms by Sir Henry Fisher, the chairman of the departmental inquiry, who concluded: "It seems to me clear that it was [the professional officer's] duty to look for weaknesses or contradictions in the prosecution's case, and to see whether there were matters which should be further enquired into . . . If (as he said) he did not notice anything which required further investigation or specific reference to counsel, then in my view he was at fault, though in extenuation it can be said that he was under great pressure of work. If (as the police say) his attention was drawn to them and he did nothing, then his fault was greater."[38] Before leaving the subject of his inquiry, Sir Henry Fisher turned his attention to the administrative practices then in force in the office of Director of Public Prosecutions. Noting that the Director had not seen fit to criticise his subordinate's handling of the *Confait* case, the chairman of the inquiry concluded that "the experienced and conscientious officer did as much as under prevailing practice was expected of him."[39] Based on this assumption the procedures then in place were condemned as unsatisfactory.[40] The lessons of that case are unlikely to be readily forgotten within the Department of Public Prosecutions.

Describing the present mode of administering the Department, it has been authoritatively explained that under no circumstances can a decision to prosecute be made by anyone below the rank of Assistant Director who, before obtaining that rank, will generally have served in the department

[36] *Op. cit.* p. 213.
[37] *Ibid.* paras. 26.6 and 26.8, p. 216.
[38] *Ibid.* para. 26.7, p. 216.
[39] *Ibid.* para. 26.8, p. 216.
[40] *Ibid.*

for something like 17 years on average.[41] All cases, in the first instance, are sent to the Assistant Director in charge of the particular geographical area where the crime occurred. Short, straightforward cases can be dealt with expeditiously by the Assistant Director reaching a decision himself and communicating at once with the chief constable giving any necessary advice regarding charges and evidence. In all other cases the files will be allocated between the senior legal assistants who constitute the backbone of the division concerned. The individual officer who takes charge of the police file will read the case in greater detail, eventually returning the file to the Assistant Director with a minute summarising the salient facts, identifying any legal or evidential problems and registering his opinion as to the proper disposition of the case. Depending on the seriousness, sensitiveness or difficulties of the case the resolution of the decision to prosecute will be made from among the senior echelons of the office, often after informal discussions that ensure the exercise of all the accumulated experience that is at the disposal of the Director. In addition, if the case is of a highly complex character, either as to its facts or the legal issues involved, the Director may invoke the assistance of counsel. In London, this is likely to be one of the eight senior and ten junior Treasury Counsel who conduct all Crown prosecutions at the Central Criminal Court and the Inner London Crown Courts, or one of the supplementary counsel whose name is on the Attorney General's list drawn from the various circuits.[42] Normally, counsel are not instructed by the Director of Public Prosecutions until after committal for trial but this practice will be departed from if the circumstances warrant it and then the same counsel will likely take charge of the committal proceedings. Resort to the opinion of counsel, in the circumstances described above, means exactly that and no more. It does not entail the transfer of responsibility for making the prosecutorial decision from the Director to Treasury Counsel. As Sir Thomas Hetherington explained to the Royal Commission on Criminal Procedure, in the initial stages of a prosecution brought or taken over by the Director of Public Prosecutions he has complete control. It is entirely for the Director to decide against whom proceedings should be brought and on what charges.[43] Once the case has been committed to the Crown Court, however, as Hetherington went on to elaborate, "the position is not so straightforward, since the view is taken that the final responsibility for the

[41] In recommending a revision of the Prosecution of Offences Regulations 1946, Sir Henry Fisher noted that "the demands made of the Director's professional staff are excessive . . . If the present system is to continue, there can be no assurance that cases like the *Confait* case will not recur if the Director's staff is not increased"—*op. cit.* pp. 30, 207–208. Sir Henry Fisher's disposition to see a greater measure of involvement of the D.P.P.'s staff in supervising the police investigation of those cases which the Director is under a statutory duty to "institute, undertake or carry on" was opposed by Sir Norman Skelhorn, *ibid.* pp. 24–27, 30–31. With reference to the handling of the *Confait* case itself by the professional officer in the D.P.P., see esp. the conclusion reached at p. 216.

[42] Hetherington, *Written Evidence, op. cit.* paras. 165–167.

[43] *Ibid.* para. 170, p. 60.

conduct of the trial rests with counsel instructed by me to appear for the Crown. The convention, though, is that where questions of substance arise, for example, the acceptance of a plea to a lesser offence than that charged in the indictment, counsel consults me before arriving at a final decision. It is rare that there is any fundamental disagreement between us, but should such a situation arise, the arrangement is that the matter would be referred to the Attorney General."[44]

SUFFICIENCY OF THE EVIDENCE: THE FIFTY-ONE PER CENT RULE

At whatever level of authority the decision is ultimately taken to prosecute or not to prosecute, the evaluation process involves three separate but inter-related stages. It is possible to compress these exercises into two stages but the position will probably be made clearer if we adhere to the tripartite division of the assessment procedure. How separate the various stages are actually observed in practice may well be open to question, given the years of experience that most of the professional staff can draw upon in reaching their conclusions on the succession of files assigned for their attention.[45] It may be stretching credulity to be asked to believe that each and every such review is conducted with an inflexible adherence to the cycle of analysis that is about to be described. However compressed may be the evaluation of the run of the mill cases that occupy most of the professional officer's time on a regular basis, the following analysis is necessary in order to identify the separate issues that must be resolved in reaching the eventual decision to prosecute or not to prosecute.

The first objective is to ensure that there are no insuperable legal or jurisdictional obstacles that could constitute a fatal flaw to the prosecution of a case. Was the offence, for example, committed outside the jurisdiction of the English courts? Have any pertinent time limits for prosecution already passed? Are there any definitional problems that require compliance and which are deficient in the evidence accumulated by the police? It is possible that some of these deficiencies can be rectified by further police investigation, and advice to this effect will be conveyed by letter or in person to the police force concerned. In the absence of such a possibility it stands to reason that it is pointless to pursue the merits of the case if the essential legal underpinnings are not in place.

The second stage must next be addressed. It is concerned with the issue whether the evidence in the case is sufficient to justify instituting criminal proceedings. The present Director of Public Prosecutions has repeatedly sought to explain to all and sundry the criterion that applies throughout his department, at whatever level of authority the operational decision is made. Different wording has been used on occasion to explain the

[44] *Ibid.*

[45] For a realistic analysis of the relationship between theory and practice in adhering to the successive stages leading up to decision making in individual cases, see Barnes, *op. cit.* pp. 26–32.

governing test, some less felicitous than others, and we can begin by referring to the Director's written submission in 1978 to the Royal Commission on Criminal Procedure in which Hetherington stated: "The test normally used in the Department . . . is whether or not there is a reasonable prospect of a conviction; whether, in other words, it seems rather more likely that there will be a conviction than an acquittal. We set an even higher standard if an acquittal would or might produce unfortunate consequences. For example, if a man who has been convicted of some offence is subsequently acquitted of having given perjured evidence at his trial, that acquittal may cast doubt on the original conviction. Likewise, an unsuccessful prosecution of an allegedly obscene book will, if the trial has attracted publicity, lead to a considerable increase in sales. In such cases we are hesitant to prosecute unless we think the prospects of a conviction are high. We also tend to adopt a somewhat higher standard if the trial is likely to be abnormally long and expensive and the offence is not especially grave."[46]

On another occasion, this time in a memorandum prepared in 1980 for the House of Commons Select Committee on Deaths in Police Custody, the Director of Public Prosecutions confirmed that the standards applied in police complaint cases are the same as those invoked in all other cases reported to the department. The first consideration, the memorandum stated, is "whether the totality of the available evidence is of such quality that a reasonable jury (or magistrate, in respect of summary offences) is more likely than not to be satisfied beyond reasonable doubt that the accused is guilty of the offence charged. If so, the evidence is sufficient to justify proceedings. If it fails that test, we would not consider it proper to prosecute."[47]

In thus delineating the standard of sufficiency the Director of Public Prosecutions was very conscious of the contrary school of thought that maintains it is incumbent upon the Crown to prosecute whenever there is a "bare prima facie case" and that to raise the minimum standard any higher is to "usurp the proper function of the courts."[48] According to this view, in the absence of unassailable evidence that the prospective Crown witnesses are lying, it is not the function of the prosecutor to decide whether he believes a witness or not. Where the question is whether the prosecution's evidence is likely to be believed, it is argued, this is strictly a matter for the jury (or the magistrate in summary cases) and not the Director to decide.

[46] *Written Evidence, op. cit.* p. 33, paras. 92–94. The criterion "whether or not there is a reasonable *prospect* of conviction," repeatedly referred to by Hetherington in his public utterances should be compared with the formula "a reasonable *certainty* of conviction" used by his predecessor as the D.P.P., Sir Norman Skelhorn (*ante*, fn. 9) at p. 35. In his memoirs, *Public Prosecutor* (1982), Skelhorn describes the acid test, used during his period as D.P.P., to be "whether on the evidence before us, if that evidence stood up in court and was not eroded, there was in our considered opinion a likelihood that a conviction would result," *ibid.* p. 70 but *cf.* his formulation on p. 71.

[47] H.C. Paper 401—iii, February 14, 1980, see p. 27.

[48] *Written Evidence, op. cit.* p. 34, para. 95.

Hetherington's response to this argument is an outright rejection of its underlying thesis. The resolution of the sufficiency of evidence test, in the opinion of the present Director of Public Prosecutions, requires that proper attention be paid to the credibility of the witnesses since "the universal adoption of a prima facie case standard would not only clog up our already overburdened courts but inevitably result in an undue proportion of innocent men facing criminal charges."[49]

The elucidation of the key passages in the above extracts from the Director's written submissions, *viz.* "the reasonable prospect of a conviction" and it is "more likely that there will be a conviction than an acquittal" resemble the difficulties in giving realistic meaning to the task imposed upon examining justices in deciding whether there is "sufficient evidence" to warrant committing the accused for trial,[50] and upon a trial judge when explaining to a jury the standard of "proof beyond a reasonable doubt" in a criminal case,[51] or in deciding whether the evidence is sufficient to justify him in withdrawing the case from the jury and which is determined according to "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty."[52] It is not my intention to venture into a comparative analysis of the respective meanings accorded by the appellate courts to the various criteria mentioned above. These comparable situations are introduced in order to draw attention to the difficulties experienced in applying such nebulous standards, and the additional problem encountered by the Director in explaining to the general public how he and his staff approach the task of defining "sufficiency of evidence." In a no doubt sincere attempt to elucidate this piece of legalise, Hetherington has acquired for himself the immortal title of "Mr. Fifty-one per cent.," a reference to his resort to mathematical percentages as a vehicle for simplifying the

[49] *Ibid.* and see the exchange of views on this question with the Director defending his position before the Select Committee on Home Affairs, (*ante*, fn.4), p. 35.

[50] The Magistrates' Courts Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c.56) s.7(1), and *Archbold*, (41st ed.), para. 4–193, afford little assistance in interpreting the "sufficiency of evidence" test, stating only that the function of the committal proceedings is "to ensure that no one shall stand trial unless a prima facie case has been made out." And see *R.* v. *Epping & Harlow Justices, ex p. Massaro* [1973] Crim. L.R. 109. In interpreting a similar provision in the Criminal Code, s.475, the Supreme Court of Canada (in *U.S.A.* v. *Sheppard* [1977] S.C.R. 1077) has declared (by a majority) that "sufficiency of evidence" to warrant committal for trial bears the same meaning as that accorded the same formula when deciding whether to withdraw the case from the jury, *viz.*, "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty."

[51] The leading authorities are reviewed in *Cross on Evidence*, (5th ed. 1979) pp. 110–115, according to which the *locus classicus* remains the judgment of Denning J., in *Miller* v. *Minister of Pensions* [1947] 2 All E.R. 372 at pp. 373–374. See, too *Archbold, Criminal Pleading, Practice and Procedure*, (41st ed., 1979), para. 4–426.

[52] The decision to uphold or reject a submission of no case to answer does not depend on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit—Practice Note issued by the Divisional Court, [1962] 1 All E.R. 448; and see *R.* v. *Mansfield* [1977] 1 W.L.R. 1102.

governing criterion.[53] Formulated in these terms the question to be asked in contemplating a prosecution is this—is there a better than 50 per cent. chance that a jury will find the accused guilty on the evidence that the prosecution are in a position to present? Hetherington's words of caution, uttered in another public lecture, that it is not possible to evaluate to a percentage degree of accuracy have been lost sight of in the public's preference for simple, uncomplicated metaphors.[54] Talk of cases falling within the marginal 49 to 51 per cent. category are equally unhelpful because of the false conception implicit in such language that the prosecutor's decision-making bears the stamp of scientific objectivity. Nothing could be more misleading insomuch as it obscures the reality of the situation. An experienced Assistant Director disclaimed any ability on his part to offer a neat yardstick as to how to assess the prospects of a conviction or an acquittal. "All I can say" he frankly admitted "is that we do our best to call upon the experience that we have accumulated over the years, and that in itself is a strong reason for the high level at which our decisions are taken."[55] The truth of the matter lies closer to recognising the subjective nature of the prosecutorial decision in individual cases, it being at least likely that something less than identical answers would be forthcoming if the same set of files were to be given to a sample of, say, 20 or 50 professional officers all working in the same Department of Public Prosecutions.[56] With the restriction of the actual decision-making to the small coterie of senior staff of Assistant Directors and above, vagaries of subjectivity are probably kept to a minimum.

A special consideration that we should look at is the weight attached to an earlier police decision to charge, before the papers in the case have been submitted to the Director's office. This election by the police to go ahead may be necessary, for example, where there are substantial grounds for believing that the accused will leave the country, interfere with witnesses or commit further crimes. In these circumstances it is understandable that the police should wish not only to charge the suspected person but to strongly oppose bail. Other situations, however, arise when the Director's consent is refused on policy grounds notwithstanding the existence of ample evidence to support a prosecution, and it is obviously preferable if the issue of consent is first determined before a formal charge is laid by the police. Pre-emptive action of this kind by the police, it has been readily acknowledged, exerts pressure upon the Director of Public Prosecutions and his staff in sustaining the objective of a dispassionate decision.[57] It is

[53] See, *e.g.* the headline in the *Sunday Times*, January 27, 1980, which compounds the difficulties by dubbing the present Director as "Mr. Fifty per cent." Hetherington himself refers to "the 50 per cent rule" in his address to the Media Society, *ante*, fn. 12.

[54] *Op. cit.* Media Society address, at pp. 7–8.

[55] Barnes, *op. cit.* p. 27.

[56] The likelihood of such an outcome was readily acknowledged by the Deputy D.P.P. in the course of my discussion with him in his office on July 7, 1980.

[57] Barnes, *op. cit.* pp. 25–26.

also understandable that a team of detectives who have worked laboriously and conscientiously for an extended period in solving a case should feel an acute sense of having been let down by the Director if approval to the bringing of criminal proceedings is not forthcoming. The police may be firmly convinced of the guilt of the suspect, but if the evidence is insufficient in terms of the probability of a conviction the policy of the Department of Public Prosecutions, as stated by its Director, is to oppose the initiation of a prosecution.[58] Any substantiated indications that the Director of Public Prosecutions and the staff of the Department are prone to succumb to police pressures in making their decisions instead of adhering to the principle of fearless impartiality would surely contribute to the erosion of public confidence. It may be assumed that nowhere is this fact better appreciated than in the office of the Director of Public Prosecutions itself.

AN EVALUATION OF SOME RECENT CONTROVERSIAL DECISIONS

Criticisms of particular decisions made by the Director have usually centred around cases that have already attracted public attention, in which cultural or political prejudices are readily given rein. In the early years of the office of Public Prosecutions the practice of the Director was to defer a public response to criticisms of his decisions until he prepared his annual report for Parliament.[59] This avenue for defending the Department's actions has long since disappeared[60] and it is doubtful whether, in present day conditions of accelerated communication, public opinion would be satisfied to await a yearly accounting of the Director's work. What is evident is the readiness of Sir Thomas Hetherington to defend his record after the event by whatever media resources are placed at his disposal.

Some of the more notorious cases in recent times have centred on the narrow question of the sufficiency of evidence. In the *Blair Peach* case in 1979, for example, one of several situations where a suspect has died in police custody in suspicious circumstances, Hetherington has admitted that the reason why there was no prosecution against any particular officer is that it was impossible to tell which of any policemen committed the crime. In an interview with *The Times*,[61] and referring expressly to the *Blair Peach* case, the Director stated: "I am not absolutely certain that he was hit on the head by a police officer, but I think it is probable that he was. There was no evidence as to which one, literally no evidence, and no evidence really as to what the weapon was, except that it was a blunt

[58] One qualification to this policy is the reluctance of the D.P.P.'s office to turn around a police decision to charge, unless the evidence is totally without substance. If there is some evidence to support the original police charge, the tendency is to let the lower court make the decision not to commit for trial by "soft pedalling" the evidence in support of the prosecution's case. *Per* the Deputy D.P.P. in discussion with the author, July 7, 1980.

[59] Edwards, *Law Officers of the Crown*, pp. 377–387.

[60] *Ibid.* p. 386.

[61] *The Times*, May 11, 1981.

instrument. We don't have the evidence. What they did in fact was to remain silent, which they are entitled to do."[62] This unusually frank disclosure of the thinking that contributed to the decision not to prosecute in that case should not be extended by inference to the 26 other cases involving complaints against a police officer or police officers that resulted from deaths in suspicious circumstances over a period of 10 years between 1970 and 1979.[63] According to figures published by the Home Office in February 1980, a total of 274 people had died while in the custody of the police during the same period.[64] 48 deaths, the highest total in any single year, occurred in 1978 during which the number of persons taken into custody was 1·25 million. The disparity in the respective totals mystified many people at the time, including the members of the House of Commons Select Committee. The explanation for the lower figure is that these cases represent those where a public complaint was registered and where the particular chief constable felt it incumbent upon him to submit the papers to the Director of Public Prosecutions under the test laid down in section 49 of the Police Act 1964.[65] The remainder would be cases in which either no complaint was received or the chief officer of the police was satisfied that no criminal offence could have been committed. Furthermore, the suspicious circumstances surrounding the deaths were not necessarily confined to deaths that took place while the victim was "in police custody," a phrase that can encompass a variety of situations ranging from an arrest in the home or on the street to the actual detention of the person concerned in a police station or in a hospital.

Prominent among the cases generally referred to as having given rise to widespread public concern, in addition to *Blair Peach*, are those of *James Kelly* (1979) and *Liddle Towers* (1976), who died after release from custody. The continuous attention devoted to these cases in the press[66] and in Parliament was reinforced by the remarkable fact that, arising out of the 26 situations in which the deceased allegedly died at the hands of the

[62] *Ibid.*

[63] This is the figure adhered to by the D.P.P. in the course of his evidence before the Home Affairs Committee—see *Report*, February 14, 1980, H.C. 401-iii. A breakdown of the 26 cases where the deceased allegedly died at the hands of the police or as a result of action taken by the police formed part of the Director's written memorandum to the Committee. Annex I (p. 29) analyses the statistics according to the attributed cause of death (7 being due to natural causes, 4 to misadventure, 4 to suicide, 2 to accidental death, 2 to lawful killing—the remainder are classified as no inquest, inquest adjourned or no known cause). Annex II (p. 30) indicates that 11 of the deaths took place in hospital, 5 while the deceased was in police custody, 7 as having taken place "elsewhere," and 3 "not known."

[64] *Justice of the Peace*, February 23, 1980, pp. 111–112. At first, the Home Office refused to disclose the names of the deceased "because of the disproportionate cost involved" (*The Times*, January 7, 1980), but later provided the relevant information (*The Times*, January 14, 1980).

[65] *Minutes of Evidence* of the Home Affairs Committee, H.C. Paper 401-iii, at p. 31. For a further elaboration of the responsibilities defined in section 49 see *post*, p. 419.

[66] See, *e.g. The Times* editorial, January 14, 1980; the *Sunday Times*, January 6, 1980 (reporting the call by Sir Harold Wilson for a public inquiry into the death of James Kelly in a police cell).

police, in different parts of the country, not one prosecution had been instituted by the Director of Public Prosecutions. Questioned on this subject by the members of the House of Commons Select Committee, the Director stated that in each of the 26 cases the decision not to prosecute was based on the failure to surmount the first hurdle of meeting the sufficiency of evidence test.[67] Sir Thomas Hetherington disclosed that he had personally considered 3 of the 26 deaths, presumably the most controversial cases, and that he had been fully satisfied in each case that there was no further witness that needed to be interrogated and that no further inquiries needed to be undertaken.[68] In some of the cases the papers had been referred to outside counsel whose conclusions were the same as those eventually reached by the Director.[69] Experience and statistics alike, however, confirm the fact that it is only in the very strongest of cases that a jury will convict a police officer of assault. The same pattern of a very high rate of police acquittals exists with respect to all types of indictable offences. Thus the overall acquittal rate in cases brought against police officers is 59 per cent. compared with a national rate in trials on indictment against other citizens of about 17 per cent.[70] Like it or not, juries appear to view with a high degree of scepticism the testimony of prosecution witnesses who have a criminal record or whose background casts a shadow on their degree of credibility. Another statistic which requires some explanation is the remarkably low figure of cases, involving complaints of assault by the police, in which the Director has initiated prosecution of the police officer(s) concerned. In 1979, for example, which is the last full year for which results are available, the percentage of assault cases prosecuted was slightly in excess of 2 per cent.[71] A partial explanation for this state of affairs is the demonstrated tendency on the part of chief constables, anxious to avoid public criticism that they have sought to protect their own, to send forward for the Director's consideration cases that do not have the semblance of sufficient evidence to support a prosecution.[72] Many of the circumstances involve nothing more than

[67] *Ante*, fn. 65, p. 31, Q. 152. To the chairman's supplementary question "So in these [26] cases of death in custody which you were considering, you do not think that the public interest criterion came into it all?" the D.P.P. answered "No, we never got to that stage" (*ibid.* p. 32).

[68] *Ibid.* p. 33, Q. 164.

[69] *Ibid.*

[70] Barnes, *op. cit.* p. 27.

[71] *Per* the D.P.P. in the course of an interview with the *Daily Telegraph*, February 15, 1982. This represents an average of 47 prosecutions out of an annual total of 2,600 assault complaints.

[72] See *Written Evidence, op. cit.* p. 54. Referring to the Police Act 1964, s.49(3) of which requires that complaints made by a member of the public have to be reported to the D.P.P. unless the chief officer is "satisfied that no criminal offence has been committed," Hetherington commented: "In practice almost every chief officer is extremely anxious to divest himself of responsibility for deciding whether one of his officers should be prosecuted, however trivial the allegation, so that there can be no suspicion of improper bias. Hence they normally report all cases involving an officer even if the evidence is virtually non-existent and regardless of whether the complaint has been made by a member of the public"—*loc. cit.*

technical assaults. Even so the perception of different standards being applied is not such that it can be dismissed and there will be a constant need to explain the Director's policies in this regard.

Adherence to the same strict standards as to the quantum of evidence necessary to justify prosecution is confirmed by the attitude of the Director of Public Prosecutions in the *Cowley Shop Stewards* case in 1966, several years before the formulation of Hetherington's "51 per cent. rule." Questions were asked in the House of Commons as to why criminal proceedings had not been brought against the stewards who had admittedly conducted a "kangaroo court" and expelled several workers for not taking part in an official strike.[73] Quintin Hogg (as he then was) had earlier accused the Attorney General of failing to prosecute for improper motives[74] and Randolph Churchill had trotted out the ghosts of the Campbell affair in 1924 as a warning of the fate that might befall the Government because of the Attorney General's decision not to prosecute.[75] Sir Elwyn Jones, the then Attorney, explained that he had been consulted by the Director but that there was insufficient evidence to justify proceeding against any identified individual.[76] Confirmation of this wholly non-political explanation for the decision became available years later when Mr. Peter Barnes in his Birmingham address, referring to circumstances that seem to match the Cowley case in 1966, stated: "We eventually managed to satisfy him that that the evidence really was insufficient but I was left with no doubt whatsoever that the Attorney General was anxious that there should be a prosecution if possible, although I had equally no doubt that such a prosecution would have been embarrassing to his Government from the political point of view."[77]

The failure to institute major prosecutions arising out of the revelations contained in the Bingham report to the alleged violations of the Rhodesia Oil Sanctions orders has already been addressed in an earlier chapter.[78] In the present context it is only necessary to remind ourselves of the explanation proferred by the Director of Public Prosecutions in defence of the decision not to launch criminal proceedings against the international companies involved in circumventing the statutory prohibitions. According to Sir Thomas Hetherington the true explanation lay in the inability of the Crown to satisfy the 51 per cent. standard.[79] The Director had sought the advice of outside counsel, Mr. Michael Sherrard Q.C., who concluded that, whatever the Bingham report may have revealed about political and economic realities, the evidence it contained would not alone justify a

[73] H.C. Deb., Vol. 727, Oral Answers, April 27 and May 18, 1966.
[74] *Sunday Express*, March 13, 1966.
[75] *Evening Standard*, March 16, 1966.
[76] *Ante*, fn. 73.
[77] Barnes, *op. cit.* p. 32.
[78] *Ante*, pp. 325–333.
[79] The *Sunday Times*, January 13, 1980. As illustrative of the evidentiary obstacles to a successful prosecution the Director disclosed: "We do not even have the documents to prove that oil was carried from Mozambique to Rhodesia."

prosecution.[80] An investigation in search of the necessary evidence would have taken several years, involving uncooperative witnesses who were outside the purview of the British courts' jurisdiction. Even then, in Hetherington's judgment, there was insufficient likelihood of obtaining convictions. As with other high profile cases, it is often difficult to separate convincingly the evidentiary reasons for a negative decision as to prosecution and those other public interest considerations that tend to loom large in the decision-making process.

There are, of course, numerous instances in which the go-ahead signal is given by the Director of Public Prosecutions and the outcome is a spectacular failure, when judged in the narrowest terms of a conviction against an acquittal. The *Jeremy Thorpe* case will often come to mind in this kind of comparison,[81] demonstrating as it does the unpredictability of juries or, if it is preferred, the fallibility of the judgments reached in the calm atmosphere of the Department of Public Prosecutions. Asked about the outcome of the Thorpe prosecution, Hetherington rejected any feeling of embarrassment and instead gave the verdict a sense of perspective by declaring that it would be stored away as evidence to guide his instinct when similar facts present themselves again for assessment.[82] Asked whether given another chance he might have prosecuted on different charges, Hetherington insisted that the charges of conspiracy to murder were absolutely right on the evidence before him.[83] More recently, speaking publicly on the legal dilemma concerning well-meaning doctors who deliberately accelerate the death of a patient, Sir Thomas Hetherington described as "his most difficult prosecutorial decision" the institution of a murder charge in 1981 against *Dr. Leonard Arthur*, a consultant paediatrician of unimpeachable reputation, who admitted to taking steps to hasten the death of a baby suffering from Down's syndrome.[84] The child died after only 69 hours of life. It had been rejected by its natural parents and the prosecution maintained that the accused had thought it more humane and more in keeping with informed medical opinion to let the mongoloid baby die. In consequence of the parents' rejection Dr. Arthur ordered nursing care only and prescribed the drug dihydrocodeine to relieve distress. Other effects of the drug are a suppressed appetite and impaired breathing. Evidence from other leading paediatricians confirmed that Dr. Arthur had acted within accepted medical limits. Following the

[80] See *ante*, pp.328–329.

[81] See also *ante*, pp. 52–57 for the respective roles played by the D.P.P. and the Attorney General in reaching the decision to proceed with the prosecution in the *Thorpe* case.

[82] The *Sunday Times*, January 13, 1980.

[83] *Daily Mirror*, November 1, 1979. In the course of the same interview Hetherington stated: "I thought there would be a conviction but I was wrong. Having decided that I thought there would be a conviction, I then had to consider whether it was in the public interest to go ahead. I had no doubt at all that it would be in the public interest. It would have been quite wrong to have covered it up. I still think I was right about that."

[84] *Daily Telegraph*, February 15, 1982. For the related contempt proceedings against the *Daily Mail*, arising out of the *Arthur* case, see *Att. Gen.* v. *English* [1982] 2 W.L.R. 959.

cross examination of the Home Office consultant pathologist, who had performed the post mortem on the child and whose findings were subsequently reversed by the same witness, the murder charge was withdrawn from the jury's consideration. The jury later acquitted the accused of the remaining charge of attempted murder. Speaking to the press several months later after the high emotions of the highly publicised trial had died down, the Director of Public Prosecutions stated that if the prosecution had known in advance of the expert medical evidence to be produced by the defence "it might have changed the whole course of the trial. We might not have charged murder in the first place." The uncertainties of the criminal law, Hetherington maintained, had left no scope in which to bring another charge other than murder.[85]

The *Bristol Riot* case, on the other hand, in retrospect appears to have been a genuine error of judgment on the part of the Director and he candidly admitted as much after the original trial which produced eight acquittals and four jury disagreements.[86] In a charge of riotous assembly, the legal requirement of establishing a common purpose among the various defendants illustrates the importance of the very first stage in the process leading a decision to prosecute. As it transpired, the fatal defect in the prosecution's case was not recognised in the initial evaluation of the evidence. The jury's verdict at the original trial demonstrated the danger of re-indicting those accused with respect to whom there had been jury disagreements. So it came as no great surprise to learn that, after consultations between the Attorney General, the Director of Public Prosecutions, Crown counsel and the chief constable of Avon and Somerset it was agreed that it was not in the public interest to proceed with a second trial of the four defendants in respect of whom the jury had failed to agree upon a verdict.[87]

[85] *Loc. cit.* Hetherington also issued a warning to the medical profession that, unless and until a legal solution is found to the problem of a doctor who eases the pain and suffering of a terminal patient, "if there is clear evidence that a doctor has deliberately ended the life of a baby, then because of the position of the law as it stands, we shall certainly have to consider whether the public interest requires a prosecution"—*loc. cit.* It seems likely that the D.P.P. had in mind the public statement attributed to the secretary of the British Medical Association, immediately following the acquittal in the *Arthur* case, who had stated: "I hope that the D.P.P. will now realise that it is not appropriate to bring criminal proceedings against eminent and distinguished paediatricians." There can be no doubt, however, as to the correctness of the D.P.P.'s position under the existing law, the classic statement being that of Devlin J.'s direction to the jury in the *Bodkin Adams* case: *The Times*, April 9, 1957; [1957] Crim. L.R. 365. See, too, the D.P.P.'s recent decision to authorise a charge of attempted murder of an aborted baby against the senior consultant gynaecologist of a hospital—*The Times*, July 1, 1983.

[86] Speaking on the BBC Radio 4 programme *The World This Weekend*, April 19, 1981 and reported in *The Times*, April 20, 1981. Hetherington re-affirmed the same sentiments in his extended interview with the present editor of *The Times*, May 11, 1981, emphasising the significance of the judgment expressed by the local chief constable as to the likely repercussions of a further trial being instituted.

[87] *The Times*, April 7, 1981 and see H.C. Deb., Oral Answers, April 16, 1981, p. 262.

THE BOUNDARIES OF RELEVANT PUBLIC POLICY FACTORS

We turn next to the final stage in the process leading up to the ultimate determination whether to prosecute or not. That decision, it should be emphasised, is not sufficiently explained in terms of answering "Yes" or "No" to the question of prosecution. The decision may involve a choice between the following alternative dispositions: (a) to prosecute if no charge has yet been preferred by the police or other governmental authority; (b) to proceed with any charge(s) already laid; (c) to reduce (or increase) the offence already charged; (d) to charge any other person with the offence; (e) to ask the police to make further inquiries; (f) to discontinue further police investigations in favour of the decision not to prosecute for any offence. Having decided that the evidence is sufficient to justify criminal proceedings, the Director and his senior colleagues must then go on to consider whether the provable facts and the whole of the surrounding circumstances are such that it is incumbent upon them, in the public interest, to institute a prosecution and with respect to what offence(s). This final decision is, without doubt, the most difficult of all since it involves a subjective attempt to determine what course of action will best reflect the interests of the community as a whole. No ready made yardsticks are available to solve the myriad circumstances recorded in the files submitted to the Director for his decisions. What is apt to be misleading is the impression conveyed in Sir Thomas Hetherington's written submission to the Phillips Commission and repeated in his public statements explaining how the department functions. The description of the process as an orderly sequence of cumulative judgments, each separated from the other but each requiring an affirmative resolution in order to achieve the final judgment, ignores the impact that public interest considerations are bound to make in borderline cases. Rigid adherence to the separation of the evidentiary and public interest questions is a standard incapable of fulfilment and it is unhelpful to exaggerate the exclusive nature of the separate exercises.

The boundaries of public policy factors that can properly be taken into account when making prosecutorial decisions are slowly becoming identified. This is a positive contribution towards public understanding and support for the substantial element of discretion that is involved in every such decision.[88] Several of these factors are relatively non-contentious and can be described as exculpatory or mitigating in their possible impact. Staleness of the crime will likely influence the Director's eventual decision, it being stated that there is much hesitation to prosecute if three or more

[88] One of the recommendations of the Royal Commission on Criminal Procedure (see *Report*, *op. cit.* pp. 173–175, 188) urged the preparation of a statement setting forth the appropriate criteria that should govern the decision whether or not to prosecute. Action to this end has produced a document entitled "Criteria for Prosecution" which, bearing the seal of authority of the Attorney General, has been distributed to prosecuting solicitors and police forces for their guidance—see *ante*, p. 112, fn. 27.

years have lapsed between the date of the offence and the probable date of trial.[89] The gravity of the offence will naturally diminish the significance of the element of staleness and the same applies if the complexity of the case explains the prolonged police enquiries. A similar response will likely occur if the accused has contributed to the staleness by disappearing or covering his tracks. Lack of diligence on the part of the police, on the other hand, will tend to enhance the relevance of the time interval.[90]

The youthfulness or advanced age of the accused will have to be taken into consideration in appropriate cases. In sexual cases, for example, high regard for the respective ages of the persons involved is generally regarded as a proper balancing of the values at stake. The consenting nature of the victim's participation and the issue of corruption will also bear heavily on the way in which discretion is exercised.[91] In other cases, the younger the offender the greater must be the inclination to examine alternative possibilities such as a caution if the accused has no previous blemishes and, in addition, has a good home background and employment record. Against these positive qualities must be set the seriousness of the crime and the extent to which it has aroused public concern. With respect to a defendant who is of advanced age there must always be concern as to whether he is likely to be fit enough to stand trial. Apart from such a practical matter, there is general reluctance to prosecute anyone who has passed his seventieth birthday and is infirm, unless there is a real possibility that the offence will be repeated or, of course, that the offence is of such a grave character that a prosecution cannot be avoided.[92]

Caution is called for when the mental condition of the accused is brought into the discussions preceding the decision to prosecute.[93] Its relevance during court proceedings is unquestioned and the court has broad powers to authorise psychiatric examinations if called for in the particular case. No one can doubt either the importance of evidence of mental illness to the issue of criminal responsibility. What we are presently concerned with is the possible impact that evidence of mental instability should have in avoiding the subjection of the accused to a criminal trial. The initiative in this regard will usually come from the defendant's solicitor who may point to the dangers of a permanent worsening of his client's condition if the prosecution goes ahead. The possible spurious nature of any such claim can be met in part by ensuring an independent examination of the defendant's mental condition. The healthy scepticism that prevails in the Director's office in such matters is perhaps best captured in the view expressed by Mr. Peter Barnes that: "On the one hand it is somewhat distasteful to

[89] See the D.P.P.'s *Written Evidence*, *op. cit.* p. 38 and Barnes, *op. cit.* p. 29.

[90] *Ibid.* The same reaction is to be expected if there has been dilatoriness "on the part of those who have some sort of moral responsibility for reporting the matter to the police in the first place."

[91] *Written Evidence*, *op. cit.* pp. 38, 40–41, and Barnes *op. cit.* pp. 29–30.

[92] *Written Evidence*, *op. cit.* p. 39 and Barnes, *op. cit.* p. 29.

[93] *Written Evidence*, *op. cit.* pp. 39–40.

prosecute someone who is mentally subnormal but on the other hand that very subnormality or abnormality may itself increase the risk of an offence being repeated and so it may be necessary for us to prosecute in the hope that this may result in some form of effective treatment."[94]

Perjury is an offence that the public might be forgiven for believing that it has become as much of a dead letter crime as, say, bigamy. In his evidence to the Royal Commission on Criminal Procedure, the Director of Public Prosecutions acknowledged that experience has shown that the modern tendency is for the judges to impose no more than a nominal penalty in cases of bigamy unless there are exceptional or aggravated circumstances. Faced with this reality very few prosecutions for bigamy are nowadays approved, the normal advice being to issue a caution against any repetition of the offence.[95] With perjury, on the other hand, a far more serious view is taken of the crime and it is pertinent to note the principles that guide the Director in his approach to such cases.[96] A clear distinction is drawn between alleged perjury by a witness and that sought to be laid at the door of the accused. In the case of the former, assuming there is sufficient corroboration as required by the Perjury Act 1911 and a reasonable prospect of a conviction, the Director's office will sanction a prosecution if the perjured evidence goes to the heart of the issue before the original trial. On the contrary, should the evidence, whilst technically in breach of the Act, relate to a peripheral issue and the intent of the witness is more to protect his own skin than to prevent the course of justice, then it is most likely that a prosecution will be approved.

The position of a defendant who commits perjury is seen in a different light, especially if his effort is unsuccessful and a conviction has been registered in the case. In these circumstances, the Director's submission to the Commission stated: ". . . it is necessary to have regard to the punishment inflicted by the court and to assess whether a subsequent prosecution for perjury would be likely to result in any substantial increase of the sentence. It is also essential that the evidence should be so exceptionally strong that a conviction is virtually certain, because of the doubts which an acquittal would cast upon the verdict of guilty in the original case. Usually, although not necessarily, it is the emergence of some additional and compelling evidence, after the original trial, which removes the last trace of doubt. Even, however, where there is abundant evidence against a defendant who has unsuccessfully lied without involving others, I would not normally think it right to prosecute unless there are aggravating factors."[97] The imperative obligation to balance subordinate considerations one against the other is well illustrated in the further observation that the Director's office "will consider whether the lies

[94] Barnes, *op. cit.* p. 30.
[95] *Written Evidence, op. cit.* p. 43.
[96] *Ibid.* pp. 41–42.
[97] *Ibid.* p. 42, paras. 121–122.

necessary involved an attack on the truthfulness (as opposed to recollection or ability to identify) of one or more prosecution witnesses; whether the lie was clearly planned before the hearing or arose on the spur of the moment during cross-examination; and the degree of persistence in maintaining the lie."[98]

This kind of analysis of the conflicting considerations that must be taken into account when contemplating possible proceedings for perjury highlights the impracticality of ever laying down hard and fast rules that will confer a high degree of predictability as to the result of their application. The very nature of discretionary authority requires resistance to any attempt to develop rigid rules that cannot encompass every possible contingency. Take another factor, that of public expense in maintaining a long drawn out trial. Any suggestion of imposing upon the police or the Director of Public Prosecutions a predetermined ceiling as to the costs that can be incurred in connection with different categories of prosecutions would be abhorrent to the principles of justice and law enforcement. At the same time, lack of any restraint in the face of predictable major expenditures in bringing accused persons to trial would likewise be regarded as irresponsible. Hence the careful balancing of costs against the purposes to be achieved through prosecution that must occupy the minds of the decision-makers in the office of Public Prosecutions when the magnitude of the bill to be paid out of the public purse cannot be ignored.[99]

As one illustration of this unusual factor reference can be made to the crop of potential defendants enmeshed in the *Poulson* affair.[1] By mid-1974 the list of candidates for investigation and possible prosecution for corruption numbered around 300, most of whom were individuals in subordinate positions whose involvement was relatively trivial. In the event only the leading figures in the conspiracy were brought to trial. Commenting on the decision to single out the principal conspirators in this fashion, Sir Thomas Hetherington has stated; "It is not necessarily in the public interest to prosecute every minnow connected with an offence, provided the whales are tried . . . In the Poulson case . . . after the prosecution of John Poulson, Dan Smith, George Cunningham and other public servants there were still a number of leads which had not been investigated fully . . . They were retired, old, and a lot more money would have to be spent. Was it really in the public interest to go ahead?"[2] The Director of Public Prosecutions has frequently found himself the target of public criticism as a result of his authorising prosecutions that have involved enormous public costs and resulted in the acquittal of the accused. The implication, whether intended by the critics or not, is that it is

[98] *Ibid.* p. 42, para. 123.

[99] Barnes, *op. cit.* p. 30. The D.P.P. made no reference to the public expense factor in his written submission to the Royal Commission.

[1] See *ante*, pp. 81–85.

[2] *The Times*, May 11, 1981.

acceptable to proceed if convictions are obtained, otherwise the ends do not justify the costs incurred. This is asking the impossible of the Director of Public Prosecutions and it is doubtful if there has been any serious criticism of the Director's judgment by those whose responsibility it is in government to guard against the extravagant use of public money.

Another amorphous factor that is difficult to pin down relates to the attitude of those who, directly or indirectly, can be said to have a special stake in the outcome of a prosecution. Mention has already been made of the indefinable relationship that occurs between the professional officers who have been in charge of the case up to the point where the papers are transmitted to the Director for decision. The imperceptible pressures engendered by this relationship cannot be dismissed, a senior member of the Director's office going so far as to acknowledge the Department is reluctant to turn around a police decision to charge, unless the evidence is totally without substance.[3] If there is some evidence to support the original police charge the tendency is to let the court make the decision not to commit for trial by soft-pedalling the evidence in support of the charge. The attitude of victims and complainants may not exert as powerful an influence, there always being the possibility that the accusation was made in the heat of the moment or as the last straw in a relationship that has been simmering in intensity for some time. A change of heart on the part of the complainant, be it a person (in a case of assault) or a company (in a case of fraud) will be assessed in the light of the seriousness of the offence and the harm inflicted, as well as exploring any suspicion that the withdrawal was actuated by fear.[4] Then there is the current mood of the local community, which may have given expression to its concerns as to the prevalence of the offence in its area, or as in the *Bristol Riot* case where the views expressed by the chief constable of Avon and Somerset as to the detrimental effects which a new trial would have on racial harmony in the city appears to have been a powerful factor in persuading the Attorney General and the Director not to pursue charges against the remaining four defendants.[5]

There remains the sensitive aspect of the position occupied in society by the defendant, and his or her previous character. At times, it may be difficult to separate these variables and it may even be more of a challenge to demonstrate that equality before the law has been adhered to in the decision to prosecute or not to prosecute, as the case may be. The circumstances surrounding the handling of the prosecution of *Jeremy Thorpe*, and in particular the transfer by the Attorney General to the Director of Public Prosecutions of responsibility for making the decision in that case, have already been examined in detail in this work.[6] Apropos our

[3] *Per* the Deputy Director of Public Prosecutions in the course of my talk with him in his office on July 7, 1980; and see, too, Barnes, *op. cit.* pp. 25–26, expressing much the same views in relation to circumstances where the Director's consent is a pre-requisite to launching a prosecution.

[4] *Written Evidence, op. cit.* p. 43.

[5] *Ante*, p. 422.

[6] *Ante*, pp. 52–57.

present concern, it can readily be imagined that Sir Thomas Hetherington was acutely conscious of the public position occupied by the suspect, and at the same time sensitive to the enormity of the charge of conspiracy to murder and the penalty for such a crime. Questioned by *The Times* representatives in the course of a wide ranging interview on the Director's handling of prominent cases during his tenure of office, Hetherington was asked what his response would have been if Mr. Silkin had instructed him not to prosecute Jeremy Thorpe. The Attorney's instruction, the Director replied, would have been "most unconstitutional."[7] In the event of his proving unsuccessful in persuading the Attorney to change such a hypothetical ruling, Hetherington declared that he would probably have resigned. "It was so basic," he said, "that I wouldn't have been able to carry out my duties thereafter."[8]

The position of the Director becomes more vulnerable where he decides against prosecuting and the proposed charge involves a prominent public figure. Allegations of bias and of protecting "the Establishment" will surface quickly in this kind of situation, presenting the Director and the Attorney General with the choice of riding the storm in silence or responding quickly in a way that is calculated to dispel uninformed criticism. A case in point was that involving *Sir Peter Hayman*, formerly this country's High Commissioner in Canada.[9] In 1978 a packet containing obscene literature and other written material was found in a London bus. The subsequent police investigation revealed the existence of correspondence of an obscene nature, involving young children, between Hayman and a number of other persons. Altogether a total of seven men and two women were named in the report submitted by the Metropolitan London Police to the Director of Public Prosecutions, as possible defendants to charges under section 11 of the Post Office Act 1953. A further report revealed that one of the nine men, not Sir Peter Hayman, was also carrying on correspondence with another person which indicated that the two shared an obsession about the systematic killing by sexual torture of young people and children. In view of the extreme nature of this latter material the Director decided to prosecute them for conspiring to contravene the 1953 Act.

There was no evidence that Hayman had ever sent or received material of this kind through the post. Simultaneously with these inquiries, the police investigation into the activities of the "Paedophilic Information Exchange" resulted in a separate trial for conspiracy to corrupt public morals, the defendants being involved in the management or organisation of the body concerned. Hayman did not fall within this group. With respect to the original group of nine persons, which did include Sir Peter Hayman,

[7] *The Times*, May 11, 1981.
[8] *Ibid.*
[9] The facts set out in the text above are based on the Attorney General's statement, H.C. Deb., Vol. 1(6s.) Written Answers, cols. 139–140, March 19, 1981.

the Director advised against the bringing of criminal proceedings,[10] the principal factors being stated to be, first, that the correspondence had been contained in sealed envelopes passing between adult individuals in a non-commercial context and, secondly, none of the material was unsolicited. The Attorney General defended the Director's decision in a full statement to the Commons, saying that he was in agreement with the decision.[11] Previously, before Hayman's name was disclosed to the Commons by a Labour back-bencher, the Attorney General had appealed to the Member of Parliament concerned to spare Sir Peter and his family public humiliation in naming him when the decision had been taken not to prosecute Hayman or any of the potential defendants.[12] Subsequently, the Director explained that the public position occupied by Hayman had had nothing to do with his decision. It had been dictated by the fact that the spirit of the Post Office Act offence had not been infringed, given that it is no offence to possess indecent material and the recipients had not been unwilling victims of the obscene literature in the sense of being shocked and disgusted by the contents.[13]

DECISIONS NOT TO INSTITUTE PROCEEDINGS—THE NEED FOR RESTRAINT IN PUBLIC EXPLANATIONS

This kind of explanation, in such detail, has come to be expected from the present Director. It should be noted, however, that there is a general reluctance to elaborate on the particular considerations that led to a decision *not* to institute proceedings in specific cases. Such reluctance is explained on two grounds. First, whilst it is reasonably safe to expound in abstract terms on the kind of discretionary factors, reviewed in this chapter, which enter into the decision-making process, there is a marked

[10] For conflicting views on the merits of the D.P.P.'s decision see *The Times*, March 26, 1981 and Sir David Napley's statement to the press, *ibid.* March 20, 1981 and his letter to the editor, *ibid.* March 27, 1981. Napley was the defending solicitor in the case.

[11] *Ante*, fn. 9.

[12] *The Times*, March 18, 1981.

[13] *The Times*, May 11, 1981. Elaborating on the reasoning that lay behind his decision not to prosecute Hayman, the D.P.P. stated: "It would be quite wrong of me to say that Parliament should have repealed the Act and it hasn't, and therefore I am never going to prosecute anyone for sending obscene literature through the post. It is for Parliament to decide whether an offence should be on the statute book, but it is part of the constitution law that I have a discretion to prosecute. Parliament is really saying: 'This is the offence. We haven't abolished it but we leave it to you, director, or to the police, to decide whether, in the individual circumstances, it requires prosecution'. Sending indecent material through the post, bearing in mind that it is no offence to possess indecent material, is not the sort of offence that affects members of the public. The only people who can be affected by it are the postmen, if it is written on the outside of the packet, which it wasn't, or the unwilling recipient, who is shocked and disgusted, which wasn't the case. And therefore the spirit of the statute was not infringed and that is why we didn't prosecute." It is impossible to estimate whether Hetherington's explanation, fortified by the Attorney General's view that the right decision was reached, has succeeded in dissipating public suspicions of the kind exemplified in a feature article "Pain, Anguish and the DPP" in the *Sunday Times*, March 22, 1981. For an analysis of the current law, the enforcement policies of the Post Office and recent proposals for reform, see Colin Manchester, "Obscenity in the Mail" [1983] Crim.L.R. 64.

resistance to disclosing publicly the specific in-house policies that have been developed to guide the professional staff in their approach to certain kinds of offences. The explanation for this resistance, departed from so visibly in the Peter Hayman situation, is that "it would not be in the public interest to risk it becoming known that certain offences of medium or minor importance can in fact be committed with relative impunity."[14] This remark, on the part of the present Deputy Director, contains more than a hint of exaggeration in its basic assumption that the incidence of criminal activity is directly related to the level of prosecutorial activity. The fundamental questions implicit in this assumption have been addressed in the parallel context of law enforcement activity with little evidence to support the proposition that a strong statistical nexus exists between levels of police action and the levels of criminal activity.[15] This conclusion, it is acknowledged, does not control the public's perception of how the criminal justice system functions and it is these perceptions that principally influence individual behaviour.

As for the other ground on which the Director and his colleagues studiously maintain a veil of silence in relation to specific cases, the explanation is principally dictated by the ethics of the Director's relationship to the police, the undisclosed witnesses and the defendant himself. Pressed by the Select Committee on Deaths in Police Custody to go beyond the Department's customary resort to explaining its decision in terms of the insufficiency of the evidence, Sir Thomas Hetherington drew no distinction between police complaint cases and other cases.[16] To make public the grounds on which the evidence was judged to be insufficient to secure the likelihood of a conviction would, in the first place, breach the confidentiality of police reports and statements taken by the police from potential witnesses. Disclosure of the reasons for not believing prospective witnesses might require revealing the criminal record of those witnesses. The same reasons would apply to making public details about the defendant with the result that there would be a public "trial" of the potential defendant without his or her having all the safeguards that are an integral part of a criminal trial in open court. Much as a very substantial body of public opinion might savour the opportunity to engage vicariously in this kind of trial by the media, the Director's adherence to the contrary principles favouring non-disclosure is to be preferred. This choice is not as easy to make as might sometimes be supposed, and the present Director has confessed to the frustration that he has experienced in the more emotive cases, such as *Blair Peach* and *James Kelly*, in not being able, because of the principle of confidentiality, to answer publicly the bombardment of criticism to which he and his Department have been subjected.[17]

[14] Barnes, *op. cit.* p. 30.
[15] See *post*, p. 446, fn. 15.
[16] *Ante*, fn. 47, at pp. 34–35.
[17] The *Sunday Times*, January 13, 1980.

In its Report the Select Committee recommended that the Director of Public Prosecutions should make it his normal practice to supply a complainant with at least a summary of the considerations which led him to decide against prosecution.[18] It also proposed that the police investigation report be made available to the legal representatives of the deceased when appearing at the ensuing coroner's inquest.[19] Both recommendations were rejected by the Director, a decision supported by the Attorney General, for the same grounds as those explained to the Select Committee as governing established practice.[20] That indefinable concept, the public interest, might in exceptional circumstances deem it sufficiently imperative to enforce full public disclosure but it would have to be done after the most careful balancing of the conflicting principles at stake, and with the necessity of requiring the Attorney General to defend before the House of Commons a decision that runs counter to the general practice faithfully observed by the Director of Public Prosecutions.

PUBLIC DISCLOSURE OF PROSECUTION GUIDELINES

Most of what has been written in this chapter will have equal application whatever the jurisdiction in which the decision to prosecute or not to prosecute has to be made. There are growing signs too of a disposition to follow the example set by Edward H. Levi, an outstanding Attorney General of the United States who, during his term of office in 1977, embarked on a programme of formulating the principles upon which prosecution decisions should be made. In his prefatory note to the document setting forth such principles[21] Attorney General Levi stressed that the materials being circulated were not to be construed as Department of Justice "guidelines" and that they imposed no obligations on United States Attorneys, their Assistants, or other attorneys acting on behalf of the United States Government.[22] Ascribing the most modest of objectives to this pioneering initiative Mr. Levi said that it was intended solely for use by government attorneys to the extent that the principles were found to be appropriate in discharging their responsibilities as federal prosecutors.[23] The Attorney General's "materials" covered such topics as the decision to prosecute, the election of charges, plea negotiations and, a procedural feature that is peculiar to United States law, opposition to *nolo contendere* pleas.[24] Not surprisingly, there is much common ground between the

[18] H.C. Paper 631 of 1980, pp. 30–40.
[19] *Ibid.* p. xiv.
[20] H.C. Deb., Written Answers, Vol. 993, cols. 150–153, November 11, 1980.
[21] "U.S. Department of Justice Materials Relating to Prosecutorial Discretion" (1978) 22 *The Criminal Law Reporter*—see Text Section, pp. 3001–3008.
[22] *Ibid.* p. 3001.
[23] *Ibid.*
[24] *Ibid.* pp. 3005–3006. See also *Federal Rules of Criminal Procedure*, Rule 11(a) and (b) and *American Bar Association Standards Relating to the Administration of Criminal Justice*, Vol. 18, 1974, "Pleas of Guilty", pp. 299–308.

relevant factors that are said to guide the Director of Public Prosecutions in England and Wales, and those expressed in the Levi documents as the advisable guideposts within the federal criminal justice system of the United States. In Australia, the impact of the Levi statement of principles has been immediate, the Attorney General of the Commonwealth of Australia breaking new ground in bringing together in a public document the guidelines that will govern the actions of all counsel and Crown solicitors whose authority derives from the senior Law Officer of the Crown and who are engaged in the prosecution of Commonwealth offences. The policy paper containing the guidelines and considerations upon which prosecutorial decisions are to be made within the federal sphere of jurisdiction was tabled in the Australian Senate in December 1982.[25] Included within this precedent-setting statement is a reaffirmation of the "Shawcross doctrine" as a fundamental tenet that must govern the Attorney General's personal involvement in prosecution decision making.[26] Added to which the document contains the necessary reminder that this philosophy was accepted by the Government in the speech made by Prime Minister Fraser on the occasion of the Endicott resignation debate in September 1977.[27] None of these prosecution blueprints is in the nature of hard and fast rules. Within any such sets of guidelines, including those issued by the Attorney General of England and Wales on the effects of jury vetting and disclosure, and now the criteria for prosecution,[28] there is a considerable measure of discretion as to how the relevant standards are to be applied in the particular circumstances.[29]

[25] *Prosecution Policy of the Commonwealth*, tabled in the Australian Senate on December 16, 1982 on behalf of the Commonwealth Attorney General, Senator Peter Durack Q.C. Among the subjects covered are (i) who may institute and conduct Commonwealth prosecutions, (ii) the decision to prosecute and police involvement, (iii) private prosecutions and stays of proceedings, (iv) no bill applications, (v) granting of indemnities or pardons to witnesses, (vi) plea negotiations, (vii) special prosecutors. So far as I am aware, no comparable statement exists in any of the States of Australia, each of which has its own body of criminal law and procedure. Adherence to the principles set forth in the Commonwealth policy statement is explicitly acknowledged by the Attorney General (Senator Gareth Evans) in the detailed opinion prepared for the Prime Minister with respect to the *Mick Young* case—see *ante*, p. 371, fn. 64.

[26] *Ibid.* p. 9.

[27] *Ibid.* and see *ante*, pp. 384–385.

[28] On the subject of prosecution guidelines see *ante*, p. 423, fn. 88 and on the issues of jury vetting and disclosure to the defence see *post*, Chapter 14, pp. 476–490.

[29] Despite the disclaimer by former Attorney General Levi that his expansive treatment of the various items included in the Justice Department's memorandum was nothing more than "suggestions," it is noticeable that each principle is accompanied by detailed comments as to the meaning that is intended to be attached to the several propositions. Moreover, the language used in the comments have the distinct ring of departmental expectations that the policies enunciated in the document will be either followed strictly or an explanation provided for any departure from the existing departmental policies. The same level of expectation runs through the growing number of policy directives issued by the Attorney General of Ontario, referred to *ante*, p. 406, fn. 14. For the arguments in favour of seeking Parliamentary approval of prosecution guidelines, see the note by Francis Bennion in (1981) 125 S.J. 534.

This discretion, moreover, attaches to each of the documents that have been referred to, irrespective of whether they are described as "guidelines" or "appropriate considerations that are not to be regarded as departmental requirements," and whether they emanate from the office of the Attorney General in London, Canberra, Toronto or Washington. They do not, it is true, carry the force of a "practice direction" similar to those issued from time to time by the Lord Chief Justice after consultation with the Judges of the Queen's Bench and Family Divisions. These latter statements of practice have the same binding force as all other rules of procedure that derive their statutory authority from the Supreme Court of Judicature Acts.[30] Nevertheless, since the Prosecution of Offences Act 1879, section 2 ordains that the Attorney General is the Minister responsible for the actions of the Director of Public Prosecutions and can issue directives to his subordinate official with respect to any of his functions, it cannot be doubted that there exists a secure statutory basis for the Attorney General's emerging forays into the setting of guidelines concerned with subjects that lie within the Law Officers' prerogative authority. In this respect, the approach favoured by the Attorney General of the United States in expressly disclaiming any mandatory component for the guidance afforded to the United States Attorneys would be a highly inappropriate parallel to use in describing the modest incursions of the English Attorney General into the same field. At the same time it is interesting to note that, as the federal Minister of Justice in charge of the United States Department of Justice, Attorney General Levi attached no qualifications to the series of formal guidelines that he imposed upon the Federal Bureau of Investigation when executing his policy of bringing that agency back into the fold of ministerial control and accountability.[31] This fascinating exercise must regrettably be left to others to recount,[32] as we

[30] See Supreme Court of Judicature (Consolidation) Act 1925, (c.49), s.99.

[31] For authoritative descriptions of the legacy of F.B.I. abuses left by its founder J. Edgar Hoover at his death in 1972 see United States House of Representatives, Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, *Hearings: FBI Oversight*, Serial No. 2, Parts 1–3, 94th Congress, 1st and 2nd session, 1975–76; and United States Senate, Select Committee to Study Governmental Operations with respect to Intelligence Activities, *Hearings*, Vols. 2–6, 94th Congress, 1st sess. 1975, and *Final Report*, Books I–IV, 94th Cong, 2nd sess. 1976.

[32] The best informed and succinct account of this exercise is contained in John T. Elliff's *The Reform of the F.B.I. Intelligence Operations*, (Princeton, 1979), see especially pp. 37–76. Among the guidelines promulgated by Attorney General Levi during his tenure of office were those relating to (1) F.B.I. Domestic Security Investigations (released March 10, 1976), (2) Reporting on Civil Disorders and Demonstrations involving a Federal Interest (released March 10, 1976) and (3) White House Personnel Security and Background Investigations (ditto) and (4) Informants in Domestic Security, Organised Crime and Other Criminal Investigations (released December 15, 1976). These guidelines are conveniently reprinted in Elliff, *op. cit.* Appendices 1 to 4. The machinery for preparing the guidelines, in which the F.B.I. under its new Director, Clarence M. Kelly, took a fully cooperative part, is described by the same author, *op. cit.* pp. 58–61. Levi had made a commitment to prepare new guidelines for the F.B.I. during his confirmation hearings before the Senate but had not completed the task by the time he left office following a change in the office of United States President—*ibid.* pp. 55 and 60.

move on to describe the substantial restriction on the powers of the Attorney General for England and Wales, and by derivation those of the Director of Public Prosecutions, in the matter of preferring an indictment without prior resort to a preliminary hearing. This powerful discretionary jurisdiction, frequently exercised in such Commonwealth countries as Canada, New Zealand, and Australia is not available to the English Attorney General. At least, not in relation to his functions in England and Wales. On assuming the duties of Attorney General for Northern Ireland, however, the same Law Officer inherited the power of presenting a direct Bill of indictment in the Northern Ireland courts, a power created by the Stormont Parliament when it abolished the grand jury.[32a]

PREFERRING BILLS OF INDICTMENT—BRITISH AND COMMONWEALTH DIFFERENCES

Prior to 1933 the Attorney General or the Solicitor General exercised concurrent jurisdiction with a judge of the High Court in sanctioning the presentation of a voluntary bill of indictment by a private citizen. These restrictions on private accusations were introduced by the Vexatious Indictments Act 1859[33] to counter the abuse and hardship incurred by those accused of crimes who had no right to appear before or to be heard by the grand jury before it decided whether or not to return a true bill. Proceedings to determine whether leave should be granted,[34] by one of the Law Officers[35] or by a High Court judge, was always *ex parte*[36] and the grand jury's subsequent involvement of returning a true bill became a mere formality. Under the provisions of the Administration of Justice (Miscellaneous Provisions) Act 1933[37] the grand jury was recognised as a useless anachronism and abolished.[38] At the same time the discretionary power of the Attorney General and the Solicitor General to authorise the presentation of a bill of indictment, that would effectively by-pass the

[32a] See Grand Jury (Abolition) Act (N.I.) 1969, c.15, s.2. I am indebted to Mr. David Haggan of the Law Officers' Department for drawing my attention to this unique feature of Northern Ireland statute law pertaining to the powers of the Att. Gen. for Northern Ireland.

[33] 22 & 23 Vict. c.17, s.1. The restrictions extended to the following offences only: perjury, subornation of perjury, conspiracy, false pretences, keeping a gaming or disorderly house, indecent assault.

[34] An indictment could also be preferred "by the direction" of the same authority.

[35] Both of the Law Officers were named in the legislation thus conferring equal authority to act in their own right. No instance is on record, however, paralleling the extraordinary events in Australia in the *Mercantile Bank* case in 1893—see *ante*, pp. 372–379.

[36] The earlier background to the *ex parte* procedure resorted to in such cases was examined in considerable detail by the Court of Appeal in *R.* v. *Raymond* [1981] 3 W.L.R. 660 at pp. 665–667. Despite subsequent legislation, repealing the 1859 statute, and the introduction of new rules of procedure the court unanimously held that the defendant was not entitled to be heard in person before leave is granted to prefer a bill of indictment. For the transformation in the practice of hearing the parties concerned, prior to the Attorney General's issuance of a *nolle prosequi*, see Edwards, *op. cit.* pp. 229, 236.

[37] 23 & 24 Geo. 5, c. 36.

[38] *Ibid.* s.1.

procedure of a preliminary inquiry before examining justices, was likewise terminated.[39]

The avenues remaining to a prosecutor in England and Wales who seeks to bring an accused person to trial by indictment are two-fold. The first, and most regularly followed, is by way of committal to the Crown Court following either the taking of depositions as part of the preliminary hearing or by resort to the accelerated procedure which, since the coming into force of the Criminal Justice Act 1967, s.1,[40] allows a committal, in given circumstances, without consideration of the evidence. Briefly, the circumstances require that all the evidence be in the form of written statements or exhibits and that no objection is voiced by the defendant or his lawyer that there is insufficient evidence to put the defendant to trial by jury for the offence(s) charged.[41] What have come to be known as "section 1 committals" cannot be resorted to if the defendant is not legally represented.[42] The second avenue open to a prosecutor is to circumvent the committal procedure altogether by way of seeking the leave of a High Court judge *ex parte* in accordance with the provisions contained in section 2(2) of the Administration of Justice (Miscellaneous Provisions) Act 1933 which states: " . . . no bill of indictment charging any person with an indictable offence shall be preferred unless either—(a) the person charged has been committed for trial for the offence; or (b) the bill is preferred . . . by the direction or with the consent of a judge of the High Court or pursuant to an order made under section 9 of the Perjury Act 1911."[43] These powers merely replicate the jurisdiction originally conferred on the High Court under the terms of the Vexatious Indictments Act 1859.[44] It is this procedure which the Director of Public Prosecutions, like any other private prosecutor, has to invoke when faced with unexpected obstacles that arise in the course of seeking a normal committal by the examining justices.

A prolonged preliminary hearing, for example, with little prospect of an expedited committal, may prompt drastic action by the Director as occurred in the *Terence May* case in 1981 when 15 black youths were charged with a variety of offences including murder, affray, and riotous assembly following the death of a motor cyclist in South London.[45] The

[39] *Ibid.* s.2(7).

[40] c.80. Such statistical evidence as is available points to the virtual supplanting of the conventional preliminary hearing (under the Magistrates Courts Act 1952, s.7) by the expedited committal procedures (under section 1 of the 1967 Act)—see the Report of the Royal Commission on Criminal Procedure, p. 70. For the further recommendations of the Commission see *ibid.* pp. 181–183.

[41] *Ibid.* s.1(1)(*b*).

[42] *Ibid.* s.1(1)(*a*).

[43] 24 & 24 Geo. 5, c.36.

[44] See *ante*, p. 434. There is no longer any restriction on the list of indictable offences with respect to which the procedure of preferring a bill of indictment applies.

[45] *The Times*, October 23 & 24, 1981 and November 7, 1981. The D.P.P.'s action was prompted by a request from the chairman of the Croydon magistrates' court that committal be sought by way of a voluntary bill of indictment. This move was explained by the magistrates' "profound concern at the lack of progress." Leave to prefer a bill of indictment was granted

conduct of several counsel representing the defendants at the committal hearing was the subject of a formal complaint made by the Attorney General to the Professional Conduct Committee of the Bar Council, a step that was later repeated at the conclusion of the actual trial.[46] In another recent situation, involving the unexplained death of *Barry Prosser*, an inmate of Winson Green Prison, Birmingham, and a second refusal of the examining magistrate to commit the three accused prison officers to trial because of the insufficiency of the evidence presented by the Crown, the Director of Public Prosecutions changed his mind after first stating that the case was closed.[47] After consultations with the Attorney General, *ex parte* proceedings were begun that resulted in the Director obtaining leave from Stephen Brown J., for the presentation of a direct indictment against the prison officers concerned.[48] At the subsequent trial in Leicester Crown Court all three accused were acquitted of murder.[49] In yet another case, *R.* v. *Raymond*,[50] that eventually found its way before the Criminal Division of the Court of Appeal, it was said that the defendant "gave such unmistakable indications of an intention seriously to disrupt the committal proceedings as to make a mockery of them"[51] that counsel for the Crown decided to abandon them and sought leave to prefer a bill of indictment from a High Court judge. The principal ground of the appeal against conviction of the accused for theft of more than £2 million worth of currency from the storerooms of Heathrow Airport was the failure of the judge, hearing the *ex parte* application, to afford the appellant an opportunity to be heard if he wished to do so. After carefully reviewing the entire history of preferring bills of indictment, Watkins L.J., speaking for the court, rejected the argument that the 1933 Act had conferred any such

by Michael Davies J., on the basis that "there was no prospect of committal proceedings, if they continued, being completed within a reasonable or tolerable time. Any trial by jury would thus be delayed for an excessive and unacceptable period." Sitting as the presiding judge at the Central Criminal Court, Lawson J., refused to disturb the decision to grant the bill, stating that he was only empowered to quash the bill if there had been an excess of jurisdiction in making the original decision. No such grounds had been established before him. Verdicts of guilty were subsequently returned against the 10 accused charged with various offences ranging from riot to manslaughter that arose from the stabbing to death of Terence May, a crippled teenager—*The Times*, April 16, 1982.

[46] *The Times*, October 23, 1981 and see also *The Times*, April 15 and 16, 1982. Following a three-day hearing by a disciplinary tribunal of the Bar Council, presided over by Staughton J., Mr. Narayan, the Secretary of the Society of Black Lawyers, was found not guilty of professional misconduct when he issued a press statement accusing the Attorney General and D.P.P. of being "corrupt, incompetent and an unholy alliance with the National Front." The defendant claimed that he had issued the statement not as a barrister but in his capacity as chairman of an organisation called "Black Rights U.K." *The Times*, April 9, 1983. The tribunal issued a formal reprimand with respect to charges of abusing the D.P.P.'s staff during a murder trial at the Old Bailey and ordered that Mr. Narayan be suspended for 6 weeks on the other charges of professional misconduct. *The Times*, June 25, 1983.

[47] *The Times*, October 2, 1981.

[48] *The Times*, October 24, 1981.

[49] *The Times*, March 1, 17 and 20, 1982.

[50] [1981] 3 W.L.R. 660.

[51] *Ibid.* at p. 664.

rights[52] or that the elimination of the roles formerly associated with the Attorney General and Solicitor General was an indication that the executive element was dispensed with leaving only procedures in which the High Court was required to conform to the *audi alteram partem* rule.[53] In his concluding remarks Watkins L.J. said: "There can be no doubt that the defendant is becoming, if he has not already become, a practised disturber of court proceedings. In agreeing to receive and consider the written representations made by his solicitor on the defendant's behalf, Michael Davies J., probably paid him much more regard than he ever deserved."[54]

By English standards, the legislation of many Commonwealth countries confers extraordinary authority upon the Attorney General and his agents who are empowered to prefer an indictment irrespective of whether a preliminary inquiry has or has not been held or that such an inquiry has resulted in the accused being discharged.[55] There is, for example under the Canadian Criminal Code, the parallel procedure whereby a private individual can seek leave to prefer a direct indictment by order of a judge of a provincial Supreme Court, or in certain limited circumstances a county or district court judge sitting as a court of criminal jurisdiction, or from the Attorney General.[56] In some circumstances the Attorney General may elect to proceed by way of seeking leave from the court,[57] notwithstanding

[52] *Ibid.* at p. 665. Speaking of the 1933 legislation, the court (*coram* Watkins L.J., Boreham & Hodgson JJ.) stated: "The Act merely did away with a virtually useless anachronism, the grand jury, and with the powers of the Attorney-General and Solicitor-General. It perpetuated the other existing procedures along with the existing powers of a High Court judge and justices. We reject the submission that the Act of 1933 did not have this effect, and disagree with the proposition that a precise effect of it was to substitute the High Court judge for the grand jury. The powers of a High Court judge, be it noted, find identical expression in the Acts of 1859 and 1933." Parliament, it was inferred, must have been aware that prior to the Act of 1933 High Court judges had been using their powers under the Act of 1859 by a procedure which was exclusively *ex parte*. According to the Court of Appeal the Indictments (Procedure) Rules 1971 (S.I. 1971 No. 2084 L.51), enacted under the Lord Chancellor's rule-making power (1933 Act, s.2(6)), must be taken as a determination to perpetuate the *ex parte* procedure which had been in effect since 1859. The Rules contained no reference to the defendant and expressly conferred judicial power to act without requiring the attendance before the High Court judge of the applicant, counsel or any witnesses (*ibid.* rule 10).

[53] *Ibid.* at p. 667.

[54] *Ibid.* at p. 672.

[55] Criminal Code R.S.C. 1970, c.C-34, ss.505(4) and 507(3). For the historical background to these provisions see esp. *R.* v. *Harrison* (1975) 33 C.R.N.S. 62 *per* Henry J. The original provisions in the Criminal Code of 1892, s.641(2) and (3) were derived from the English Draft Code of 1879, s.505, as to which Stephen wrote (*H.C.L.* i. 293–294): "The Criminal Code Commissioners of 1878–9 recommended that this Act [the Vexatious Indictments Act, 1859] should be applied to all indictments whatever, and that the power of secret accusation . . . should be taken altogether away." Under a proposed amendment to the Canadian Code, made known in a recent information paper released by the federal Minister of Justice in July 1983, only the appropriate Attorney General or Deputy Attorney General could consent to the preferring of a direct indictment by Crown prosecutors, *op. cit.* p. 5. No alterations are proposed in the procedure involving private prosecutors, *ibid.*

[56] *Ibid.* ss.505(1)(*b*) and 507 (1) and (2).

[57] *Ibid.* ss.505(1)(*b*) and 507(2).

his having jurisdiction in his own right to prefer an indictment.[58] Electing to proceed by the former route might be explained, in some situations, by the desire of an Attorney General not to risk further criticism in unilaterally re-activating a prosecution that failed to secure a committal by the examining justice.[59] There is a similar sensitivity evident in the accepted judicial view that "If the Attorney General has definitely refused to prefer, or to consent to the preferring of a charge, the court should hesitate to order or consent to the laying of the charge as to which his refusal has been made, and should refuse its order of consent when it is made to appear that the administration of justice is being prejudiced or jeopardised by the proper action of that officer who by custom, tradition and constitutional usage, as well as by law, is charged with the administration of justice in the province."[60] It is by virtue of the co-equal jurisdiction conferred upon the court in preferring indictments, under the provisions of sections 505 and 507 of the same Code, that in this instance a departure is justified from the fundamental proposition that the Attorney General's prosecutorial discretion is not examinable by any court but is subject to review by the legislature, to whom the Attorney General is answerable.[61]

[58] *Loc. cit.* For the Crown's right to indict under s.307(2) for offences disclosed by the evidence taken on a preliminary inquiry but for which the accused was not specifically charged, see *R.* v. *Chabot* [1980] 2 S.C.R. 985 and (1981) 23 Crim. L.Q. 454, and *R.* v. *McKibbon* (1982) 35 O.R. 124.

[59] *Cf., e.g.* the judicial positions taken in *R.* v. *Brooks* (1971) 6 C.C.C. (2d) 87 and *R.* v. *Murphy and Saik* (1972) 19 C.R.N.S. 236 with that expressed in *R.* v. *Nellis et al.* (1981) 64 C.C.C. (2d) 470. Even more calculated to arouse public criticism would be the situation canvassed in *Nellis* (*supra*) that: "There is nothing in the Criminal Code to prohibit the Attorney General from bringing a direct indictment *after* the Court has adjudicated on an application for consent. I do not see this possibility as being one intended by Parliament yet it could hardly be avoided in those circumstances where there is no indication the Attorney General is refusing to indict or is at least equivocal"—*ibid.* p. 476.

[60] *Re Johnson and Inglis et al.* (1980) 17 C.R. (3d) 250 at p. 261 *per* Evans C.J., High Court of Ontario (adopting the view previously expressed in *Maloney* v. *Fildes* (1933) 60 C.C.C. 7 at p. 13). *Cf.* the statement by Haultain C.J.S. in *R.* v. *Weiss* (1915) 23 C.C.C. 460, 463 " . . . there is nothing in the Criminal Code to prevent me from consenting to a charge being preferred by any person but I think that very strong reasons should be shown to justify me in taking such a step, in face of the deliberate action of the Crown authorities. If the evidence taken on the preliminary inquiry disclosed such a strong prima facie case against the accused as to suggest an abuse of his judicial discretion by the A.G., or an attempt to stifle a proper prosecution, I should have no hesitation about consenting to a charge being preferred."

[61] For a strong and unequivocal acceptance of the basic constitutional position see *Re Johnson and Inglis et al., supra* (at pp. 267–268), in the course of which the Chief Justice added: "This power to prosecute . . . must be distinguished from the s.507 power to grant a consent to the preferring of an indictment. This latter statutory power is given to both the Attorney-General and the court and is one which places them in positions of equality. While the court cannot interfere with the Attorney-General's exercise of his discretion, so too the Attorney General cannot interfere when a court sees fit to grant a consent. A court may, in exercising its discretion, choose to consider the position taken by the Attorney-General in any given case. This does not mean, however, that it must do so, or that if it does it is compelled to adopt his position. Our jurisdictions are and must remain separate but equal." 17 C.R. (3d) 268. This analysis, as Evans C.J., himself recognised (*loc. cit.*), is incomplete since there remains the residual power of the Attorney General to enter a stay to an indictment preferred with the approval of the court. The possibility of such a clash might be extremely remote but its implications cannot be ignored.

This principle of judicial deference to the Attorney General in matters pertaining to the institution of criminal prosecutions makes it totally unrealistic to contemplate the adoption in Canada and other Commonwealth countries of the law that now prevails in England and Wales in which, as we have seen, the leave of a High Court judge is the only route open to the Attorney General, the Director of Public Prosecutions or any private person who seeks to present a bill of indictment as the most expeditious procedure for commencing a trial on indictment. Until the Criminal Law Act 1967, there was always the possibility that the Attorney General could invoke his prerogative authority to file an *ex officio* information, the origins of which are traceable as far back as the reign of Edward I. A full account of this procedure's chequered history is set forth in my previous study.[62] The Divisional Court's condemnation in *R.* v. *Labouchere*[63] of the laxity with which, in the early part of the nineteenth century, the normal process of presentment and indictment was by-passed, exerted a powerful restraint upon holders of the office of Attorney General in resorting to their prerogative discretion of filing an *ex officio* information. The last recorded instance in which a criminal trial was launched in this manner was *R.* v. *Mylius* in 1910 when Sir Rufus Isaacs, as Attorney General, without resort to a preliminary inquiry, filed an *ex officio* information charging the accused with criminal libel against King George V.[64] This special privilege of the Attorney General survived the legislative scythe that, in the Administration of Justice (Miscellaneous Provisions) Act 1938, abolished outlawry proceedings, the exhibiting of articles of peace in the High Court, and criminal informations "other than informations filed *ex officio* by His Majesty's Attorney General."[65] The Criminal Law Revision Committee in its Seventh Report, observing that the procedure had not been used since 1911, described the Attorney General's prerogative right as "plainly unnecessary" and recommended that it should be abolished.[66] The final demise of the Attorney's *ex officio* information was effectuated in the Criminal Law Act 1967,[67] section 6(6) of which declared that "Any power to bring proceedings for an offence by criminal information in the High Court is hereby abolished." No voices in opposition to this move were raised during the passage of the Bill through Parliament. We must presume, therefore, that the Law Officers, as well as

[62] Edwards, *op. cit.* pp. 262–267.

[63] (1884) 12 Q.B.D. 320.

[64] *The Times*, February 2, 1911 and see Edwards, *op. cit.* p. 186 fn. 31 and also p. 266.

[65] 1 & 2 Geo. 6, c. 63, s.12.

[66] Cmnd. 2659, para. 63, the full extent of the Committee's treatment of the subject being contained in a single paragraph that reads as follows: "For misdemeanour, though not for felony, a person may be tried on a criminal information *ex officio* filed by a Law Officer instead of an indictment. This procedure has not been used since 1911, and it is plainly unnecessary and should be abolished."

[67] 1967, c. 58. Action to the same end in Canada had been taken in the revised Criminal Code 1955, s.488(2), and in New Zealand, by implication, under the provisions of the Crimes Act 1961, s.345—see Adams, *Criminal Law and Practice in New Zealand*, (2nd ed.), pp. 705–706.

past holders of those offices, were reconciled to the need to obtain the leave of a High Court judge as the most expeditious procedure for bringing accused persons speedily to trial.

One interesting postscript, from Australia, is the confirmation by its High Court in *Barton* v. *R.* in 1981[68] that *ex officio* informations (or *ex officio* indictments as they are there described) are alive and well in New South Wales in accordance with the powers conferred by the Westminster Parliament in the Australian Courts Act 1828.[69] This law was intended to confer upon the colonial counterparts the same prerogatives as those practised by the Attorney General of England.[70] Due note was taken in *Barton* of the abolition in 1967 of the English Attorney General's former

[68] *Sub nom. Gruzman* v. *A.G. for N.S.W. & Others* (1980) 32 A.L.R. 449.

[69] 9 Geo. 4 (U.K.), c. 83, s.5 of which provided "that until further provision be made as hereinafter directed for proceedings by juries, all crimes, misdemeanours, and offences, . . . shall be prosecuted by Information, in the name of His Majesty's Attorney General, or other officer duly appointed for such purpose by the Governor of New South Wales and Van Diemen's Land respectively." For a recent illustration, arising out of the Street Commission's findings dismissing allegations of interference with the course of justice against the Premier of N.S.W. (Mr. Wran) but leading to the laying of ex-officio indictments by the Attorney General (Mr. Landa) against the Commissioner of the N.S.W. Rugby League and a former chief stipendiary magistrate, see *The Australian*, October 19, 1983.

[70] Each of the Australian States has conferred upon its Attorney General a statutory power to file an indictment whether the accused person has been committed for trial or not. The language chosen to accomplish this purpose, however, displays the confusion that can arise in failing to keep distinct (1) the original common law power of the Attorney General of England to file an *ex officio* information in the Queen's Bench Division without a previous indictment and (2) the statutory power first created under the Vexatious Indictments Act 1859, that effectively controlled the right of any person to prefer an indictment before a grand jury by requiring, if no committal proceedings had taken place, "the direction or consent of a Judge or the Attorney General." For examples of this confusion see the Queensland Cr. Code, s.561: "Ex officio informations. A Crown Law Officer may present an indictment . . . for an indictable offence. . . . "—interpreted and commented upon in *R.* v. *Webb* [1960] Qd. R. 443 and *R.* v. *Johnson & Edwards* (1979) 2 A. Crim. R. 414; the Tasmanian Cr. Code, s.42: "A Crown Law Officer may, without leave, file an indictment (herein called an ex officio indictment) for any crime." The proper distinction is maintained in the Victoria Crimes Act between the power of the Attorney General, or Solicitor General or any prosecutor for the Queen in the name of a Law Officer, to make presentation for any indictable offence (s.353(1)) and the later provision that "Nothing herein contained shall in any manner alter or affect the power which the A.G. possesses at common law to file by virtue of his office an information in the Supreme Court etc.," (s.355), a clear reference to the transposition to Victorian law of the English *ex officio* information. The New Zealand Crimes Act, s.345 empowers "the A.G., or any one with the written consent of a judge of the Supreme Court or of the Att. Gen., to present an indictment for any offence." Adams, *Criminal Law & Practice in New Zealand*, (1971), unhesitatingly points to the historical connection between the above section in New Zealand's Criminal Code and the British Vexatious Indictments Act 1859, the principles of which were re-enacted for N.Z. in that country's Vexatious Indictments Act 1870, and subsequently incorporated into New Zealand's Criminal Code Act 1893. The present section 345 is essentially on a par with the Canadian provisions (Code ss.505 and 507) examined earlier, but Adams, *op. cit.* para 2755 is seriously wrong in claiming that "substantially the same result has been arrived at in England by section 2 of the Administration of Justice (Miscellaneous Provisions) Act, 1933." As we have seen (*ante*, pp. 434–435) the 1933 legislation in England effectively eliminated the former jurisdiction of the Attorney General and Solicitor General to direct or to grant leave for the preferment of an indictment, the exclusive control over this form of expedited procedure now resting in the hands of the judiciary.

privilege of filing an *ex officio* information in the Queen's Bench Division of the High Court, but there was no disposition to urge that similar action be instituted in the Australian legislative bodies. The remarkable feature of the High Court's decision was the lengths to which a majority of the justices were prepared to go in according the accused a fundamental right to have the prosecution present its case through a preliminary inquiry. No suggestion was made that the Attorney General's decision to commence a prosecution was examinable by the courts.[71] Rather, the approach was more indirect in its adoption of the position that "a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair."[72] According to the majority of the justices of the High Court: "It is for the courts, not the Attorney General, to decide in the last resort whether the justice of the case required that a trial should proceed in the absence of committal proceedings. It is not for the courts to abdicate that function to the Attorney General, let alone to Crown Prosecutors whom he may appoint . . . If the courts were to abdicate the function there is the distinct possibility that the *ex officio* indictment, so recently awakened from its long slumber, would become an active instrument, even in cases in which it has not been employed in the past, notwithstanding the criticism which has been directed to it and the assertions of commentators that it was appropriate for use of in a very limited category of cases."[73] Reconciliation of the two principles adumbrated by the High Court of Australia is to be found in the unanimous assertion that, notwithstanding the non-reviewability of the Attorney General's decision to launch the prosecution, the courts may postpone or stay the ensuing trial on indictment in circumstances where such action is necessary to prevent an abuse of process and ensure a fair trial for the accused person.[74]

Stephen and Wilson JJ., refused to subscribe to the theory that a prima facie case of abuse of process would arise whenever the accused was denied the essential prerequisite of committal proceedings.[75] The detriments associated with a preliminary hearing, they maintained, could be overcome by resort to speedier and less cumbersome forms of pre-trial discovery.[76]

[71] (1981) 32 A.L.R. 449 at pp. 455–459. The High Court rejected the contrary view advanced by Fox J. in *R.* v. *Kent, ex p. McIntosh* (1970) 17 F.L.R. 65, and overruled that decision.

[72] *Ibid.* at p. 463, *per* Gibbs and Mason JJ.

[73] *Ibid.*

[74] *Ibid.* at p. 459 (*per* Gibbs and Mason JJ.) and at p. 465 (*per* Stephen J.).

[75] *Ibid.* at pp. 466 and 470.

[76] Murphy J., in lending his support to the views of Stephen and Wilson J., cited with approval J. Seymour, *Committal for Trial, An Analysis of Australian Law Together with an Outline of British and American Procedures*, (Australian Institute of Criminology, 1978), a study to which the present writer is also indebted. In Canada, likewise, there are distinct signs that the preliminary hearing, with the taking of depositions, is destined to be replaced by procedures analogous to those of "section 1 committals" under the English Criminal Justice Act 1967. The abolition of committal proceedings, described as "a cumbersome and expensive vehicle for obtaining discovery," was recommended by the Law Reform Commission of Canada in 1974, *Working Paper No. 4 on Discovery*. A somewhat more

In each jurisdiction, except New South Wales, it is possible for th committal to rest on written statements. And in four of the Australia states, Victoria, Queensland, Tasmania and Western Australia, what i tantamount to the English procedure of "section 1 committals" (under th Criminal Justice Act 1967) is already in place.[77]

This attention to the Australian High Court's ruling in the *Barton* case : less important for the actual decision, that pertains to the unique characte of New South Wales law, than the deeper issues it explores in connectio with the court's role in examining the prosecutorial discretion exercised b the Attorney General. We have seen that the Australian justices adhere closely to the constitutional separation of powers doctrine that impels th English courts likewise to reject any jurisdiction by way of reviewing th Attorney General's decision to institute criminal proceedings,[78] to enter *nolle prosequi*, to seek an injunction to prevent the commission c repetition of a serious offence, or the Director's intervention to take over private prosecution and to end the proceedings by offering no evidenc The same general principles govern the approach of the Canadian courts i declining to become too closely involved, except when required to do so b express statutory provision, in questions that will decide whether prosecution should be commenced.[79] When the ultimate function of th court is to determine the accused's guilt or innocence it is rightly conclude that the judges should not be seen to be associated with the initial step c allowing the prosecution to take place. The broad consistency of th judicial approach to this problem is departed from in dramatic fashic under present English law when the issue of approving the presentment c a bill of indictment, without resort to a committal hearing, is conferre exclusively upon a judge of the High Court.

This extraordinary jurisdiction is of moderate antiquity dating back t the Vexatious Indictment Act 1859, and it is doubtful whether its exercis has ever been so frequently resorted to as in the turbulent years of recer memory. The elimination in 1933 of the former concurrent jurisdiction c the Attorney General and the Solicitor General to grant leave in th regard may well have been dictated by the desire to provide safeguarc against the abuses associated with the filing of *ex officio* informations in th eighteenth and nineteenth centuries. In remedying one possible ground c public dissatisfaction with the criminal process, Parliament may unwittin ly have laid the foundations for a future conflict of purpose between th judiciary and the Law Officers of the Crown.

cautious approach, recommending a period of voluntary experimentation with a pre-tri disclosure system prior to the enactment of reform legislation, is reflected in the report of t influential Ontario committee on preliminary hearings 1982, chaired by Mr. Justice G. Arth Martin, Ontario Court of Appeal.

[77] *Ante*, fn. 76.

[78] *Ante*, fn. 71.

[79] *Ante* fnn. 60 and 61.

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is a matter for the judge; that it is thereafter unnecessary to leave the same matters to the jury; but that the jury should be told that what weight they attach to the confession depends on all the circumstances in which it was taken, and that it is their right to give such weight to it as they think fit.

That was exactly what this chairman did, and in the opinion of this court, if he did not leave the matter to the jury in the way that previously judges have done, that is a matter on which he was fully justified having regard to the recent decision.

[His Lordship considered the other grounds of appeal, which do not call for a report, found that there were no grounds for interfering with the verdict, and continued:]

The court would like to say this. Their attention has been drawn to the fact that some inquiry is pending in regard to the allegations that have been made by the defendant, allegations which could have been made at the trial as well, into the conduct of Detective Constable Symonds. The court has no knowledge as to what the truth of that matter is, and of course they have decided this appeal on the evidence before them. Should anything hereafter turn out which would throw doubt on the evidence of Symonds or any other police officer in the case, then, as is well known, the defendant may petition the Home Secretary, and the Home Secretary has the power, if he so desires, to refer the matter once again to this court.

Appeal dismissed.

Solicitors: *Sotheby & Co.; Solicitor, Metropolitan Police.*

S. S.

[COURT OF APPEAL]

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LORD DENNING M.R., SALMON and EDMUND DAVIES L.JJ.

REGINA
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COMMISSIONER OF POLICE OF THE METROPOLIS, *Ex parte* BLACKBURN

Court of Appeal—Jurisdiction—Criminal cause or matter—Mandamus—Order directing Commissioner of Police of Metropolis to reverse decision not to enforce law—Whether "criminal cause or matter"—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 31 (1) (a).

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Crown Practice—Mandamus—Commissioner of Police of Metropolis—Whether order available to compel performance of duty—Enforcement of betting and gaming statute—Whether private citizen sufficient interest.

Metropolis—Police—Commissioner—Status—Duty of law enforcement—Whether owed to public—Responsibility—Whether answerable to law alone—Whether mandamus available to compel performance of duty—Discretion not to prosecute—Power to make policy decisions—Whether absolute.

*Police—Duties—Law enforcement—Commissioner of Police of Metropolis—Whether duty of law enforcement owed to public—Whether performance of duty compellable—Enforcement of duty—Whether mandamus available—Discretion not to prosecute—Power to make policy decisions—Whether discretion absolute—Policy decision not to enforce Gaming Acts—Whether mandamus available to secure reversal of decision—Betting, Gaming and Lotteries Act, 1963 (c. 2), s. 32 (1) (a).**

Gaming—Game of chance—Odds favouring banker—Duty of police to prosecute.

As a consequence of a policy decision made in April, 1966, by the respondent, the Commissioner of Police of the Metropolis, the police did not attempt to enforce section 32 (1) (*a*) of the Betting, Gaming and Lotteries Act, 1963, in gaming clubs in London. The applicant, a private citizen, complained that illegal gaming was being carried on, and applied to the Divisional Court for, inter alia, an order of mandamus directing the respondent to reverse the policy decision. The application was refused and the applicant appealed to the Court of Appeal. In December, 1967, the respondent orally announced a new policy of enforcing, and steps were taken to enforce, section 32 (1) (*a*) of the Act, and he undertook on appeal that the policy decision of April, 1966, would be officially revoked.

On the contentions that the respondent owed no duty to the public to enforce the law and had an absolute discretion not to prosecute, and that the appeal was in a criminal cause or matter within section 31 (1) (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925,[1] so that the court was without jurisdiction in the appeal:—

Held, (1) that the respondent owed a duty to the public to enforce the law (post, pp. 136A, 138G, 148G—149A) which he could be compelled to perform (post, pp. 136G, 138G, 148G—149A); that (*per* Lord Denning M.R. and Salmon L.J.) while he had a discretion not to prosecute his discretion to make policy decisions was not absolute (post, pp. 136D, F, 139A); but that, since the respondent had undertaken to revoke the policy decision of April, 1966,

* Betting, Gaming and Lotteries Act, 1963, s. 32 (1): ". . . gaming shall be lawful if, but only if . . . (*a*) . . . (i) the chances in the game are equally favourable to all the players; or (ii) the gaming is so conducted that the chances therein are equally favourable to all the players . . ."

[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1): "No appeal shall lie (*a*) . . . from any judgment of the High Court in any criminal cause or matter . . ."

and had taken steps to enforce section 32 (1) (*a*) of the Act, and more could not be reasonably be expected, no order should be made on the appeal (post, pp. 138B, 145D, 147C).

Fisher v. *Oldham Corporation* [1930] 2 K.B. 364; 46 T.L.R. 390; and *Attorney General for New South Wales* v. *Perpetual Trustee Co. Ltd.* [1955] A.C. 457; [1955] 2 W.L.R. 707; [1955] 1 All E.R. 846, P.C. considered.

Mills v. *Mackinnon* [1964] 2 Q.B. 96; [1964] 2 W.L.R. 363; [1964] 1 All E.R. 155, D.C., doubted.

(2) That the reversal of the policy decision was not "a criminal cause or matter" within section 31 (1) (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925, (post, pp. 134F, 145B, 147F–G), and accordingly, the Court of Appeal had jurisdiction to hear the appeal.

Ex parte Alice Woodhall (1888) 20 Q.B.D. 832, C.A. and *Amand* v. *Home Secretary* [1943] A.C. 147, considered.

Quaere: Whether the applicant had a sufficient interest to be protected by mandamus (post, pp. 137C, 145C 149A).

APPEAL from Divisional Court (Lord Parker C.J., Winn L.J. and Widgery J.).

On April 22, 1966, an instruction was issued from the office of the Commissioner of Police of the Metropolis, the respondent, by the assistant commissioner of "A" department, to senior officers of the Metropolitan Police in the following terms:

> "Confidential Instruction. Gaming in registered or licensed clubs. For the time being all applications for authority for an inside observation in licensed or registered clubs for the purpose of detecting gaming are to be submitted to A.1. branch for my covering approval. . . ."

By affidavit sworn in June, 1967, Robert Alfred Bearman, assistant secretary, A.1. branch, administration department, New Scotland Yard, stated as follows:

> "It is a fact that in April, 1966, the then assistant commissioner 'A' department ordered as a matter of policy that no observations by police were to be kept in licensed or registered clubs for the purpose of detecting offences under the Betting, Gaming and Lotteries Act [1963] without his covering approval. . . . I was informed verbally by the assistant commissioner referred to, who is now the deputy commissioner, that he considered that in view of the uncertainty of the law, the expense and manpower involved in keeping gaming observations in such clubs were not justified unless there were complaints of cheating or reason to suppose that a particular club had become the haunt of criminals. At the time when this decision was taken the Kursaal case [*Kursaal*

Casino Ltd. v. *Crickitt*[3]] . . . was believed to be going to the House of Lords on the point certified by the Divisional Court. Had this been decided in favour of the prosecution, it was felt that roulette and other games where the bank had an advantage would have been clearly illegal and would, therefore, have come to an end in any reputable clubs or have been very easy to detect and prosecute. . . ."

As a consequence, police observation was stopped, and the police did not attempt to enforce section 32 (1) (*a*) of the Act of 1963 in large gaming clubs in London.

In 1966 the applicant, Albert Raymond Blackburn, a private citizen, alleged to the respondent that illegal gaming was taking place in casinos in London. By letter dated March 15, 1967, he repeated the allegation that in virtually every London casino games were played which manifestly contravened the provisions of section 32 of the Act of 1963 in that the bank had a permanent advantage and roulette with a zero was being played, he named two clubs, and asked for assistance by the respondent in enforcing the provisions of the Act of 1963.

On March 21, 1967, the applicant was informed by Robert Alfred Bearman that there were difficulties in enforcing the provisions of the Act of 1963, that the way in which police manpower was used was a matter for the respondent's discretion, that it was felt that, as the gaming law stood, there were higher priorities for the deployment of manpower, and reference was made to the policy decision of April 22, 1966.

On July 11, 1967, the applicant in person moved the Divisional Court for an order of mandamus directed to the respondent in the following terms:

> "requiring him to assist the applicant and such other persons as may have good grounds for requesting his assistance in the prosecution of gaming clubs in the metropolitan police area which contravene the provisions of the [Betting] Gaming [and Lotteries] Act, 1963; and in particular to assist the applicant in respect of the complaint lodged by him with the [respondent] on March 21, 1967, concerning the Golden Nugget Club, Piccadilly; and requiring him to reverse or procure the reverse of the policy decision [dated April 22, 1966] taken by him or his superiors that the time of police officers will not be spent on enforcing the provisions of the Act of 1963."

The application was supported by a written statement of the

[3] [1966] 1 W.L.R. 960; [1966] 2 All E.R. 639, D.C.

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applicant's submissions. The Divisional Court refused the applicant's motion with costs.

The applicant appealed on the grounds, inter alia, that the decision was contrary to law and should be reversed. The respondent gave notice that, in addition to grounds relied on by the Divisional Court, the decision should be affirmed on further grounds as follows:

> "That as a matter of law an order of mandamus will not issue against a chief officer of police in respect of any of the matters set out in the applicant's notice of motion and statement because (a) the respondent has no legal duty to the applicant in regard to any of those matters, and (b) each one of the matters is a matter lying only within the discretion of the respondent; that the order of mandamus which the applicant seeks would amount either directly or indirectly to an order to prosecute certain persons both specified and ascertainable, and as a matter of law an order of mandamus will not issue for such latter purpose; that an order of mandamus ought not to issue as there are alternative remedies available to the applicant in that he might himself (a) lay informations, or (b) apply for voluntary bills of indictment."

The respondent also gave notice of intention to rely upon the additional ground that the court had no jurisdiction to hear the appeal since it was in a criminal cause or matter within section 31 (1) (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925.

On December 19, 1967, judgment in the appeal to the House of Lords in *Kursaal Casino Ltd.* v. *Crickitt (No. 2)*,[a] was given and consequent on that decision police officers made visits to London gaming clubs.

On December 30, 1967, the respondent issued a statement in the following terms: "It is the intention of the Metropolitan Police to enforce the law as it has been interpreted."

At the hearing of the appeal the applicant abandoned his application for orders directing the respondent to assist him and others in the prosecution of gaming clubs, and in particular to assist him in respect of the named club. He adduced evidence about practices in the Golden Nugget Casino Club and the Victoria Sporting Club.

The respondent produced schedules of prosecutions under section 32 of the Act of 1963, for 1964, 1965 and 1966, and by counsel undertook that the policy decision of April 22, 1966,

[a] [1968] 1 W.L.R. 53; [1968] 1 All E.R. 139, H.L.(E.).

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would be revoked. The court was informed that reports by police officers on gaming in big clubs in London were to be referred to the Director of Public Prosecutions.

Further facts are stated in the judgments.

The applicant in person. Three questions arise on this appeal, namely, first, whether appeal lies to this court under section 31 (1) (*a*) of the Judicature Act, 1925; secondly, whether mandamus will issue against a chief officer of police for failure to enforce the law; and, thirdly, whether mandamus should issue since it has been suggested that, if the applicant had sufficiently strong feelings, a private prosecution could be brought by way of laying information or application for voluntary bills of indictment. These are technical questions, and it is not suggested that the applicant has a clear-cut case on the technicalities.

Mandamus will issue against the respondent for the following reasons. In relation to duties of law enforcement the police are not responsible to the Secretary of State for Home Affairs or to police authorities. The views of the Government as stated in 1958 were that the full responsibility for enforcement is a matter which is reserved entirely to the chief officer of police; in the exercise of this responsibility he is answerable to the law alone and not to any police authority: *per* Lord Chesham, Hansard, 213 H.L.Deb. 58, col. 7. The Secretary of State for Home Affairs cannot give orders to the respondent or to other members of the force with regard to their duty of enforcing the law: The Home Office, by Sir Frank Newsam (1954), p. 45. It follows that, if the police are not responsible to the courts for the discharge of duties "faithfully according to law" (to quote the oath of police officers), they are responsible to no one. The police are under the law, and it is the law which is the policeman's master: Public Administration, by Sir John Anderson (1929), p. 192. A chief officer of police can, and should, be made the subject of an order of the court where he issues orders or makes policy decisions which are manifestly illegal and ultra vires, or if he is guilty of persistent and serious failure to ensure that the law is enforced in relation to any significant part of the law, and seeks to usurp the function of the judges as sole interpreters of the law who alone may declare a statute vague, ambiguous and unenforceable. The court has a wide discretion, and it is important to rule that the police are responsible to the court for the duty of law enforcement. Mandamus is the only practical remedy for enabling such matters to come before the court.

The facts show that the respondent has failed to enforce the law. The policy decision of April, 1966, is illegal and ultra vires section 5 of the Metropolitan Police Act, 1829. The law is not, and has not been, uncertain in section 32 (1) (*a*) of the Betting, Gaming and Lotteries Act, 1963: *Kursaal Casino Ltd.* v. *Crickitt* (*No. 2*).[4] Because of failure to enforce the law the country has become a gambler's paradise: *per* the Secretary of State for Home Affairs in "The Times" newspaper, September 13, 1966. The Act of 1963 failed to achieve its purpose because of failure to enforce it: "The Times" newspaper, January 2, 1968.

This appeal is not within section 31 (1) (*a*) of the Judicature Act, 1925, in that the words "criminal cause or matter" therein refer to a breach of law where an act is illegal or criminal and where a prosecution has been or is about to be brought or is pending. No criminal cause or matter is even pending here.

As to a private prosecution. The applicant is a private citizen and feels strongly about individual freedom. An indictment of the respondent by a private citizen is not a proceeding he could be expected reasonably to undertake. A private citizen is not now the proper person to undertake the duty of general law enforcement. The applicant does not wish to bring a private prosecution. In so far as the respondent claims that he owes no duty to the public to enforce the law the claim is made to the possession of power without responsibility. This matter is fundamental to the status of the police as a whole.

Michael Worsley for the respondent. The submissions for the respondent may be summarised as follows. The order is applied for in a criminal cause or matter in which section 31 (1) (*a*) of the Judicature Act, 1925, deprives the court of jurisdiction. Alternatively, if that submission is wrong, the submission is as follows. As a matter of law an order of mandamus will not issue against the respondent in respect of any matter set out in the notice of motion because, first, the respondent has no legal duty to the applicant in regard to any of the matters complained of; and, secondly, each of the matters lies only within the discretion of the respondent. Further, the order sought would amount either directly or indirectly to an order to prosecute certain persons both specified and ascertainable. As a matter of law mandamus will not issue for the latter purpose. Mandamus ought not to issue because the applicant has the remedies of laying informations or applying for voluntary bills. Lastly,

[4] [1968] 1 W.L.R. 53.

having regard to what, on instructions, the court will be told has been done, is being done and will be done by the respondent's department, mandamus ought not to issue.

No proceedings will lie by which a private person may compel the respondent to prosecute or assist in prosecuting or to reverse his policies, which is what it is sought to do here. The respondent has no duty to prosecute and owes no duty to the applicant.

[LORD DENNING M.R. Suppose a chief officer of police were to say "I do not like this Act, I shall not enforce it, and I am supported by my watch committee," what is there to compel him to prosecute?]

The status of the respondent differs from that of a chief constable. A chief constable is now provided for by the Police Act, 1964, and the Secretary of State for Home Affairs has power to require him to retire. The status of the respondent derives from the Metropolitan Police Act, 1829, s. 1, as amended by the Metropolitan Police Act, 1856, s. 1. He is appointed by, holds office during pleasure of, and may be dismissed by the Crown which would probably act on the advice of the Secretary of State for Home Affairs. The respondent has the status of a justice of the peace, takes the oath of a justice but does not sit judicially, and has all the duties of a justice for keeping the peace. He is not attested as a constable. The Secretary of State for Home Affairs has power to set up a local inquiry to inquire into the policing of any area and so is in a position to advise the Crown; the power is to be found in the Police Act, 1964, s. 32 (1), s. 62, and Sch. 8. At any such inquiry no doubt the respondent could be heard. No sanction other than dismissal can be found as against a chief officer of police himself. Any constable under him is subject to disciplinary regulations: section 33 of the Police Act, 1964. Mandamus is not available to compel the respondent to prosecute; and, except perhaps by some extra-legal means such as persuasion, he cannot be forced to prosecute because he has no duty to prosecute. The only place in which a duty might be said to originate is the oath of a justice which the respondent takes on his appointment; however, this is peculiar to him and is not taken by chief constables. In any event he has not the forces available to enforce all the laws all the time. It is conceded that mandamus will lie against a justice of the peace in respect of a judical duty and provided that an applicant is a person to whom the duty is owed.

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. Is 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. Unlike the position in most other countries, and especially on the continent, the police are in the same position as all other subjects of the Crown in regard to the bringing of prosecutions: Stephen's History of the Criminal Law of England (1883), vol. I, p. 493. The absence of the existence of any duty to prosecute is correlative in law and practice with the right of all citizens to prosecute. The respondent adopts as part of his submissions The Office and Duties of the Director of Public Prosecutions, by Sir Theobald Mathew (1950), pp. 3 to 13. Until 1829 there was no legal duty to prosecute other than the general duty on all persons to prosecute such malefactors as they might have evidence against. The Metropolitan Police Act, 1829, was the foundation of all modern legislation on the police. No duty to prosecute is imposed thereby on the police. No statute and no common law decision is to be found imposing a legal duty to prosecute. In practice the police frequently do prosecute; but they assume as a matter of practice the job of prosecuting. If any duty to prosecute exists in the respondent it is owed to the Crown whose servant he is; it is not owed to any member of the public: *Reg.* v. *Lewisham Union Guardians.*[8]

[EDMUND DAVIES L.J. Is not legislation contemplated to abolish the capacity of a private citizen to prosecute?]

If such legislation were to be introduced the whole history, law and practice would have to be reviewed and the question considered whether the Director of Public Prosecutions or the police should have a duty to bring prosecutions. It would be wrong to abolish the private right to prosecute without taking those matters into account.

Although no strict legal duty to prosecute exists in the respondent, provision is made for communicating information about certain offences to the Director of Public Prosecutions: see The Prosecution of Offences Regulations 1946 (S.R. & O. 1946, No. 1467/L.17). The Director of Public Prosecutions is under the general superintendence of the Attorney-General who is answerable to Parliament.

[8] [1897] 1 Q.B. 498.

The foregoing submissions may be summarised by saying that until 1892, when the foundation of modern police forces began, there was no legal duty on any particular person to prosecute, and since then there has been no common law or statutory provision imposing a duty on the police to prosecute, and there has been nothing since then apart from a mere practice in the majority of cases.

Ex parte Napier[6] is the fons et origo of recent learning on mandamus and shows that the substratum on which mandamus rests is a common law, a contractual or a statutory duty, and that practice does not amount to a legal obligation. The authorities are: *Reg.* v. *Lewisham Union Guardians*[7]; *Grant* v. *Secretary of State for India in Council*[8]; *Reg.* v. *Secretary of State for War*[9]; *Reg.* v. *Caledonian Railway Co.*[10] and *Reg.* v. *Commissioners of Inland Revenue, Ex parte Nathan.*[11] *Julius* v. *Bishop of Oxford*[12] shows the kind of interest an applicant has to have and the duty there has to be towards him in particular as distinct from a duty to the public in general.

As to the respondent's discretion. When the respondent considers the question of prosecution he has to take many factors into account, including the manner of deployment of the forces available to him, and he has a discretion how, when and for what purpose to use those forces. He cannot be under a duty to prosecute willy nilly either in a particular case or in a particular class of cases; for example, some people think that the police ought to enforce the speed limit more strictly, and others think likewise about the Litter Act, 1958; but, if the police were to attempt to enforce those provisions of the law as strictly as possible, very few policemen would be left to perform other duties. His discretion is similar to that of the Director of Public Prosecutions who rightly has a general policy in regard to, and rarely prosecutes in, certain classes of offences such as perjury and unlawful sexual intercourse by young persons.

The earlier words in the mandamus sought may be interpreted in one of two ways, namely, first, in substance, mandamus to prosecute, and secondly, literally, mandamus to assist the applicant and others to prosecute. As to the first, mandamus will not issue to order any person to prosecute: *Reg.* v. *Southampton Port Commissioners, Ex parte Southampton Burgesses*[13]; *Elwood* v.

[6] (1852) 18 Q.B. 692.
[7] [1897] 1 Q.B. 498.
[8] (1877) 2 C.P.D. 445.
[9] [1891] 2 Q.B. 326, C.A.
[10] (1850) 16 Q.B. 19.
[11] (1884) 12 Q.B.D. 461.
[12] (1880) 5 App.Cas. 214, 225, 226, 227, 230, 244.
[13] (1862) 1 Best & Sm. 5; (1870) L.R. 4 H.L. 449.

Belfast Corporation.[14] As to the second, the terms of the application are too general in that, if mandamus were to issue, the respondent would be ordered to assist not only the applicant but also anybody in the land choosing to request assistance in the prosecution of almost anybody else for gaming. The words are bad for generality as imposing an impossibly wide duty on the respondent.

The order sought cannot be served, and if any part of the mandamus sought is in "a criminal cause or matter" the order will not issue: *Rex v. Governor of Brixton Prison, Ex parte Savarkar.*[15] If, on the other hand, severance is possible now that rules of pleading are less strict than used to be the case, what is left is an application for mandamus to assist the applicant and others in the prosecution generally of gaming clubs and one in particular which has been named. Clearly then the application is in a criminal cause or matter: *Provincial Cinematograph Theatres Ltd.* v. *Newcastle-upon-Tyne Profiteering Committee,*[16] *per* Lord Sumner,[17] as interpreted in *Amand* v. *Home Secretary*[18] and especially by Lord Porter.[19]

The application is made in a criminal cause or matter. The point is taken out of duty to the court. The authorities are: *Ex parte Alice Woodhall*[20]; *Ex parte Pulbrook*[21]; and the *Provincial Theatres* case.[22]

The application is unprecedented.

The point about alternative remedies available to the applicant is made not in an attempt on behalf of a public officer to strain a technicality but following the lead given by Lord Parker C.J. on the applicant's ex parte application for leave and in the judgment appealed against.

On the facts the respondent has brought prosecutions under the Act of 1963 from 1964 to 1967 and has taken action since December 19, 1967, when the decision was given in *Kursaal Casino Ltd.* v. *Crickitt (No. 2).*[23] Since the policy direction of April 22, 1966, has been withdrawn orally and the respondent is prepared to undertake that not only will that direction be withdrawn in writing but that it will be replaced with fresh written instructions to accord with the new policy as announced following *Kursaal Casino Ltd.* v. *Crickitt (No. 2),*[24] in all the

[14] (1923) 57 Ir. L.T. 138.
[15] [1910] 2 K.B. 1056, C.A.
[16] (1921) 27 Cox C.C. 63; 37 T.L.R. 799, H.L.
[17] (1921) 27 Cox C.C. 63, 67, 68.
[18] [1943] A.C. 147, H.L.
[19] Ibid. 164.
[20] (1888) 20 Q.B.D. 832.
[21] [1892] 1 Q.B. 86.
[22] 27 Cox C.C. 63.
[23] [1968] 1 W.L.R. 53.

circumstances, both on the merits and in law, it would be wrong for the court, if it has jurisdiction, to order the writ to go.

The applicant in reply: *Kursaal Casino Ltd.* v. *Crickitt (No. 2)*[25] shows that the law as it appeared from *Kursaal Casino Ltd.* v. *Crickitt*[26] was sufficiently strong for enforcement, and did not justify inaction by the respondent.

Submissions in reply should be made on general principles. Whatever the outcome of the appeal the court is invited to rule on two matters, namely, first, whether on the facts the respondent has failed or otherwise to enforce the provisions of section 32 (1) (*a*) of the Act of 1963, and, secondly, on the claim made for the respondent that he has no duty to the public to enforce the law but has merely an unenforceable responsibility to the Crown.

It is accepted that this application is unprecedented. The respondent has a duty to assist in prosecution for contravention of the Act of 1963 because the special position of the police is recognised by section 51 of the Act in that a search warrant is obtainable exclusively by a police officer. What it is sought to do by the appeal is to ensure enforcement of the provisions of section 32 (1) (*a*). So much of the application as relates to an order directing assistance in prosecution is withdrawn.

Much of the argument for the respondent was directed to the proposition that he has power without responsibility. The court does not accept the view that such power exists. Those submissions may be described as arguments which might have been put with force to the Court of Star Chamber: see *Liversidge* v. *Anderson,*[27] where Lord Atkin said[28]: ". . . arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I." *England* v. *Davidson*[29] is authority for the proposition that performance by a police officer of his public duty furnishes no consideration for a reward offered for his services; accordingly he owes a duty to the public and not merely to the Crown as contended on behalf of the respondent.

If the court is able to control an unquestionably improper policy decision made by a chief officer of police, it follows that some remedy must be available against him. The court has inherent jurisdiction to act; it cannot act ex proprio motu. If there is no remedy, then there is no right; ubi remedium ibi jus, and the converse. The court is invited to vindicate the rule

[24] [1968] 1 W.L.R. 53.
[25] [1966] 1 W.L.R. 960; [1966] 2 All E.R. 639, D.C.
[26] [1942] A.C. 206, H.L.
[27] Ibid. 244.
[28] (1840) 11 Ad. & El. 856; 3 Per. & Dav. 594; 9 L.J.Q.B. 287.

on law and to show in the language of *Tzortzis* v. *Monark Line*,** *per* Salmon L.J.** that the law and its administration in this country has not been devalued.

LORD DENNING M.R. Mr. Blackburn, the applicant, moves for a mandamus against the Commissioner of Police of the Metropolis, the respondent. He says that it was the commissioner's duty to enforce the law against gaming houses: and he has not done it. He seeks an order to compel the commissioner to do it. This motion, thus made, raises questions of constitutional significance. I will deal with them separately.

1. The Law as to Gaming houses

The common law of England has always condemned gaming-houses. This is not because gambling is wicked in itself, but because of the evils attendant on it. Hawkins in his Pleas of the Crown (Book I, c. 75, s. 6, 1716 ed. p. 198) says . . .

> ". . . all common gaming houses, are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood."

The statute law of England has likewise condemned gaming-houses. As early as 1541 in the time of Henry VIII (33 Hy. 8, c. 9, para. 11) Parliament enacted that no person should for his gain keep a gaming-house. The reason then was because gambling disturbed the military training. It distracted the young men from practising archery which was needed for the defence of the country. Several statutes have been passed since. All of them condemned gaming houses because of the mischiefs attendant on them.

When roulette was first introduced over two hundred years ago, Parliament tried to stop it. A statute of 1744 (18 Geo. 2, c. 34), recited that the "pernicious game called roulet, or roly-poly" was practised. It prohibited any person from keeping any house for playing it.

But all those statutes proved of no avail to prevent the mischief. Blackstone (Commentaries, Book IV, c. 13, s. 8, 8th ed., 1778, pp. 171, 173) said that the legislature had been careful to pass laws to prevent "this destructive vice," but these laws had failed

** [1968] 1 W.L.R. 406; [1968] 1 All E.R. 949, C.A.

** [1968] 1 W.L.R. 406, 414; [1968] 1 All E.R. 949, C.A.

to achieve their object. The reason for the failure was because the gamblers were too quick-witted for the law to catch them. He said (Commentaries, Book IV, c. 13, 8th ed., p. 173) that ". . . the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another." So much so that by the beginning of the nineteenth century gaming-houses were a scandal. The Victorian legislation, aided by the Victorian judges in *Jenks* v. *Turpin*,[1] reduced the evil but did not exterminate it.

History has repeated itself in our own time. Parliament made an attempt in 1960 to put the law on a sound footing. It had before it the Report (1949–1951) of the Royal Commission (Cmd. 8190) on the subject. The report drew a clear distinction between promoters who organised gaming for their own profit (which was an evil) and those who arranged gaming for the enjoyment of others without making a profit out of it themselves (such as gaming in a members' club, which was innocent). The Royal Commission (Cmd. 8190, p. 125, para. 412) thought that "the main object of the criminal law should be to prevent persons being induced to play for high stakes for the profit of the promoter." They recommended legislation to achieve this object. The draftsmen set to work and produced the Bill which became the Betting and Gaming Act, 1960, since re-enacted in the Betting, Gaming and Lotteries Act, 1963. The old common law was abolished. The old statutes were repealed. New sections were enacted with the intention of ensuring that promoters did not make high profits out of gaming, either in clubs or elsewhere.

These sections have lamentably failed to achieve their object. Just as in Blackstone's time, so in ours. The casino companies have set up gaming houses and made large profits out of them. They always seem to be one device ahead of the law. The first device they used after the Act of 1960 was to levy a toll on the stakes. They used to promote roulette without a zero and demand sixpence for themselves on every stake. That device was declared unlawful in *Quinn* v. *Mackinnon*.[2] Next, they claimed that they could take sixpence from every player on every spin of the wheel. That device too was held to be unlawful in this court in *Allan (J. M.) (Merchandising) Ltd.* v. *Cloke*.[3] Then they claimed

[1] (1884) 13 Q.B.D. 505, D.C.

[2] [1963] 1 Q.B. 874; [1963] 2 W.L.R. 391; [1963] 1 All E.R. 570, D.C.

[3] [1963] 2 Q.B. 340; [1963] 2 W.L.R. 899; [1963] 2 All E.R. 258, C.A.

that they could charge every player 10 shillings for every 20 minutes. That too was found to be unlawful in *Kelland* v. *Raymond*.[4]

But one of their devices at this time succeeded. It was in chemin-de-fer. The promoters charged every player £5 for every "shoe" which took about 35 minutes. This was held to be lawful in *Mills* v. *Mackinnon*.[5] I must say I doubt that decision. I should have thought that £5 for every 35 minutes was worse than 10 shillings every half hour. At any rate, it is more profitable.

After those cases, the casino companies thought out a new device which proved to be far more profitable. They promoted roulette with a zero. This is a game in which the chances over a long period mightily favour the holder of the bank. Under this new device, the organisers so arranged things that they themselves nearly always held the bank. But they claimed it was lawful because the croupier every half hour "offered the bank" to the players. Very rarely, if ever, was the offer accepted: for the simple reason that it may be ruinous to hold the bank for only a few spins of the wheel. It is only worth holding if you can hold it for a long time, such as a week or a month. Nevertheless the organisers claimed that this "offer of the bank" rendered the gaming lawful. They were supported, we were told, by the opinion of some lawyers in the Temple, but there were conflicting views. At any rate, this device was highly profitable. For a time it was surprisingly successful, provided it was skilfully worked. It was not worked very skilfully in the first two cases: and the casino companies were convicted, one in Blackpool, *Casino Club (Bolton) Ltd.* v. *Parr*,[6] and the other in Southend, *Kursaal Casino Ltd.* v. *Crickitt*.[7] But this device was worked skilfully in the third case, and the casino company was acquitted in the Divisional Court in *Kursaal Casino Ltd.* v. *Crickitt (No. 2)*.[8] That case has, however, recently been overruled by the House of Lords.[9] The device of "offering the bank" will no longer work.

But the casino companies do not seem to be unduly worried. They have not stopped their gaming. They have put on their thinking-caps and brought out another device. They do not trouble now to "offer the bank" to a player. They give a winner two kinds of chips, ordinary chips on which he collects his

[4] [1964] 2 Q.B. 108; [1964] 2 W.L.R. 662; [1964] 1 All E.R. 564, D.C.
[5] [1964] 2 Q.B. 96; [1964] 2 W.L.R. 363; [1964] 1 All E.R. 155, D.C.
[6] (1966) 64 L.G.R. 155, D.C.
[7] [1966] 1 W.L.R. 960; [1966] 2 All E.R. 639, D.C.
[8] [1967] 1 W.L.R. 1227; [1967] 3 All E.R. 360, D.C.
[9] [1968] 1 W.L.R. 53; [1968] 1 All E.R. 139, H.L.(E.).

winnings, and special chips which he throws back. No doubt they hope that the same will happen with this device as with the others. It will have to be tested in the courts. Meanwhile they expect to carry on with their gaming. If this is then held to be unlawful, they will try to think of another device. And so on ad infinitum: at least they may think so.

What are the consequences? They were stated with striking clarity by the Secretary of State for Home Affairs, Mr. Roy Jenkins, in "The Times" newspaper of September 13, 1966. He is reported as saying:

> "The Betting and Gaming Act, 1960, has led to abuses, particularly in the field of gaming clubs, which were not foreseen by its promoters. This country has become a gambler's paradise, more wide open in this respect than any comparable country. This has led to a close and growing connection between gaming clubs and organised crime, often violent crime, in London and other big cities. The fat profits made by proprietors (often out of the play itself and quite contrary to the intention of the 1960 Gaming Act) made them sitting targets for protection rackets. In addition, gaming on credit, with gaming debts unenforceable at law, means that strong-arm methods are sometimes used to extort payment from those who have gambled beyond their means."

Mr. Blackburn says that this state of affairs is due to the failure of the police to enforce the law and seeks to compel them to do it.

2. The steps taken by Mr. Blackburn.

In 1966 Mr. Blackburn was concerned about the way in which the big London clubs were being run. He went to see a representative of the Commissioner of the Police of the Metropolis and told him that illegal gaming was taking place in virtually all London casinos. He was given to understand, he says, that action would be taken. But nothing appeared to be done. On March 15, 1967, Mr. Blackburn wrote a letter to the commissioner in which he again stated that illegal gaming was taking place. He asked the commissioner to assist him in prosecuting several London clubs. Following that letter he was seen by Mr. Bearman on behalf of the commissioner. Mr. Bearman explained to him that there were difficulties in enforcing the provisions of the Act. He added that the way in which police manpower was used was a matter for the discretion of the commissioner; and that it was felt that, as the gaming law stood, there were higher priorities

for the deployment of police manpower. He also stated that it would be contrary to a policy decision for him to promote or assist in the promotion of a prosecution for breach of section 32 of the Act of 1963.

Mr. Blackburn was dissatisfied and made application to the Divisional Court for a mandamus directed to the commissioner requiring three things: (1) to assist him and others to prosecute gaming clubs; (2) to assist him in a particular complaint against a named club; and (3) to reverse the policy decision. The Divisional Court rejected his application. He appeals in person to this court.

Mr. Worsley, for the commissioner, took an objection to the jurisdiction of this court. He argued that this was an appeal from a judgment of the High Court "in a criminal cause or matter," and that an appeal did not lie to the Court of Appeal, see section 31 (1) (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925. He referred us to several cases on the subject, particularly *Provincial Cinematograph Theatres* v. *Newcastle-upon-Tyne Profiteering Committee* [10] in the House of Lords. I think there might perhaps have been something in this objection if Mr. Blackburn had persisted in his first two requests. They might be said to be steps in a criminal matter. But Mr. Blackburn withdrew those two and confined himself to the third, i.e., requiring the commissioner to reverse his policy decision. It seems to me that this is not a step in any "criminal cause or matter." Mr. Blackburn can appeal, I think, to this court on the matter. So I turn to it.

3. The Policy Decision.

The policy decision was a confidential instruction issued to senior officers of the Metropolitan Police. Mr. Bearman exhibited it in his affidavit in these proceedings. It was dated April 22, 1966, and was in effect an instruction to take no proceedings against clubs for breach of the gaming laws unless there were complaints of cheating or they had become haunts of criminals. The actual terms of the instruction were as follows:

> "Confidential instruction. Gaming in registered or licensed clubs. For the time being all applications for authority for an inside observation in licensed or registered clubs for the purpose of detecting gaming are to be submitted to A.1. branch for my covering approval."

[10] (1921) 27 Cox C.C. 63; 37 T.L.R. 799, H.L.

Mr. Bearman explained in his affidavit that the reason for the instruction was:

> "In view of the uncertainty of the law, the expense and manpower involved in keeping gaming observations in such clubs were not justified unless there were complaints of cheating or reason to suppose that a particular club had become a haunt of criminals."

It appeared in evidence before us that this policy decision was made under a misapprehension. It was thought that *Kursaal Casino Ltd.* v. *Crickitt* [11] was going to the House of Lords, in which event the law would be settled about the "offer of the bank." But in point of fact that case was not going there, and the commissioner's officers do not seem to have known of it. I do not know that that misapprehension would have made much difference. The commissioner got to know later that that case was not going there, and he did not revoke the policy decision even then. It was the Southend police who took action, as they had done before. The Metropolitan Police did not take action: it was the enterprising Superintendent Crickitt of Southend.

At any rate, the result of the policy decision of April 22, 1966, was that thenceforward, in this great metropolis, the big gaming clubs were allowed to carry on without any interference by the police. We were told that in one or two cases observations had previously been started: but after this policy decision they were discontinued. No prosecutions were instituted in the metropolis against these clubs. That is what Mr. Blackburn complains of. He says that the policy decision was erroneous and that it was the duty of the commissioner to prosecute. To this I now turn.

4. The Duty of the Commissioner of Police of the Metropolis.

The office of Commissioner of Police within the Metropolis dates back to 1829 when Sir Robert Peel introduced his disciplined force. The commissioner was a justice of the peace specially appointed to administer the police force in the metropolis. His constitutional status has never been defined either by statute or by the courts. It was considered by the Royal Commission on the Police in their Report in 1962 (Cmnd. 1728). But I have no hesitation in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act, 1964, the Secretary of State can call

[11] [1966] 1 W.L.R. 960.

upon him to give a report, or to retire in the interests of efficiency. I hold it 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 no 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. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. That appears sufficiently from *Fisher* v. *Oldham Corporation*,[13] and *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[14]

Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law.

A question may be raised as to the machinery by which he could be compelled to do his duty. On principle, it seems to me that once a duty exists, there should be a means of enforcing it. This duty can be enforced, I think, either by action at the suit of the Attorney-General or by the prerogative writ of mandamus.

[13] [1930] 2 K.B. 364; 46 T.L.R. 390.

[14] [1955] A.C. 457; [1955] 2 W.L.R. 707; [1955] 1 All E.R. 846, P.C.

I am mindful of the cases cited by Mr. Worsley which he said limited the scope of mandamus. But I would reply that mandamus is a very wide remedy which has always been available against public officers to see that they do their public duty. It went in the old days against justices of the peace both in their judicial and in their administrative functions. The legal status of the Commissioner of Police of the Metropolis is still that he is a justice of the peace, as well as a constable. No doubt the party who applies for mandamus must show that he has sufficient interest to be protected and that there is no other equally convenient remedy. But once this is shown, the remedy of mandamus is available, in case of need, even against the Commissioner of Police of the Metropolis.

Can Mr. Blackburn invoke the remedy of mandamus here? It is I think an open question whether Mr. Blackburn has a sufficient interest to be protected. No doubt any person who was adversely affected by the action of the commissioner in making a mistaken policy decision would have such an interest. The difficulty is to see how Mr. Blackburn himself has been affected. But without deciding that question, I turn to see whether it is shown that the Commissioner of Police of the Metropolis has failed in his duty. I have no doubt that some of the difficulties have been due to the lawyers and the courts. Refined arguments have been put forward on the wording of the statute which have gained acceptance by some for a time. I can well understand that the commissioner might hesitate for a time until those difficulties were resolved; but, on the other hand, it does seem to me that his policy decision was unfortunate. People might well think that the law was not being enforced, especially when the gaming clubs were openly and flagrantly being conducted as they were in this great city. People might even go further and suspect that the police themselves turned a blind eye to it. I do not myself think that was so. I do not think that the suggestion should even be made. But nevertheless the policy decision was, I think, most unfortunate.

The matter has, I trust, been cleared up now. On December 19, 1967, the House of Lords in *Kursaal Casino Ltd.* v. *Crickitt (No. 2)*[14] made it quite clear that roulette with a zero was not rendered lawful simply by the "offer of the bank". Following that decision, on December 30, 1967, the commissioner issued

[14] [1968] 1 W.L.R. 53.

a statement in which he said: "It is the intention of the Metropolitan Police to enforce the law as it has been interpreted." That implicitly revoked the policy decision of April 22, 1966; and the commissioner by his counsel gave an undertaking to the court that that policy decision would be officially revoked. We were also told that immediate steps are being taken to consider the "goings-on" in the big London clubs with a view to prosecution if there is anything unlawful. That is all that Mr. Blackburn or anyone else can reasonably expect.

5. Conclusion.

This case has shown a deplorable state of affairs. The law has not been enforced as it should. The lawyers themselves are at least partly responsible. The niceties of drafting and the refinements of interpretation have led to uncertainties in the law itself. This has discouraged the police from keeping observation and taking action. But it does not, I think, exempt them also from their share of the responsibility. The proprietors of gaming houses have taken advantage of the situation. By one device after another they have kept ahead of the law. As soon as one device has been held unlawful, they have started another. But the day of reckoning is at hand. No longer will we tolerate these devices. The law must be sensibly interpreted so as to give effect to the intentions of Parliament; and the police must see that it is enforced. The rule of law must prevail.

SALMON L.J. The chief function of the police is to enforce the law. The Divisional Court left open the point as to whether an order of mandamus could issue against a chief police officer should he refuse to carry out that function. Constitutionally it is clearly impermissible for the Secretary of State for Home Affairs to issue any order to the police in respect of law enforcement. In this court it has been argued on behalf of the commissioner that the police are under no legal duty to anyone in regard to law enforcement. If this argument were correct it would mean that insofar as their most important function is concerned, the police are above the law and therefore immune from any control by the court. I reject that argument. In my judgment the police owe the public a clear legal duty to enforce the law—a duty which I have no doubt they recognise and which generally they perform most conscientiously and efficiently. In the extremely unlikely event, however, of the police failing or refusing to carry

out their duty, the court would not be powerless to intervene. For example, if, as is quite unthinkable, the chief police officer in any district were to issue an instruction that as a matter of policy the police would take no steps to prosecute any housebreaker, I have little doubt but that any householder in that district would be able to obtain an order of mandamus for the instruction to be withdrawn. Of course, the police have a wide discretion as to whether or not they will prosecute in any particular case. In my judgment, however, the action I have postulated would be a clear breach of duty. It would be so improper that it could not amount to an exercise of discretion.

Mr. Worsley has argued that the discretion is absolute and can in no circumstances be challenged in the courts. He instances the policy decision not to prosecute, save in exceptional circumstances, young teenage boys who have had sexual intercourse with girls just under the age of sixteen. But this, in my view, is an entirely different and perfectly proper exercise of discretion. The object of the Criminal Law Amendment Act, 1885, which made it a criminal offence to have sexual intercourse with girls under 16, was passed in order to protect young girls against seduction. Unfortunately, in many of the cases today in which teenage boys are concerned, it is they rather than the girls who are in need of protection. These are not the kinds of cases which the legislature had in mind when the Criminal Law Amendment Act, 1885, was passed. Moreover, experience has shown that if young boys are prosecuted in such circumstances, the courts usually take the humane and sensible course of imposing no penalty. The object of the statute which made housebreaking a crime was quite simply to prevent housebreaking in the interests of society. Similarly, the object of sections 32 to 40 of the Betting, Gaming and Lotteries Act, 1963, and the corresponding provisions of the Betting and Gaming Act, 1960, which the statute of 1963 replaced, was quite simply to protect society against the evils which would necessarily follow were it possible to build up large fortunes by the exploitation of gaming. The statutes of 1960 and 1963 were designed to prevent such exploitation and would have been entirely effective to do so had they been enforced. Regrettably they have not been properly enforced. As a result, and entirely contrary to the intention and contemplation of Parliament, an immense gaming industry, particularly in London, has been allowed to grow up during the last seven years. This has inevitably brought grave social evils in its train—

protection rackets, crimes of violence and widespread corruption. There are no doubt a few large establishments which are respectably run and from which these evils are excluded. But for every one of these, there are scores of others. As long as it remains possible for large fortunes to be made by the private exploitation of gaming, the evils to which I have referred will grow and flourish until they threaten the whole fabric of society. Since large fortunes can be made out of the exploitation of gaming, naturally a great deal of ingenuity has been exercised to devise schemes for the purpose of evading the law. With a little more resolution and efficiency, these schemes could and should have been frustrated.

In the present case we are concerned chiefly with the game of roulette played with a zero. For the reasons which appear in the evidence before us, so long as the odds offered against any one number are no more than 35 to 1, the chances favour the bank by 3 to 10 per cent., according to the way the bets are laid. If the house holds the bank, the house in the long run is bound to win. It follows that this contravenes section 32 (1) (*a*) and (*b*) of the Act of 1963, for the "chances in the game are not equally favourable to all the players" (of whom the bank is one) (subsection (1) (*a*)), and the "gaming is so conducted that the chances therein are not equally favourable to all the players" (subsection (1) (*b*)). We have all heard of the very old song "The Man who Broke the Bank at Monte Carlo." The bank could, of course, have a very bad run of luck during one evening and lose heavily. It could perhaps have a very bad run of luck for days and even for weeks, but month in and month out, it is bound to win. This, amongst other reasons, is why the house which holds the bank month in and month out is bound to be more favourably placed than any player who may hold it sporadically for comparatively short periods of time.

In *Kursaal Casino Ltd.* v. *Crickitt*[16] which was decided in the Divisional Court on March 23, 1966, the justices had held that for the house to hold the bank contravened the law. The point taken by the prosecution, which to my mind was manifestly a good point, was that whoever held the bank was ex hypothesi a player and accordingly the game could not be equally favourable to all players and was therefore illegal. It would, therefore, make no difference that the house went through the motions of offering the bank to the players and that very occasionally the offer was

[16] [1966] 1 W.L.R. 960.

accepted for short periods of time. The defence had argued that as the bank was offered at regular intervals to all the players, the chances were equal for all. The justices convicted. Incidentally, they also held that as there must be very many players who could not afford to take the bank, the offer, therefore, was in any event neither genuine nor realistic. The Divisional Court[17] upheld the conviction and concluded that there was ample evidence to support the finding that the offer of the bank was neither genuine nor realistic. It is perhaps a pity, if this was regarded as a test case, that the prosecution were not advised to call evidence, which could easily have been supplied by any actuary or anyone conversant with the game, that whatever the means of the players or however their liability might be limited, it would be quite impossible to offer the bank on any conceivable terms which could possibly result in the gaming being so conducted that the chances therein would be "equally favourable to all the players." This does not depend on questions of fact or degree or the circumstances of any particular case. It is something which is inherently impossible—as the House of Lords in *Kursaal Casino Ltd.* v. *Crickitt (No. 2)*[18] subsequently decided. The Divisional Court certified[17] a point of law of general public importance but refused leave to appeal to the House of Lords.

On April 22, 1966, after the time for applying for leave to appeal to the House of Lords had expired, the then assistant commissioner issued the following written confidential instruction:

> "For the time being all applications for authority for an inside observation in licensed or registered clubs for the purposes of detecting gaming are to be submitted to A.1. branch for my covering approval."

According to the affidavit of Mr. Bearman, the assistant secretary of the A.1. branch, the then commissioner

> "considered that, in view of the uncertainty of the law, the expense and manpower involved in keeping gaming observations in such clubs were not justified unless there were complaints of cheating or reason to suppose that a particular club had become a haunt of criminals."

This, I think, can only mean that, save in the circumstances postulated, no steps were to be taken to bring any prosecution in respect of roulette or other games in which the bank held an advantage: that is to say, there should be no prosecution in respect of games contravening section 32 as such.

[17] [1968] 1 W.L.R. 53.

[18] [1966] 1 W.L.R. 960.

The affidavit continues as follows:

"At the time when this decision was taken, the *Kursaal* case[17] was believed to be going to the House of Lords on the point certified by the Divisional Court. Had this been decided in favour of the prosecution, it was felt that roulette and other games where the bank had an advantage would have been clearly illegal and would therefore have come to an end in any reputable club"—mark these words—"or have been very easy to detect and prosecute."

This can only mean that if the decision of the Divisional Court stood, there would have been no difficulty in the way of prosecution, but that the law was thought to be still uncertain because the *Kursaal* (*No.* 1) case[17] was believed to be going to the House of Lords and therefore no step should be taken meanwhile. No-one has or could possibly impugn the good faith of the assistant commissioner. It is, however, a very great pity that he apparently did not even take the trouble to discover that the time for asking the House of Lords for leave to appeal (which had been refused by the Divisional Court) had already expired by the date of his confidential instruction of April 22, 1966, and that therefore there was no possibility of any appeal to the House of Lords. Every month which went by added tens or perhaps hundreds of thousands of pounds to the profits made from illegal gaming, and, as the Secretary of State for Home Affairs said on September 13, 1966, the connection between gaming clubs and organised crimes continued to grow.

In the meantime the Kursaal casino devised a scheme under which the bank was offered to the players in circumstances supposed to ensure that they could limit their liability to any sum they liked to name. The Kursaal continued playing roulette under this new scheme. They were prosecuted again by the vigilant Superintendent Crickitt of Southend and duly convicted on December 2, 1966: that is to say, more than seven months after the confidential instruction. During this period nothing had been done to enforce the law in London, apparently because of the belief that there was to be an appeal to the House of Lords in *Kursaal Casino Ltd.* v. *Crickitt*.[17] This is the appeal that never was and which the slightest enquiry would have revealed never could have been at any time after April 20, 1966.

The inactivity after the conviction in *Kursaal Casino Ltd.* v. *Crickitt* (*No.* 2)[18] on December 2, 1966, is sought to be excused

[17] [1966] 1 W.L.R. 960. [18] [1967] 1 W.L.R. 1227.

in Mr Bearman's affidavit by the fact that it was known that that conviction was to be tested in the Divisional Court.[18] No steps, however, were taken (since no inside observations were kept) to see whether the London gaming houses offered the bank to the players under conditions which allowed the players to limit their liability. There was thus no reason to suppose that the London gaming houses had even the defence open to them which had failed before the justices in *Kursaal* (*No.* 2).[18]

Another seven months went by before *Kursaal* (*No.* 2)[18] was decided in the Divisional Court on July 10, 1967, in favour of the defence. Apparently still no steps were taken to ascertain on what terms, if any, the bank was being offered to players in London and still the gambling empires were left undisturbed. Then on December 19, 1967, the decision of the Divisional Court in *Kursaal* (*No.* 2)[18] was reversed by the House of Lords.[19] We have been told that that decision and its implications are being carefully studied. The study should not take long. Lord Pearson's speech,[20] in which all the other law lords concurred, made the law pellucidly clear. In no circumstances can roulette be legal when played with a zero and when the odds are 35 to 1 or less against any one number turning up. The correct odds are, of course, 36 to 1, since including zero there are 37 numbers on the roulette wheel.

According to the evidence before this court, however, most of the gaming houses in London, in direct defiance of the law as laid down by the House of Lords, are still playing roulette, unmolested, in exactly the same way (save for one immaterial variation to which I will refer) as they were doing prior to December 19 last. The variation is as follows: If the number backed by a player for, say, one chip turns up, he receives 35 ordinary chips and one special chip of a different colour. He is not allowed to play with this chip or to exchange it for an ordinary chip. The normal practice is for the players to toss the special chips back to the croupier. Clearly the players are under no illusion. They realise that these special chips are but a hollow sham devised to deceive the exceptionally gullible into thinking that the odds being paid out are 36 to 1 when in reality they are 35 to 1. If anyone with a special chip chooses (and very few of them do) to take it to the cash desk to be cashed, it is duly cashed but the player concerned has to pay a fee, for example, of £10 in the

[18] [1967] 1 W.L.R. 1227.
[19] [1968] 1 W.L.R. 53. [20] Ibid. 61.

Golden Nugget Casino Club and £50 in the Victoria Sporting Club. It may be that gamblers are reluctant to cash the chips because they do not like paying the fee or because, rightly or wrongly, they fear they may be barred—and most gamblers would rather sacrifice a shade of odds than lose the chance of gambling.

However that may be, it is obvious that in reality the odds on the overwhelming number of bets remain at the rate of 35 to 1 against a single number turning up. What otherwise could be the object of having a different coloured chip to make the odds up to 36 to 1 and charging a fee for cashing it? At most it amounts to giving a player an option either to pay a fee or to play in a game in which the chances are not equally favourable to all players. There is certainly nothing here for a test case. This could only serve to give the gaming houses a further breathing space for another long spell, at the end of which no doubt an equally transparent ruse would be devised. What is now urgently needed is that energetic steps should immediately be taken to prosecute a substantial number of major London gaming houses in which the law is being defied. It may be that even when very heavy fines are imposed, they will be ineffective, in which event the Attorney-General would no doubt consider the advisability of bringing relator actions to restrain the present abuses by injunction.

Mr. Blackburn has abandoned the first two parts of his application: only the third part remains which asks for an order of mandamus requiring the commissioner to reverse the policy decision that the time of police officers will not be spent in enforcing the provisions of the Act of 1963. Mr. Worsley, on behalf of the commissioner, has given an undertaking to this court that the confidential instruction of April 22, 1966, will be immediately withdrawn and the whole matter referred to the Director of Public Prosecutions. Moreover, he has given an assurance that since December 19 last, the policy decision referred to in Mr. Bearman's affidavit has been reversed and that observation has been kept on many of the principal gaming houses in London, including those referred to in the affidavits filed by Mr. Blackburn. Had it not been for this undertaking and assurance, I should, I think, have been in favour of making an order.

I am not impressed by the argument that Mr. Blackburn has an equally effective and equally convenient remedy open to him and that, therefore, the order of mandamus should in any event

be refused in the court's discretion. It seems to me fantastically unrealistic for the police to suggest, as they have done, that their policy decision was unimportant because Mr. Blackburn was free to start private prosecutions of his own and fight the gambling empires, possibly up to the House of Lords, single-handed. Nor, as at present advised, do I accept the argument that this is a "criminal cause or matter" and that therefore, by reason of the Supreme Court of Judicature (Consolidation) Act, 1925, section 31 (1) (*a*), no appeal lies to this court from the Divisional Court. No doubt the words "criminal cause or matter" must be given a very wide construction, but I am not convinced that they relate to proceedings in which neither party is at risk of being prosecuted as a result of the order sought or made (see *Amand* v. *Home Secretary*[31]). I would prefer to keep that point open as it does not directly arise for decision. The only doubt I should have had would have been as to whether Mr. Blackburn had a sufficient personal interest in order to obtain an order of mandamus. As it is, no order is necessary and I agree that, accordingly, none should be made.

Before parting with the case, I would, however, like to say that I entirely agree with the observations made by Lord Denning M.R. in regard to *Mills* v. *Muckinnon*.[32] That was a decision which rested on some very special facts found in that case. Should there be another prosecution in relation to chemin-de-fer and the prosecution were to call a number of respectable people who thoroughly understood the game, I should be surprised if the decision were the same.

EDMUND DAVIES L.J. It would be difficult to exaggerate the importance of these proceedings. If there are grounds for suspecting that a grave social evil is being allowed to flourish unchecked because of a sot policy of inaction decided upon by a pusillanimous police force, public confidence must inevitably be gravely undermined. We have ranged far and wide in this case—both chronologically (from Anglo-Saxon times to the present day) and geographically (from Las Vegas to the Edgware Road)—but we have not travelled an inch beyond that made necessary by the urgency and importance of the issues raised.

It is, to say the least, singularly unfortunate that, the conviction in *Kursaal Casino Ltd.* v. *Crickitt*[33] having been upheld

[31] [1943] A.C. 147.
[32] [1964] 2 Q.B. 96.
[33] [1966] 1 W.L.R. 960.

by the Divisional Court on March 23, 1966, and the time for applying to the House of Lords for leave to appeal having expired, the assistant commissioner issued on April 22 the "Confidential Instruction" regarding "Gaming in registered or licensed clubs," to which Lord Denning M.R. and Salmon L.J. have already referred. What prompted it has been one of the disturbing questions raised by these proceedings. This court was given no answer to that question directly emanating from its author, the assistant commissioner, but it appears from the affidavit of Mr. Bearman of the administration department of New Scotland Yard that the assistant commissioner

> ". . . considered that, in view of the uncertainty of the law, the expense and manpower involved in keeping gaming observations in such clubs were not justified unless there were complaints of cheating or reason to suppose that a particular club had become a haunt of criminals."

In other words, no steps were to be taken to investigate whether breaches of the Betting, Gaming and Lotteries Act, 1963, as such were being perpetrated, and it is conceded by Mr. Worsley for the respondent that in consequence observation in some of the biggest gambling clubs in the West End was immediately stopped. Small wonder, then, that on January 2 last "The Times" newspaper boldly asserted that,

> "It is now clear that the Act has failed to achieve its purpose not so much because it could not be enforced as because the police failed to do so."

The timing of this directive was as maladroit as the reasons given to this court for its publication. It prevailed for nearly two years after *Kursaal Casino Ltd.* v. *Crickitt*,[33] notwithstanding that Mr. Bearman in his affidavit stated in effect that, as long as that decision remained undisturbed, it rendered "roulette and other games where the bank had the advantage . . . clearly illegal." As long as the directive remained operative, it has understandably created perturbation in the minds of many, and the fact that it apparently continued in force even after *Kursaal Casino Ltd.* v. *Crickitt (No. 2)*[34] was decided on December 19 last, served to perpetuate that anxiety. Indeed, it was only on the penultimate day of this hearing that Mr. Worsley, in answer to a direct question by a member of the court, intimated that oral instructions have been spread around that the directive no longer remains operative.

[33] [1966] 1 W.L.R. 960.

[34] [1968] 1 W.L.R. 53.

But a more satisfactory stage was reached when, in the concluding stages of his address, Mr. Worsley undertook on behalf of the respondent that the criticised directive will be expressly and immediately withdrawn and replaced by a new directive emphasising the intention of the Metropolitan Police to enforce the law against "roulette with zero and all other forms of gaming where the bank has an inherent advantage over players. . . ." The *main* object sought to be attained by the applicant in these proceedings was that by mandamus the respondent be required "to reverse or procure the reverse of the policy decision . . . that the time of police officers will not be spent on enforcing the provisions of the Act of 1963." The undertaking now given to this court has for all practical purposes secured for the applicant the relief he sought and accordingly no grounds remain in respect of which it would any longer be proper to consider granting mandamus.

That is the practical outcome of these proceedings, and from the public standpoint a very useful outcome it is. But how stands the law? Lord Denning M.R. and Salmon L.J. have already dealt with it in extenso, and I propose to deal quite briefly with but some of the points raised by the respondent.

I deal first with jurisdiction. It is urged that these proceedings relate to "a criminal cause or matter" and that accordingly an appeal from the Divisional Court lies directly to the House of Lords and not to this court—see section 31 (1) (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925. I need not again go through the long line of cases relied upon in this connection by the respondent, beginning with *Ex parte Alice Woodhall*.[35] In my judgment they have no bearing upon the quite general application now made that the commissioner be compelled to reverse a policy directive regarding the enforcing of a statute. Such an application has no reference to any particular criminal cause or matter, and is not even a remote step in relation to a criminal cause or matter, but is designed simply and solely to ensure that the police do not abdicate, in consequence of a policy decision, their functions as law enforcement officers. I therefore agree with my lords in holding that this court has jurisdiction to hear and determine the present appeal. But it is necessary to add that I am persuaded so to hold by reason of the abandonment of all but the last portion of the motion, for the earlier parts (and particularly that which related to the prosecution of a specific, named

[35] (1888) 20 Q.B.D. 832, C.A.

club) seems to me truly open to the objection as to jurisdiction raised by the respondent. In this context, I am not for the present prepared, with respect, to adopt the view expressed by Fletcher-Moulton L.J. in *Rex* v. *Governor of Brixton Prison, Ex parte Savarkar*[26] that—

> "if *any* portion of an application or order involves the consideration of a criminal cause or matter, it arises out of it, and in such a case this court is not competent to entertain an appeal."

Be that as it may, nothing there said can, in my judgment, apply to a case (such as the present) where the applicant for relief abandons those parts of his motion which offend, or may offend, against the rule, and I see no reason why this court should thereafter be prevented from adjudicating upon the validity of that which remains.

So far, so good, from the applicant's point of view. But even so it is said that he could not in any event have succeeded in these proceedings. In this context Mr. Worsley has addressed to the court an elaborate and learned argument in support of the bald and startling proposition that the law enforcement officers of this country owe no duty to the public to enforce the law. Carried to its logical limit, such a submission would mean that, however brazen the failure of the police to enforce the law, the public would be wholly without a remedy and would simply have to await some practical expression of the court's displeasure. In particular, it would follow that the commissioner would be under no duty to prosecute anyone for breaches of the Gaming Acts, no matter how flagrantly and persistently they were defied. Can that be right? Is our much-vaunted legal system in truth so anaemic that, in the last resort, it would be powerless against those who, having been appointed to enforce it, merely cocked a snook at it? The very idea is as repugnant as it is startling, and I consider it regrettable that it was ever advanced. How ill it accords with the seventeenth-century assertion of Thomas Fuller that, "Be you never so high, the law is above you." The applicant is right in his assertion that its effect would be to place the police above the law. I should indeed regret to have to assent to the proposition thus advanced on behalf of the respondent, and, for the reasons already given by my Lords, I do not regard it as well founded. On the contrary, I agree with them in holding that the law enforcement officers of this country certainly owe a legal

[26] [1910] 2 K.B. 1056, 1065, C.A.

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Ex parte
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duty to the public to perform those functions which are the *raison d'etre* of their existence. How and by whom that duty can be enforced is another matter, and it may be that a private citizen, such as the applicant, having no special or peculiar interest in the due discharge of the duty under consideration, has himself no legal right to enforce it. But that is widely different from holding that no duty exists, enforceable either by a relator action or in some other manner which may hereafter have to be determined.

It was further urged that, assuming jurisdiction in this court and even assuming that the respondent is under the duty which this court now unanimously holds he does owe, nevertheless the applicant should be denied the relief sought inasmuch as it is open to him to lay an information or apply for a voluntary bill of indictment. The law is, as I believe, that relief by way of a prerogative order will not be granted if there is available any other legal remedy, equally convenient, beneficial and appropriate. Having regard to the course these proceedings have taken, no final consideration of this submission is called for, and I content myself with the simple observation that only the most sardonic could regard the launching of a private prosecution (a process which, incidentally, is becoming regarded with increasing disfavour in this country) as being equally convenient, beneficial and appropriate as the procedure in fact adopted by this appellant.

I began by saying that these are important proceedings. They have served useful public purposes (a) in highlighting the very real anxiety which many responsible citizens manifestly entertain as to the adequacy of the steps hitherto taken to exterminate a shocking and growing cancer in the body politic; and (b) in clarifying the duty of the police in relation to law enforcement generally. Accordingly, while, for the reasons given by my Lords, there must be a formal dismissal of this appeal, it may well be that the applicant and his supporters will nevertheless feel as they leave this court today that in truth theirs has been the victory.

No order on appeal. Order of Divisional Court as to costs set aside.

Solicitors: *Solicitor, Metropolitan Police.*

L. N. W.

Law Reform Commission of Canada

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legal status of the police

CRIMINAL LAW SERIES

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This ruling is not easily reconciled with the decision of the same court in the *Hawkins* case, except possibly on the ground that the power of arrest is one that is specifically recognized as belonging to a constable by virtue of his status as a peace officer, whereas his authority to lay an information is no different from that of any other private citizen. Although direct confrontation between a constable and his chief constable over the initiation of a prosecution has arisen in England (see "Constable May Face Discipline Proceedings after Private Prosecution of Tory M.P.", *Times*, July 6, 1974; Gillance and Khan, 1975), it has apparently never been resolved by the courts there.

Similar concerns have arisen in Canada, and in 1970 allegations that senior officers had been improperly intervening to withdraw charges laid by a constable of the Metropolitan Toronto Police Force were the subject of an inquiry held by the Board of Commissioners of Police of Metropolitan Toronto (Toronto, Board of Commissioners of Police, 1970). In its report on the inquiry, however, the Board specifically eschewed laying down any precise resolution of the proper relationship between a constable and his senior officers:

> The question of when, *by whom*, and under what circumstances, a decision not to prosecute is proper exercise of discretionary power, can never be satisfactorily defined in precise terms. Any attempt to lay down rules so that discretion could be exercised in a uniform manner does not seem to offer any hope that suspicions of its improper use would never arise in the future. Indeed, if some such rule was in existence, it could actually discourage the use of quite proper discretion under some circumstances. (p. 92 — Emphasis added)

Noting that such discretion had in fact been exercised by officers at various levels of the force (up to the level of deputy chief) in relation to the cases it had inquired into, the board concluded that:

> Criticizing a judgment must not be interpreted as a restriction on the ability of and the need at times for senior officers to use their judgment and their discretion. As long as it is exercised impartially, fairly, and with reason, it should not be discouraged. (*Ibid.*)

Not surprisingly, given the absence of judicial attention to such questions, the board did not cite a single authority in support of these conclusions. As a result, they remain legally uncertain (see e.g., "Police Quotas? Not Enough Tags a Ticket to the Boss's Office", Toronto *Globe and Mail*, December 13, 1980, p. 5). Most recently, however, the whole question of the relationship between a police officer and his senior officers has been brought directly before the Federal Court of Canada, and has been the subject of a preliminary ruling by that court.

In *Wool v. The Queen and Nixon* (Federal Court of Canada, Trial Division, Dubé J., June 8, 1981, not yet reported) a staff sergeant of the R.C.M.P. was seeking an interim injunction to restrain his commanding officer (in charge of an R.C.M.P. Division) from interfering with a criminal investigation which the staff-sergeant, in his capacity as co-ordinator for commercial crime

investigations in the Division, had been undertaking. The investigation involved allegations against the Premier and the Minister of Justice of the Yukon Territory. After the investigation had continued for a considerable time, involving the expenditure of substantial resources, and after legal advice had been obtained from R.C.M.P. headquarters, from the Assistant Deputy Attorney General of Canada and from a special prosecutor hired by the federal Attorney General, the commanding officer of the division had ordered the applicant to discontinue the investigation, had transferred him from a plain clothes to a uniform position, and had recommended his transfer from the Division. It was against these orders that the applicant sought the injunction. Wool contended that his commanding officer's order to discontinue the investigation was "not a lawful order in that it purports to limit his rights as a peace officer and a citizen under section 455 of the *Criminal Code*, and his duty under section 18 of the *Royal Canadian Mounted Police Act*" (p. 3). Section 455 of the *Criminal Code* provides that "(a)ny one who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice . . .". Section 18 of the *R.C.M.P. Act* lists the duties of members of the force, including the "apprehension of criminals and offenders and others who may be lawfully taken into custody". The section, however, opens with the words: "It is the duty of members of the force who are peace officers, subject to the orders of the Commissioner, . . .". From this, the court, in dismissing the application, concluded that "whereas the plaintiff has a right to lay an information, that right is not absolute, but subject to the orders of the Commissioner" (p. 6). The court held that the commanding officer (Nixon) also had a duty to fulfil in relation to the investigation, and observed that:

> 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. . . .
>
> . . . 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 *R. v. Commissioner of Police of the Metropolis, Ex parte Blackburn*). (pp. 6-7)

Observing that "(i)t 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" (p. 8), the court concluded that "the plaintiff has no absolute right to continue the investigation without the orders of his superiors" (p. 9).

The decision in the *Wool* case is, to the author's knowledge, unique in squarely addressing these issues. Since it is only a preliminary ruling concerning a request for an interim injunction, the matter can be expected to occupy further judicial attention at trial, and possibly on appeal.

The difficulty of generalizing from Dubé J.'s decision in this case, of course, springs from his substantial reliance on the opening words of section 18 of the *R.C.M.P. Act*. As we have noted in Chapter Three of this paper, the legislation prescribing the duties of police constables in many jurisdictions in Canada does not specify that their duties are subject to the orders of superior officers. It remains a matter of speculation, therefore, as to whether the courts would necessarily reach the conclusions of the *Wool* case if they were interpreting provisions relating to the duty of police constables that were not qualified in this manner (see e.g., section 57 of the Ontario *Police Act*). The few relevant judicial *dicta* that can be gleaned from a review of Canadian case-law, however [see e.g., *Bowles* v. *City of Winnipeg*, [1919] 1 W.W.R. 198 (Man. K.B.) at 214-215; *Re Copeland and Adamson* (1972), 7 C.C.C. (2d) 393 (Ont. H.C.); and *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1974), 5 O.R. (2d) 285 (Div. Ct.) at 297-298], would seem to suggest that they probably would.

B. Conclusions

By now, it will be apparent that he who ventures to generalize about the legal status of the police in Canada, and about its implications, does so at his peril. The police operate under a variety of statutes, which contain significantly different provisions respecting the status and accountability of the police. These statutory provisions, by themselves, leave many important questions unanswered. The courts have rarely had the opportunity to address these questions directly, let alone answer them. On those few occasions when the courts have suggested answers (almost always through *obiter dicta*), they have rarely agreed on them. Thus, while many police statutes provide that police governing authorities (be they Ministers or police Boards) may give "direction" to the police, the courts have not provided a clear answer as to what such terms comprehend. While we can say with confidence that the terms do not comprehend instructions or orders to break the law (*Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1974), 5 O.R. (2d) 285 (Div. Ct.)) the courts have not provided clear answers as to whether, and to what extent, such directions may relate either to general or specific matters of law enforcement.

If we ask whether the police have an independent right to lay criminal charges or investigate criminal offences without interference, few clear answers are to be found. In some provinces (e.g., New Brunswick) this has been

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 (police work than the delicate balance between the independer discretion exercised by a police officer in the name of the law and the ultimate legislative accountability of the attorney genera for all aspects of the administration of justice.

Police Discretionary Powers in a Democratically Responsive Society

dress Delivered to the 73rd Annual Conference of the Canadian sociation of Chiefs of Police by Honourable R. Roy McMurtry orney General of Ontario.

rinted with the kind permission e Editor, Canadian Police Chief azine, Vol. 67, No. 4 (October,).

reflect upon the nature of the ing relationship between the e and the law officers of the n. I count myself fortunate to le to bring to the topic the exnce of some 20 years as a decounsel, including some as a part-time Crown attorney few years as a senior counsel 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.

he Criminal Code specified that nly for a handful of offences is the nsent 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 officers before a decision to commence or not com prosecution. In my view, th gestions completely ignc basic principles of our cimi cess. There are some real q in law as to whether the a general or anyone can give direction.

The suggestion also ignores t that a police officer, just li other citizen, has the full ri access to our courts of law. no one can direct an officer to an information under an oath violates his conscience, no or block his access to the court case where he is satisfied t prosecution is appropriate.

To suggest that this discretion st be subject to some automatic view by a crown law officer, be the discretion is even exerci would be to undermine the very pose for which high standards professionalism are being insti and maintained in police for throughout the country. For the b tom line is that independence fr political control in *individual* cas is one of the hallmarks of the bas independence of constables ar chief constables under our syste of law.

This is not, however, to lose sigh of the fundamental principle c legislative and public accountabil ity of all those who exercise powers in the name of the public. Those o 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 an appropriate response from the police to the public as represented the politically responsible minister of the crown.

cannot leave this topic without mmenting briefly on what I mean the expression "political". Particularly as I fully appreciate that re is a great deal of cynicism se days about the political pros and about politicians.

you know, I am a relatively new al in the wonderful wacky d of politics. My decision to enpolitics was not arrived at light without a great deal of soulching. Certainly, one does not a comfortable law practice. cularly when you have six ren, without some real degree prehension.

ermore, we all have been long of the traditional sceptisism 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 oficers 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 aditionally should receive the idest 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 ery citizen.

is 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 er jurisdictions where the tradin has never been woven into the ric of society that we realize that choice becomes one of either archy or totalitarianism.

economic pressures mount, I pect that the importance of the 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*.

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

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

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 had dealings with the same printer.

My Lords, it appears to me far from surprising that on these facts Mr. Melvill 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 ow name. The respondent went through it with him and on Sept. 28 swore th information before Mr. Campion, a different magistrate, who issued a warrant fo the arrest of the appellant. He was duly arrested the next day and at about 1 a.m. was charged. I now mention an incident which might have some importanc if I took a different view of other facts in the case. In addition to Stevens an Davies a person giving the name of Martin appeared to have been concerne in the fraud and the respondent thought that this was yet another alias of th appellant. For this he relied on two witnesses named Hallam and Blackst on 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

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 the 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 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 *Blackford* 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.

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.

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.

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 someone 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 Glinski 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 think it shows a want of reasonable and probable cause. It shows that he was using the charge of conspiracy for an improper purpose: and it was therefore evidence of malice on his part. But it does not destroy the reasonable and probable cause which was apparent on all the undisputed facts of the case. When the facts of a case show such strong grounds for prosecution as this did, an accused cannot be allowed to say those grounds do not exist simply by a chance phrase which he puts into the mouth of a police officer. Were this not so, every police 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 F counsel whom Mr. Melville instructed. No suggestion of malice or bad faith 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.1, 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.

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