IN THE HIGH COURT OF JUSTICE CO /99

QUEEN'S BENCH DIVISION

CROWN OFFICE LIST

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

B E T W E E N:

THE QUEEN

and

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

EX-PARTE

DAVID GODFREY DUCKENFIELD

Applicant

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reports: "These cases make clear that on an issue of diminished responsibility the jury are entitled and indeed bound to consider not only the medical evidence but the evidence on the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the accused before, at the time of and after it and any history of mental abnormality. It being recognised that the jury on occasion may properly refuse to accept medical evidence, it follows that they must be entitled to consider the quality and weight of that evidence. As was pointed out by Lord Parker C.J. in BYRNE (1960) 44 Cr.App.R. 246, 254; [1960] 2 Q.B. 396, 404 what the jury are essentially seeking to ascertain is whether at the time of the killing the accused was suffering from a state of mind bordering on but not amounting to insanity. That task is to be approached in a broad common sense way."

Approaching the task here in a broad common sense way, looking at all the circumstances, looking at what was in the applicant's confession statements and at what was conspicuously absent from them, we can find no ground whatever upon which to condemn the jury's verdict of guilty of murder here as in any way unsafe or unsatisfactory. The application for leave to appeal against conviction is accordingly refused.

Application refused.

Solicitors: Registrar of Criminal Appeals, for the applicant. M. D. Shaffner, Chief Prosecuting Solicitor, West Yorks, for the Crown.

[QUEEN'S BENCH DIVISION]

BEFORE

MR. JUSTICE MARS-JONES

TURNER *v.* DIRECTOR OF PUBLIC PROSECUTIONS

AUGUST 3, 7, 1978

Criminal Procedure—Initiation of Proceedings—Private Prosecution—Undertaking by Director of Public Prosecutions that Offender Would Not Be Prosecuted—Convicted Co-Defendant Bringing Action Against Director Contending that he Acted Ultra Vires in Offering No Evidence Against Offender—Whether Action Should be Struck Out as Vexatious and Abuse of Process of Court—Prosecution of Offences Act 1879 (42 & 43 *Vict.*, *c.* 22), *s.* 2—*Prosecution of Offences Act* 1908 (8 *Edw.* 7. *c.* 3), *ss.* 1 (5), 2 (1), (3)—*Prosecution of Offences Regulations* 1946 (*S.R. & O.* 1946 *No.* 1467), *regs.*, 1, 5.

Where pursuant to his powers under the Prosecution of Offences Acts 1879 and 1908 and regulations made thereunder the Director of Public Prosecutions gives an accomplice, who is a Crown witness in a prosecution for a criminal offence, an undertaking that he would not be prosecuted for his part in the offence, the director is entitled in a subsequent private

prosecution brought against the accomplice by a co-defendant charging him with the offence, to intervene and offer no evidence so that the summons would be dismissed.

T was charged with robbery. At his trial the Director of Public Prosecutions decided in the public interest to call one of the participants in the crime as a witness for the prosecution rather than prosecute him for the offence. He was given a written undertaking that he would not be prosecuted for the offences disclosed by his statements. T was convicted and subsequently started a private prosecution of the witness in respect of the robbery. The Director of Public Prosecutions, pursuant to his powers under the Prosecution of Offences Acts 1879 and 1908, intervened with a view to offering no evidence against the witness on the ground that it was not in the interests of justice or the public for the prosecution to continue. T brought an action against the Director of Public Prosecutions contending that his action in intervening was unlawful and *ultra vires*, and that he was stopped from his proposed course of action by virtue of his statement to the jury at the original trial that it was open to any private individual to prosecute the witness, and that his purported exercise of his statutory power was void for bad faith. The Director of Public Prosecutions applied to strike out the action as disclosing no reasonable cause of action and that it was vexatious and an abuse of the process of the Court.

Held, that (1) having regard to the wide powers conferred on the Director of Public Prosecutions by the Prosecution of Offences Acts 1879 and 1908 and the Prosecution of Offences Regulations 1946, it was impossible to argue that it was unlawful or *ultra vires* for the Director of Public Prosecutions to intervene for the purpose of offering no evidence; further, (2) as to estoppel, whatever counsel for the Crown said or did not say at the trial could not fetter the Director of Public Prosecutions' discretion in deciding whether to intervene if a private prosecution were launched and offering no evidence in those proceedings for an estoppel could not be raised to prevent the exercise of a statutory discretion or prevent or excuse the performance of a statutory duty, save in exceptional cases, which did not arise on the present occasion; thus no valid estoppel could possibly be raised on the facts of the present case and no such facts were pleaded in the statement of claim; and (3) the Director of Public Prosecutions had not acted in bad faith but in the public interest; accordingly, as the statement of claim disclosed no reasonable cause of action, it would be struck out because the action was vexatious and an abuse of the process of the Court.

[For powers and duties of Director of Public Prosecutions, see *Archbold* (39th ed.), para. 150.]

Summons.

This was a summons by the Director of Public Prosecutions the defendant on behalf of the Attorney-General sued as the Director of Public Prosecutions applying for an order to strike out the statement of claim brought by George Ernest Turner against the Director of Public Prosecutions under R.S.C., Ord. 18, r. 19 and under the inherent jurisdiction of the High Court on the grounds that (1) the statement of claim disclosed no reasonable cause of action against the defendant and (2) that it was vexatious and an abuse of the process of the Court.

The summons was originally to be heard before a master of the Supreme Court on October 4, 1978; but Master Creightmore on July 28, 1978, directed that it should be heard by Mars-Jones J. in chambers. At the request of both parties judgment on the summons was adjourned into Court.

The facts and relevant parts of the statement of claim appear in the judgment.

Harry Woolf for the defendant, the Director of Public Prosecutions, as applicant on the summons. *Martyn Zeidman* for the plaintiff, respondent to the summons.

MARS-JONES J.: On March 4, 1978, George Ernest Turner was convicted of robbery by a jury at Chelmsford Crown Court and sentenced to seven years' imprisonment. The chief prosecution witness at the trial was Colin Saggs, who claimed to have taken part in the robbery at Southgate on January 31, 1974, with Turner and others. On or about May 12 or 13, 1978, Turner petitioned the Home Office from prison for permission to bring a private prosecution against Saggs. Before the Home Office could come to any decision on that petition, counsel and solicitors instructed by Turner applied to the Tottenham justices on May 13 for a summons against Saggs charging him with the Southgate robbery. The justices granted the application and issued a summons against him, thus initiating a private prosecution against Saggs at the suit of Turner but in the name of the Crown, as is the case in all private prosecutions. The Director of Public Prosecutions had been in charge of the proceedings against Turner and others from the outset. During the course of their inquiries into the Southgate robbery and other associated offences the police interviewed a large number of suspects, including Saggs. He made several statements under caution and in particular one about the Southgate robbery which contained a detailed account of his participation with Turner and others in that offence. In about December, 1976, after careful consideration, the Director of Public Prosecutions decided that it was in the public interest to call Saggs as a witness for the prosecution rather than prosecute him for the offences he had disclosed in his statements. After that decision had been made Saggs made a number of further witness statements based upon his previous statements under caution. By this time Saggs had had to move house and live under an assumed name in a secret place. He has been under constant police protection from that time to this day, his safety and that of his family being matters of very real concern to them. It was not until January this year that Saggs was given a formal undertaking that he would not be prosecuted for the offences disclosed in his statements. Turner's legal advisers, the trial judge and the jury were made aware of the nature of that undertaking.

It is accepted by Mr. Zeidman that the Director of Public Prosecutions had at no time given consideration to the possibility of a private prosecution being launched against Saggs for any of these offences. That is hardly surprising because such researches as have been made into the records and reports have disclosed no case where a private citizen has sought to prosecute a defendant after the Director has decided not to do so and given an undertaking to that effect. The situation which has arisen in this c[redacted]s an entirely novel one and one which gives rise to important questions of p[redacted] policy.

On the face of it this private prosecution was launched with a view to punishing Saggs for giving evidence as a witness for the Crown against Turner.

That would certainly be the result of these proceedings if they were prosecuted to a successful conclusion. Such a result or even the threat of it would obviously have very grave consequences so far as the administration of justice is concerned. I do not need to spell out in detail the effect on future criminal investigations or proceedings if a witness giving evidence for the prosecution in these circumstances could not rely upon the undertaking of the Director of Public Prosecutions and his co-operation in ensuring that such a witness would be protected against a private prosecution of this kind.

The Director of Public Prosecutions was informed of the application for a summons against Saggs and the outcome of that application. The next day, namely, on May 16, 1978, he caused a letter to be sent to Turner's solicitors and a copy to the clerk of the justices. It reads as follows: "Dear Sirs, I understand that at Tottenham Magistrates' Court yesterday counsel instructed by you on behalf of your client, George Ernest Turner, made a successful application for a summons against Colin Saggs alleging participation in the robbery which occurred at Southgate in January, 1974. Prior to giving evidence for the Crown during the trial of your client at Chelmsford Crown Court in March of this year, Saggs had admitted to the police his complicity in this offence, but the Director decided to call him as a witness rather than institute proceedings against him. The Director is of the view, in these circumstances, that it is not in the interests of either justice or the public for the prosecution of Saggs commenced by your client to continue, and accordingly I have decided to assume responsibility for the proceedings with a view to offering no evidence when Saggs appears before the court. I should be glad if you would regard this letter as a formal notice of my intervention in the exercise of the powers conferred on me by the Prosecution of Offences Acts and Regulations. I am sending a copy of this letter to the Clerk to the Tottenham Magistrates' Court. Yours faithfully, K. Dowling, Principal Assistant, Director of Public Prosecutions." Mr. Dowling being a principal assistant to the Director has the authority of the Director by virtue of the office which he holds.

The relevant provisions of the Prosecution of Offences Acts and Regulations are these. Section 2 of the Prosecution of Offences Act 1879, in its relevant parts, reads as follows: "... It shall be the duty of the Director of Public Prosecutions, under the superintendence of the Attorney-General, to institute, undertake, or carry on such criminal proceedings ... in ... or ... before magistrates, or otherwise ... as may be for the time being prescribed by regulations under this Act, or may be directed in a special case by the Attorney General." Next comes section 1 (5) of the Prosecution of Offences Act 1908, which reads: "An Assistant Director of Public Prosecutions may do any act or thing which the Director of Public Prosecutions is required or authorised to do by or in pursuance of any Act of Parliament or otherwise." Section 2 (1) of that Act reads: "The regulations under the Prosecution of Offences Act 1879 shall provide for the Director of Public Prosecutions taking action in cases which appear to him to be of importance or difficulty, or which for any other reason require his intervention." Section 2 (3) reads: "Nothing in the Prosecution of Offences Acts 1879 and 1884 or in this Act, shall preclude any person instituting or carrying on [redacted]riminal proceedings, but the Director of Public Prosecutions may undertake a[redacted]y stage the conduct of those proceedings if he thinks fit."

The words used in these two subsections, "or any other person ... if he thinks fit" confer upon the Director and his assistants a wide, unfettered

discretion, in any case which appears to him, the Director or his assistants, to call for his intervention and to undertake the conduct of a private prosecution at any stage.

The Prosecution of Offences Regulations 1946, made under the Act of 1879, impose a duty upon the Director to intervene in such circumstances. Regulation 4 reads: "It shall be the duty of the Director of Public Prosecutions to initiate, undertake, or carry on criminal proceedings in the following cases, that is to say . . . (c) in any case which appears to him to be of importance or difficulty or which for any other reason requires his intervention." Regulation 5 provides: "The Director of Public Prosecutions shall in all matters, including the nomination of counsel, be subject to the directions of the Attorney General."

The date appointed for the return of the summons against Saggs was July 20, and on that date Mr. Blofeld, Q.C., appeared before the Tottenham justices on behalf of the Director of Public Prosecutions. He outlined the history of this matter and invited the justices to take the view that he was properly in charge of the proceedings at that stage and that Mr. Zeidman had no *locus standi*. Mr. Blofeld urged that the justices proceed to hear the summons and he, on behalf of the prosecution, would offer no evidence and ask for Saggs to be discharged. Mr. Zeidman resisted that suggestion and asked the court to adjourn the hearing *sine die*.

A transcript of those proceedings has been placed before me, exhibited to the affidavit of Mr. Dowling, principal assistant to the Director of Public Prosecutions. Mr. Zeidman contended before the justices that the Director of Public Prosecutions' intervention in the criminal proceedings issued on the application of Turner was unlawful and that the matter was to be decided in an action which had been commenced with the issue of a writ and statement of claim endorsed thereon on July 10 this year, some 10 days earlier.

The gravamen of the complaint made by Mr. Zeidman to the justices in support of his contention that the Director of Public Prosecutions had acted unlawfully was this. I read from p. 11 of the transcript of the proceedings to which I have referred: "I do not think, so far as the facts are concerned, there will be any great dispute. I am instructed that the position is this. Leading counsel, Mr. Blofeld, made remarks to the judge and also discussed this matter which was mentioned to the jury during the course of his speech. Once again, I do not suggest for one moment that the precise words are these, because no transcript was taken of the speech, but the gist of it was this. Mr. Blofeld said to the jury, in his final speech about when Saggs was giving his evidence, [that he did so] 'at some personal risk.' He went on to say this: 'While the Director of Public Prosecutions had undertaken to Saggs, that they, the Director of Public Prosecutions, would not prosecute him, Saggs, it remained open to any private individual to prosecute him.' If those be the words, what was the purpose of those words being said to the jury? In my submission, it is quite clear what the implication of those words is. The point being made is that if Saggs comes to court and at some personal risk gives evidence against himself, the risk is that he could be prosecuted so you can attach far more weight than you would otherwise to his evidence. However, people do not normally come to court and say, 'Look, I did something wrong,' usually the opposite. If [redacted]body does go into the witness-box and takes that risk of being prosecuted, then you can attach far more weight to that person's evidence than otherwise. In my submission, that is the only possible relevance of Mr. Blofeld's remark to the jury, that it remained open to any private individual to prosecute him."

Later, at p. 14 of the transcript, Mr. Zeidman goes on to deal with the principle of estoppel and he says: "Perhaps we might remind ourselves of its principle. Where a person makes a representation and where another person relies upon that representation to his detriment, then the person making that representation is prevented from going back on it. We say he is estopped. So although the director is indeed given powers by statute to carry out certain activities in the ordinary course of events, there is no doubt about it that he would be entitled to intervene in this prosecution, but where you have a situation of Crown counsel, acting for the Director of Public Prosecutions, one minute, so to speak, saying one thing and the next minute his department is going back on it, that prima facie, in my submission, raises a very real question as to the legality of that behaviour." Mr. Zeidman's application was granted and the proceedings were adjourned *sine die*.

The statement of claim in the action brought by Turner against the Director of Public Prosecutions was served on or about July 10, and on July 18, the Treasury Solicitor took out a summons on behalf of the Attorney-General sued as the Director of Public Prosecutions applying for an order to strike out the statement of claim under Ord. 18, r. 19 of the Rules of the Supreme Court and under the inherent jurisdiction of this Court on the grounds that (1) it disclosed no reasonable cause of action against the defendant, and (2) it was vexatious and an abuse of the process of the Court. This summons was originally to be heard on October 4 of this year. The Master directed that it should be heard by me. At the request of both parties I am delivering this judgment in open court.

The statement of claim reads as follows: "(1) On March 16, 1978, the plaintiff was convicted by a jury at the Chelmsford Crown Court of a robbery which occurred at Southgate, London, in January 1974. He was sentenced to seven years in prison by His Honour Judge Greenwood. (2) At his trial the plaintiff had denied guilt. A main Crown witness against him was one Colin Saggs who confessed to being an accomplice in the said robbery, and who testified that the plaintiff had participated with him and others. (3) Leading counsel instructed by the defendant to conduct the prosecution case stated to the judge and jury that Saggs was giving his evidence at some personal risk, because whilst the Director of Public Prosecutions (the defendant) had undertaken to Saggs that he would not prosecute him, it remained open to any private individual to prosecute him." Then there appears an irrelevant averment dealing with other statements in other cases. Paragraph 4 reads: "The jury were thus invited to attach greater weight to the evidence of Saggs by reason of these matters, by prosecuting counsel instructed by the defendant, and to view his evidence in the light thereof."

That averment in paragraph 4 is of no relevance to these proceedings, as Mr. Zeidman now concedes. Whatever effect what leading counsel may have told the jury had upon their minds it cannot possibly have any bearing on these proceedings. It may be a point which might be taken on Turner's appeal to the Court of Appeal (Criminal Division) although I must not be thought to be advocating [redacted] a point of substance. But it is obvious that the main ground of complaint [redacted] this statement of claim and in Mr. Zeidman's submissions to the magistrates is based upon a misconception.

The statement of claim continues in paragraph 5: "On May 15, 1978, the Tottenham Justices issued a summons against Saggs alleging the commission by him of the Southgate robbery at the private suit of the plaintiff." The return date was July 21, 1978. It further recites the history of the correspondence between the director and the clerk to the justices and the plaintiff's solicitors, and says that subsequent letters from the plaintiff's solicitors have failed to persuade the director to change his decision. It then goes on: "And the plaintiff claims a declaration that (1) the proposed intervention of the defendant in the conduct of this prosecution in order merely to offer no evidence and quash it is unlawful and ultra vires."

Dealing with that prayer first, having regard to the wide powers conferred by the statutes and regulations to which I have referred, it is impossible to argue that it was unlawful or *ultra vires* for the Director of Public Prosecutions to intervene in this private prosecution only for the purpose of offering no evidence. As Mr. Woolf has pointed out, there is nothing novel about such a procedure. The Attorney-General could always enter a *nolle prosequi* in criminal proceedings before Courts of record, and the Courts have never sought to interfere with the exercise of that power. It was natural for the Crown in whose name the criminal proceedings were instituted to reserve the right to the Attorney-General to stay proceedings at will. Likewise in the case of proceedings before the Courts of summary jurisdiction, the Director of Public Prosecutions has the same power and has exercised it time and again under the statutory provisions to which I have referred. As I have observed, although this was a private prosecution it was and in the nature of things has to be brought in the name of the Crown.

Paragraph 2 of the prayer avers: "The defendant is estopped from the course of action which he now proposes." Mr. Zeidman relied primarily on the plea of estoppel, but I must confess that I find it difficult to spell out the basis of such a plea from the wording of the statement of claim. There should be an averment that the defendant or his agents made a representation of fact to the defendant. What appears in the statement of claim is the allegation that counsel instructed by the Director of Public Prosecutions stated to the judge and jury that despite the director's undertaking—these are the relevant words—"it was still open to any private individual to prosecute Saggs." Those words were not a representation of fact but a correct statement of the law so far as it went. They cannot possibly found a plea of estoppel even if it could be argued that those words could amount to a representation made to Turner as opposed to something said to the judge and jury or that Turner could reasonably have understood it was intended that he should act upon such a representation.

Although there is no reference to this fact in the statement of claim, Mr. Zeidman argued that the prejudice suffered by Turner was that he has personally incurred the costs of launching a private prosecution on the strength of what learned counsel said at his trial. Whatever counsel said or did not say at the trial, he could not fetter the Director of Public Prosecutions' discretion in deciding whether to intervene if a private prosecution were launched and offering no evidence in those proceedings. An estoppel cannot be raised to prevent the exercise of a statutory discretion or prevent or excuse the performance of a statutory duty, save in exceptional cases, which do not arise here.

In a sentence, that seems to me to be the effect of the various decisions to which I have been referred in argument: the judgment of the Court of Appeal in the recent case of WESTERN FISH PRODUCTS LTD. *v.* PENWITH DISTRICT COUNCIL

and THE DEPARTMENT OF THE ENVIRONMENT, delivered on May 22 of this year but not as yet reported; MARITIME ELECTRIC CO. LTD. *v.* GENERAL DAIRIES LTD. [1937] A.C. 610; LAKER AIRWAYS LTD. *v.* DEPARTMENT OF TRADE [1977] 2 All E.R. 182. On the basis of certain observations made by Lord Denning M.R., at p. 194, o that last case, Mr. Zeidman sought to draw a distinction between exercise of statutory duty and exercise of a statutory right in considering whether estoppe could be raised against the Crown or a statutory body. In the former case, as understand it, he was conceding that estoppel could not be raised, but that in th case of a statutory right it could. He adopted as part of his argument an articl which was published in (1966) 29 M.L.R. 1. On the other hand Mr. Woolf submitte that the distinction there drawn refers to private rights exercised by statutor bodies, but he argued that where a statute confers upon a person or body discretion to act in the public interest that person or body is under an obligatio to consider whether and how that discretion should be exercised in any give circumstances. In any event, the Prosecution of Offences Regulations 194 expressly impose a duty upon the Director of Public Prosecutions to institute undertake or carry on any case which appears to him to be of importance o difficulty, or which for any reason requires his intervention. I accept Mr Woolf's submission on this point. In my judgment no valid plea of estoppe could possibly be raised on the facts of this case and no such facts have bee pleaded in the statement of claim.

The third prayer seeks a declaration that the defendant's purported exercis of the statutory power is void for *mala fides* by reason of the matters set out i paragraphs 3 and 4 of the statement of claim. Mr. Zeidman has urged me t direct that a preliminary issue be tried on whether the Director of Publi Prosecutions has exercised his discretion properly here. Although he is no prepared to support the allegation of *mala fides* in the statement of claim, he ha invited me to say that the pleading discloses an arguable case for a review o this exercise of the defendant's undoubted discretion by the Director of Publi Prosecutions. Mr. Zeidman referred me to *Halsbury's Laws of England*, 4th ed Vol. 1, para 20. This deals with Statutory and Prerogative Powers and reads a follows: "If the repository of a power exceeds its authority, or if a powe is exercised without lawful authority, a purported exercise of power may b pronounced invalid. The lawful exercise of a statutory power presupposes n only compliance with the substantive, formal and procedural conditions laid dow for its performance but also with implied requirements governing the exercise discretion. All statutory powers must be exercised in good faith, and for th purpose for which they were granted. The repository of a power must hav regard to relevant considerations and not allow itself to be influenced b irrelevant considerations. It must act fairly, and in some contexts reasonably. I the case of prerogative powers, however, the general rule is that the courts, required to determine the validity of the exercise of the power, are limited t ascertaining the existence and scope of the power and will not consider th sufficiency of the grounds on which it has been exercised."

There is no doubt about the existence or the unfettered nature of the Directo of Public Prosecutions' powers in this respect. As it is not suggested that he acte in bad faith and he clearly acted in the public interest to prevent a witnes from being prosecuted because he had given evidence for the Crown agains Tu when the Director of Public Prosecutions had undertaken not to do s there is no case for the trial of a preliminary issue here. If Saggs were brough

before the Tottenham justices the date and time of his appearance would be known, and if thereafter he were to be remanded in custody or sentenced to imprisonment he would be exposed to danger which he is entitled to expect he would not have to face. Apart from Saggs's own position, the Director of Public Prosecutions had to take into consideration the possible effects of such a private prosecution being allowed to proceed upon current and future criminal inquiries and proceedings.

The remedy sought here is a drastic one which should only be granted in the clearest of cases. This is such a case. For the reasons I have given, I hold that this action is vexatious and an abuse of the process of the court. The statement of claim discloses no reasonable cause of action. Accordingly, I order that it be struck out and the plaintiff's action dismissed.

Solicitors: Treasury Solicitor, for the defendant/applicant. A. Merrick & Co., for the plaintiff/respondent.

Orders accordingly.

[COURT OF APPEAL, CIVIL DIVISION]

BEFORE

THE MASTER OF THE ROLLS (LORD DENNING) AND LORD JUSTICE BROWNE

ROONEY *v.* SNARESBROOK CROWN COURT

June 16, 1978

Contempt of Court—Crown Court—Power to Order Committal—Only to be Exercised on Clear Evidence—Establishing Contempt beyond Reasonable Doubt.

One T, an electrical engineer applied for a job to a company of which the appellant was managing director. The appellant engaged him and T then told him that he had been called for jury service some three weeks later. In the intervening period, as T was found to be quite unsuitable for the job for which he was engaged, he was told by the appellant on a Friday, three days before he was due for jury service, that he was dismissed with one week's money in lieu of notice because of the aforesaid unsuitability. On the Monday T attended the Court and performed his juror's duties until the following Friday. When he collected his attendance allowance he said to the Court officer that he had been dismissed from his job through his jury service. The matter was reported to the judge who summoned the appellant before him. Although represented by counsel the judge assumed the role of prosecutor, formed the opinion that T's dismissal was substantially prompted by his jury service, and he accordingly, found the appellant guilty of contempt and fined him. On appeal,

Held, that it was not right that the appellant should have been convicted

of what amounted to a criminal offence except on clear evidence which established the contempt beyond reasonable doubt—the evidence in the instant case did not come up to the required standard; further, it was not a contempt in the face of the Court. The proper inference was that T. had been dismissed not for jury service but for unsuitability. Accordingly, the appeal would be allowed, the conviction for contempt quashed and the fine set aside.

BALOGH *v.* ST. ALBANS CROWN COURT [1975] Q.B. 73 considered.

Per curiam: It is undesirable that a judge should be both prosecutor and judge. It was not a pending case, and not like a case of a threat to a juror. The matter should have been dealt with either by another judge or by motion to the Divisional Court of Queen's Bench under R.S.C., Ord. 52.

[For contempt of court, see *Archbold* (39th ed.), paras. 233–241, 3455–3471.]

Interlocutory appeal.

Pursuant to the leave of the Court of Appeal granted on May 22, 1978, the appellant, Peter John Rooney, applied for an order that the order of Judge Hayman sitting at Snaresbrook Crown Court on December 12, 1977, whereby he sentenced the appellant to a fine of £250, payable in 28 days or six months' imprisonment in default, for contempt of court be set aside.

The facts appear in the judgment of Lord Denning M.R.

His grounds of appeal were, *inter alia*, (1) that the facts as found by Judge Hayman did not constitute a contempt of court by the appellant; that the judge had no jurisdiction to determine the matter summarily and/or of his own motion in particular because, on the facts as alleged against the appellant (a) the matter was not urgent; (b) the matter was not a gross or sufficiently gross interference with the course of justice; (c) the appellant's conduct did not and was not calculated to affect the course of any proceedings; and (d) the appellant's conduct did not disturb the trial or affect any just verdict or judgment, nor was it so intended. (2) The proceedings were in breach of the rules of natural justice and/or Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms in that the judge assumed both the functions of prosecutor and judge.

J. Melville Williams, Q.C., and *John Hendy* for the appellant.

THE MASTER OF THE ROLLS: This is an unusual case. Mr. Taplin is an electrical engineer by occupation and on November 14, 1977, he was interviewed by the managing director of a company called Lowshire Engineering Services Ltd. with a view to his being employed there. He was taken on as an employee—his main duty being estimating for contracts which were hoped for.

When he was taken on and given the job he told the managing director he had been called for jury service and the jury service was to start at the Snaresbrook Crown Court on December 5, 1977. It so happened that during those two or three weeks, when the company had seen his work, they thought that he was quite unsuitable for them to retain. So, on Friday, December 2, the managing director saw Mr. Taplin and told him that he was unsuitable and he was given a week's money in lieu of notice. An entry was made in the company's file, in which they noted: "Dismissed for complete unsuitability. Quite incapable of carrying out estimating work to the standard required." So Mr. Taplin left that day, Friday, December 2.

CO/1104/90

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

(DIVISIONAL COURT) Royal Courts of Justice,

Tuesday, 10th December, 1991

Before:

LORD JUSTICE WATKINS

and

MR. JUSTICE JUDGE

- - - - - -

Crown Office List

JONATHAN COOKE

-v-

DIRECTOR OF PUBLIC PROSECUTIONS

and

BRENT JUSTICES

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(Computer aided transcript of the Stenograph Notes of Marten Walsh Cherer Ltd., Pemberton House, East Harding Street, London EC4A 3AS. Telephone Number: 071-583 7635. Shorthand Writers to the court.)

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MR. K. CRAIG (instructed by Messrs. Eaton Hood, London, NW10) appeared for the Applicant.

MR. A. COLLINS Q.C. and MR. J. McMANUS (instructed by the CPS) appeared for the First Respondent.

THE SECOND RESPONDENTS were not represented.

J U D G M E N T
(As approved by judge)

LORD JUSTICE WATKINS: On 17th October 1989, Jonathan Cooke, the applicant before us for judicial review, was 16 years of age. At about 3.00 p.m. that day, he was a passenger in a motor car driven by his mother. Police officers believed on information received over a police wireless that she had been driving badly. They stopped her car as soon as they saw it. They asked Mrs. Cooke to alight. It was alleged that she immediately became extremely abusive and the applicant got out of the car and attacked and injured slightly both officers who thereupon arrested him and took him to a police station at Harlesden. He was charged with obstructing the police and bailed. On 22nd November, he was charged at the police station with criminal damage, disorderly behaviour, obstructing a police officer and two offences of assault occasioning actual bodily harm (section 47) as to which he later on elected to be tried by jury.

A committal hearing was arranged for 16th January 1990. The Crown Prosecution Service (the CPS), before proceedings commenced, withdrew before the court the two section 47 charges and substituted for them two charges of assaulting a police officer in the execution of his duty contrary to section 51 of the Police Act 1954. The solicitor of the firm acting for the applicant that day did not object to what thereby necessarily became a summary trial. The applicant was asked to plead to the two charges and he pleaded not guilty.

Shortly afterwards, the applicant's solicitors, having

further considered the matter, wrote to the CPS asking why the substitution of charges had taken place and why that had not been brought about by the procedure laid down in section 23 of the Prosecution of Offences Act 1985.

As relevant, that states: "(1) Where the Director of Public Prosecutions has the conduct of proceedings for an offence, this section applies in relation to the preliminary stages of those proceedings.

"(2) In this section, 'preliminary stage' in relation to proceedings for an offence does not include (a) in the case of a summary offence, any stage of the proceedings after the court has begun to hear evidence for the prosecution at the trial; (b) in the case of an indictable offence, any stage of the proceedings after (i) the accused has been committed for trial; or (ii) the court has begun to hear evidence for the prosecution at a summary trial of the offence.

"(3) Where, at any time during the preliminary stages of the proceedings, the Director gives notice under this section to the clerk of the court that he does not want the proceedings to continue, they shall be discontinued with effect from the giving of that notice but may be reviewed by notice given by the accused under subsection (7) below. .....

"(5) The Director shall, in any notice given under subsection (3) above, give reasons for not wanting the proceedings to continue. .....

"7. Where the Director has given notice under

subsection (3) above, the accused shall, if he wants the proceedings to continue, give notice to that effect to the clerk of the court within the prescribed period; and where notice is so given the proceedings shall continue as if no notice had been given by the Director under subsection (3) above."

Rules made under Magistrates' Courts Act 1980, as extended by section 23, lay down as follows: "3. The period within which an accused person may give notice under subsection (7) of section 23 that he wants proceedings against him to continue is 35 days from the day when the proceedings were discontinued under that section.

"4. Notice under subsection (3), (4) or (7) of section 23 shall be given in writing and shall contain sufficient particulars to identify the particular offence to which it relates; and, without prejudice to any other lawful method of giving notice, may be given by post in a registered letter or by the recorded delivery service, in which case it shall be treated as having been given on the date on which it is received for dispatch by the Post Office."

Mr. Eaton, a partner in the firm of solicitors acting for the applicant, attended at court in order to deal further with this matter on 11th April. Before any evidence was taken, he made an application to the court that it should regard the section 47 charges as not discontinued. He made a series of submissions to the justices that day which were

based upon the contention that section 23 contained a procedure which governed and solely governed any kind of attempt by the CPS to discontinue proceedings in a criminal case. The submissions which he made have been the subject of a far more detailed analysis by Mr. Craig, learned counsel for the applicant in this court.

Mr. Eaton asked the justices on that occasion, they refusing his application to regard the section 47 offences as not being discontinued, to proceed no further in any event whilst he gave consideration to the making of an application for judicial review. He applied for legal aid on behalf of the applicant. That appears to have been granted. An application to this court was made. It came before Pill J. who granted the applicant leave to move. He, on request, also stayed all proceedings before the justices so that we are, in December 1991, dealing with a matter which, factually speaking, arose as long ago as 1989.

The decisions which are challenged in this court on behalf of the applicant are, firstly, the refusal of the CPS on 30th March 1990 and afterwards to serve upon the applicant a notice of discontinuance in respect of the two section 47 offences; secondly, the refusal of the Brent justices on 11th November 1990 to treat the proceedings in respect of those offences as continuing; and, thirdly, the refusal of the justices on that day to stay the proceedings in respect of the section 51 offences.

The relief sought is (1) an order of mandamus directed to the Director or the C.P.S. requiring that there be served on the applicant a notice of discontinuance in respect of the section 47 offences, (2) an order of mandamus directed to the justices requiring them to treat those offences as continuing, and (3) an order of prohibition directed to the justices preventing them from hearing either the substituted offences or any other offences until after the disposal of the section 47 offences.

The grounds upon which relief is sought are said to be, firstly, that by purporting to withdraw the section 47 offences and by refusing to serve notice of discontinuance, the C.P.S. was, and is, acting in breach of section 23 of the Prosecution of Offences Act 1985; secondly, the decision of the justices to treat the section 47 offences as properly discontinued was wrong in law and contrary to section 23; and, thirdly, the justices were in error in refusing to order a stay in respect of the substituted summary offences until all proceedings in respect of the section 47 offences had been concluded.

Mr. Craig says that the issue here is as stated by Mr. Collins Q.C., for the Director instructed by the C.P.S, in his skeleton argument, subject to a minor alteration. Taking that into account, the issue is this: does section 23 of the Prosecution of Offences Act 1985 provide a complete code for the termination of a prosecution during the preliminary stages

of a prosecution or does the prosecution retain a power (a) to offer no evidence at committal hearings before examining justices, and (b) to withdraw charges with the leave if required of the court? Was the applicant properly discharged by the justices in respect of the two section 47 offences or, alternatively, were those charges properly withdrawn?

I ought to interpolate here that in the court record, the section 47 charges are referred to as "discharged". It may be that a more appropriate word would have been "withdrawn", but however that may be, it does not affect the real issue here which concerns the effect of section 23 upon the right of a prosecutor to withdraw a criminal charge.

I think that it is not in issue that the CPS did not avail themselves at all in the present case of section 23. It is equally clear, in my judgment, that if they were not in law bound to do so, the action they took and the justices' reaction to that cannot be criticised. Thus, the applicant properly stands to be tried summarily for the section 51 offences and, of course, upon the other charges he faces which are also only triable summarily only.

That the CPS regard section 23, and the Director likewise, as an addition and no more to pre-existing powers of a prosecutor to discontinue proceedings is manifest from the booklet of guidance given to the CPS by or on the authority of the Director, a part of which, paragraph 10, is relevant here.

That states: "The use by the Crown Prosecutor of his power to terminate proceedings whether by using the procedure under Section 23 of the Prosecution of Offences Act 1985 or the continuing power to withdraw or offer no evidence is, in many ways, the most visible demonstration of the Service's fundamental commitment towards ensuring that only fit and proper cases are taken to trial. Unless, of course, advice has been given at a preliminary stage, the police decision to institute proceedings should never be met with passive acquiescence but must always be the subject of review. ....."

Mr. Craig submits that this guideline wrongly states the position in law because absent the section 23 procedure, the CPS has no residual power to withdraw a prosecution nor to offer no evidence. He says that, in any event, having regard to section 10 of the 1985 Act, the Director has no power to issue guidelines as to when a prosecutor may withdraw a charge. I say at once that I cannot agree about the residual power. Whether the guidelines issued are valid is, of course, an altogether different matter. As to that I know of nothing which supports Mr. Craig's submission which I would not regard as well founded.

Mr. Craig's main submissions are as follows. He concedes that prior to the 1985 Act, the law governing the power of a prosecutor to withdraw a charge, discontinue proceedings in other words, is clearly and correctly stated in a number of cases to which he referred us.

In R. v. Redbridge Justices, Ex parte Sainty (1981) R.T.R. 13, at page 18A, Ackner L.J. stated: "Those authorities account for the proposition to be found in Halsbury's Laws of England 4th Ed. Vol. 29, ... paragraph 328, headed 'Withdrawal of Summons'. It reads as follows: 'By long practice a summons may with the permission of the court be withdrawn without an adjudication. This does not, however, as a rule, have the effect of putting an end to the ground of information or complaint.' It then refers in the note to the cases in which a withdrawal of a summons has occurred and the court has proceeded to consider the effect of that in so far as it might be a bar to further proceedings. I am accordingly wholly satisfied that the suggestion that a court of summary jurisdiction has no power to permit a summons or information to be withdrawn is a wholly invalid point and the justices were wholly correct in rejecting it."

In R. v. Canterbury & St. Augustine Justices, Ex parte Klisiatz, R. v. Ramsgate Justices, Ex parte Warren & Ors. (1982) 1 Q.B. 398, Lord Lane C.J. gave judgment in the course of which he referred to a number of authorities including R. v. Broad (1978) 68 Cr.App.R. 281. It was held in Klisiatz: "1. That justices could not question a decision of the prosecution in committal proceedings to offer no evidence as they had no material before them on which to do so and, therefore, the principle that a higher court had a duty to consider and consent to the decision of the prosecution to

offer no evidence on a count of an indictment was not applicable to committal proceedings before the justices."

At page 411E, Lord Lane observed: "Next, it is submitted that the justices always have a discretion to prevent an abuse of the process of their court, and this, it is alleged, is what happened on both these occasions. We were referred to a number of authorities on the powers of the court to prevent an abuse of the process before them." The Lord Chief Justice then referred to well-known authorities and he went on: "I am prepared to assume that there does exist in the justices an inherent power to act so as to prevent any flagrant abuse of the processes of their court, limited necessarily by any relevant statutory obligation. This power, if it exists, would have to be exercised by the justices very sparingly and only in the most obvious circumstances which disclose blatant injustice. There must be, somewhere, some limit as to what can be done before the court, and in that respect we were referred to R. v. Bennett .... and to R. v. Bodmin Justices ...." He went on further to quote from part of the judgment of Lord Goddard in the latter case. It is clear that that Lord Chief Justice was in no doubt at all that justices have the power, although it must be sparingly used, to resist an attempt by the prosecution to withdraw proceedings which are before them.

The most recent of the authorities to which we were referred was R. v. Liverpool Stipendiary Magistrate, Ex parte

Ellison (1990) R.T.R. 220. In that case, the applicant was charged with attempted theft of property from a motor vehicle. At an adjourned date for hearing before the stipendiary magistrate, the prosecutor applied to lay an oral information in substitution for the charge under section 1 alleging an offence of vehicle interference contrary to section 9(1)(ii) of the Act of 1981. The prosecutor's reason for doing that was that the offence which was to be proceeded with in substitution for that originally charged was triable only summarily.

Leggatt J., in giving judgment, with which Bingham L.J. agreed, said at page 226E: "The key to the determination of this case appears to me to be that a defendant arraigned in a magistrates' court has in truth no absolute right to trial by jury. Whether he has such a right depends on the charge which is preferred against him. Until the more serious charge in this case was withdrawn, the applicant enjoyed such a prospective right, but in relation to the less serious charge he did not. To speak of depriving the applicant of his right to trial by jury is, in my judgment, only a pejorative way of making the point that upon reduction of the charge he ceased to be confronted by a charge sufficiently serious to warrant a right to trial by jury. In the absence of bad faith on the part of the prosecutor or of unfairness or prejudice to the accused, the prosecutor's motive in making the substitution was irrelevant. The question is whether the substitution was

in this sense a proper one. The prosecutor's good faith has not been impugned nor has any unfairness or prejudice to the applicant been suggested, except in so far as the substitution was made so as to have the case tried summarily. That in my judgment did not involve any manipulation or misuse or process. Whilst it is no doubt preferable that the charge ultimately made against a defendant should be correct in the first place, that cannot always occur. The prosecutor has said on affidavit that the Crown Prosecution Service took the view that the less serious charge was appropriate in this case."

What was said in Ellison, especially in the quotation which I have extracted from it which is of relevance, does not, Mr. Craig submitted, assist us because what was said there was per incuriam seeing that the effect of section 23 does not seem to have been referred to the court. Anyhow, it is clear that it was neither argued nor considered, so Mr. Craig maintained, and that would appear to be the case.

The position is, he asserts, that section 23 swept away all the power a prosecutor had previously to discontinue proceedings. So much is, he says, absolutely plain from subsection (1) and made plainer possibly by subsection (7) which puts the power in the hands of a defendant finally to decide whether proceedings should be discontinued. Thus the weapon once in the hands of a prosecutor to deprive by discontinuance a defendant's right to trial by jury has been taken away from him and not before time. If, he went on, the

prosecutor by the time of trial has been deprived of evidence essential to continue a prosecution, he may, without recourse to section 23, go before the court and offer no evidence, but that is not the position here. The evidence, including medical evidence, upon the section 47 charges is precisely that which would be offered on the section 51 charges. Thus, the section 23 procedure alone can be resorted to by the CPS which will give the applicant the right to insist via subsection (7) upon trial by jury.

To all of that, Mr. Collins responded in a series of submissions which amount to this. He maintains that section 23 is a valuable addition to the power of a prosecutor to discontinue proceedings and was designed by Parliament to have that effect. That being so, all the existing power of the prosecutor, as is clear from the cases to which reference has been made, has been preserved. If it was the intention of Parliament, he argued, that those powers should be taken away, it would have said so expressly in the 1985 Act, either in section 23 itself or in some other section. However, no such express words are to be found in the Act and there are no words used in the Act from which such an inference to that effect can be drawn. Therefore, section 23 is, he maintains, coterminous with the common law powers.

If that be right, then there can be no question but that it is open to a prosecutor to use, when deciding whether to discontinue proceedings, either the procedure under section 23

or, as was always open to him to do, appear before the court and invite the court to allow him to withdraw the proceedings in the presence, of course, of a defendant or his legal representative.

As to the consent of the court being necessary for the purpose of allowing a prosecutor to withdraw proceedings, reference was made to R. v. Broad to which I have already referred in this judgment, but it has to be borne in mind that what was said in Broad does not reflect what was clearly the view of the Lord Chief Justice as expressed in Klisiatz, which is to say that the power of justices to refuse to consent to the withdrawal of a charge upon application by a prosecutor is limited, limited in the sense that justices must, out of the reasons given by a prosecutor seeking to withdraw a charge, find bad faith or other motive which would savour of an abuse of the process of the court.

Mr. Collins went on to submit that the reason why, in Ellison, no reference is to be found to section 23 is simply because the court there and counsel appearing before it must have come to the conclusion that section 23 had no role to play in the issues before that court and did not arise for consideration out of the facts.

The power to withdraw a charge is therefore, so he contended, two-fold. It is as is explained in the reported cases and as stated in section 23. One does not exclude the other nor does one do away with the other. Section 23 is a

very useful handmaiden for a prosecutor and will do nothing but good to a defendant as well because very early on after the initial charging of a defendant and the papers in the case have been sent to the CPS, that Service can bring its mind to bear upon the wisdom or otherwise of proceeding with the charge. If it comes to the conclusion that it should not proceed then, in a common sense way, the CPS may resort forthwith to the use of the sensible procedure laid out in section 23. That would avoid an appearance in court by either the prosecutor or the defendant with a consequent saving of costs, time and trouble. That would, of course, still leave it free to a defendant to use subsection (7) and to demand that the proceedings continue. He may do that if only for the reason that he wants to bring the matter into court in order that it should be ventilated there and reported so that the withdrawal of the charge against him be given the maximum publicity possible.

In my view, Mr. Collins is absolutely right in all his contentions. It is for one thing inconceivable, I think, that the court in Ellison simply overlooked section 23. The law as to discontinuance, offering no evidence and so forth is still that as stated in the cases I have mentioned in this judgment.

The reason for the introduction of section 23 is, in my opinion, all too clear. It provides a most useful pre-hearing or pre-trial economically beneficial to everyone concerned procedure which enables the CPS by correspondence and without

a court appearance to dispose of a prosecution which, upon further consideration or reflection, it believes should no longer be proceeded with. The terms of the section all point, it seems to me, to a creation of a power additional to that already possessed by a prosecutor to discontinue proceedings whilst, at the same time, affording to a defendant the right to insist on the continuance, if only for the purpose, as I have said, of making an appearance in court where his name may be cleared and publicity given to that.

Certain it is, in my judgment, that whether section 23 has been used or not, a prosecutor may go before the court and withdraw a charge, without or if required the consent of the court, and thereby discontinue proceedings. He may also offer no evidence regardless of a defendant's wish that an existing charge or charges be dealt with and are not supplanted by others which would deprive him of his preference to be tried by jury.

I would dismiss this application for those reasons.

MR. JUSTICE JUDGE: I agree.

MR. LEWIS (for Mr. Collins): My only costs application is that legal aid taxation be granted.

LORD JUSTICE WATKINS: Yes, certainly.

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A

R. v. DIRECTOR OF PUBLIC PROSECUTIONS, ex parte C.

QUEEN'S BENCH (DIVISIONAL COURT) (Lord Justice Kennedy and Mr Justice Scott Baker): February 15, 18, 1994

B PROCEDURE

Prosecution of Offences

Decision not to prosecute—Guidelines to be followed by prosecutor. Prosecution of Offences Act 1985 (c. 23), s. 10—Code for Crown Prosecutors (CPS Annual Report 1992–93), para. 8(1)(6).

C By section 10 of the Prosecution of Offences Act 1985:

"(1) The Director [of Public Prosecutions] shall issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them . . ."

By section 12(1) of the Sexual Offences Act 1956:

D "It is an offence for a person to commit buggery with another person or with an animal."

The Divisional Court has power to review a decision of the Director of Public Prosecutions not to prosecute but the power is one to be sparingly exercised.

The applicant, T.C., had alleged that she had been a victim of non-consensual buggery committed by her husband F.C., a police E sergeant, whom she had married on May 27, 1992. On November 5, 1992, she complained to the police that he had buggered her repeatedly and without her consent during the five months of their cohabitation. She was examined by a police surgeon who found damage consistent with repeated anal penetration over a prolonged period. When the allegations made by the applicant were put to F.C. he chose not to reply. On December 1, 1992, F the police submitted the file to the Crown Prosecution Service so that a decision could be made whether or not to prosecute. By letter dated December 9, 1992, the applicant was informed that the D.P.P. had decided not to prosecute.

Held, allowing the application, that the decision of the D.P.P. was unreasonable in that it failed to have regard to a material consideration. The prosecutor had not followed the Code issued pursuant to section 10 of G the Prosecution of Offences Act 1985. Although buggery without consent and consensual buggery were both offences contrary to section 12 of the Sexual Offences Act 1956, they were in reality separate offences and in the instant case only the former was alleged by the complainant There were

two possible lines of defence. First the accused might deny ever having had intercourse *per anum*. This possibility had not been considered. Instead it had been assumed that his line of defence would be to admit buggery but to assert that it was consensual. In those circumstances, the prosecutor erred in that he failed in accordance with paragraph 4 of the Code to "have regard to any lines of defence which were plainly open to ... the accused." Thus, the decision would be set aside and remitted to the D.P.P. for further consideration.

R. v. Courtie (1984) 78 Cr.App.R. 292, [1984] A.C. 463 applied.

Metropolitan Police Commissioner, ex p. Blackburn [1968] 2 Q.B. 118, 136, *Selvarajan v. Race Relations Board* [1975] 1 W.L.R. 1686, 1697, *General Council of the Bar, ex p. Percival* [1991] 1 Q.B. 212, 234 *Chief Constable of Kent County Constabulary, ex p. L.* [1993] 1 All E.R. 756, 768g, and *Inland Revenue Commissioner, ex p. Mead* [1993] 1 All E.R. 772 considered.

[For s. 10 of the Prosecution of Offences Act 1985, see *Archbold* (1993) paras. 1–296, 297. For s. 12 of the Sexual Offences Act 1956, see, *ibid.* (1994) para. 20–91.]

Application for judicial review.

This was an application by T.C. to remove into the Divisional Court and quash the decision of the Crown Prosecution Service made on or about December 9, 1992, refusing to prosecute the applicant's husband, F.C., a police sergeant, and the decision of December 23, 1992 refusing to release material evidence for the purpose of a private prosecution.

The facts appear in the judgment of Kennedy, L.J.

The application was argued on February 15, 1994.

Michael Supperstone, Q.C. and *Amir Sultan* for the applicant, T.C.

Mark Dennis for the Director of Public Prosecutions, the first respondent.

Michael Egan for F.C., the second respondent.

Cur. adv. vult.

February 18, 1994. **KENNEDY L.J.** read the judgment of the Court:

1. *General*

This is an application for judicial review of a decision of the Director of Public Prosecutions not to prosecute the applicant's husband, Police Sergeant C, for the offence of buggery. He is the second respondent in these proceedings.

2. *The Facts*

The facts are to some extent not in dispute. On April 10, 1992 the applicant came to the United Kingdom from Pakistan and on May 27, 1992

she married the second respondent. It was an arranged marriage. On November 5, 1992 she complained to the police that he had buggered her repeatedly and without her consent during the five months of their cohabitation. She also said that in about June 1992 he had obtained a pornographic video which he used to stimulate sexual activity. On November 6, 1992 she was examined by Dr Houston, an experienced female police surgeon, and on November 13, 1992 she was re-examined by Dr Barker, another experienced female police surgeon. She was observed to be an Asian lady of slight build with a poor command of English. Dr Houston noted scratches on her right upper arm and the backs of both hands consistent with fingernail scratches less than a week old. Examination of the private parts disclosed on each occasion damage consistent with repeated anal penetration over a prolonged period. To both doctors the applicant made it clear that the anal penetration took place without her consent but she was not wholly consistent as to its frequency. She told Dr Houston it happened three or four times a week but to Dr Barker she said it happened at least weekly. To both doctors she made one complaint of other violence, telling Dr Houston that on about November 3, 1992 when she refused to have intercourse her husband had dragged her down the stairs, scratching her with his nails, then he had grabbed her by the back of the neck and thrown her on the settee.

When the allegations made by the applicant were put to the second respondent he chose not to reply, but when the police visited the matrimonial home they found the pornographic video. On November 24, 1992 the police submitted the file to the Crown Prosecution Service so that a decision could be made whether or not to prosecute.

3. *The Crown Prosecution Service Decision (Part I)*

What happened then is clear from an affidavit sworn by Mr Naunton, the Head of the Police Complaints Division at the Crown Prosecution Service. The evidence was reviewed and discussed by responsible members of staff, and on December 1, 1992 it was considered by Mr Naunton who sought to apply to it the relevant principles from the Code for Crown Prosecutors which was issued pursuant to section 10 of the Prosecution of Offences Act 1985 as a public declaration of the principles upon which the Crown Prosecution Service exercises its functions. The Code indicates that when considering whether to institute proceedings prosecutors should have regard first to the evidential sufficiency criteria and, if they are satisfied, to the public interest criteria. For present purposes the evidential sufficiency criteria can be said to be summarised in the question: is there a realistic prospect of a conviction, bearing in mind the evidence available and those lines of defence which are plainly open to, or have been indicated by the accused? The public interest criteria are a variety of considerations which may make it inappropriate to prosecute even though there is a realistic prospect of conviction. The interests of the

victim are an important factor, so is the likely penalty. Paragraph 8(1) of the Code states:

> "When the circumstances of an offence are not particularly serious, and a court would be likely to impose a purely nominal penalty, Crown Prosecutors should carefully consider whether the public interest would be better served by a prosecution or some other form of disposal such as, where appropriate, a caution. This applies particularly where the offence is triable on indictment when Crown Prosecutors should also weigh the likely penalty with the likely length and costs of proceedings."

In relation to sexual offences paragraph 8(6) of the Code reads:

> "(a) Whenever two or more persons have participated in the offence in circumstances rendering both or all liable to prosecution, the Crown Prosecutor should take into account each person's age, the relative ages of the participants and whether or not there was any element of seduction or corruption when deciding whether, and if so in respect of whom, proceedings should be instituted.
> (b) Sexual assaults upon children should always be regarded seriously, as should offences against adults, such as rape, which amount to gross personal violation. In such cases, where the Crown Prosecutor is satisfied as to the sufficiency of the evidence, there will seldom be any doubt that prosecution will be in the public interest."

4. *The Law of Buggery*

Before I come to the actual decision made by Mr Naunton it is necessary to say something about the offence of buggery, and about the attitude to be adopted by this Court when asked to review a decision of the Crown Prosecution Service not to prosecute.

If an adult male has anal intercourse with an adult female that is an offence contrary to section 12(1) of the Sexual Offences Act, 1956. Unlike the situation when buggery is committed by adult males on each other, it is no defence that the woman consented or that the act was committed in private, and indeed if she does consent she becomes an accomplice. However if the offence is committed in private by an adult man on an adult woman who consents the matter is unlikely normally to come to the notice of the criminal law, and if it does, provided that there is no element of corruption or seduction, the penalty will probably be relatively modest (see, for example, *Bush* (1989) 11 Cr.App.R.(S.) 295 where the sentence, as varied by the Court of Appeal, was three months' imprisonment).

5. *The Power of Review*

It has been common ground before us in the light of the authorities that this Court does have power to review a decision of the Director of Public

Prosecutions not to prosecute, but the authorities also show that the power is one to be sparingly exercised. As recently as 1975 Lawton L.J. said in *Selvarajan v. Race Relations Board* [1975] 1 W.L.R. 1686 at 1697:

> "As far as I know, the courts have never interfered with the exercise of the Director's discretion: but it does not follow that they could not do so if he refused or failed to perform his public duties or acted corruptly or unfairly."

Then in *General Council of the Bar, ex p. Percival* [1991] 1 Q.B. 212 where the applicant sought to review the Council's decision not to prefer a more serious charge Watkins L.J. confirmed the existence of this Court's power to review the existence of discretion by a prosecuting authority. He said at p. 234:

> "We do not think it right that strictly defined limits should be set to the judicial review of a body which can broadly be described as a prosecuting authority. Each case must be considered with due regard to the powers, functions and procedures of the body concerned and the manner in which it has dealt (or not dealt) with the particular complaint or application. This complaint should not, we think, fail because the applicant is unable to demonstrate that it was not dealt with at all or excluded by the adoption of an illegitimate prior policy. It falls to be decided, in our view, on the substantive issues of irrationality and/or procedural irregularity, with due regard to the nature of the discretion involved."

In *Chief Constable of Kent County Constabulary, ex p. L.* [1993] 1 All E.R. 756 this Court was concerned with decisions made by the Crown Prosecution Service in relation to the prosecution of juveniles, and Watkins L.J. suggested at p. 768E that a "rigorous approach" would be adopted to attempts to obtain judicial review of a decision made by the police or the Crown Prosecution Service. At p. 768G he said:

> "It seems to me that a decision to discontinue proceedings by the CPS can be equated with a decision by the police not to prosecute and is, therefore, open to judicial review only upon the restricted basis available to someone, assuming he has *locus standi*, seeking to challenge a decision by the police."

That restricted basis was indicated by the Court of Appeal in *Metropolitan Police Commissioner, ex p. Blackburn* [1968] 2 Q.B. 118, 136 in which Lord Denning M.R. said of the Commissioner:

> "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."

Salmon L.J. said of the latter type of situation that it would be a clear breach of duty. It would be so improper that it could not amount to an exercise of the discretion. We were also referred to the decision of the Court of Appeal in *Raymond v. Attorney-General* (1982) 75 Cr.App.R. 34, [1982] Q.B. 839, a decision of Nolan J., as he then was, on an application for leave, reported only as *Director of Public Prosecutions, ex p. Langlands-Pearse* [1991] C.O.D. 92, and the decision of this Court in *Inland Revenue Commissioner, ex p. Mead* [1993] 1 All E.R. 772. From all of those decisions it seems to me that in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions acting through the Crown Prosecution Service arrived at the decision not to prosecute:

(1) because of some unlawful policy (such as the hypothetical decision in *Blackburn* not to prosecute where the value of goods stolen was below £100); or
(2) because the Director of Public Prosecutions failed to act in accordance with her own settled policy as set out in the Code; or
(3) because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived.

Mr Supperstone sought to satisfy us under all three heads but he did not suggest anything like improper motive or bad faith.

6. *The Crown Prosecution Service Decision (Part II)*

Having identified what we have to look for I return to the evidence as to what caused Mr Naunton to decide as he did. It is to be found in paragraphs 5, 6, 7 and 8 of his affidavit, which read:

"5. I was satisfied that the evidential sufficiency criteria set out in the Code were satisfied in respect of the offence of buggery allegedly committed by C on his wife.
6. In considering the public interest criteria I had regard to:
(a) paragraph 7 of the Code, and in particular the words there attributed to Lord Shawcross.
(b) paragraph 8(vi) of the Code. In the light of the wording of that paragraph I considered the evidence on the issue of consent. In view of all the circumstances, and in particular the absence of any corroboration of the complainant's account on this issue and her failure to make a complaint over a long period, I reached the conclusion that the evidence of lack of consent would not have been strong enough to offer a realistic prospect of a conviction had the

offence required proof of lack of consent. I therefore considered that paragraph 8(vi)(b) of the Code did not apply.

7. I also had regard to the fact that, by virtue of the Sexual Offences Acts 1967, buggery in private between males aged over 21 is not an offence, unless proved to be non-consensual. Because of this provision, I also considered whether a prosecution was required for buggery of the alleged offender's wife in private, where both parties were over 21, and where the evidence of lack of consent would not have been sufficient to offer a realistic prospect of a conviction had the person buggered been male.

8. Approaching the case on the basis that the alleged buggery could not have been proved to have taken place without the complainant's consent, I concluded that in all the circumstances the complainant's grievance could be more appropriately dealt with in the matrimonial court, and that the public interest did not require the institution of criminal proceedings. I was also aware that the police would consider whether disciplinary proceedings were appropriate."

7. The Applicant's Submissions

Mr Supperstone submits that there is evidence in those paragraphs of the adoption of an unlawful policy, namely a policy not to prosecute where buggery between adults of different sexes may have taken place with consent. Secondly, Mr Supperstone submits that Mr Naunton does not seem to have acted in accordance with the policy as set out in the Code. The applicant complained that she was the victim of non-consensual buggery and that there was no evidence suggesting she gave her consent. So when in paragraph 5 Mr Naunton says he was satisfied that the evidential sufficiency criteria were satisfied in respect of the offence of buggery allegedly committed it would seem to follow that Mr Naunton considered that there was a realistic prospect of a conviction of buggery without consent. If so, the public interest criteria would be likely to militate in favour of rather than against a decision to prosecute.

But it seems clear from paragraphs 6, 7 and 8 of the affidavit that in reality, despite what he says in paragraph 5, Mr Naunton was not satisfied of the evidential criteria in relation to the offence alleged. He was only satisfied of the evidential criteria in relation to something different, namely consensual buggery, an offence not alleged, so the approach was to some extent distorted and not in line with the Code. Lest it be thought that I am mistaken in referring to consensual buggery as something different, it should be remembered that in *R. v. Courtie* (1984) 78 Cr.App.R. 292, [1984] A.C. 463 the House of Lords recommended that lack of consent be alleged in the particulars of the count in the indictment, with consensual buggery, if appropriate, being alleged as an alternative in a separate count. Although the circumstances were different in that case because that case was concerned with buggery between males, the principle, as it seems to me, still applies.

Mr Supperstone's third submission is that in so far as Mr Naunton was not satisfied that the evidential sufficiency criteria were met in relation to buggery without consent his decision was perverse because it failed to have regard to the apparent credibility of the complainant, to the medical evidence and to the discovery of the pornographic video. It also had regard to an irrelevant factor, namely the lapse of time before the complaint was made. Mr Supperstone submits that it is hardly surprising that the applicant waited for five months before she complained. She was newly married and in a strange country, unable to speak much English, with few people to turn to, and possibly feeling some concern about her status as an immigrant. All of those matters would have been obvious to Mr Naunton had he thought about them without reference to any affidavit which came into existence after he had made his decision.

8. *The Respondent's Submissions*

For the Director of Public Prosecutions Mr Dennis invited us to focus on the lack of corroboration in respect of the offence alleged, namely buggery without consent. He submitted, in my view rightly, that the medical evidence and the discovery of the pornographic video give little indication as to whether anal intercourse took place with or without consent, although Dr Houston did observe a painful red sector of the anus and red splits in the anal skinfolds. She was also unable to test the tone of the internal ring of muscles because of the pain produced by spasm and the patient becoming distressed. No doubt because of the process of healing those injuries were less apparent when Dr Barker examined, but for my part I do find it a little difficult, albeit not impossible, to envisage a woman agreeing to acts of buggery which produced such painful results.

As Mr Dennis points out, Mr Naunton could not regard the injuries to the arm and hands as significant because the applicant herself was inconsistent as to how they were caused and Mr Dennis submits that there were features indicating that in fact this lady did consent to buggery. She was at the material time nearly 30 years of age. When, according to her, the first act of anal intercourse took place she was in her sister's home and so her sister would have been nearby. That is apparent from the affidavit of the applicant sworn on March 9, 1993 but whether it was known to Mr Naunton in December 1992 I do not know because we do not have before us any statement which the applicant made or may have made prior to that date. Mr Dennis also points to the lapse of time before a complaint was made.

Mr Dennis, supported by Mr Egan for the second respondent, submits that having decided that non-consensual buggery could not be proved Mr Naunton was entitled to consider whether or not to prosecute at all and to weigh in the balance the penalty likely to be imposed, the devastating effect on the accused of such a prosecution and the fact that in law the complainant would be an accomplice. Mr Egan reminded us of what was

said by Lord Brightman in *R. v. Hillingdon London Borough Council, ex p. Puhlofer* [1986] A.C. 484 and by Lord Lowry in *R. v. Secretary of State for the Home Department, ex p. Brind* [1991] 1 A.C. 696 about the need for courts to exercise restraint when discretion has been vested in others, and Mr Egan points out with force that some of the matters now relied upon by Mr Supperstone were not before Mr Naunton in late 1992, or are matters which could not be relied upon in a criminal trial.

9. *Conclusion*

In my judgment this is one of those rare cases where the Director of Public Prosecution's decision is shown to be flawed because Mr Naunton on behalf of the Director of Public Prosecutions did not approach the question which he had to decide in accordance with the settled policy of the Director of Public Prosecutions as set out in the Code. Although buggery without consent and consensual buggery are both offences contrary to the 1956 Act they are in reality separate offences and here only the former was alleged, but the prosecutor's approach was, as it seems to me, to some extent clouded by the latter. Initially at least, as it seems to me, he should have disregarded it. He would then have had to bring his mind fully to bear on the question of whether the evidential sufficiency criteria were satisfied in relation to the more serious offence. In other words, he would have had to ask himself if there was a realistic prospect of a conviction. He would have had to look at the evidence available and consider those lines of defence plainly open to the accused. The accused had, up to that time, chosen to remain silent but there were, as it seems to me, looking at the matter from Mr Naunton's standpoint, two possible lines of defence. First, the accused might deny ever having had intercourse *per anum*. That was a possibility which, so far as I can see, was not considered at all by Mr Naunton, and of course if he had considered it the question of corroboration would have been easily satisfied. Instead he assumed that the second respondent's line of defence would be to admit buggery but to assert that it was consensual. In those circumstances it seems to me that Mr Naunton erred in that he failed in accordance with paragraph 4 of the Code to "have regard to any lines of defence which are plainly open to . . . the accused." What conclusion Mr Naunton would have reached if he had had regard to both of the lines of defence to which I have referred instead of to just one of them, as well as to the fact that the second respondent had not as yet indicated what his line of defence might be, is not a matter which in my judgment should be speculated upon in this court. The decision is one for the Director of Public Prosecutions not for this court. Accordingly, unless there are compelling reasons to do otherwise, I would set aside the decision and remit the matter to the Director of Public Prosecutions for consideration in the light of the judgment of this Court, and of course in the light of all that has happened since the original decision was made. It follows of course from what I have said that I need

not deal with Mr Supperstone's submission that the decision under challenge was the result of the application of an unlawful policy, although I am far from satisfied about that, but he is entitled to say that the decision was unreasonable in that it failed to have regard to a material consideration. Primarily however I base my decision on what seems to have been a patent failure to act in accordance with the settled policy as set out in the Code.

10. *The Decision Letter*

The decision not to prosecute having been taken, the applicant was informed by a letter dated December 9, 1992 which we have read. To say as Mr Naunton does that "perhaps the letter could have been more helpful" is an understatement, and it is some relief to me to know that the standard letters and explanatory note are being revised, but frankly it seems to me that this applicant, with her poor command of English, should have been told of the decision either directly or through an interpreter in words that she could understand.

11. *Oppression*

On behalf of the second respondent Mr Egan submits that even if the decision was flawed we should let it stand in justice to the second respondent because he was told in December 1992 that he would not be prosecuted and did not learn of this application until July 1993. Shortly before the decision was taken it seems that some member of the applicant's family made an approach to the press, and the applicant, having shared a roof with the second respondent for some considerable time after she complained to the police, has resisted his petition for divorce without cross-petitioning, all of which it is submitted should weigh against reopening the decision whether or not to prosecute. But in my judgment those matters are of comparatively little weight at this stage when the applicant could still if she wanted commence a private prosecution and has shown some indication of doing so. Were she to do so the Director of Public Prosecutions might or might not feel constrained to take it over and offer no evidence, but for present purposes the important matter is that the second respondent cannot claim to have been misled into thinking that he was free of all jeopardy. I say nothing as to whether if the second respondent is shown to have made admissions after December 9, 1992 in the belief that he was no longer in danger of being prosecuted by the Director of Public Prosecutions those admissions would be admissible if such a prosecution were now to be launched. That may be a matter for the Director of Public Prosecutions to consider when the matter is returned to her, because in my judgment the order now must be for the decision under challenge to be set aside, and for the matter to be remitted to the Director of Public Prosecutions for further consideration.

SCOTT BAKER J.: I agree. Section 12 of the Sexual Offences Act 1956 provides that it is an offence for a person to commit buggery with another person or with an animal. Where the offence is committed with a woman the maximum sentence is life imprisonment. In the case of buggery with a male subsequent legislation has created several different levels of offence and maximum penalty depending on the circumstances (see *R. v. Courtie* (1984) 78 Cr.App.R. 292, [1984] A.C. 463). Where the buggery is committed with a woman the maximum penalty remains life imprisonment regardless of circumstances. In practice, however, there are two very different offences within section 12(1) depending upon whether the offence took place, with or without the consent of the woman.

In my judgment, following *R. v. Courtie* the prosecutor should, if he decides to proceed, make it clear whether he is charging buggery without consent or buggery with consent. It may of course be appropriate to allege offences in the alternative. I suspect the difficulties in the present case may in part have arisen because Mr Naunton did not sufficiently distinguish in his mind that there are in practice two different offences within section 12.

Application allowed.

Solicitors: David Shine & Kharbanda, Southall, for the applicant. Crown Prosecution Service, London for the D.P.P., first respondent. Russell, Jones & Walker for F.C., the second respondent.

5.12

[COURT OF APPEAL]

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

1968 Jan. 24, 25, 26, 29

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

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).

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.

* 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 ..."

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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. 902E, 904H - 905A, 913F) which he could be compelled to perform (post, pp. 903C, 905A, 912B); 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. 902H, 905C); but that, since the respondent had undertaken to revoke the policy decision of April, 1966, 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. 904D, 910E. 912B).

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. 901C, 910C, 912F) 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. 903F, 910E. 913G).

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

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 ..."

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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*[1]] ... 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]

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

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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 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 information, 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)*,[2] 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

2 [1968] 1 W.L.R. 53; [1968] 1 All E.R. 139, H.L.(E.).

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counsel undertook that the policy decision of April 22, 1966, 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.

Michael Worsley for the respondent.

The following cases in addition to the cases referred to in the judgments were cited in argument: *Ex parte Napier*[3]; *Reg. v. Lewisham Union Guardians*[4]; *Grant v. Secretary of State for India in Council*[5]; *Reg. v. Secretary of State for War*[6]; *Reg. v. Caledonian Railway Co.*[7]; *Reg. v. Southampton Port Commissioners, Ex parte Southampton Corporation*[8]; *Elwood v. Belfast Corporation*[9]; *Ex parte Pulbrook*[10]; *Reg. v. Commissioners of Inland Revenue, Ex parte Nathan*[11]; *Julius v. Bishop of Oxford*[12]; *Liversidge v. Anderson*[13]; *England v. Davidson*[14]; and *Tzortzis v. Monark Line A/B.*[15]

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

3 (1852) 18 Q.B. 692.
4 [1897] 1 Q.B. 498.
5 (1877) 2 C.P. 445.
6 [1891] 2 Q.B. 326, C.A.
7 (1854) 16 Q.B. 19.
8 (1862) 1 Best & Sm. 5; (1870) L.R. 4 H.L. 449.
9 (1923) 57 Ir.L.T. 138.
10 [1892] 1 Q.B. 86. D.C.
11 (1884) 12 Q.B.D. 461, C.A.
12 (1880) 5 A.C. 214, H.L.
13 [1942] A.C. 206; 58 T.L.R. 35; [1941] 3 All E.R. 338, H.L.
14 (1840) 11 Ad. & E. 856; 9 L.J.Q.B. 287.
15 [1968] 1 W.L.R. 406. C.A. All E.R. C.A.

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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. 3, 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 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

1 (1884) 13 Q.B.D. 505, D.C.

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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 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 csase, 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 winnings, and special chips which he throws back. No doubt

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.
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.).

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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

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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."

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

10 (1921) 27 Cox C.C. 63; 37 T.L.R. 799. H.L.
11 [1966] 1 W.L.R. 960.

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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 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*.[12] and *Attorney-General for New South Wales v. Perpetual Trustee Co. Ltd.*[13]

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

12 [1930] 2 K.B. 364; 46 T.L.R. 390.
13 [1955] A.C. 457; [1955] 2 W.L.R. 707; [1955] 1 All E.R. 846, P.C.

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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. 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

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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 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

14 [1968] 1 W.L.R. 53.

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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.

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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*[15] 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 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[15] upheld the conviction and concluded that there was ample evidence to support the finding that the offer of the bank was

15 [1966] 1 W.L.R. 960.

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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)*[16] 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.

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

16 [1968] 1 W.L.R. 53.
17 [1966] 1 W.L.R. 960.

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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 (No. 1)*.[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 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

17 [1966] 1 W.L.R. 960.
18 [1967] 1 W.L.R. 1227.
19 [1968] 1 W.L.R. 53.
20 Ibid. 61.

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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 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

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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*[21]. 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. Mackinnon*.[22] 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 set 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

21 [1943] A.C. 147.
22 [1964] 2 Q.B. 96.

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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*[23] having been upheld 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*,[23] 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)*[24] 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.

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

23 [1966] 1 W.L.R. 960.
24 [1968] 1 W.L.R. 53.

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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.*[25] 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 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."

25 (1888) 20 Q.B.D. 832, C.A.
26 [1910] 2 K.B. 1056, 1065, C.A.

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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 affords 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 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 he granted if there is available any

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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.

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5.11

[COURT OF APPEAL]

REGINA *v.* RACE RELATIONS BOARD, *Ex parte* SELVARAJAN

1975 July 15, 16, 18; 30

Lord Denning M.R. and Lawton and Scarman L.JJ.

Discrimination - Race Relations Board - Functions - Complaint of unlawful discrimination upheld by conciliation committee - Decision by board to reinvestigate - Report by officer of board recommending finding of no discrimination - Only three members in possession of all papers - Whether board under obligation to act fairly - Whether board entitled to delegate - Race Relations Act 1968 (c. 71), s. 15 (3) (5)[1]

Natural Justice - Statutory board - Duty to be fair - Race Relations Board - Procedure

The applicant, who was of Indian origin, complained to the Race Relations Board that his employers had unlawfully discriminated against him because of his colour or race in that he had been denied promotion. The complaint was referred to a conciliation committee who, after investigation, found that "unlawful discrimination had occurred in breach of section 3 (1) (*b*) of the Race Relations Act 1968." But the

1 Race Relations Act 1968, s. 15: "(3) In investigating any complaint the board or a conciliation committee - (*a*) shall make such inquiries as they think necessary with regard to the facts alleged in the complaint and form an opinion whether any person has done any act which is unlawful ... (5) If on investigating a complaint a conciliation committee form the opinion that any such act as aforesaid has been done and ... they are unable to secure ... a settlement and assurance ... they shall make a report to that effect to the Race Relations Board and the board shall consider the report and shall either investigate the complaint themselves or, without investigating it, determine whether or not to bring proceedings ..."

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employers refused to negotiate any settlement or assurance, and the committee so reported to the Race Relations Board enclosing a note by their chairman explaining their views on the case and the reasons for their decision. A file containing the record of the proceedings before the conciliation committee and the chairman's note was sent to the seven members of the board's employment committee. The employment committee decided to reinvestigate the matter under section 15 (5) of the Act. This was carried out by a conciliation officer who wrote to the employers with a summary of the complaint and then to the applicant setting out points which might adversely affect his case and requesting his comments by a certain date. Before that date, and without hearing from the applicant, the conciliation officer prepared a short report which was sent to all seven members of the employment committee, headed "clearly predictable case," recommending that the committee form an opinion of no unlawful discrimination. Three members of the committee received a full set of papers. When the committee met they formed the opinion that no unlawful discrimination had occurred.

By leave of the Divisional Court the applicant moved for an order of certiorari to quash the findings of the Race Relations Board and for an order of mandamus requiring the conciliation committee to form an opinion as to the person who had discriminated against him. The Divisional Court dismissed the applications.

On appeal by the applicant: -

Held, dismissing the appeal, (1) that the board, though not a judicial body, was, as an administrative or investigating body under an obligation to act fairly (post, pp. 1694A-B, 1697E, 1699F); that, subject to that obligation and its enforcement by the courts, the board was master of its own procedure (post, pp. 1694C, 1698F, 1700F-G); that, accordingly, the board could delegate certain functions to its staff and could determine the number of its members to receive a full set of papers; that in the present case the receipt by three members of the employment committee of a complete set of papers was enough to enable the applicant's case to be fairly dealt with (post, pp. 1695H-1696A, 1698G-H); and that the applicant's case had been fully and fairly investigated.

(2) That it was not necessary for the conciliation committee to name the person who, in their opinion, was guilty of discrimination where, as in the present case, the identity of such person was clear (post, pp. 1694H,1700H).

Per Lord Denning M.R. and Lawton L.J. The use of the heading "clearly predictable case" was unfortunate (post, pp. 1695D-E, 1697H).

Decision of the Divisional Court of the Queen's Bench Division affirmed.

The following cases are referred to in the judgments:

Attorney-General ex rel. McWhirter v. Independent Broadcasting Authority [1973] Q.B. 629; [1973] 2 W.L.R. 344; [1973] 1 All E.R. 689, C.A.

Jeffs v. New Zealand Dairy Production and Marketing Board [1967] 1 A.C. 551; [1967] 2 W.L.R. 136; [1966] 3 All E.R. 863, P.C.

Maxwell v. Department of Trade and Industry [1974] Q.B. 523; [1974] 2 W.L.R. 338; [1974] 2 All E.R. 122, C.A.

Pergamon Press Ltd., In re [1971] Ch. 388; [1970] 3 W.L.R. 792; [1970] 3 All E.R. 535, C.A.

Reg. v. Gaming Board for Great Britain, Ex parte Benaim and Khaida [1970] 2 Q.B. 417; [1970] 2 W.L.R. 1009; [1970] 2 All E.R. 528, C.A.

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Wiseman v. Borneman [1971] A.C. 297; [1969] 3 W.L.R. 706; [1969] 3 All E.R. 275, H.L.(E.).

The following additional cases were cited in argument:

Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208, H.L.(E.).
Ealing London Borough Council v. Race Relations Board [1972] A.C. 342; [1972] 2 W.L.R. 71; [1972] 1 All E.R. 105, H.L.(E.).
Reg. v. Commissioner of Police of the Metropolis, Ex parte Blackburn [1968] 2 Q.B. 118; [1968] 2 W.L.R. 893; [1968] 1 All E.R. 763, C.A.
Reg. v. Committee on Works of Halifax City Council, Ex parte Johnston(1962) 34 D.L.R. (2d) 45.
Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore [1965] 1 Q.B. 456; [1965] 2 W.L.R. 89; [1965] 1 All E.R. 81, C.A.
Reg. v. Registrar of Building Societies, Ex parte A Building Society [1960] 1 W.L.R. 669; [1960] 2 All E.R. 549.
Ross-Clunis v. Papadopoullos [1958] 1 W.L.R. 546; [1958] 2 All E.R. 23, P.C.
Smith v. East Elloe Rural District Council [1956] A.C. 736; [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855, H.L.(E.).
Spackman v. Plumstead Board of Works (1885) 10 App.Cas. 229, H.L.(E.).
Ward v. James [1966] 1 Q.B. 273; [1965] 2 W.L.R. 455; [1965] 1 All E.R. 568, C.A.

APPEAL from the Divisional Court of the Queen's Bench Division.

The applicant, Govindaswamy Selvarajan, applied to the Divisional Court, pursuant to leave given by that court on July 31, 1973, for (a) an order of certiorari to remove into the court and quash the decision of the Race Relations Board on January 15, 1973, that there had been no unlawful discrimination against the applicant on the ground that the proceedings before the Race Relations Board after it received the report of its conciliation committee were contrary to the fundamental conditions for the administration of justice; and (b) an order of mandamus directed to the North Metropolitan Conciliation Committee of the Race Relations Board to enter an opinion pursuant to section 15 (3) (*a*) of the Race Relations Act 1968 and carry out the duties placed on it by section 15 (3) (*b*) (*c*) of the Act, on the grounds (1) that the committee failed to enter a complete finding in the terms of section 15 (3) (*a*), and (2) the committee failed in their duty under the Act in delegating their functions under section 15 (3) to office staff.

On March 7, 1974, the Divisional Court dismissed the applications for orders of certiorari and mandamus. The applicant appealed by notice of appeal dated March 20, 1974. By respondents' notice dated May 13, 1974, the Race Relations Board gave notice of their intention to contend that the judgment of the Divisional Court should be affirmed on the additional ground that the duty of the board in investigating complaints of discrimination pursuant to section 15 of the Act was to make only such inquiries as they bona fide considered necessary and not to act judicially and/or fairly.

The facts are stated in the judgment of Lord Denning M.R.

The applicant in person.
Michael Beloff for the Race Relations Board.

Cur. adv. vult.

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July 30. The following judgments were read.

LORD DENNING M.R. This case raises questions about the procedure of the Race Relations Board.

Govindaswamy Selvarajan, the applicant, studied at the University of Madras and obtained degrees in physics and law. In 1955 he came to England. He was then aged 30. Two years later he entered the teaching profession here: and, whilst teaching, he studied further so that he became a Master of Science in the University of London: and he obtained the Post Graduate Certificate in Education. So he is well qualified academically. In September 1957 he was employed by the Inner London Education Authority. In September 1961 he was appointed to the City of Westminster College (now known as Walbrook College) as a lecturer in mathematics and physics. He started as a lecturer grade I. He has been 14 years in that post in the same grade. That is very unusual. In the ordinary way a lecturer is promoted from grade I to grade II within a few years. He feels that he has not been promoted because of his colour or race, and thus there has been unlawful discrimination against him. He complained to the Race Relations Board. It was referred to a conciliation committee and they formed the opinion that there had been unlawful discrimination against him. But the Race Relations Board itself took a different view. They refused to take proceedings on his behalf against his employers - the Inner London Education Authority. He then applied to the Divisional Court for an order of certiorari to quash the board's determination. The Divisional Court refused. He now appeals to this court.

The relevant section is section 3 (1) (*b*) of the Race Relations Act 1968. It says:

> "(1) It shall be unlawful for an employer or any person concerned with the employment of others to discriminate against any other person - ... (*b*) ... by refusing or deliberately omitting to afford or offer him ... the like opportunities for training and promotion as the employer makes available for persons of the like qualifications employed in like circumstances ..."

That section only came into force on November 25, 1968. The applicant feels that, even before that date, he had been less favourably treated than others; but his actual complaint can, I think, only be made of matter arising after the Act was passed.

In February 1971, the staff of the college were informed that 10 posts were to be upgraded to lecturer grade II, and that one of them had been allocated to the science department. The successful candidate was to be responsible for "careers advice." Lecturers grade I were invited to apply. There were three candidates. They were interviewed by a selection board consisting of the principal, the vice-principal, the head of the science department and an inspector of the Inner London Education Authority. A Miss Lancaster was appointed. She was not so well qualified academically as the applicant, nor had she anywhere near such long service. The applicant was aggrieved that she had been appointed instead of him. He made a written complaint to the Race Relations Board against the Inner London Education Authority, fully documented with letters of commendation for his work during his career.

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The Conciliation Committee

On receiving that complaint the board, in accordance with their power under the statute, referred it to a conciliation committee; and it became the duty of the conciliation committee to investigate it: see section 15 (2) (*a*) (*b*). The committee was the North Metropolitan Conciliation Committee. It had nine members of excellent qualifications. All were unpaid, giving their services voluntarily except for travelling expenses. The secretary was Miss Allport.

Section 15 (3) of the Act says:

> "In investigating any complaint, the board or a conciliation committee - (*a*) shall make such inquiries as they think necessary with regard to the facts alleged in the complaint and form an opinion whether any person has done any act which is unlawful ..."

In making their investigation, the board or the committee are entrusted with a task which has important consequences, both for the complainant and the accused. If they form an opinion that an accused has done an act which is unlawful, it means that civil proceedings may be brought against him for an injunction or damages: see section 19; and he will be put to all the worry and expense of contesting those proceedings. If they form an opinion that the accused has not done an act which is unlawful, it means that the complainant has no remedy at all.

The Proceedings before the Conciliation Committee

The procedure adopted by the conciliation committee was this. First, the secretary, Miss Valerie Allport, wrote to the principal of the college telling him of the complaint. She met him and the members of the staff and discussed it with them. She saw the applicant and discussed it with him. She received a letter from him with his comments. She saw the representatives of the Inner London Education Authority and discussed the case with them. She put their answer to the applicant and invited him to make his representations in writing. He did so. She made reports of her interviews, and collected all the letters together, and prepared them in a file for a subcommittee.

Secondly, the subcommittee (Lady Seear and Mr. Thomas) met on July 14, 1971, and saw the applicant. They felt that there were several points which were adverse to the college. So their secretary put the points to the principal and got his answer. They considered them and decided to seek a further meeting. On October 11 the subcommittee (Or. Bayliss and Lady Seear) met the principal of the college and a representative of the Inner London Education Authority. On October 13 the full subcommittee (Mr. Thomas, Or. Bayliss, Mr. Bery, Mr. Keating, Mr. T. Robert and Lady Seear) met and considered the case. They agreed to recommend to the conciliation committee that unlawful discrimination had occurred and that this should be a "starred case."

Thirdly, the secretary reported the result to the applicant and the Inner London Education Authority. Thereupon the authority asked for a further opportunity of being heard. This was granted. On November 8, 1971, the subcommittee heard them in full. The applicant also made representations in writing and orally. He produced statements of several witnesses on his own behalf. The subcommittee considered the case on

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five days, November 24 and 26, December 8 and 22, 1971, and January 26, 1972. Finally, the case came back to the full conciliation committee on February 9, 1972, when 10 members were present. They then formed the opinion that unlawful discrimination had occurred. The secretary notified this finding to all concerned.

Fourthly, it then became the duty of the conciliation committee, under section 15 (3) (*b*) of the Act, to

> "use their best endeavours by communication with the parties concerned or otherwise to secure a settlement of any difference between them and, where appropriate, a satisfactory written assurance against any repetition ..."

The secretary made approaches to this end, but they were rejected by the Inner London Education Authority outright. In a letter of March 14, 1972, the education officer wrote denying any discrimination. He said:

> "... They are not, therefore, able to accept this opinion or enter into discussions proposed in your letter about a settlement and assurances: and they require that the matter be reported to the Race Relations Board for further investigation."

Fifthly, having failed to secure a settlement and assurances, the conciliation committee on March 22, 1972, as the Act requires, made a report to that effect to the Race Relations Board: see section 15 (5). This was a formal report stating simply that the conciliation committee had failed. But Or. Bayliss, the chairman, supplemented it by a confidential note setting out the matters which weighed with them:

> "Ten years at grade I with Mr. Selvarajan's qualifications needed some explanation. We never had any convincing explanation ... There are a series of inconsistencies in the evidence presented by the representatives of the college and the ILEA which created the impression that they would use whatever argument was convenient as a means of answering Mr. Selvarajan's complaint. ... The ILEA have pushed our opinion aside and this letter makes it clear that they want the board to ignore it. The committee believe that a major public authority should not be allowed to get away with such cavalier treatment of one of the board's regional committees."

I must say that I sympathise with the conciliation committee. Here they were, a group of able men and women, holding positions of responsibility, giving their time and skill to the service of the community, without any remuneration. They had investigated the complaint over a period of nine months, from May 1971 to February 1972. They had had representations in writing and orally from all concerned. They had given each side a full opportunity of meeting everything that was said on the other side. They had heard oral evidence and received written statements. They had discussed the case at length between themselves. It must have taken many hours. They had formed the opinion that there had been unlawful discrimination against the applicant. Yet their opinion was rejected out of hand by the Inner London Education Authority in terms, as if to say: "We don't care about your opinion. We are not going to discuss the matter with you. We are going straight to the Race Relations Board. We want them to investigate it."

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The Proceedings before the Race Relations Board

The Race Relations Board has a chairman and 11 members. It has authority to act by a group of members selected by the chairman: see section 14 (4). In this matter they acted by the employment committee of the board. The chairman of the employment committee is Sir Roy Wilson Q.C. The chairman of the board, Sir Geoffrey Wilson, is a member of the employment committee; and there are five others.

On May 5, 1972, Mrs. Coussey, a conciliation officer, sent to each of the seven members a file containing a record of all the proceedings before the conciliation committee. It was over 100 pages. She also sent the confidential note prepared by the chairman of the conciliation committee and, in addition, a summary made by the secretary of the conciliation committee. The conciliation officer recommended: "... that the committee defer a decision pending discussions with the North Metropolitan Conciliation Committee."

On May 10, 1972, the full employment committee met. They decided to defer consideration until they had discussed the matter with members of the conciliation committee. This meeting took place on May 23, 1972. It was attended by Sir Geoffrey Wilson, the chairman of the board, and the principal conciliation officer, Mr. Hills. He made a report commenting that it was a question whether the applicant's failure was due to personality rather than race or colour. He recommended that the committee should reinvestigate the case. The employment committee met on June 7, 1972. They decided that the board should reinvestigate the matter themselves. This was permissible under section 15 (5) of the Act.

The reinvestigation was made in this way. On August 16, 1972, the conciliation officer, Mrs. Coussey, wrote to the Inner London Education Authority with a summary of the applicant's complaint. On November 17, 1972, they replied in detail and attached a statement which covered 16 pages. On November 24, 1972, Mrs. Coussey wrote to the applicant setting out several points which might be regarded as adversely affecting his case. The letter concluded:

> "If you wish to dispute or comment on these points, or if you wish to put forward any additional facts or arguments, you are invited to do so. You may put your views forward in any of the following ways: - by writing a letter for the committee's consideration; or to me personally and I will report them to the committee; or put them to the committee yourself. In putting your views to me or the committee you may if you wish be assisted by a friend or an adviser. I should be very grateful if you would adopt one of these courses by December 8, 1972."

Although the applicant was invited to take one of those courses by December 8, 1972, he did not do so. On December 13, 1972, the employment committee met, but he had not replied even by that date. Meanwhile Mrs. Coussey had prepared a report for the board dated December 4, 1972, which needs careful consideration. It is headed: "Clearly Predictable Case - Full papers to Mota Singh." Then there followed a short summary of the complaint and the answer in one and a half pages: and the report concluded:

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"Comments

A pre-opinion letter was sent by Mr. Selvarajan on November 24. Representations are due by December 8.

Recommendation

That the committee form an opinion of no unlawful discrimination."

The employment committee was summoned for December 13, 1972. The full papers were sent to the chairman of the employment committee and to one of the members, Mr. Mota Singh, a barrister. The chairman of the board also had them. At the meeting there were present the chairman of the employment committee and the chairman of the board and four members of the committee, together with five of the staff. Mr. Mota Singh was unable to be present, but he sent his apologies, together with a message that he had read the papers and had formed the view that there had been no unlawful discrimination, and asked that this view be passed on to the other members of the committee. The other four members of the committee had not had all the papers. They had the original set sent by Mrs. Coussey. Since then they only had the summary prepared by Mrs. Coussey saying it was a "clearly predictable case" and recommending that there be a finding of "no unlawful discrimination."

At the meeting the chairman said that, having examined the papers, he agreed with the view of Mr. Mota Singh that there had been no unlawful discrimination. The other members of the committee agreed. The committee then formed the opinion that no unlawful discrimination had occurred; and that opinion was recorded in the minutes.

On the next day the board received a letter from the applicant, dated December 13, 1972. It did not give a reasoned reply. It contained much criticism of the board. He said:

> "The Race Relations Board in investigating the complaint from scratch is acting outside reason. ... I cannot lend myself to be associated with the activities of such an irrational body. ... I shall certainly endeavour to take the whole matter to the High Court ..."

On receipt of that letter, the chairman of the employment committee directed that the matter should be reconsidered at their next meeting. It was so reconsidered at a meeting on January 10, 1973. On this occasion Mr. Mota Singh was present. The employment committee confirmed its previous opinion.

On July 31, 1973, the Divisional Court gave leave to the applicant to apply for certiorari. He served a notice of motion covering five pages of reasons. On February 7, 1974, the Divisional Court dismissed his application.

The Position of the Race Relations Board

The board, in a respondent's notice, raised this contention: that the duty of the board, in investigating complaints of discrimination, is only to make such inquiries as they bona fide consider necessary and not to act judicially and/or fairly.

That contention goes, I think, too far. In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion. Notably, the Gaming Board, who

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have to inquire whether an applicant is fit to run a gaming club: see *Reg. v. Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417; inspectors under the Companies Act 1948 who have to investigate the affairs of a company and make a report: see *In re Pergamon Press Ltd.*[1971] Ch. 388; and Commissioners of Inland Revenue who have to determine whether there is a prima facie case: see *Wiseman v. Borneman* [1971] A.C. 297. In all these cases it has been held that the investigating body is under a duty to act fairly: but that which fairness requires depends upon the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely afflicted by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover, it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.

Applying these principles in the present case to the two bodies concerned, it seems to me that the conciliation committee conducted their investigations with the greatest care and the greatest fairness. They gave their services voluntarily without pay. They spent many hours in hearing all concerned and considering all the reports. They were impressed by the applicant's high qualifications and long service. These exceeded those of the other candidates. They thought they were such as to merit his being promoted td lecturer grade II. On this account they inferred that there was discrimination against him.

Equally, however, the employment committee of the board conducted their investigations with much care and fairness. They had before them all the papers and information which was before the conciliation committee. But they thought that the conciliation committee had made a mistake. There was no evidence to show that the applicant failed. to get promotion because of his colour or his race. Everything went to show that it was his personality which made him unsuitable. He was not the best person for the post. Nor, indeed, the right person. The successful candidate, Miss Lancaster, was much more suitable. On this ground the board formed the opinion that there was no unlawful discrimination.

Now for the particular points raised by the applicant.

(i) *"Any Person"*

The applicant submitted that the conciliation committee - and the board - ought to name "any person" of whom they formed an opinion that he had been guilty of unlawful discrimination. I do not think this is necessary so long as it is reasonably clear. In this case it must have been the appointments committee of the college and also the Inner London Education Authority.

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(ii) *"Investigate the Complaint Themselves"*

The applicant submitted that under section 15 (5) the board, if they decided to investigate the complaint themselves, ought to have done so by making their own inquiries. They ought not to have had recourse to the evidence or papers which were before the conciliation committee: but only to the report of that committee. Section 15 (5) says "... the board shall consider the report." The applicant submitted that the report itself was the thing. The board should not consider anything outside the report. A parallel might be made when the court considers the award of the arbitrator or the report of an inspector under the planning legislation. The court does not go outside it and consider the evidence.

I do not think there is any parallel. The reinvestigation by the board is not to be regarded as an appeal from the conciliation committee. Section 15 (3) (*a*) says that, in investigating any complaint, the board "shall make such inquiries as they think necessary." That is quite wide enough to enable them to inquire into all the things which influenced the conciliation committee, and the evidence and reports before them.

(iii) *The Report by the Conciliation Officer*

It was, I think, unfortunate that the conciliation officer headed her report "clearly predictable case." But there was a good reason underlying it. In preparing the papers, it is very helpful for the staff to estimate the length of time needed to discuss the case and the amount of work to be done by the members to make a summary. But it was a mistake of the staff to pre-judge the case by calling it "clearly predictable" and by recommending to the board the opinion which it should form. That is undesirable because it might tempt the members of the board to take a short cut - and not read the papers - and merely rubber - stamp the recommendation. The summary should outline the facts, the points in controversy and the issues. It should not tell the committee what the result should be.

(iv) *Delegation to Some Members Only*

The most troublesome point is that several members of the hoard did not have all the papers. Four of them only had the summary of a "clearly predictable case" of one and a half pages and a recommendation that the committee should form the opinion of no unlawful discrimination. It may reasonably be inferred that these four were not in a position to form an opinion of their own. They must have gone by the opinion of the other three members who had received all the papers and had read them.

If this had been a judicial body, I do not think this would be right. Every member of a judicial body must have access to all the evidence and papers in the case, he must have heard all the arguments, and he must come to his own conclusion. The maxim delegatus non potest delegare applies strictly to judicial functions. But it is different with a body which is exercising administrative functions or which is making an investigation or conducting preliminary inquiries, especially when it is a numerous body. The Race Relations Board has 12 members. The employment committee has seven members. It is impossible to suppose

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that all of them need sit to determine a matter, or that all of those who sit should have read all the papers or heard all the evidence. But I do think that two or three, at any rate, must have done so. If there is a quorum of, say, three, I should think a quorum must have done so. That is the ordinary accepted method of carrying on business. It should be applied here, also.

We were referred to *Jeffs v. New Zealand Dairy Production and Marketing Board* [1967] 1 A.C. 551. But in that case, on the construction of the relevant statute, the board had no power to delegate its functions. It was necessary, therefore, for the board at least to have an accurate summary of the evidence and of the submissions. But in the present case the board undoubtedly had power to delegate its functions.

Conclusion

In my opinion the applicant's complaint has been fully investigated in accordance with the statute. He has been most fairly treated. And the Race Relations Board formed an opinion which was manifestly correct, that there had been no unlawful discrimination against him. I would, therefore, dismiss this appeal.

LAWTON L.J. The broad question in this appeal is whether this court can, or should, interfere with a decision of the Race Relations Board. It can within limits; but, in my judgment, this is not a case in which it should.

The Race Relations Act 1968 gives some people rights and impinges on the rights of others. Discrimination against persons on the ground of colour, race or ethnic or national origins in relation to the provision of goods, facilities, services, employment and accommodation (subject to certain exceptions) is declared unlawful. Parliament appreciated, however, that exhorting people to love their neighbours is one thing, getting them to do it is another. The Race Relations Board was set up to secure compliance with the provisions of the Act against discrimination and the resolution of differences arising out of any of those provisions. The main function of the board was to be conciliation and prevention. The Act did not enact that those who discriminate against others commit offences. The board has no power to initiate prosecutions. The most it can do is to start civil proceedings (a) for declarations that acts were unlawful by virtue of the provisions against discrimination, (b) for damages to compensate those who have suffered loss by reason of discrimination, (c) for injunctions to restrain discrimination in specified circumstances and (d) for the revision of contracts containing discriminatory terms: see sections 19 and 21 to 23. The board has no jurisdiction to determine anything in a judicial sense. It has a duty to receive and investigate complaints: see section 15 (1); to use its best endeavours to secure a settlement of differences: see section 15 (3); to form an opinion as to whether there has been any unlawful discrimination: see section 15 (4); and, if there has been and the board has been unable to settle any difference, it can determine whether to bring civil proceedings of the limited kind to which I have already referred. It investigates, conciliates, and initiates. Forming an opinion that there has been no

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discrimination, as the board did in this case, is not a definitive determination of an issue: it is a preliminary to a decison whether proceedings should be initiated. In some respects its powers are like those of the Director of Public Prosecutions. He receives complaints from public bodies and members of the public; he can start investigations; and if he is of the opinion that there is sufficient evidence to justify a prosecution, he can initiate one; but he does not decide guilt or innocence. As far as I know, the courts have never interfered with the exercise of the Director's discretion; but it does not follow that they could not do so if he refused or failed to perform his public duties or acted corruptly or unfairly: see *Attorney-General ex rel. McWhirter v. Independent Broadcasting Authority*[1973] Q.B. 629, 649 and 657.

In my judgment, this court should be slow to interfere with any decisions the Race Relations Board makes. It should only interfere in the following circumstances. First, if the board has refused or failed to perform the functions which Parliament has given it. It is inconceivable that it would ever refuse to perform these functions; but if its work became very heavy it might allow its staff to do that which it should do itself. That is said by the applicant to have happened in this case. It might also shy away from investigating complaints made against powerful bodies. The applicant seems to have thought that his troubles have arisen from a reluctance on the part of the board to investigate his complaint against the Inner London Education Authority. Secondly, courts can and should interfere if the board exceeds its powers. It has not been suggested in this case that it did, so nothing more need to be said about that. Thirdly and finally, this court can and should interfere if the board has acted unfairly or corruptly to the prejudice of either a complainant or a person or body against whom complaint has been made. There has been no suggestion of corruption in this case. I have used the adverb "unfairly" in preference to the applicant's phrase "contrary to the rules of natural justice" for the reason I gave in *Maxwell v. Department of Trade and Industry* [1974] Q.B. 523, 539. The applicant's phrase is liable to lead courts into the trap of legalism. The common sense of the British people has appreciated that there are circumstances in which over strict attachment to legal forms can hinder the doing of what should be done. This is shown by the wide-spread use of such expressions as "barrack-room lawyer" or "sea lawyer."

Applying these principles to the facts of this case, the results are clear. At the meeting of the board's employment committee on January 10, 1973, those present did form an opinion that what had been done by the Inner London Education Authority was not unlawful discrimination. Whether they had sufficient material upon which to do so is a matter which I will consider in relation to alleged unfairness. The civil servant, Mrs. Coussey, had made a recommendation in the document dated December 4, 1974. It may not have been as full as it should have been. The use of the heading "clearly predictable case" was unfortunate as was the fact that the recommendation was made by her before she had seen the applicant's reply to the request for comments which she had made to him on November 24, 1972. The fact remains that all she did was to make a recommendation and the employment committee treated it as such. The suspicion which the applicant has about the

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board's reluctance to investigate his complaint against the Inner London Education Authority is swept away by the evidence. The board did investigate it. By letter dated August 16, 1972, Mrs. Coussey, on behalf of the board, reported to the authority what the applicant was alleging against them and requested comments. By letter dated November 19, 1972, the authority gave their answer, accompanied by no less than 15 foolscap pages of supporting statements. The last of them is not without interest: it was a letter signed by 14 members of the staff at Walbrook College, who had been the applicant's colleagues there. In it they protested at the suggestion that he had been subjected to discrimination.

I come now to the suggestion that the board acted unfairly. I found it difficult to follow what the applicant was complaining about in this respect. As far as I could make out his complaints came under the following heads: first, that the employment committee of the board had not investigated his complaint as thoroughly as the conciliation committee had done; secondly, that they had left the investigation to a civil servant, Mrs. Coussey, instead of doing it themselves; thirdly, that they had formed their opinion not to initiate proceedings without having adequate material before them.

As to the first head of complaint, all the information which the conciliation committee had was passed on to the employment committee. As I have already recounted Mrs. Coussey on behalf of the board did re-open with the Inner London Education Authority the matter of the applicant's complaint and gave him an opportunity of commenting on the material which that authority had put before the board. He acted tardily in taking advantage of this opportunity and when he did he misused it in a way which corroborated what the authority had said about his personality and why he had not been promoted.

For my part, I can see no reason at all why the board should not delegate to its staff the function of collecting information. It would be impractical for the members of the board themselves to make investigations, How the board does what Parliament has entrusted it to do is not a matter for the courts to decide as long as it acts fairly and in good faith. It is for the board, not the courts, to decide how much information each of its members should have when considering a particular case. As long as the board, or one of its constituent committees, has enough information to enable it to make a fair assessment of the case, the courts will not interfere. How it gets the information is for the chairman and his advisers to decide. He may decide in a particular case that each member of the board, or the committee, should have a copy of the whole file. In another case he may consider that the case can be adequately and fairly dealt with if one member has the file and reports to the others what is in it. In this case three members of the employment committee had a copy of the complete file. This was enough to enable the committee to deal with the applicant's case fairly.

In my judgment the applicant has failed to show cause for interfering in any way with the employment committee's decision not to initiate proceedings. I would dismiss the appeal.

SCARMAN L.J. The North Metropolitan Conciliation Committee of the Race Relations Board reported to the board that they had

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investigated a complaint by the applicant, a teacher, of unlawful discrimination against him by his employers, the Inner London Education Authority; that they had formed the opinion that there was unlawful discrimination; but that they had failed to secure a settlement of the difference or an assurance from the Inner London Education Authority that there would be no repetition of the act complained of. The complaint was that he had been denied promotion because of his race. After receiving the report, the board decided to investigate the complaint themselves. They formed a contrary opinion and reached a determination that they would take no further action.

The applicant's case against the board is not what you might expect. He does not rely on an allegation of lack of natural justice in the way the board handled his complaint. He says no such question arises: he says that the board erred in law in deciding themselves to investigate his complaint, when, as he submits, it was their duty to send it back to the conciliation committee with an instruction to that committee to fulfil their statutory duty of making a report.

As I understand his argument, he takes the following points. (1) That there was no report under the statute, because the conciliation committee failed to identify "any person" as having done the unlawful act: section 15 (3) (*a*) Race Relations Act 1968. (2) That, the committee being seized of the complaint, the board had no jurisdiction themselves to investigate it; they were bound by the report; their purported investigation was, therefore, a nullity. This point is one of construction of section 15 (5) of the Act.

Accordingly, he sought from the Divisional Court an order of certiorari to quash the determination of the board and an order of mandamus to compel the conciliation committee to form an opinion as to the person or persons who had discriminated against him. The Divisional Court refused this relief, and he appeals to this court.

Inevitably, though the applicant roundly asserted it was not his case, considerable discussion has arisen as to whether the board acted fairly in their handling of his complaint. I agree with my Lords that the board was under an obligation to act fairly, and did so. If it be any part of the applicant's case that the board acted unfairly, the contention fails, in my judgment, for the reasons that my Lords have given. Whatever be the extent of their legal obligations, the board dealt faithfully with the applicant's complaint. They, and their officers, went to great trouble to get at the facts. The volume of documentary material available to the board was prodigious; Sir Roy Wilson, Sir Geoffrey Wilson, and Mr. Singh, all of them members of the board and its employment committee, studied the papers in depth; and the board had the complaint upon its agenda at four meetings, and deferred its final determination until it had considered the applicant's written observations in his letter of December 13, 1972. The complaint came for the first time to the attention of the board, as distinct from its conciliation committee, in May 1972, when that committee's voluminous file (over 100 documents) together with a note prepared by the committee's chairman was sent to the board. There ensued meetings between members of the conciliation committee, the chairman of the Race Relations Board, and board officers. In June the board decided itself to investigate the complaint. During the summer,

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an officer of the board sought to make contact and to arrange a with the applicant, but he was not available. On November 24 the applicant was invited by letter to make such further representations as he might wish either at a meeting or by letter. Finally, after receipt of his written reply, which was not sent until December 13, the board made their final decision and duly informed the applicant by letter of January 15, 1973. During those eight months the applicant was given every opportunity to present and develop his complaint, while the hoard and its officers applied themselves conscientiously to its investigation.

The truth is that the applicant's case, as he chose to present it, is based on a total misconception of the statute. He would have us believe that the Race Relations Act 1968 has created a fixed hierarchy of institutions performing judicial functions, that at each level of the hierarchy the judicial duty must be done before the complaint under consideration can be passed on to the next level; and, if a conciliation committee reports that the complaint is justified but that it has not obtained a settlement of an assurance of no repetition, the board may not go beyond the report but must make their decision on the basis of the information contained in it, and on nothing else.

The Race Relations Board does not exercise judicial functions. Part II of the Act is absolutely clear. The board was created so that in the sensitive field of race relations compliance with the law and the resolution of differences could first be sought without recourse to the courts with their necessarily open and formalised judicial process. The board is an administrative agency charged with a number of critically important functions in the administration of the law: but it is not a judicial institution - nor is it the apex of a hierarchy of judicial institutions. The procedures are not adversarial but conciliatory: settlement, not litigation, is the business of the board: and it is left to the board to decide how best to perform the functions which the statute requires it to perform, namely, investigation, the formation of an opinion, conciliation, and, if all else fails, the taking of legal proceedings in the county court. I draw attention specifically to sections 14 and 15 of the Act.

The board is, of course, subject to the supervisory powers of the High Court. If it fails to perform a statutory function, mandamus will lie. If it fails to act fairly, the High Court can intervene by certiorari, prohibition, or mandamus to ensure that it does. Subject to such supervision (the limits of which in the case of an administrative agency charged with making decisions that directly affect private persons are by now well known), the Race Relations Board - not the courts - decides in its field how to go about the task of securing compliance with the law and resolving differences.

In the present case the conciliation committee undoubtedly made a report. I reject the applicant's point that the committee failed to identify the person who in their opinion discriminated. The Inner London Education Authority was his employer and took full responsibility. Under section 15 (5) it then became the board's duty to consider the report, which has been done. The board then had to decide whether or not themselves to investigate the complaint: they decided to investigate. The board then had to form an opinion, which they did; they then had to decide what, if anything, to do, which they also did. After studying the

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immense amount of relevant material assembled and considered by the board, I wish to pay my tribute to them for the way they handled the applicant's complaint. I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Bindman & Partners.*

C. N.

November 20. The Appeal Committee of the House of Lords (Lord Diplock, Lord Kilbrandon and Lord Edmund-Davies) dismissed a petition by the applicant for leave to appeal.

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R v Bow Street Stipendiary Magistrate and another, ex parte South Coast Shipping Co Ltd and others

QUEEN'S BENCH DIVISION
LLOYD LJ AND WATERHOUSE J
9, 10, 13 APRIL 1992

Criminal law – Proceedings – Duties of Director of Public Prosecutions – Institution of proceedings – Private prosecution – Criminal proceedings to which Director's duty to take over conduct does not apply – Director deciding not to institute proceedings – Whether decision of Director precluding private prosecution – Prosecution of Offences Act 1985, ss 3(2)(b), 6.

Where the Director of Public Prosecutions could have instituted proceedings against a person under s 3(2)(*b*)[a] of the Prosecution of Offences Act 1985 on the ground that it appeared to him to be appropriate that he do so having regard to the importance and difficulty of the case but he has decided not to bring proceedings, any other person may institute a private prosecution in respect of the same matter, since on the true construction of ss 3(2)(*b*) and 6(2)[b] of the 1985 Act a person is only precluded by s 6(1) of that Act from bringing a private prosecution in respect of those proceedings set out in s 3(2)(*a*), (*c*) and (*d*) which the Director is under a duty to take over, and there is nothing in s 6(1) to preclude the bringing of a private prosecution in respect of proceedings under s 3(2)(*b*). However, the Director may take over proceedings instituted by a private prosecutor which he might otherwise have instituted himself and having done so he may then discontinue them under s 23 of the 1985 Act if the evidence is insufficient or if the proceedings would be contrary to the public interest or to avoid duplication of proceedings or for any other good reason or, if it is too late to discontinue, he may offer no evidence or the Attorney General can enter a nolle prosequi (see p 222 *b* to *d* and p 225 *c*, post).

Notes

For the duties of the Director of Public Prosecutions with respect to initiating criminal proceedings, see 11(1) *Halsbury's Laws* (4th edn reissue) paras 639, 646.

For the Prosecution of Offences Act 1985, ss 3, 6, see 12 *Halsbury's Statutes* (4th edn) (1989 reissue) 936, 939.

Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Connelly v DPP [1964] 2 All ER 401, [1964] AC 1254, [1964] 2 WLR 1145, HL.

DPP v Humphrys [1976] 2 All ER 497, [1977] AC 1, [1976] 2 WLR 857, HL.

R v Horseferry Road Magistrates' Court, ex p Stephenson (1989) Times, 25 January, DC.

R v Telford Justices, ex p Badhan [1991] 2 All ER 854, [1991] 2 QB 78, [1991] 2 WLR 866, DC.

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a Section 3, so far as material, is set out at p 221 *f g*, post

b Section 6 is set out at p 221 *j* to p 222 *a*, post

Cases also cited or referred to in skeleton arguments

Blue Metal Industries Ltd v Dilley [1969] 3 All ER 437, [1970] AC 827, PC.
Chief Constable of West Midlands Police v Gillard [1985] 3 All ER 634, [1986] AC 442, HL.
Luke v IRC [1963] 1 All ER 655, [1963] AC 557, HL.
Metropolitan Police Comr v Curran [1976] 1 All ER 162, [1976] 1 WLR 87, HL.
R v Bow Street Stipendiary Magistrate, ex p Cherry (1990) 91 Cr App R 283, DC.
R v Chief Constable of the Merseyside Police, ex p Calveley [1986] 1 All ER 257, [1986] QB 424, CA.
R v Crown Court at Derby, ex p Brooks (1985) 80 Cr App R 164, DC.
R v Cuthbertson [1980] 2 All ER 401, [1981] AC 470, HL.
R v Stafford Justices, ex p Customs and Excise Comrs [1991] 2 All ER 201, [1991] 2 QB 339, DC.

Application for judicial review

South Coast Shipping Co Ltd, Robert Henry Samuel, Peter Malcolm Butcher, Frederick Brian Darwell and George Edward Greenwood (the defendants) applied, with the leave of Popplewell J given on 19 December 1991, for judicial review by way of (i) an order of certiorari to quash the decisions of the first respondent, Sir David Hopkin, the Chief Stipendiary Magistrate at Bow Street Magistrates' Court, on 12 November 1991 in which he ruled that the second respondent, Ivor Glogg, had locus to bring a private prosecution for manslaughter against the defendants and on 21 November 1991 in which he ruled that the charges of manslaughter did not amount to an abuse of the process of the court, (ii) an order of prohibition to prevent the magistrates' court from inquiring into the charges and (iii) an order of mandamus requiring the magistrates' court to stay the proceedings. The Director of Public Prosecutions was joined as third respondent to the application under RSC Ord 53, r 9. The facts are set out in the judgment of Lloyd LJ.

Michael Hill QC and *Michael Wood* (instructed by *Hill Taylor Dickinson*) for the defendants.
Michael Mansfield QC and *Sally Bradley* (instructed by *Christian Fisher & Co*) for Mr Glogg
R Alun Jones QC (instructed by the *Crown Prosecution Service*, Headquarters) for the Director of Public Prosecutions.
The first respondent did not appear.

LLOYD LJ. These proceedings arise out of a collision on the River Thames on 20 August 1989 when the Bowbelle, a dredger owned and operated by South Coast Shipping Co Ltd, ran down a pleasure boat, the Marchioness. The Marchioness sank and 51 people lost their lives. Among them was Mrs Ruth Hadden. On 17 July 1991 her husband, Mr Ivor Glogg, brought a private prosecution against the owners of the Bowbelle and four of the company's employees. I shall refer to them all as 'the defendants'. They are charged with manslaughter. On 12 November 1991 there was an application to stay the prosecution. It came before Sir David Hopkin, the Chief Stipendiary Magistrate at Bow Street Magistrates' Court.

There were two grounds for the application. The first was that Mr Glogg is not entitled to bring a private prosecution; he has no locus standi. The second ground was that the prosecution is an abuse of the process of the court. Sir David Hopkin decided both points in favour of Mr Glogg. The defendants now apply for an order of certiorari to quash his decision. The committal proceedings which were

due to start on 6 January 1992 have been adjourned to await the outcome of this application.

I take each of the two points in turn.

Locus standi

On 26 April 1990 the Director of Public Prosecutions announced that Captain Henderson, the master of the Bowbelle, would be charged with an offence under s 32 of the Merchant Shipping Act 1988 of failing to keep a proper lookout. He also announced that no other charges would be brought.

On 30 October 1990 there was an application to the Divisional Court to challenge the Director's decision not to bring other charges. That application fail[redacted] On 3 April 1991 Captain Henderson's trial began. The jury was unable to rea[redacted] a verdict. There was a retrial in July 1991 but the jury again failed to reach a verdict, whereupon Captain Henderson was discharged.

In those circumstances, Mr Michael Hill QC for the defendants submits that there is no room for further criminal proceedings arising out of the same casualty. It might have been different if the Director had brought no proceedings at all. But here the Director brought proceedings against Captain Henderson and decided not to bring proceedings against these defendants. Parliament cannot have intended to leave it open for a private prosecutor to bring proceedings which the Director has decided not to bring, especially when the case is one of difficulty and importance.

I see the force of Mr Hill's argument. Parliament might well have legislated so as to exclude the private individual's right to prosecute in those circumstances. But the question is whether it has in fact done so. The answer depends on two sections of the Prosecution of Offences Act 1985. Section 3 defines the functions of the Director. Section 3(2) provides:

> 'It shall be the duty of the Director, subject to any provisions contained in [redacted] Criminal Justice Act 1987—(*a*) to take over the conduct of all criminal [redacted] ceedings, other than specified proceedings, instituted on behalf of a police force (whether by a member of that force or by any other person); (*b*) to institute and have the conduct of criminal proceedings in any case where it appears to him that—(i) the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him; or (ii) it is otherwise appropriate for proceedings to be instituted by him; (*c*) to take over the conduct of all binding over proceedings instituted on behalf of a police force (whether by a member of that force or by any other person); (*d*) to take over the conduct of all proceedings begun by summons issued under section 3 of the Obscene Publications Act 1959 (forfeiture of obscene articles) . . .'

It will be noticed that s 3(2)(*a*), (*c*) and (*d*) each provide for the Director to take over the conduct of certain kinds of proceedings. By contrast, s 3(2)(*b*) provides for the Director to *institute* certain other kinds of proceedings where it appears to him to be appropriate, having regard to the importance and the difficulty of the case. The difference in language is not, in my view, accidental. It becomes of crucial importance when one turns to s 6, which deals with private prosecutions. Section 6 provides:

> '(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.

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(2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage.' a

The effect of s 6(1) is to preclude a person from bringing a private prosecution in cases covered by s 3(2)(*a*), (*c*) and (*d*) but not in the residuary category of cases covered by s 3(2)(*b*). So far as s 3(2)(*b*) cases are concerned, there is nothing to preclude a private prosecution.

Mr Hill submits that s 6 must be read subject to an implied limitation so as to preclude more than one prosecution in any one case whether against the same defendant or another defendant. I can see no basis for reading in any such limitation, especially when one has regard to s 6(2). b

Section 6(2) is clearly intended to cover s 3(2)(*b*) cases, *i e* cases where the Director has a duty to institute proceedings as distinct from his duty to take over their conduct. Section 6(2) therefore contemplates that the Director may take over the conduct of proceedings instituted by a private prosecutor which he might otherwise have instituted himself. Having taken over the conduct of those proceedings, he may then discontinue them under s 23 of the 1985 Act if the evidence is insufficient, or if the proceedings would be contrary to the public interest, or to avoid duplication, or for any other good reason. If it is too late to discontinue, he may offer no evidence or the Attorney General can enter a nolle prosequi. c d

So read, ss 3(2) and 6 make a coherent and consistent framework in which the right of the private citizen to bring a prosecution is preserved but subject always to the Director's right to intervene at any stage. It provides a useful and effective safeguard against 'improper inaction' by the prosecuting authority (I quote from the Report of the Royal Commission on Criminal Procedure (Cmnd 8092 (1981)), p 161, para 7.50 under Sir Cyril Philips). e

In the course of the hearing, it occurred to us that the Director might himself be affected by the result of this application and ought therefore to have been given the opportunity to be heard. Mr Alun Jones QC has appeared this morning on behalf of the Director and addressed us in opposition to Mr Hill's application. We gave leave for him to be joined under the provisions of RSC Ord 53, r 9. We are grateful for Mr Jones's attendance. We do not however think it necessary to give separate consideration to his arguments, which echo in every respect those advanced by Mr Mansfield. f

On 2 August 1991 the Director indicated that he did not intend to intervene at that stage of the proceedings. But it will be open to him to reconsider that decision if the prosecution goes ahead. g

For the above reasons, which are substantially those given more shortly by Sir David Hopkin, I would reject Mr Hill's first ground of attack on Sir David's decision.

h

Abuse of process

I now turn to the second ground of application. Under this head, Mr Hill advances three main arguments. The first goes to Mr Glogg's motive. It is said that he is manipulating or misusing the prosecution because what he really wants is a full scale public inquiry. Deprived of the opportunity afforded by a public inquiry, he is now using the prosecution as a platform to ventilate his grievances. j

Mr Hill's second argument is that the delay in launching the prosecution has been so prolonged that a fair trial is no longer possible.

Mr Hill's third argument is that the publicity generated by Mr Glogg's solicitors has been so great that any jury is likely to be prejudiced against the defendants. Again, I will take each of those three points in turn.

Manipulation or misuse of the prosecution process

I do not doubt that Mr Glogg wanted a full scale public inquiry instead of the limited investigation carried out in private by the Marine Accident Investigation Bureau under the new procedure introduced by s 33 of the Merchant Shipping Act 1988 and the Merchant Shipping (Accident Investigation) Regulations 1989, SI 1989/1172. Those regulations came into force only a fortnight before the casualty. No doubt the members of the so-called Marchioness Action Group who have lost relatives in the disaster also wanted a public inquiry. I can well understand their anxiety, frustration and sense of grievance when a public inquiry was not announced. I should add that Mr Glogg was not himself a member of the Marchioness Action Group but he is represented by the same firm of solicitors.

Does it then follow from Mr Glogg's desire for a public inquiry that he had some indirect or improper motive in launching the prosecution? I do not think it does. At the start, Mr Glogg's state of mind may well have been that he wanted *both* a public inquiry *and* a prosecution for manslaughter. The fact that a public inquiry has been ruled out does not mean that his motive in instituting the prosecution should now be regarded as improper. If there is evidence that a defendant has been guilty of an offence, then a desire to see him prosecuted and, if found guilty, punished is not an improper motive, especially where the prosecutor is one of the bereaved. Even if Mr Glogg's motives were mixed, the court should be slow to halt a prosecution unless the conduct of the prosecution is truly oppressive (see *Connelly v DPP* [1964] 2 All ER 401 at 409, [1964] AC 1254 at 1301 per Lord Morris and *DPP v Humphrys* [1976] 2 All ER 497 at 527, [1977] AC 1 at 46 per Lord Salmon). The law was correctly stated on this point by Mann LJ in *R v Telford Justices, ex p Badhan* [1991] 2 All ER 854 at 862–863, [1991] 2 QB 78 at 90. Dealing with the power of the justices to prevent an abuse of process, he said:

> 'They have no power to refuse to embark on an inquiry because they think that a prosecution should not have been brought because it is, for example, mean-minded, petty or animated by hostility. It is for this reason that the powers of the justices are said to be "very strictly confined" . . .'

Mr Hill referred us to *R v Horseferry Road Magistrates' Court, ex p Stephenson* (1989) Times, 25 January. But that was a very different case on its facts. There was no evidence at all which could possibly have grounded a prosecution for blackmail; it was a mere device to embarrass the impending conference. In the present case it has not been argued that there is no evidence to support the manslaughter charge, although Mr Hill has made no admission to that effect.

An alternative line of argument under this head was as follows. In the course of the summer of 1991 the Director was pressing Mr Glogg's solicitors to hand over any fresh material available to Mr Glogg so that he could make up his mind whether or not to take over the conduct of the prosecution. Mr Glogg's solicitors declined to hand over the evidence until after the committal. It is said that Mr Glogg's purpose was to bring to bear on the Director such intense pressure of publicity that he would be unable to take over and discontinue the prosecution.

I do not accept that it would necessarily be wrong for a private prosecutor to attempt to dissuade the Director from taking over the conduct of the prosecution by force of publicity. I suspect he is made of sterner stuff. But, even if it were wrong, it does not show that the prosecutor's purpose here in bringing the prosecution was oppressive or improper.

Finally, it is said that, if I am right in thinking that Mr Glogg had a sufficient locus standi to bring the prosecution, that must be because there is an unforeseen or unintended lacuna in the 1985 Act. Mr Hill contends that it is an abuse of process to take advantage of that lacuna. It is sufficient to say that I do not agree

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Delay

Mr Hill argues that the delay since the date of the casualty, or at least since 27 October 1989 when Mr Glogg's solicitors indicated in a letter that they had enough evidence in their possession to prove wilful misconduct on the part of the owners of the Bowbelle, was such as to cause serious prejudice to the defendants.

The questions to be asked in these cases, where delay is relied on as an abuse of process of the court, are, first, whether the delay on the part of the prosecution is unjustifiable and, secondly, whether, if so, the prejudice to the defendant is such that a fair trial can no longer be held. I would answer both those questions in favour of Mr Glogg. It was entirely reasonable for him to wait as he did until after the completion of the second trial of Captain Henderson before serving his summonses on the defendants on 31 July 1991. There has been little, if any, delay since then. There are, it is true, cases in which it has been held that what is called 'mere delay' may suffice. But these cases should be regarded as highly exceptional.

Nor has there been, in my view, any substantial prejudice to the defendants. No specific prejudice is alleged. This is not a case where prejudice should be inferred since the trial will not depend on eye-witness accounts of fast-moving events. It is the mens rea of the company which will be mainly in issue. It is therefore to be expected that the trial will depend largely on documents. But, in so far as it will depend on the memory of witnesses, the defendants will have had every reason to have these events very much in mind since the day of the casualty. I am not persuaded that a fair trial in this case is no longer possible.

Publicity

I can deal with this question even more shortly without, I hope, doing injustice to Mr Hill's very careful argument on behalf of the defendants. That argument was that there has been so much adverse publicity in the past in this case and there is likely to be so much further adverse publicity in the future that the jury is bound to be prejudiced against the defendants. I do not agree. Sir David Hopkin was taken through the publicity page by page and paragraph by paragraph. What he had to say was this:

> 'It is quite clear, by anyone's standard, that this incident was of the greatest public interest and concern and it appears to me, reading the publicity as it has been put before me, that the reporting was mainly restricted to those matters which were matters of public interest and concern. It is my view that the main subject of publicity were the Ministry of Transport for their laxity in licensing unsuitable vessels and their refusal to mount a public inquiry. Another subject was the question of compensation. Yet another was the general question of corporate liability, which was dealt with in a general way and emphasised the difficulties involved. The final target was the Director of Public Prosecutions when he threatened to intervene in the private prosecution. Then, of course, followed his withdrawal from that stance which also attracted publicity. Only on a very few occasions was it even specifically suggested that this company, or any of its directors, would be prosecuted for manslaughter.'

That was a view which Sir David Hopkin was entitled to take. It is a view with which I agree, although I do not pretend to have the same familiarity with the publicity material as he had.

Mr Hill's case, as it turned out in reply, does not depend on showing that Mr Glogg's solicitors were personally responsible for generating the publicity or that they were party to a concerted campaign. It is right to say, however, that the material which Mr Mansfield put before us this morning gives me the opposite

impression, that Mr Glogg's solicitors were doing their best to avoid adverse publicity which might affect the conduct of the present proceedings once the summonses had been served. Whether that impression be correct or not, I am quite unable to hold that a fair trial is no longer possible on the ground that a jury, however carefully directed, is likely to be prejudiced against these defendants or because there is even a risk that the jury would be so prejudiced. In my view, Sir David Hopkin reached the right view on all the points before him. Mr Hill has fallen far short of showing that we ought to interfere on *Wednesbury* grounds (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). I would therefore dismiss the application.

WATERHOUSE J. I agree and there is nothing that I can usefully add.

Application dismissed.

Dilys Tausz Barrister.

R v Shepherd

HOUSE OF LORDS

LORD GRIFFITHS, LORD EMSLIE, LORD ROSKILL, LORD ACKNER AND LORD LOWRY

11 NOVEMBER, 16 DECEMBER 1992

Criminal evidence – Document – Computer print-out – Admissibility – Statement in document produced by computer – Evidence as to functioning of computer – Who may give evidence – Till rolls – Till rolls linked to computer – Evidence of store detective as to how tills operated, what computer did and computer's reliability – Whether person familiar with operation of computer can give evidence that computer was operating properly at material time – Whether fact that computer was operating properly may be proved without calling computer expert – Police and Criminal Evidence Act 1984, s 69(1)(b), Sch 3, para 8(d).

The appellant was arrested at her home on suspicion of theft. In her car were goods from a department store to the value of £78·36 consisting of various items of food, including a joint of beef priced at £12·57 and five items of clothing, for which she had no receipt. When interviewed the appellant stated that she had bought the items at a branch of the department store that day and that on returning to her car the bags had split and she had transferred the items to a bag of her own; she said that she never kept receipts and denied stealing the goods. At her trial the principal evidence for the Crown was given by a store detective employed at the branch store, who stated that she had removed all the till rolls for the day in question from the tills, which were linked to a central computer, and examined all of them, that there was no trace on them of the unique product code for the clothing found in the appellant's car and no record of an item of food costing £12·57 and nor was there any group of prices matching the items of food found in the car. In the course of her evidence she described how the tills operated, what the central computer did, that there had been no trouble with the computer and how she had also examined all the till rolls, which showed no evidence of malfunction either by the tills or the central computer. The appellant objected to the admission of that evidence, contending that it did not satisfy the

R v Tower Bridge Metropolitan Stipendiary Magistrate, ex parte Chaudhry

QUEEN'S BENCH DIVISION

KENNEDY LJ AND BELL J

30 JUNE, 1, 7 JULY 1993

Magistrates – Summons – Refusal to issue summons – Private prosecution – Private prosecution against defendant already charged in respect of same matter – Driver charged with minor traffic offences in respect of collision in which applicant's son killed – Applicant seeking issue of summons against driver for causing death by reckless driving – Magistrate refusing to issue summons – Whether magistrate required to take into account existence of prosecution by Crown Prosecution Service – Whether magistrate properly refusing to issue summons – Magistrates' Courts Act 1980, s 1 – Prosecution of Offences Act 1985, s 6.

The applicant's son suffered fatal injuries when a van collided with his motor cycle at a junction. Statements made to the police in the course of their inquiries indicated that the van driver had driven through red traffic lights controlling the junction. The file was submitted to the Crown Prosecution Service, which laid informations against the van driver alleging three offences, namely driving without due care and attention, failing to comply with a traffic sign and failing to ensure that his brake lights were clean and in working order. The applicant, who was concerned at the absence of any allegation of causing death by reckless driving, laid an information alleging that offence before a stipendiary magistrate. The magistrate decided that since the conduct of the case was being dealt with by the Crown Prosecution Service he was bound by authority to refuse to issue a summons for that offence and that even if he was not so bound the Crown Prosecution Service would, in the exercise of its powers under the Prosecution of Offences Act 1985, take over the applicant's prosecution and it would not be in the interests of justice for a summons to be issued. The applicant applied for judicial review of the magistrate's decision.

Held – A magistrate when deciding whether to exercise his discretion under s 1[a] of the Magistrates' Courts Act 1980 to issue a summons at the behest of a private prosecutor was required to have regard to all the relevant circumstances of the case, including (i) whether the incident giving rise to the information had already been investigated by a responsible prosecuting authority which was pursuing what it considered to be the appropriate charges against the proposed defendant, (ii) the fact that if a summons for a more serious charge was issued the discretion of the Crown prosecutor would be overridden in a way which might appear to the defendant to be oppressive and (iii) the fact that the Director of Public Prosecutions could, and in reality might, take over the prosecution under s 6(2)[b] of the 1985 Act. Although it was not the case that a magistrate should never issue a summons for a private prosecution when the Crown Prosecution Service had already laid informations in respect of the same matter, it would only be in special circumstances, such as apparent bad faith on

a Section 1, so far as material, is set out at p 47 *f* to *j*, post

b Section 6 is set out at p 48 *b c*, post

the part of the public prosecutor, that the issuing of a summons for a private prosecution would be justified. On the facts, the magistrate had properly had regard to the action already taken by the Crown Prosecution Service and to the power of Director of Public Prosecutions pursuant to s 6(2) of the 1985 Act to take over and bring to end any prosecution. The application would therefore be dismissed (see p 51 *f* to p 52 *e g*, post).

R v West London Justices, ex p Klahn [1979] 2 All ER 221 and *R v Stafford Justices, ex p Customs and Excise Comrs* [1991] 2 All ER 201 considered.

R v Ealing Magistrates' Court, ex p Dixon [1989] 2 All ER 1050 distinguished.

Notes

For the jurisdiction of justices to issue summonses, see 29 *Halsbury's Laws* (4th edn) paras 223, 321, and for cases on the subject, see 33 Digest (Reissue) 124, *821–828*.

For the Magistrates' Courts Act 1980, s 1, see 27 *Halsbury's Statutes* (4th edn) (1992 reissue) 149.

For the Prosecution of Offences Act 1985, s 6, see 12 *Halsbury's Statutes* (4th edn) (1989 reissue) 939.

Cases referred to in judgments

Beresford, Re (1952) 36 Cr App R 1, Assizes.

Gouriet v Union of Post Office Workers [1977] 3 All ER 70, [1978] AC 435, [1977] 3 WLR 300, HL.

R v Bros (1901) 85 LT 581, DC.

R v Ealing Magistrates' Court, ex p Dixon [1989] 2 All ER 1050, [1990] 2 QB 91, [1989] 3 WLR 1098, DC.

R v Gateshead Justices, ex p Tesco Stores Ltd, R v Birmingham Justices, ex p D W Parkin Construction Ltd [1981] 1 All ER 1027, [1981] QB 470, [1981] 2 WLR 419, DC.

R v Nuneaton Justices, ex p Parker [1954] 3 All ER 251, [1954] 1 WLR 1318, DC.

R v Stafford Justices, ex p Customs and Excise Comrs [1991] 2 All ER 201, [1991] 2 QB 339, [1990] 3 WLR 656, DC.

R v West London Justices, ex p Klahn [1979] 2 All ER 221, [1979] 1 WLR 933, DC.

R v Wilson, ex p Battersea BC [1947] 2 All ER 569, [1948] 1 KB 43, DC.

Raymond v A-G [1982] 2 All ER 487, [1982] QB 839, [1982] 2 WLR 849, CA.

Sammy-Joe v GPO Mount Pleasant Office [1966] 3 All ER 924, [1967] 1 WLR 370.

Cases also cited

Hill v Anderton [1982] 2 All ER 963, sub nom *R v Manchester Stipendiary Magistrate, ex p Hill* [1983] 1 AC 328, HL.

Snodgrass v Topping (1952) 116 JP 332, DC.

Applications for judicial review and for leave to apply for judicial review

Mrs Brigitte Chaudhry applied, with the leave of Otton J given on 28 January 1992, for judicial review by way of orders of certiorari to quash the decisions made by Mr A T Evans, a metropolitan stipendiary magistrate sitting in the Tower Bridge Magistrates' Court on 5 July 1991, (i) refusing to allow the applicant to lay an information before him relating to a prosecution against Nicholas Sansom for causing death by reckless driving contrary to s 1 of the Road Traffic Act 1988, (ii) declining to issue a summons pursuant to the information and (iii) permitting the Tower Bridge Magistrates' Court to proceed to accept a plea of guilty from Nicholas Sansom to a charge of driving

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without due care and attention contrary to s 3 of the Road Traffic Act 1988. The applicant, having been refused leave by Hidden J on 22 June 1993, also renewed her application for leave to apply for judicial review by way of an order of certiorari to quash the decision of the Tower Bridge Magistrates' Court on 5 July 1991 to accept a plea of guilty by Nicholas Sansom to the charge of driving without due care and attention and the sentence pertaining thereto. The facts are set out in the judgment of Kennedy LJ.

Anthony Scrivener QC and *Christa Fielden* (instructed by *Bloom Camillin*) for the applicant.

Stephen Robbins (instructed by the *Treasury Solicitor*) for the magistrate.

Peter Hunt (instructed by *Jeffrey Gordon & Co*) for Mr Sansom.

Cur adv vult

7 July 1993. The following judgments were delivered.

KENNEDY LJ. This is an application for judicial review of a decision of a metropolitan stipendiary magistrate, Mr Evans, dated 5 July 1991, when he refused to issue a summons, an information having being laid before him which alleged that Nicholas Sansom had, on 27 October 1990, caused the death of Mansoor Chaudhry by reckless driving.

The background facts are simple and tragic. On 27 October 1990 Mansoor Chaudhry, the only son of Mrs Brigitte Chaudhry, was riding his motor cycle across the junction of Lambeth Road with St George's Road, London SE1, when he was in collision with a van driven by Nicholas Sansom, and as a result Mansoor Chaudhry sustained injuries from which he died. The police made inquiries and took statements from witnesses, some at least of which statements clearly indicated that at the material time the traffic lights controlling the junction were green for the motor cyclist and red for the van driver. In the normal way the file was submitted to the Crown Prosecution Service, and on 22 April 1991 informations were laid and summonses were issued against the van driver, alleging three offences, namely: (1) driving without due care and attention, contrary to s 3 of the Road Traffic Act 1988 and Sch 2 to the Road Traffic Offenders Act 1988; (2) failing to comply with a traffic sign, namely traffic lights; (3) failing to ensure that brake lights were clean and in working order.

Mr Sansom was due to appear before Tower Bridge Magistrates' Court to answer those summonses on 5 July 1991 but Mrs Chaudhry was very disturbed by the absence of any summons alleging causing death by reckless driving, and on 4 July 1991 solicitors acting on her behalf advised the court that on the following day, on her instructions, counsel would lay an information and invite a magistrate to issue a summons alleging that offence. So the matter came before Mr Evans. For present purposes it is accepted that he received the information, and that he was not informed as to the intentions of Mr Sansom in relation to the existing summons. The magistrate heard submissions by counsel for Mrs Chaudhry, and there is before us an affirmation of the magistrate, paras 5 and 6 of which read:

> '5. I was aware that the prosecution of Nicholas Sansom on a charge of driving without due care and attention and other road traffic offences was listed to be heard before a lay bench at Tower Bridge Magistrates' Court on

5 July 1991. So far as the Court's records went, they indicated that the case was listed so that a date for trial as a contested case could be set. The case was being dealt with by the Crown Prosecution Service.

6. I considered the case and the decision in *ex parte Dixon* ([1989] 2 All ER 1050, [1990] 2 QB 91). In my Judgment, *ex parte Dixon* was binding authority upon me preventing me from issuing a Summons in these circumstances where the Crown Prosecution Service had conduct of the case. Even if that were wrong, it seemed to me that if a Summons were issued, the Crown Prosecution Service would, in the exercise of its powers under the Prosecution of Offences Act 1985, take over Mrs Chaudhry's prosecution. It did not therefore appear to me to be in the interests of Justice that a Summons should be issued even if I were wrong about the applicability of the decision in *ex parte Dixon*. I therefore refused to issue a Summons.'

Before us Mr Scrivener QC submits that the decision of the magistrate was wrong because: (1) he was not bound by the decision of this court in *R v Ealing Magistrates' Court, ex p Dixon* [1989] 2 All ER 1050, [1990] 2 QB 91; (2) the magistrate's alternative ground of decision was equally flawed, because he should not have speculated as to whether the Crown Prosecution Service would take over Mrs Chaudhry's prosecution; (3) had the magistrate approached his task as he should have done, he would have concluded that there was no reason not to issue a summons.

The statutory provisions which are relevant in this case are to be found in s 1 of the Magistrates' Courts Act 1980 and in ss 3, 6, 15 and 23 of the Prosecution of Offences Act 1985.

Section 1 of the 1980 Act, so far as it is relevant, provides:

'(1) Upon an information being laid before a justice of the peace for an area to which this section applies that any person has, or is suspected of having, committed an offence, the justice may, in any of the events mentioned in subsection (2) below ... issue a summons ...

(2) A justice of the peace for an area to which this section applies may issue a summons ... under this section—(a) if the offence was committed or is suspected to have been committed within the area, or (b) if it appears to the justice necessary or expedient, with a view to the better administration of justice, that the person charged should be tried jointly with, or in the same place as, some other person who is charged with that offence, and who is in custody, or is being or is to be proceeded against, within the area, or (c) if the person charged resides or is, or is believed to reside or be, within the area, or (d) if under any enactment a magistrates' court for the area has jurisdiction to try the offence, or (e) if the offence was committed outside England and Wales and, where it is an offence exclusively punishable on summary conviction, if a magistrates' court for the area would have jurisdiction to try the offence if the offender were before it ...'

Section 3(2) of the 1985 Act, so far as it is relevant, provides:

'It shall be the duty of the Director ... (a) to take over the conduct of all criminal proceedings, other than specified proceedings, instituted on behalf of the police force (whether by a member of that force or by any other person) ...'

It is common ground that proceedings under the Road Traffic Act 1988 are not 'specified proceedings' for the purposes of s 3(2) of the 1985 Act. Section 6 of the 1985 Act states:

> '(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.
>
> (2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage.'

Both ss 3 and 6 of the 1985 Act fall within Pt I of that Act, in relation to which s 15(2)(a) states:

> 'For the purposes of this Part, proceedings in relation to an offence are instituted—(a) where a justice of the peace issues a summons under section 1 of the Magistrates' Courts Act 1980, when the information for the offence was laid before him ...'

Finally, s 23 provides that where the Director of Public Prosecutions has the conduct of proceedings for an offence he can, by notice, discontinue.

Ex p Dixon was concerned with alleged infringements of copyright. When executing a search warrant, the police were accompanied by Mr Dixon and another employee of the Federation Against Copyright Theft Ltd (FACT). When the defendants were charged, Mr Dixon was present and signed the charge sheet as the person charging. The charge sheet was also signed by the custody officer as the officer taking the charge. He read out the charge and the defendants were granted bail. Against that background the Divisional Court held that for the purposes of s 15(2) of the Prosecution of Offences Act 1985 proceedings were instituted *on behalf of a police force* when the charge was read out, and by virtue of s 3 (2) of that Act, it then became the duty of the Director of Public Prosecutions to take over the conduct of the criminal proceedings.

Consequently, the magistrates were right to hold that before them the solicitor for Mr Dixon and FACT could not conduct the prosecution.

In *R v Stafford Justices, ex p Customs and Excise Comrs* [1991] 2 All ER 201, [1991] 2 QB 339 a differently constituted Divisional Court had to consider a somewhat similar situation where the customs officer was described as 'the person charging'. The court declined to follow the decision in *Ex p Dixon*, which it said was wrongly decided. In the present case the attention of the magistrate was not invited to the decision in the *Stafford Justices* case, but in my judgment neither Divisional Court decision was really of any assistance to the magistrate in relation to the issue that he had to decide. I therefore conclude that Mr Scrivener is right in his submission that the magistrate was not bound by the decision in *Ex p Dixon*.

Before us Mr Hunt for Mr Sansom tried to place some further reliance on s 3(2)(a) of the 1985 Act, and on the decision in *Ex p Dixon*, by submitting that once the Director of Public Prosecutions is, as he put, it 'seised of the matter' (meaning in this case the traffic accident) she must take over all criminal proceedings arising out of it. In my judgment s 3(2)(a) cannot be stretched that far. It simply defines the duty of the Director of Public Prosecutions in relation to criminal proceedings instituted on behalf of a police force.

I deal with the second and third submissions made by Mr Scrivener together. As he pointed out, the jurisdiction which the magistrate was being asked to exercise is to be found in s 1(1) and (2) of the Magistrates' Courts Act 1980. At first sight the words of s 1(1) confer an unfettered discretion, which has to be exercised within the framework of s 1(2). In the present case the offence alleged satisfied the requirements of s 1(2)(a), and accordingly, Mr Scrivener submits, the magistrate had no option but to issue the summons. He accepts that, in deciding whether or not to issue a summons, the magistrate is making a judicial determination (see *R v Gateshead Justices, ex p Tesco Stores Ltd, R v Birmingham Justices, ex p D W Parkin Construction Ltd* [1981] 1 All ER 1027, [1981] QB 470), but he contends that the magistrate can only have regard to those matters set out in s 1(2) and to the question of whether the issue of a summons can be vexatious. In support of that proposition, he invited our attention to the decision of this court in *R v Nuneaton Justices, ex p Parker* [1954] 3 All ER 251, [1954] 1 WLR 1318, where the court held that the chairman of the justices was wrong to refuse a summons for driving without due care to a police inspector, it being the opinion of the magistrate that the summons should be for dangerous driving. Reference was made to the fact that in *Re Beresford* (1952) 36 Cr App R 1 Devlin J had observed that when death resulted from dangerous driving there should normally be a charge of manslaughter, but, said Lord Goddard CJ in *Parker's* case [1954] 1 WLR 1318 at 1319, cf [1954] 3 All ER 251 at 252, that was only a recommendation to the police, not to the magistrates: 'It must be for the Director of Public Prosecutions or the police to decide what charges should be preferred.' Lynskey J agreed, saying ([1954] 1 WLR 1318 at 1320, cf [1954] 3 All ER 251 at 252–253):

> 'It must not be thought that it is laid down that in every case where death occurs it should be manslaughter, or in every case where there is some defect it should be dangerous driving; it is a matter for the prosecution. On the other hand, the offence of dangerous driving or careless driving is a very serious one, and the police ought always, in my view, where the facts support it, to bring the more serious charge rather than the lighter charge; but they are not bound to bring the more serious charge where the evidence will not support that charge.'

Parker's case is of some interest on its facts, but in my judgment it does not really assist Mr Scrivener's case. All that it does is to warn magistrates not to exceed their discretion by using it to usurp the discretion of the prosecuting authorities and the police.

The next authority which we were invited to consider is *Sammy-Joe v GPO Mount Pleasant Office* [1966] 3 All ER 924, [1967] 1 WLR 370. There maintenance payments had been deducted from a postman's wages pursuant to an order of the magistrates' court. The postman sued the Post Office and the magistrate to recover the money on the basis that the magistrate had exceeded his jurisdiction, and Pennycuick J found the claim against the magistrate to be hopeless, because all the magistrate did was to issue a summons. As Pennycuick J said ([1966] 3 All ER 924 at 929, [1967] 1 WLR 370 at 374):

> 'That is merely a document which brings the proceedings into being. It is clearly not the duty of the magistrate who issues a summons to make any inquiry on his own into the facts on which the summons is based.'

So, as Mr Scrivener points out, *Sammy-Joe's* case is authority for the proposition that there is no duty on the magistrate to make inquiries on his own, but it does not follow that he must ignore material circumstances of which he is aware.

In *R v West London Justices, ex p Klahn* [1979] 2 All ER 221, [1979] 1 WLR 933 a defendant in a civil action wanted a summons issued against the plaintiff's solicitor alleging perjury. The magistrate refused to hear counsel on behalf of the solicitor, and the Divisional Court upheld his decision. Lord Widgery CJ said ([1979] 2 All ER 221 at 222–223, [1979] 1 WLR 933 at 935–936):

> 'The duty of a magistrate in considering an application for the issue of a summons is to exercise a judicial discretion in deciding *whether or not* to issue a summons. As Lord Goddard CJ stated in *R v Wilson* [1947] 2 All ER 569 at 570, [1948] 1 KB 43 at 46–47: "A summons is the result of a judicial act. It is the result of a complaint which has been made to a magistrate on which he must bring his judicial mind to bear and decide whether or not on the information or complaint before him he is justified in issuing a summons." It would appear that he should at the very least ascertain: (i) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (ii) that the offence alleged is not "out of time"; (iii) that the court has jurisdiction: (iv) whether the informant has the necessary authority to prosecute. In addition to the specific matters it is clear that he may and indeed should consider whether the allegation is vexatious: see *R v Bros* (1901) 85 LT 581. Since the matter is properly within the magistrates' discretion, it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given. Plainly he should consider the whole of the relevant circumstances. In the overwhelming majority of cases, the magistrate will not need to consider material beyond that provided by the informant. In my judgment, however, he must be able to inform himself of all relevant facts. Counsel who appeared as amicus curiae, and to whom the court is indebted for his assistance, submitted that the magistrate has a residual discretion to hear a proposed defendant if he felt it necessary for the purpose of reaching a decision. We would accept this contention. The magistrate must be able to satisfy himself that this is a proper case in which to issue a summons. There can be no question, however, of conducting a preliminary hearing. Until a summons has been issued there is no allegation to meet: no charge has been made. A proposed defendant has no locus standi and no right at this stage to be heard. Whilst it is conceivable that a magistrate might seek information from him in exceptional circumstances it must be entirely within the discretion of the magistrate whether to do so.' (Lord Widgery CJ's emphasis.)

Mr Scrivener submits that in the present case the magistrate must have been able to satisfy himself quite readily as to the four factors which Lord Widgery CJ identified as the minimum that he should ascertain and no one suggests that the allegation he was asked to consider was vexatious. So, submits Mr Scrivener, it being conceded that vexatiousness is not an issue, if the magistrate had confined himself, as he should have done, to what appeared on the information, he would have felt constrained to issue the summons. But I can find nothing in *Klahn's* case which requires a magistrate to adopt that sort of tunnel vision. On the contrary, it says in terms that he should consider 'the

whole of the relevant circumstances' and *may* need to consider information beyond that provided by the informant, in order to decide if it is a proper case in which to issue a summons, provided of course, that he does not go so far as to conduct a preliminary hearing.

Underlying all of Mr Scrivener's submissions is of course the individual's right to prosecute, and before us no one has questioned it. In *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 at 79, [1978] AC 435 at 477 Lord Wilberforce paid tribute to it, saying:

> 'This historical right which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi) remains a valuable constitutional safeguard against inertia or partiality on the part of authority.'

It is also allowed for by the wording of s 6(1) of the Prosecution of Offences Act 1985, but I see no conflict between the existence of that right and of the discretion of a magistrate to decide whether or not to issue a summons. After all, as Mr Scrivener recognises, an individual prosecutor does not have the unfettered right to pursue his prosecution to trial. By virtue of s 6(2) of the 1985 Act the Director of Public Prosecutions may, at any stage, take over in order to abort (see *Raymond v A-G* [1982] 2 All ER 487, [1982] QB 839), and he may even bring the magistrates' court proceedings to an end by notice pursuant to s 23 of the 1985 Act. So, as it seems to me, in any given case, a private prosecutor will have two hurdles to surmount. He will have to persuade a magistrate to issue a summons, and thereafter, if he wishes to retain control of the case, he may have to persuade the Director of Public Prosecutions not to take it over. But in reality, the criteria applied by the magistrate and the Director will be different. The magistrate should have regard to all of the relevant circumstances of which he is aware (see *Klahn's* case), such as whether the incident giving rise to the information which he is considering has already been investigated by a responsible prosecuting authority which is pursuing what it considers to be the appropriate charges against the same proposed defendant. If so, as Mr Hunt pointed out, the magistrate may have in mind the provisions of the *Guide for Crown Prosecutors* issued under s 10 of the Prosecution of Offences Act 1985, which requires the Crown Prosecution Service generally to charge the most serious offence revealed by the evidence but to have regard to the public interest, the interests of the victim, and the prospects on the available evidence of securing a conviction (which may not be very high where recklessness is alleged). If a summons for a more serious charge is issued on the application of a private prosecutor, the discretion of the Crown prosecutor is overridden in a way which may well appear to the defendant and to those who represent him to be oppressive, and so, whilst I would not go so far as to suggest that a magistrate should never at the behest of a private prosecutor issue a summons against a defendant who, in respect of the same matter, already has to answer one or more informations laid by the Crown, it seems to me that unless there are special circumstances, such as apparent bad faith on the part of the public prosecutor, the magistrate should be very slow to take that step. He will be all the more hesitant because he knows that the Director can, and in reality may well, take over the proceedings of the private prosecutor. That too is a relevant factor even if, as Mr Scrivener contends, the magistrate in the present case was

to some extent guessing when he said that it seemed to him that the Crown Prosecution Service *would* take over Mrs Chaudhry's prosecution.

If a magistrate does decide to issue a summons, the Director in deciding whether or not to exercise her powers under s 6(2) of the 1985 Act will no doubt look at the evidence in a way that the magistrate was not expecting to do when he decided to issue the summons, so the functions are different, but I do not accept that the discretion of the magistrate is anything like so confined as Mr Scrivener would have us accept. In my judgment the magistrate in the present case, albeit he was wrong to regard himself as bound by *Dixon's* case, was right to have regard to the action already taken by the Crown Prosecution Service and to the Director's powers under s 6(2) of the 1985 Act, and accordingly this court cannot and should not interfere with his conclusion, arrived at in the exercise of his discretion, that in the interests of justice a summons should not be issued.

I appreciate that my conclusion will disappoint Mrs Chaudhry, but, as Mr Robbins for the magistrate pointed out, it would be an odd situation if, where a killing occurs, or a serious sexual offence is committed, and the Director, after anxious consideration, decides to charge an offence other than the most serious offence which can be contemplated in the circumstances, that decision can, in effect, be overridden by a member of the public. The magistrate, if Mr Scrivener is right, can do nothing to stop it. He must issue the summons and the defendant must answer to it unless and until the Director decides to exercise her powers under s 6(2) to intervene. That alternative is so unattractive that in my judgment it reinforces the conclusion at which I have arrived as to the extent of the magistrate's discretion as set out in s 1(1) of the 1980 Act. Accordingly, I would dismiss the substantive application for judicial review of the decision of the metropolitan stipendiary magistrate, and refuse leave to move for judicial review of the subsequent decision of the lay justices. At the end of the hearing it was agreed that if the substantive application should fail, the application for leave to move must also fail.

We have also before us an application on behalf of the magistrates to strike out parts of the applicant's evidence as scandalous. That application was not pursued, and it too is therefore dismissed.

BELL J. I agree.

Applications dismissed.

30 July. The court refused leave to appeal to the House of Lords but certified, under s 1(2) of the Administration of Justice Act 1960, that the following point of law of general public importance was involved in the decision: whether a magistrate, in exercising his discretion whether or not to issue a summons on an information laid by a private citizen, is entitled to take into consideration that (1) criminal proceedings have been already instituted by the Crown Prosecution Service against the same defendant arising out of the same facts and (2) if a fresh summons is issued the Director of Public Prosecutions will have power pursuant to s 6(2) of the Prosecution of Offences Act 1985 to take over the conduct of the case in order to abort it, or whether the magistrate's discretion is so confined that if the offence in respect of which a summons is sought was committed or is suspected to have been committed within the area, and the application for a summons is not vexatious, a summons must be issued.

Dilys Tausz Barrister.

'Oh! why did God, Creator wise, that peopl'd highest Heaven
'With Spirits masculine, create at last
'This novelty on Earth, this fair defect of Nature . . .?'

I do not think that it can be against the policy of the law to recognise as an historical truth that the female of the species is not markedly inferior to the male when it comes to the matter of hatching plots; the contrary notion would have seemed a little less than convincing to John the Baptist and would have surprised the Thane of Cawdor. 'If that's the eye of the law', said Mr Bumble[1], 'the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience—by experience'. Mr Bumble, I think, had a point. Bracton, and the judges of his age, were, after all, ecclesiastics.

Well, in my judgment, the eye of the law is and has for some time been opened, though I would hesitate to opine whether by experience or by reason. Unless I am compelled by authority to do so, and I do not conceive that I am, I decline to apply, as the policy of the law, a mediaeval axiom which was never wholly accurate and which appears to me now to be as ill-adapted to the society in which we live as it is repugnant to common sense. A great American judge has said[2]:

> 'It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.'

Revolting or no, if I were convinced that the limitation on the tort of conspiracy which the applicant now seeks to sustain represented the law of England, I should be bound to give effect to it. But, for the reasons which I have given, I do not think that that was the law nor can I discern any public policy which dictates that I should declare it to be so now.

In my judgment, the motion fails and must be dismissed.

Application dismissed. Leave to appeal to the Court of Appeal.

Solicitors: *Lee, Bolton & Lee* (for the applicant); *Sidney Torrance & Co*, agents for *J Levi & Co*, Leeds (for the plaintiffs).

Evelyn M C Budd Barrister.

1 Dickens, Oliver Twist, ch 51
2 Oliver Wendell Holmes, Collected Legal Papers (1920), p 187

R v West London Justices, ex parte Klahn

QUEEN'S BENCH DIVISION
LORD WIDGERY CJ, EVELEIGH LJ AND STEPHEN BROWN J
20th FEBRUARY, 2nd MARCH 1979

Magistrates – Summons – Issue of summons – Objection to issue of summons – Whether proposed defendant having locus standi to be heard on complainant's application for issue of summons – Whether magistrate having discretion to hear proposed defendant – Magistrates' Courts Act 1952, s 1(1).

Although a proposed defendant to a summons has no locus standi to be heard on a complainant's application to a justice of the peace for the issue of a summons against him, the justice may, in exercising his discretion under s 1(1)[a] of the Magistrates' Courts Act 1952 whether to issue the summons, hear representations from the proposed defendant if he considers it necessary to do so in order to reach a decision on the issue of the summons (see p 223 *c* to *f*, post).

Dictum of Lord Goddard CJ in *R v Wilson, ex parte Battersea Borough Council* [1947] 2 All ER at 570 applied.

Notes

For the discretion of justices to issue a summons, see 25 Halsbury's Laws (3rd Edn) 189, para 342, and for cases on the subject, see 33 Digest (Repl) 209, 464–467.

For the Magistrates' Courts Act 1952, s 1, see 21 Halsbury's Statutes (3rd Edn) 185.

Cases referred to in judgment

R v Bros (1901) 85 LT 581, 66 JP 54, 20 Cox CC 89, DC, 14(1) Digest (Reissue) 184, 1317.
R v Wilson, ex parte Battersea Borough Council [1947] 2 All ER 569, [1948] 1 KB 43, [1948] LJR 73, 112 JP 15, 45 LGR 658, DC, 33 Digest (Repl) 211, 483.

Cases also cited

Humphrys v Director of Public Prosecutions [1976] 2 All ER 497, [1977] AC 1, HL.
R v Brentford Justices, ex parte Catlin [1975] 2 All ER 201, [1975] QB 455, DC.
R v Byrde and Pontypool Gas Co, ex parte Williams (1890) 60 LJMC 17, DC.

Application for mandamus

This was an application by Peter Klahn ('the applicant') for a writ of mandamus directed to the metropolitan magistrate sitting at West London Magistrates' Court requiring him to hear and determine the applicant's objections to the issue of a summons against him on the complaint of Michael Marshall ('the complainant'). The grounds of the application were that the magistrate erred in law in holding, on 4th November 1978, that on the hearing of the complainant's application for the issue of a summons the applicant had no right to be heard and to object to the issue of the summons. The facts are set out in the judgment of the court.

G Bathurst Norman for the applicant.
Harry Woolf as amicus curiae.
The complainant appeared in person.

Cur adv vult

a Section 1, so far as material, is set out at p 222 g, post

2nd March. **LORD WIDGERY CJ** read the following judgment of the court: The judgment which I am about to read is the judgment of the court prepared by Stephen Brown J.

Counsel for the applicant moves the court for a writ of mandamus directed to the metropolitan magistrate sitting at the West London Magistrates' Court requiring him to hear and determine the applicant's objections to the issue of a summons against him on the complaint of one Michael Marshall ('the complainant').

The applicant is a solicitor who had acted on behalf of a Mr and Mrs Gaan, who were plaintiffs in civil proceedings in the Watford County Court in which judgment was entered against the complainant as a defendant. The complainant subsequently commenced an action in the High Court against Mr and Mrs Gaan and others alleging that they had conspired to defraud and injure him by giving false evidence in the county court proceedings. On 17th October 1978 he applied to Boreham J for leave to join the applicant and members of his firm as defendants in these proceedings and also sought certain injunctions against them. These applications were dismissed with costs by the judge who held that no cause of action was disclosed.

Following this, on 26th October 1978, the complainant applied to the metropolitan magistrate sitting at the West London Magistrates' Court for the issue of a summons against the applicant alleging that he had committed perjury by wilfully making a statement false in a material particular about the complainant in an affidavit used in the High Court proceedings before Boreham J. The magistrate adjourned this application until 4th November, when he proposed to consider it further.

On 4th November, the applicant, having become aware of the complainant's application, instructed counsel to apply to the magistrate to be heard on his behalf before the magistrate came to a decision on the matter. On 4th November, Mr Kenneth Machin QC, on behalf of the applicant, duly applied to the magistrate to be heard in relation to the complainant's application for the issue of the summons. The magistrate, who had had little, if any, notice of Mr Machin's application, took the view that he had no power to hear counsel on the matter, and the applicant had no right to be heard. In an affidavit filed with this court he has further stated that, even if he had been persuaded that he had a discretion to hear representations on behalf of the applicant, he would not have done so in this instance.

Counsel for the applicant in this court has submitted that the magistrate was wrong in law in holding that he had no power to hear the applicant, that the applicant in fact had a right to be heard and to object to the issue of a summons, and that the magistrate was wrong in saying that he would not hear the applicant.

The issue of a summons by a magistrate is governed by s 1(1) of the Magistrates' Courts Act 1952 which provides:

> 'Upon an information being laid before a justice of the peace for any county that any person has, or is suspected of having, committed an offence, the justice may . . . (*a*) issue a summons directed to that person requiring him to appear before a magistrates' court for the county to answer the information . . .'

According to Stone's Justices' Manual[1], application for the issue of a summons is made ex parte in private and usually out of normal court hours. It is a step which is preliminary to the institution of proceedings and there is no provision for the giving of notice to a proposed defendant. Once a summons has been issued, the proceedings become and are Crown proceedings: see *R v Wilson, ex parte Battersea Borough Council*[2].

The duty of a magistrate in considering an application for the issue of a summons is to exercise a judicial discretion in deciding *whether or not* to issue a summons.

As Lord Goddard CJ stated in *R v Wilson*[3]:

1 111th Edn (1979), p 60

2 [1947] 2 All ER 569 at 571, [1948] 1 KB 43 at 48

3 [1947] 2 All ER 569 at 570, [1948] 1 KB 43 at 46–47

> 'A summons is the result of a judicial act. It is the result of a complaint which has been made to a magistrate, on which he must bring his judicial mind to bear and decide whether or not on the information or complaint before him he is justified in issuing a summons.'

It would appear that he should at the very least ascertain: (i) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (ii) that the offence alleged is not 'out of time'; (iii) that the court has jurisdiction; (iv) whether the informant has the necessary authority to prosecute.

In addition to these specific matters it is clear that he may and indeed should consider whether the allegation is vexatious: see *R v Bros*[1]. Since the matter is properly within the magistrates' discretion it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given. Plainly he should consider the whole of the relevant circumstances.

In the overwhelming majority of cases the magistrate will not need to consider material beyond that provided by the informant. In my judgment, however, he must be able to inform himself of all relevant facts. Counsel who appeared as amicus curiae, and to whom the court is indebted for his assistance, submitted that the magistrate has a residual discretion to hear a proposed defendant if he felt it necessary for the purpose of reaching a decision. We would accept this contention.

The magistrate must be able to satisfy himself that it is a proper case in which to issue a summons. There can be no question, however, of conducting a preliminary hearing. Until a summons has been issued there is no allegation to meet: no charge has been made. A proposed defendant has no locus standi and no right at this stage to be heard. Whilst it is conceivable that a magistrate might seek information from him in exceptional circumstances it must be entirely within the discretion of the magistrate whether to do so.

Accordingly in this case, whilst we take the view that the magistrate was in error in holding that he had no power if he wished to do so to hear representations from the applicant, we are of the opinion that he was correct in his view that the applicant had no right to address him, and furthermore was fully justified in refusing to hear counsel on behalf of the applicant. Accordingly, the application is refused.

Application refused.

Solicitors: *Davis Hanson* (for the applicant); *Treasury Solicitor.*

N P Metcalfe Esq Barrister.

1 (1901) 85 LT 581

ladies. However, for the reasons which have been given, we have come to the conclusion that this tribunal is not the proper place to investigate the validity of the evaluation study. We, certainly, no more than an industrial tribunal may, are not going to venture on any evaluation study ourselves.

For these reasons, in our view, this appeal must succeed to the limited extent that it is to be remitted for further consideration on the basis that in the first place this is a case which falls to be considered under s 1(5) where there is *prima facie* in existence a valid and proper evaluation study. If it is to be called into question, it can only be done within a very limited area, and we are quite confident that an industrial tribunal is quite capable of deciding for itself how far it can go in examining the validity of the evaluation study. Consequently this case must be remitted to a fresh tribunal to consider it along the lines that we have indicated.

Appeal allowed.

Solicitors: *Anderson & Co*, Nottingham (for the female employees).

Salim H J Merali Esq Barrister.

Gouriet v Union of Post Office Workers and others

COURT OF APPEAL, CIVIL DIVISION
LORD DENNING MR, LAWTON AND ORMROD LJJ
15th, 18th, 19th, 20th, 21st, 27th JANUARY 1977

Attorney-General – Relator action – Refusal of consent to relator action – Right of member of public to sue in own name – Claim for declaration or injunction – Enforcement of criminal law – Interlocutory injunction – Public interest – Effect of refusal of Attorney-General's consent to relator action – Right of member of public to bring action in own name – Plaintiff having no particular interest above that of other members of public – Action to restrain postal workers' union from instructing members to interfere with postal services in breach of criminal law – Attorney-General refusing consent to relator action – Right of member of public suing in own name for declaratory judgment – Right to interim injunction – Supreme Court of Judicature (Consolidation) Act 1925, s 45(1).

On the evening of Thursday, 13th January 1977, the plaintiff saw a news bulletin on television in which it was reported that the executive council of the Union of Post Office Workers had resolved that day to call on its members to impose a boycott on all postal communications between Britain and South Africa. On the following day The Times newspaper contained a report of the resolution, indicating that the action proposed to be taken by the union was in response to a call for 'international solidarity' from the International Confederation of Free Trade Unions to its member unions to protest against the South African government's policy of 'apartheid'. The boycott was to come into effect on the following Sunday, 16th January. At 12.45 p m on the Friday the plaintiff applied to the Attorney-General for his consent to act as plaintiff in a relator action for an injuction against the union on the ground that the actions of the union's members in interfering with postal communications and the action of the union in soliciting or endeavouring to procure such interference would constitute criminal offences under ss 58[a] and 68[b] of the Post Office Act 1953. At 3.32 p m the Attorney-General made the following statement: 'Having considered all the circumstances including the public interest . . . I have come to the conclusion that in relation to this application I should not give my consent.' Thereupon the plaintiff issued a writ in his own name, claiming an injunction restraining the union from soliciting or endeavouring to procure any person wilfully to detain or delay any postal packet in the course of transmission between England and Wales and the Republic of South Africa. At 3.50 p m he applied ex parte to a High Court judge in chambers for an interim injunction in the same terms. The judge dismissed the application, holding that since the Attorney-General had refused his consent to a relator action, the plaintiff himself had no locus standi to bring an action. The plaintiff appealed and on the next day, Saturday, the Court of Appeal granted an interim injunction until the following Tuesday and gave leave to the plaintiff to add the Attorney-General as a defendant. The union complied with the injunction and the boycott did not take effect. At the hearing on the Tuesday the Attorney-General appeared and contended that the court had no jurisdiction to question his decision to refuse his consent to a relator action and that, since the plaintiff had no particular interest in preventing the postal boycott other than his interest as a member of the public, he was not entitled to bring the action in his own name after the Attorney-General had refused his consent.

Held – (1) Despite the refusal of the Attorney-General to give his consent to relator proceedings, the court had jurisdiction to grant an interim injunction in the plaintiff's action for the following reasons—

(i) (per Lord Denning MR) The discretion of the Attorney-General was absolute only to the extent that the courts would not enquire into it where he had exercised it by granting his consent. Where, however, he had refused his consent his decision could be overriden, indirectly, by the court to the extent that if he refused leave in a proper case the plaintiff could himself apply to the court for a declaration or, where appropriate, for an injunction, joining the Attorney-General as a defendant. In particular, where the Attorney-General refused to give his consent to an action seeking the enforcement of the criminal law, any citizen could come to the court and ask that the law be enforced. In those circumstances the court could not only grant a declaration but also an injunction, whether interlocutory or final, to prevent the commission of a criminal offence (see p 715 *e*, p 716 *a* and *b* and p 718 *a* to *h*, post); dictum of Lord Denning MR in *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority* [1973] 1 All ER at 698, 699 and *Thorson v Attorney-General of Canada* (1973) 43 DLR (3d) 1 applied; dicta of Ormrod J in *Montgomery v Montgomery* [1964] 2 All ER at 23 and Lord Denning MR in *Thorne v British Broadcasting Corpn* [1967] 2 All ER at 1226 disapproved.

(ii) (per Lawton and Ormrod LJJ) The decision of the Attorney-General to refuse his consent to an action to enforce the law was not subject to review by the court. Where his consent was refused however it did not follow that the plaintiff was thereby barred from seeking any relief. Where there was no discernible reason why threatened breaches of the criminal law should not be restrained, but the Attorney-General had refused his consent to relator proceedings to restrain those breaches, it was open to a member of the public who might be inconvenienced or suffer material loss by reason of the breaches to bring proceedings in his own name for a declaratory judgment that the threatened actions would in fact constitute breaches of the criminal law. In such proceedings the court had jurisdiction, under s 45(1)[c] of the Supreme Court of Judicature (Consolidation) Act 1925, to grant an interlocutory injunction restraining the threatened actions (see p 721 *j*, p 723 *d* to *h*, p 724 *c*, p 725 *d* to *g*, p 726 *b* to *f* and *h*, p 730 *f* to *h* and p 731 *f* to *h*, post); *Attorney-General v Dyson* [1912] 1 Ch 158 and *Attorney-General v Westminster County Council* [1924] All ER Rep 162 applied; dicta of Viscount

a Section 58, so far as material, is set out at p 700 *f*, post
b Section 68 is set out at p 700 *h*, post

c Section 45(1), so far as material, provides: 'The High Court may grant . . . an injunction . . . by an interlocutory order in all cases in which it appears to the Court to be just or convenient so to do.'

Maugham and Lord Wright in *London Passenger Transport Board v Moscrop* [1942] 1 All ER at 103, 104, 107 explained; *Thorne v British Broadcasting Corpn* [1967] 2 All ER 1225 distinguished.

(2) Since the plaintiff, in common with other members of the public, had an interest in the availability of the postal and telephone services and a real interest in ensuring that those facilities were not interfered with by the illegal acts of the defendants, the court had exercised its jurisdiction properly in granting his application for an interlocutory injunction. The plaintiff would be granted leave to amend his pleadings to ask for a declaratory judgment but, since the original injunction had been effective and the passage of time had removed the prospect of the threatened boycott, it would not be continued (see p 719 *b* and *c*, p 725 *g*, p 726 *f*, p 731 *h* and p 732 *b*, post).

Notes

For the relator procedure, see 30 Halsbury's Laws (3rd Edn) 310-312, para 570, and for cases on the subject, see 16 Digest (Repl) 537, 538, 541-543, 3770-3790, 3821-3842; for the office and functions of the Attorney-General, see 8 Halsbury's Laws (4th Edn) paras 1274-1282.

For the grant of an injunction for the protection of public rights generally, see 21 Halsbury's Laws (3rd Edn) 347, 403, 404, paras 727, 844-846, and for related cases, see 28(2) Digest (Reissue) 961-964, 36-51.

For the Post Office Act 1953, ss 58, 68, see 25 Halsbury's Statutes (3rd Edn) 442, 448.

For the Supreme Court of Judicature (Consolidation) Act 1925, s 45, see 25 ibid 717.

Cases referred to in judgments

Adams v Adams (Attorney-General intervening) [1970] 3 All ER 572, [1971] P 188, [1970] 3 WLR 934, 8(2) Digest (Reissue) 664, 37.

Attorney-General v Ashborne Recreation Ground Co [1903] 1 Ch 101, 72 LJCh 67, 87 LT 561, 67 JP 73, 1 LGR 146, 28(2) Digest (Reissue) 961, 36.

Attorney-General v Birmingham, Tame & Rea District Council [1910] 1 Ch 48, 79 LJCh 137, 101 LT 796, 74 JP 57, 8 LGR 110; *affd with variation* [1912] AC 788, [1911-13] All ER Rep 926, 82 LJCh 45, 107 LT 353, 76 JP 481, 11 LGR 194, HL, 28(2) Digest (Reissue) 1124, 1233.

Attorney-General v Chaudry [1971] 3 All ER 938, [1971] 1 WLR 1614, 70 LGR 22, CA, 28(2) Digest (Reissue) 533, 59a.

Attorney-General v Great Eastern Railway Co (1879) 11 Ch D 449, 48 LJCh 428, 40 LT 265, CA; *affd* (1880) 5 App Cas 473, HL, 38 Digest (Repl) 384, 519.

Attorney-General v Great Northern Railway Co (1860) 1 Drew & Sm 154, 29 LJCh 794, 2 LT 653, 6 Jur NS 1006, 62 ER 337, 16 Digest (Repl) 541, 3825.

Attorney-General v Harris [1960] 3 All ER 207, [1961] 1 QB 74, [1960] 3 WLR 532, 58 LGR 242, CA; *rvsg* [1959] 2 All ER 393, [1960] 1 QB 31, [1959] 3 WLR 205, 16 Digest (Repl) 542, 3831.

Attorney-General v Logan [1891] 2 QB 100, 65 LT 162, 55 JP 615, DC, 16 Digest (Repl) 537, 3770.

Attorney-General v London County Council [1901] 1 Ch 781, 70 LJCh 367, 84 LT 245, CA; *on appeal* sub nom *London County Council v Attorney-General* [1902] AC 165, HL, 33 Digest (Repl) 127, 818.

Attorney-General v Magdalen College, Oxford (1854) 18 Beav 223, 23 LJCh 844, 24 LTOS 7, 18 Jur 363, 52 ER 88; *rvsd on other grounds* sub nom *St Mary Magdalen, Oxford (President, etc) v Attorney-General* 6 HL Cas 189, 26 LJCh 620, 29 LTOS 238, 21 JP 531, 3 Jur NS 675, 10 ER 1267, SWR 716, HL, 17 Digest (Reissue) 289, 565.

Attorney-General v Sheffield Gas Consumers Co [1853] 3 De GM & G 304, 22 LJCh 811, 21 LTOS 49, 17 Jur 677, 43 ER 119, 7 Ry & Can Cas 650, LC [illegible] LJ, 25 Digest (Repl) 519, 18.

Attorney-General & Spalding Rural District Council v Garner [1967] 2 KB 480, 76 LJKB 965, 97 LT 486, 71 JP 357, 5 LGR 944, 16 Digest (Repl) 537, 3773.

Attorney-General v Westminster City Council [1924] 2 Ch 416, [1924] All ER Rep 162, 93 LJCh 573, 131 LT 802, 88 JP 145, 22 LGR 506, CA, 16 Digest (Repl) 537, 3776.

Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority [1973] 1 All ER 689, [1974] QB 629, [1973] 2 WLR 344, CA, Digest (Cont Vol D) 209, 3785a.

Benjamin v Storr (1874) LR 9 CP 400, [1874-80] All ER Rep Ext 2000, 43 LJCP 162, 30 LT 362, 36(1) Digest (Reissue) 481, 602.

Devonport Corpn v Tozer [1902] 2 Ch 182, 71 LJCh 754, 86 LT 612; *affd* [1903] 1 Ch 759, CA, 28(2) Digest (Reissue) 964, 51.

Dyson v Attorney-General [1911] 1 KB 410, 81 LJKB 217, 105 LT 753, CA; *subsequent proceedings* [1912] 1 Ch 158, CA; 11 Digest (Reissue) 693, 308.

Flast v Cohen, Secretary of Health, Education and Welfare (1968) 392 US 83.

Lang v Purves (1852) 15 Moo PCC 389, 5 LT 809, 8 Jur NS 523, 15 ER 541, PC, 21 Digest (Repl) 436, 1452.

London Passenger Transport Board v Moscrop [1942] 1 All ER 97, [1942] AC 332, 111 LJCh 50, 166 LT 202, 106 JP 97, 40 LGR 67, HL; *rvsg* [1940] 4 All ER 281, [1941] Ch 91, CA, 45 Digest (Repl) 542, 1227.

Montgomery v Montgomery [1964] 2 All ER 22, [1965] P 46, [1964] 2 WLR 1036, Digest (Cont Vol B) 380, 6527d.

Padfield v Minister of Agriculture, Fisheries & Food [1968] 1 All ER 694, [1968] AC 997, [1968] 2 WLR 924, HL; *rvsg* [1968] AC 997, [1968] 2 WLR 924, CA, Digest (Cont Vol C) 388, 569a.

Queen, The, v Prosser (1848) 11 Beav 306, 18 LJCh 35, 12 LTOS 509, 13 Jur 71, 50 ER 834, 16 Digest (Repl) 277, 450.

R v Metropolitan (or Metropolis) Police Comr, ex parte Blackburn [1968] 1 All ER 763, [1968] 2 QB 118, [1968] 2 WLR 893, CA, Digest (Cont Vol C) 279, 1113a.

Ross Smith v Ross Smith (orse Bradford) [1962] 1 All ER 344, [1963] AC 280, [1962] 2 WLR 388, HL, Digest (Cont Vol A) 243, 1067b.

Seven Bishops' Case (1688) 12 State Tr 183.

Southport Corpn v Esso Petroleum Co Ltd [1954] 2 All ER 561, [1954] 2 QB 182, [1954] 3 WLR 200, 118 JP 411, 52 LGR 404, [1954] 1 Lloyd's Rep 446, CA; *rvsd in part* sub nom *Esso Petroleum Co Ltd v Southport Corpn* [1955] 3 All ER 864, [1956] AC 218, [1956] 2 WLR 81, 120 JP 54, 54 LGR 91, [1955] 2 Lloyd's Rep 655, HL, Digest (Cont Vol A) 1213, 68a.

Thorne v British Broadcasting Corpn [1967] 2 All ER 1225, [1967] 1 WLR 1104, CA, Digest (Cont Vol C) 565, 1009a.

Thorson v Attorney-General of Canada (No 2) (1974) 43 DLR (3d) 1.

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Attorney-General v Bastow [1957] 1 All ER 497, [1957] 1 QB 514.

Attorney-General v De Keyser's Royal Hotel [1920] AC 508, 89 LJCh 417, HL.

Attorney-General v Premier Line Ltd [1932] 1 Ch 303, 101 LJCh 132.

Attorney-General v Wimbledon House Estate Co Ltd [1904] 2 Ch 34, 73 LJCh 593.

Attorney-General v Pontypridd Waterworks Co [1908] 1 Ch 388, 77 LJCh 237.

Boyce v Paddington Borough Council [1903] 1 Ch 109, 72 LJCh 28.

Congreve v Home Office [1976] 1 All ER 697, [1976] QB 629, CA.

Institute of Patent Agents v Lockwood [1894] AC 347, HL (SC).

Laker Airways Ltd v Department of Trade [1977] 2 WLR 234, CA.

Liverpool Taxi Owners' Association [1972] 2 All ER 589; sub nom *R v Liverpool Corpn, ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, CA.

M'Bain v Crichton 1961 [illegible] (J) 25; sub nom *McBain v C* 1961 SLT 209.

Mareva Compania Nav[illegible] A v International Bulkcarriers Ltd [1975] 2 Lloyd's Rep 509, CA.

Newton, ex parte (1855) 4 E & B 869, 119 ER 323; sub nom *R v Newton* 24 LJQB 246.

R v Greater London Council, ex parte Blackburn [1976] 3 All ER 184, [1976] 1 WLR 550, CA.

Secretary of State for Education and Science v Metropolitan Borough of Tameside [1976] 3 All ER 665, [1976] 3 WLR 641, HL.

Stratford (J T) & Son Ltd v Lindley [1964] 3 All ER 102, [1964] AC 269, HL.

Interlocutory appeal

On 14th January 1977 the plaintiff, John Prendergast Couriet, applied to Her Majesty's Attorney-General for his consent to bring an action at the relation of the plaintiff against the Union of Post Office Workers ('the UPW') for an injunction restraining the UPW from soliciting or endeavouring to procure any person wilfully to detain or delay any postal packet in the course of transmission between England and Wales and the Republic of South Africa. The Attorney-General refused to give his consent. Thereupon the plaintiff in his own name issued a writ against the UPW seeking the same relief. On the same day he applied ex parte to Stocker J in chambers for an injunction in the same terms as that claimed in the writ. The judge dismissed the application and the plaintiff appealed. The appeal was heard on the following day, Saturday, 15th January. The facts are set out in the judgment of Lord Denning MR.

George Newman for the plaintiff.

Ian Hunter and *Michael Supperstone* for the UPW.

LORD DENNING MR. The Post Office operates a great public service. It is essential to the well-being of the community. I feel sure that all from the humbler grades, the postmen and the telegraph boys, up to the top, they are those who would wish to abide by the law of the land. It is as well that the law of the land should be known to everyone concerned in the Post Office. It is enacted not by old Acts of Queen Anne (as someone seems to have suggested on the television) but by statutes passed by governments of various colours in the last 20 or 30 years.

The important section here is s 58 of the Post Office Act 1953, which says:

> 'If any officer of the Post Office, contrary to his duty . . . wilfully detains or delays, or procures or suffers to be detained or delayed, any . . . postal packet, he shall be guilty of a misdemeanour and be liable to imprisonment for a term not exceeding two years or to a fine, or to both.'

That applies to every officer (however humble) in the Post Office, whether in the sorting office, on the delivery round or the like. If he puts a letter on one side deliberately meaning that it should be delayed for an hour or two, or a day or two, he is guilty of an offence. Any person in the land can lay an information before a magistrate in respect of it.

Then also s 68 of that Act says:

> 'If any person solicits or endeavours to procure any other person to commit an offence punishable on indictment under this Act, he shall be guilty of a misdemeanour and be liable to imprisonment for a term not exceeding two years.'

That applies to the offence which I have spoken of, of detaining or delaying any postal packet. It applies forcibly not only to the humbler servants but especially to those who issue orders to them, whether it be a trade union or the like. If they solicit or endeavour to procure any person to commit an offence of detaining or delaying a postal packet they are guilty under that separate section. Let there be no doubt about it. That is the law of the land which everybody must adhere to.

Furthermore, the words 'officer of the Post Office', [redacted] amending Act in 1969[1] (when the Post Office ceased to be a government department and became a nationalised undertaking), are to be construed as referring to any person employed in the business of the Post Office authority. So you see how comprehensive the law is and how clear in regard to the mail and postal packets.

So as to make it complete, the law applies not only to the mail but also to the telephone, the telegraph, the cable, the teleprinter and any other communication by the Post Office. That is by s 45 of the Telegraph Act 1863 which says:

> 'If any person in the employment of the company [and that applies to the Post Office] Wilfully or negligently omits or delays to transmit or deliver any message; Or by any wilful or negligent act or omission prevents or delays the transmission or delivery of any message; Or improperly divulges to any person the purport of any message; He shall for every such offence be liable to a penalty not exceeding twenty pounds.'

Moreover, anyone who solicits or procures such prevention or delays is guilty as an aider and abettor.

Many statutes are not at all clear but those are clear beyond doubt. Every person in the service of the Post Office should know it.

Now for what has happened in this case I cannot do better than to read the very short affidavit which has been put before us. '1. On [Thursday last], 13th January 1977', says Mr Couriet in his affidavit (that was Thursday and here we are only at Saturday)—

> 'I watched the 9 o'clock News relayed on television, by the British Broadcasting Corporation on Channel 1. In the course of that news bulletin it was reported that the Executive Council of [the UPW] had resolved that day to call upon their members to interfere with the passage of mail in the course of transmission by post between the Republic of South Africa and England and Wales.
>
> '2. Immediately after the above announcement an interview was screened with Mr Tom Jackson, the General Secretary of [the UPW], and it was put to him that the action the Council of his Union had resolved to take was in fact unlawful and illegal. He replied in terms to the effect that this matter had never been tested in the Courts, and that the laws relating to it dated from Queen Anne and were more appropriate for dealing with highwaymen and footpads.
>
> '3. There is now produced and shown to me a copy of "The Times" newspaper dated 14th January, 1977, wherein a report of the Executive Council's resolution is set out . . .'

In the extract from The Times newspaper of yesterday (Friday, 14th January) it is reported:

> 'With unanimous resolve, the 31 members of the executive of the Union of Post Office Workers decided yesterday to brave possible legal action under the Post Office Act and boycott all telephone calls, mail and telegrams to South Africa next week. Their action, taken in response to a call for "international solidarity" from the International Confederation of Free Trade Unions, is being followed by other unions who hope to influence apartheid policy . . . The Post Office Engineering Union said it would instruct its members not to provide or maintain circuits to the country except in a matter of "life and death".'

Now there are some people, certainly amongst them the plaintiff, Mr Couriet, who were distressed by those happenings. They went to see their lawyers and steps moved quickly. We have been given the time-table. After seeing counsel, at 12.45 pm yesterday the Attorney-General was approached through his officers for his consent. He was asked to [redacted] it to what is called a 'relator' action being brought in the courts against the UPW workers on account of their proposed breach of the law.

The general position is that if a person seeks to come to the courts on a matter in

1 Post Office Act 1969, s 87(1)

which the public at large are concerned he should do so, in the ordinary way, by approaching the Attorney-General and getting his consent. As we say in the law, the Attorney-General then brings an action at the applicant's 'relation', but that person being the one who is really responsible for it and who pays all the costs if he fails. The only thing he has to do is to get the Attorney-General's consent when the public interest is involved.

The Attorney-General treated it (very properly) as a matter of serious concern. He dealt with it no doubt as quickly as he could. Mr Gouriet had drafted his writ and statement of claim already and put them before the Attorney-General for consideration. At 3.32 p m yesterday the Attorney-General refused his consent. It is important that I should read what the Attorney-General said:

> 'Having considered all the circumstances including the public interest relating to the application for my consent [I need not read out the remainder of the preamble] I have come to the conclusion that in relation to this application I should not give my consent.'

So the Attorney-General did not consent to this action being brought to enforce the law of the land.

Thereupon a writ was immediately issued by Mr Gouriet's solicitors on his own account without the consent of the Attorney-General. At 3.50 p m yesterday they applied to the judge in chambers, Stocker J, for an injunction to restrain the breaches of the law which were proposed. The judge heard it for nearly an hour and a half. At 5.15 last night he regretted that he felt he could not grant the injunction or the relief asked for. The reason was because no case had ever occurred before where the Attorney-General had refused his consent and yet an individual had been allowed to proceed in the courts. The judge regretted that decision because he felt there was a breach of the law going to take place, but on account of the omission of the consent of the Attorney-General he felt he could do nothing and the courts were powerless to enforce the law.

Now counsel for Mr Gouriet has come before us today. We have sat specially today to hear the case, because the action proposed by the resolution of this union is due to take place tomorrow (Sunday) and, if anything is to be done, it has to be done today.

One appreciates very much that, although it is an ex parte application, the UPW have appeared before this court and have instructed counsel, who has argued the case on their behalf exceeding well. But at the outset I may say that counsel for the UPW very frankly has told us that he could not concede that there was any breach of the criminal law, actual or proposed; but he felt he could urge no argument to the contrary. Indeed we have heard no argument to the contrary.

Viewing those plain words of the statute, it seems to me that for any person employed in the Post Office to delay or interfere with communications with South Africa—mails, cables or whatever it may be, would be a clear breach of our law, for each individual concerned would be liable to be brought before our criminal courts. An information could be laid not merely by the authorities or the police but by any ordinary individual. Any of those concerned, whether they be postmen or working in the sorting office or wherever it may be, could be brought before the courts for a breach of our criminal law. So it seems to me there is impending a breach of the law directed, encouraged or procured by the executive of the UPW. That is plain. There is nothing that was urged to the contrary.

What is to be done about it? Are the courts to stand idly by? Is the Attorney-General to be the final arbiter whether the law should be enforced or not? It is a matter of great constitutional principle. We considered it in the case when the late Mr McWhirter[1] came to us. In that particular case, in the [redacted] the Attorney-General did give his leave but in the meantime Mr McWhirter, because he did not get leave in time, came to us very hurriedly. Without going into all the matters which we there considered, I would like to quote what I said[1]:

> '... I am of opinion that, in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can himself apply to the court itself. He can apply for a declaration and, in a proper case, for an injunction, joining the Attorney-General, if need be, as defendant ... I have said so much because I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then in the last resort any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced.'

Lawton LJ said words substantially to the same effect.

Now in this case, the Attorney-General not having consented, Mr Gouriet comes himself. In a way I wish we could hear the Attorney-General to give his reasons more fully, to see what were the grounds on which he refused his consent, because at this stage, to me at least, it seems difficult to see why his consent should be refused when, on the face of it, there is impending a plain breach of our law.

As to the UPW itself, apart from the workers, it has to be remembered that it has, in this regard, no privileged position before the law of England. I know that, under the Trade Union and Labour Relations Act 1974, no action lies in respect of any tort. This is not an action for tort. I have no doubt that, in disputes within this country, trade unions are granted a great deal of protection in regard to acts in consequence of or in relation to a 'trade dispute', but this does not involve any matter of that kind. This comes straight within s 2(1)(*d*) of the 1974 Act, which makes it clear that a trade union is liable to be proceeded against 'for any offence alleged to have been committed by it, or on its behalf' and proceedings may be brought against it in its own name. So the UPW and its officers and, in the end, every person employed by the Post Office, are as much subject to the law as anyone else.

So we come back to the point: is the absence of the consent of the Attorney-General a bar to anything being done, so that the courts are powerless to enforce the law? In my judgment, this is not the case, at all events at this stage. Mr Gouriet comes here. He does not show any special interest in himself above all others; but every individual in the land has an interest in the channels of communication being kept open between this country and other countries, never mind whether it is South Africa or anywhere else. This is so whether the channel of communication be by letter, cable or wireless. If the members of a trade union say they will make an exception in a matter of 'life and death', who are to be arbiters of that? Who is to know whether the cable is on the ground of some person dying or some person wanting to see a relative or whatever it may be? It seems to me quite plain that a union cannot be the arbiters in this matter. The plain fact is that the law must be obeyed. Of course, if we could see that the Attorney-General had only been influenced by legitimate considerations and had not taken into account anything extrinsic or irrelevant, it would be a different matter; but, as far as I can see at the moment, that is a very debatable question. It is very debatable whether he has directed himself properly in regard to all the considerations in the matter. So debatable is this, to my mind, that I think we should, under our jurisdiction in regard to injunctions (which is the widest possible) preserve the position meanwhile, so that the law is obeyed until the time when the Attorney-General can come before [redacted] d show us his good reasons (if there are) why the proceedings should not cont[redacted]

[1] *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority* [1973] 1 All ER 689, [1973] QB 629

[1] [1973] 1 All ER 689 at 698, 699, [1973] QB 629 at 649

So I will now read the request that is made in this action:

> '[Mr Gouriet] claims: An Order that [the UPW] by itself its servants or agents or otherwise be restrained from soliciting or endeavouring to procure any person wilfully to detain or delay any postal packet in the course of transmission between England and Wales and the Republic of South Africa.'

That order which is sought is nothing more nor less than repeating the very words of the Act of Parliament itself—it does not add to it or detract from it by the least. All we are asked to do is to make an order against the UPW saying it must obey the Act of Parliament. Surely no objection could be taken by anyone in the land to an order in that form. But in view of this point about the Attorney-General having a veto (so to speak), I would like to say that it is such an important constitutional point that we cannot decide it today in the absence of the Attorney-General. So I would only grant the injunction for a short time until the Attorney-General can be here and be heard. Meanwhile the law should be maintained. I would grant an injunction in the terms asked but for a very short time, say until Tuesday morning, with notice to the Attorney-General and with him being made a defendant, so that he can come here and say why this law should not be enforced, if that be the case.

So in my opinion this appeal should be allowed, the order should go in the terms asked until Tuesday morning, or until after the hearing of the further application to this court, whichever is the later. I would allow the appeal accordingly.

LAWTON LJ. There is ample evidence before this court that the UPW, by its resolution passed on Thursday last and any instructions it may already have sent out to its members, has committed an offence contrary to the provisions of s 68 of the Post Office Act 1953. The UPW can be prosecuted; all the officers who were parties to that decision can be prosecuted. As a result of that resolution tens of thousands of working people all over England and Wales, from Cornwall to Northumberland, from Anglesey to Kent, on Monday will be placed in a very difficult position. They will want to be loyal to their union; on the other hand, many of them will want to obey the law of the land. If they are loyal to their union and carry out the union instructions every man and woman of them will be liable to conviction and to such penalties as the court may pass in the event of a conviction. It has been said on behalf of the UPW that if that be the law, and it has not been suggested positively that it is not, this court can do nothing about the matter at all. It cannot come, says the UPW, to the aid of those postmen, counter clerks, sorters, telegraph boys, who are placed in the dilemma to which I have referred. If that be the state of the law, it is a very odd state indeed.

It was submitted to us on the old authorities that it was the state of the law. This court had to review that law in the case of the late Mr McWhirter, which is reported as *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority*[1]. In the course of that case two members of the court envisaged a situation in which it might be necessary for this court to intervene. In the course of my judgment I said[2] this:

> 'I agree with Lord Denning MR that if at any time in the future (and in my judgment it is not the foreseeable future) there was reason to think that an Attorney-General was refusing improperly to exercise his powers, the courts might have to intervene to ensure that the law was obeyed.'

The Attorney-General was asked on behalf of the plaintiff to see that the plain terms of the law were obeyed. They are so plain that anyone who can read must have

1 [1973] 1 All ER 689, [1973] QB 629
2 [1973] 1 All ER 689 at 705, [1973] QB 629 at 657

appreciated that what the UPW proposed constituted a criminal offence. The Attorney-General refused himself to intervene and to give his consent to the plaintiff intervening. I have used my imagination as best I can to see what good legal reason there can have been for the Attorney-General to refuse to take such steps as he could to ensure that the criminal law of the land was obeyed. It is not a criminal law which is obsolescent. It is not a criminal law dating back to the reign of Queen Anne. It is a criminal law enacted by Parliament as recently as 1953 and it is a criminal law which Parliament had an opportunity of reviewing, if it were so minded, in 1969 when the most recent Post Office Act was passed. I can conceive of many political reasons why the Attorney-General decided not to intervene, but political reasons are not necessarily good legal reasons. In those circumstances I am in this position, that until such time as there is some explanation as to why the Attorney-General did not intervene, then on the face of it his failure to do so must have been for some reason which was not a good reason in law.

A further question arises, if counsel for the UPW's submissions are well founded, that even if the Attorney-General was refusing to intervene for improper reasons (says counsel) no one can take any action at all. As Lord Denning MR has said, these are matters of grave constitutional importance. For my own part, I am making no final judgment of any kind. The Attorney-General may be able to persuade the court, if he decides to try, that this court has no powers of any kind if the Attorney-General refuses to intervene either directly or by a so-called relator action. I would add this for his consideration: this court in 1911 in the great case of *Dyson v Attorney-General*[1] decided that declaratory judgments could be made relating to the rights of private citizens. If a declaratory judgment can be made, then the problem arises whether this court can go on to say: 'That being the state of the law, obey it.' It seems to me, as at present advised, that this court here and now could make a declaratory judgment that the action of this union was illegal and contrary to the criminal law of the land. The problem is, can we go on to say: 'And stop breaking the criminal law'? I for my part, like Lord Denning MR, am prepared to say to the UPW: 'You can stop breaking the law until 10.30 on Tuesday morning'—when this court can reconsider the whole matter and, it hopes, with the help of the Attorney-General.

I would allow the appeal.

ORMROD LJ. I agree. The UPW are clearly in breach of s 68 of the Post Office Act 1953, and are therefore guilty of the criminal offence of soliciting or endeavouring to procure other persons to commit an offence under s 58 of the same Act. They are guilty of a misdemeanour and liable to be sent to prison for up to two years if they are prosecuted.

The only question is whether there is jurisdiction in this court to entertain an application for a declaration or injunction by any member of the public who seeks to enforce this provision of the exisiting law. This is obviously a very important and fundamental question which cannot be finally decided on an interlocutory application. But there can be no doubt whatsoever that the court has this power to restrain this or similar breaches of the criminal law either at the suit of the Attorney-General himself or in a relator action. That is simply an action in which the Attorney-General has consented that the person concerned may sue in his (the Attorney-General's) name. The Attorney-General is not required himself to pursue the action or to take any step other than to give his consent.

But the Attorney-General has in this case refused. Had he given his consent there can be no possible doubt, in my judgment, but that the court would have granted an injunction in the terms claimed in the writ without the slightest hesitation; no court could possibly have refused to do that.

1 [1911] 1 KB 410; *subsequent proceedings* [1912] 1 Ch 158

The question, therefore, is whether such refusal of consent by the Attorney-General deprives this court of jurisdiction to entertain the application for the injunction which is before it. As I say, this is a very difficult and fundamental question which requires much further consideration before any concluded view can be formed and it would be of the greatest assistance, quite plainly, if the court had the advantage of hearing the Attorney-General's view on it.

The next question is: what action (if any) should the court take today? On the one hand, we are dealing in this case with the plainest breach of the criminal law which it is possible to imagine and equally clearly with explicitly threatened future breaches. On the other hand, the UPW, as I see it, will suffer no loss certainly, and possibly not even any inconvenience, if an injunction is granted over a short period in the terms claimed in the writ. I therefore agree that an injunction should be granted in those terms, limited to a short period such as until 10.30 a m on Tuesday.

Appeal allowed. Order of Stocker J reversed. Interim injunction granted and ordered to continue until 10.30 a m on Tuesday, 18th January, or such later time as would enable the appeal to be disposed of after allowing the Attorney-General an opportunity to come before the court on the question whether his refusal to consent to a relator action at the plaintiff's request barred the court from granting relief. Similar injunction ordered against the Post Office Engineering Union on an ex parte application. Leave to the plaintiff to amend his statement of claim by adding the Post Office Engineering Union as a party to the proceedings in respect of the proposed breach of the Telegraph Act 1863, s 45, and joining the Attorney-General as a defendant.

Solicitors: *Trower, Still and Keeling* (for the plaintiff); *Simpson, Millar* (for the UPW).

In accordance with the leave of the court the plaintiff amended his statement of claim (i) by adding the Post Office Engineering Union ('the POEU') as second defendant and claiming an injunction to restrain it from counselling, procuring or inciting in any way whatsoever any person in the employment of the Post Office wilfully or negligently to omit or delay to transmit or deliver any message in the course of transmission between England and Wales and the Republic of South Africa or by any wilful or negligent act or omission prevent or delay the transmission or delivery of any such message; and (ii) by adding the Attorney-General as third defendant. The plaintiff also amended the statement of claim by adding a claim for a declaration that in refusing his consent to the plaintiff to bring the relator proceedings the Attorney-General had acted improperly and wrongfully exercised his discretion.

At the resumed hearing on 18th January the Attorney-General applied to have the claim for a declaration against him struck out. At the close of the hearing it was agreed between the parties that it should be amended to claim a declaration that notwithstanding the refusal of the Attorney-General to consent to relator proceedings the plaintiff was entitled to proceed with the action. The UPW and the OPEU applied for an order under RSC Ord 18, r 19(1), striking out the writ and statement of claim against them on the ground that as the Attorney-General alone could seek an injunction in a civil court to prevent a threatened breach of the law, the plaintiff's pleadings disclosed no reasonable cause of action.

George Newman for the plaintiff.
Mark Saville QC and *Ian Hunter* for the UPW.
Mark Saville QC and *V V Veeder* for the POEU.
The Attorney-General (Samuel Silkin QC), *Harry Woolf* with him, in his own behalf.

The Attorney-General. It is a vital constitutional issue that the exercise of the Attorney-General's discretion to give his consent at the request of a member of the public to act as plaintiff in relator proceedings should not be subject to review by the courts

and should be absolute. The same view has been expressed in the courts for decades. I regard it as my duty not to act as a rubber stamp but to satisfy myself in each case that the case is a proper one for giving my consent. In coming to my decision I have to have regard to many different factors, of some of which the courts can have no knowledge. I have to consider broader questions of public interest in making my decision. I certainly took into account nothing that, in accordance with precedent, it was not proper for me to take into account. In refusing my consent I followed the normal, if not invariable, practice of giving no specific reasons. That practice is fully established by the law governing the exercise of the functions of my office and is not subject to review by the courts.

As to the opinion expressed in your Lordships' judgments on Saturday, 15th January, that my reasons for refusing to intervene were political reasons, but not good legal reasons, the term 'political' has more than one meaning. I adopt the distinction[1] made by the present Lord Chancellor when Attorney-General in 1969:

> 'In the field of responsibility for litigation, party political considerations do not affect the Attorney-General's judgment. But it is of the nature of his office that he must have constant regard towards what is politic in the broad sense of what is in the public interest.'

The contention that his discretion to consent or refuse to act as plaintiff in relator proceedings is absolute, and not to be questioned or reviewed by the court, is based on judicial statements expressed in the courts and statements made by numerous distinguished textbook writers as well as law officers past and current. If the Attorney-General is wrong, he is answerable to Parliament and to Parliament alone.

In *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority*[2] the court, including my predecessor, Sir Peter Rawlinson QC, expressly accepted the principle that the Attorney-General has an absolute discretion and is answerable to Parliament alone.

In that case Lord Denning MR said[3] that if the Attorney-General refused leave for no good reason, or on entirely wrong grounds, an aggrieved citizen might come to the courts for a declaration, but that is not the issue in this case.

The function of the Attorney-General in issue in the present proceedings was one of many functions of a discretionary nature exercised by him, not in a ministerial capacity, but in a special sphere divorced from the collective responsibility of ministers. Some of those functions are statutory, such as the grant or withholding of the Attorney-General's fiat for certain types of prosecution. Others are of ancient origin such as the power to go to the court ex officio; the relator function which is in issue directly in the present case; and the power to bring before the court matters which the Attorney-General asks the court to say are in contempt of court. The common thread running through them all is the Attorney-General's answerability to Parliament and not to the courts.

It follows that the court cannot question the Attorney-General's reasons for acting or refusing to act. It cannot question his reasons directly or indirectly or deduce what those reasons were. I say with the utmost respect to your Lordships but also with the utmost firmness that the courts must not assume the mantle of Parliament.

These propositions are supported by Professor Edwards in his book[4] when he says:

> 'There is no need . . . to add to the catalogue of common law powers and privileges associated with the first Law Officer of the Crown, except to mention

1 [1969] CLJ 48
2 [1973] 1 All ER 689, [1973] QB 629
3 [1973] 1 All ER 689 at 698, 699 [1973] QB 629 at 648
4 J Ll J Edwards, The Law Officers of the Crown (1964), p 7

the absolute discretion he exercises in issuing or withholding his fiat in relator actions. The courts have repeatedly recognised their impotence to control the Attorney-General in the performance of his discretionary powers.'

They are also supported by the following classic and often cited passage in Lord Halsbury LC's judgment in *London County Council v Attorney-General*[1]:

'My Lords, one question has been raised . . . which I confess I do not understand. I mean the suggestion that the courts have any power over the jurisdiction of the Attorney-General when he is suing on behalf of a relator in a matter in which he is the only person who has to decide those questions. It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first Law Officer of the Crown in order to bring into court some trifling matter. But if he did, it would not go to his jurisdiction, it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the courts to determine whether he ought to initiate litigation in that respect or not . . . In a case where as a part of his public duty he has a right to intervene, that which the courts can decide is whether there is excess of power which he, the Attorney-General, alleges. Those are the functions of the court: but the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General. I make this observation upon it, though the thing has not been urged here at all, because it seems to me very undesirable to throw any doubt upon the jurisdiction, or the independent excercise of it by the first Law Officer of the Crown.'

On the second major issue concerning more specifically the question of the power of the individual to bring proceedings to restrain the commission of some unlawful act or illegality of general public importance in cases where the individual has no special legal standing enabling him to bring the proceedings himself, two questions arise: (1) to what extent is the Attorney-General's name required as plaintiff? (2) are there circumstances in which his name being unavailable as plaintiff he can be joined as defendant and by such joinder the want of his name as plaintiff can be cured? Subject to a recent statutory exception under s 222 of the Local Government Act 1972, the Attorney-General alone can move the court to restrain the commission of a crime as such, whether he does so ex officio or by lending his name as plaintiff in a relator action. But there are other cases, of which the present may well be one, where it is open to a person or body having a special interest to take proceedings without the Attorney-General's help. For example the Post Office itself as employer could proceed in tort for an injunction against persons seeking to induce a breach of contract and could seek a declaration against the unions to clear up any doubt whether an offence has been or would be committed. Nor is the Attorney-General's consent required in an action for a declaration by any person who has a sufficiently proximate interest: any businessman who could show that he would be likely to be adversely affected by the action of the postal or telegraph workers could seek a declaration. There is no need for an injunction to make the law clear. In the present case the plaintiff has disclaimed any such special interest and sought my consent for proceedings for an injunction only. If a person with no special interest could obtain a declaration without the Attorney-General's consent, there is no need to join the Attorney-General as a defendant, nor to seek his consent to obtain declaratory relief

1 [1902] AC 165 at 167, 168

which would settle the issue whether the unions' action is lawful or not. Whilst I concede that there is a case for reviewing that part of the law to see whether the ancient procedures are still necessary, I cannot concede that the right way of changing the law is by a decision of one court looking at one case. Only Parliament, which is able to look at all aspects of the matter, can conduct such a review. Furthermore I refute the suggestion that the safeguards exercised by the Attorney-General have become obsolescent.

There is a very important difference between cases where the Attorney-General consents to the use of his name to invoke the court's procedure for injunctive relief to restrain the commission of criminal offences and the parallel procedure, which can be used by anyone who wishes, of going to the magistrates' court and taking out a summons. Where the Attorney-General has allowed his name to be used in a criminal context, the courts in the exercise of their own discretion to grant relief by way of injunction start with the presumption that if the attorney has given his consent, prima facie the injunction should be granted because he would not have done so if the public interest were not involved. This is not to imply that the court's discretion was removed, but the court would give the greatest possible weight to that fact.

The question has been raised, if a declaration can be obtained without the Attorney-General's consent, why not an injunction? When there is a breach, or threat of a breach, of the law affecting the public generally, a private person with no greater interest than that of other members of the public can only apply for an injunction with the Attorney-General's consent. *Dyson v Attorney-General*[1] said no more than that a declaration could be made against the Crown. It is no authority for the suggestion that the Attorney-General can be made a defendant. Nor do I wish to be taken as accepting what was said in *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority*[2] which was based on *Dyson v Attorney-General*[1].

The recent cases of *Congreve v Home Office*[3] and *Secretary of State for Education and Science v Metropolitan Borough of Tameside*[4] are examples of the court holding ministers' decisions to be unlawful, but in those cases the decisions were the responsibility of all members of the government; but the present case is not of that character. It falls within that discretionary sphere involving onerous and embarrassing decisions as to what is the balance of public interest, as for example, in deciding whether or not to prosecute. In that sphere the Attorney-General alone is responsible for his functions and his conduct. Although he may get information from whatever source he thinks proper to enable him to make up his mind, and may consult with colleagues, it is he in the end who has to do the balancing act, however unpopular that may make him. It is drilled into newly appointed ministers by the prime minister of the day that they must not seek to seek to dictate to the Attorney-General what decision he should take. When he makes his decisions he has to accept complete responsibility for them. It is a most important part of the constitutional framework.

Saville QC for the UPW and the POEU. I adopt everything that the Attorney-General has said. There are a number of differences between the position of the UPW and the POEU the chief one being that in the case of the POEU no application was made for the Attorney-General's consent.

The plaintiff, though seeking to enforce a public right, cannot act as parens patriae or purport to act on behalf of the public. In both *Attorney-General v Bastow*[5] and *Attorney-General v Harris*[6], the Attorney-General became the plaintiff. He came in

1 [1911] 1 KB 410
2 [1973] 1 All ER 689, [1973] QB 629
3 [1976] 1 All ER [illegible] 1976] QB 629
4 [1976] 3 All ER 665, [1976] 3 WLR 641
5 [1957] 1 All ER 497, [1957] 1 QB 514
6 [1900] 1 All ER 207, [1901] 1 QB 71

not as the agent of the individual applicant but as the representative of the public, protecting public rights. The action thereafter became one between the Crown and the defendants. The plaintiff's amended statement of claim contains nothing in support of the usual incidents of locus standi. It does not show that the plaintiff has suffered any peculiar or special damage or infringement of any private legal right. To the extent that it claims infringement of a public right that a criminal offence should not be committed, the Post Office Act 1969 makes it clear that there is not even a public right to the mails or telegraph services and s 9(4) provides that the duties and liabilities laid on the Post Office are not to be enforceable by court proceedings.

Lawton LJ. There is an implicit public right that people can use the postal and telegraphic services and the right to have the criminal law obeyed is owned by the public at large. If in breach of the criminal law the public loses its rights, is it to be said that the court can do nothing because that right is nowhere written down?

Saville QC. Even assuming that the plaintiff establishes a right to use the Post Office facilities of which the unions without lawful justification threaten to deprive him, that is a claim in tort. The Trade Union and Labour Relations Act 1974, s 14(1), extending the immunity given by Trade Disputes Act 1906, provides that a trade union cannot be sued in tort and that means that it cannot have a declaratory judgment made against it.

Lord Denning MR. A union is not immune under s 2(1)(*d*) of the 1974 Act from criminal proceedings.

Saville QC. Nothing in s 14 prevents trade unions from prosecution for the commission of criminal offences but the section does prevent the court from granting an injunction against a union to restrain the commission of a tort which is also a criminal offence.

Newman for the plaintiff. The authorities support my submission that the courts have a control over the Attorney-General if he neglects or wrongly performs his duty. They do not support the assertion that the Attorney-General has an absolute discretion whether proceedings should be initiated.

Cur adv vult

27th January. The following judgments were read.

LORD DENNING MR. On the Saturday before last, 15th January, an ordinary citizen came to this court. He came, he said, on behalf of the public at large. He told us that a powerful trade union was breaking the law, and was going on breaking it. He asked us to make an order restraining them from doing so. We made the order. We made it in the very words of the statute of the realm. Our order was effective. The trade union, to its credit, obeyed it. So there has been no trouble. The breach of the law has been averted.

Yet the Attorney-General came before us on the next Tuesday, 18th January; and speaking with all the great authority of his office, he rebuked us. He told us that we had no jurisdiction to make that order. We had no right to do it without his consent; and he had refused his consent. It was for him, and for him alone, to decide whether this trade union should be restrained from breaking the law. And that so far as he was concerned, he was going to do nothing to stop it. He was not going to make any application to the court. And that no member of the public could come either.

This submission is, to my mind, contrary to the whole spirit of the law of England.

These courts are open to every citizen who comes and complains that the law is being broken. So long as he has a proper case for consideration, we will hear it. No one shall forbid him access. He is not to be turned away on some technical objection about locus standi. That is why we heard Mr Blackburn[1], when he complained that the Commissioner of Police was not enforcing the law as he should. It was why we heard Mr Ross McWhirter[2] when he told us that the Independent Broadcasting Authority was about to fail in its statutory duties. It is why we have heard Mr Gouriet now.

Yet the submission has been made; and the matter is of such great constitutional importance that I must examine it in detail. It arises out of events in a far-off land, South Africa. It has great problems. One of them is the organisation of labour in trade unions. The handling of it by the government of the country has come under criticism by an international organisation of trade unions. This international organisation seeks to build up public opinion against South Africa. It launched a campaign of protest and called on the trade unions of other countries to support the campaign. It called for 'international solidarity'. The trade union leaders of England responded to the call. They asked the trade unions of England to boycott all dealings with South Africa for one week, from midnight on Sunday, 16th January 1977. One of these unions was the Union of Post Office Workers ('the UPW'). This union determined to impose a boycott of all communications between this country and South Africa.

It was all done very quickly without consulting the workers and before anyone could do anything about it. This is the time-table. On Thursday, 13th January, the executive committee of the UPW met, 31 of them, and unanimously decided to impose a boycott. They knew that it might possibly be illegal, and yet they decided to do it. At least I so infer from the evidence, which has not been contradicted. On that very evening on the nine o'clock news bulletin it was reported that the executive council of the UPW had resolved that day to call on their members to interfere with the passage of mail in the course of transmission by post between the Republic of South Africa and England and Wales. Immediately afterwards the general secretary of the UPW spoke on television. It was put to him that the action was in fact unlawful and illegal. He replied that the matter had never been tested in the courts, and that the laws relating to it dated from Queen Anne and were more appropriate for dealing with highwaymen and footpads.

On the next day, 14th January, The Times newspaper carried this report:

> 'With unanimous resolve, the 31 members of the executive of the Union of Post Office Workers decided yesterday to brave possible legal action under the Post Office Act and boycott all telephone calls, mail and telegrams to South Africa next week. Their action, taken in response to a call for "international solidarity" from the International Confederation of Free Trade Unions, is being followed by other unions who hope to influence apartheid policy ... The Post Office Engineering Union said it would instruct its members not to provide or maintain circuits to the country except in a matter of "life and death".'

There is an association called the National Association for Freedom of which we know nothing except that it has a secretary, Mr John Prendergast Gouriet. It is said by its critics to be a right wing pressure group. But that is no concern of ours. On Friday morning Mr Gouriet consulted lawyers to see if the action of the UPW was lawful or not; and, if it was unlawful, whether anything could be done to stop it. The lawyers advised that it was unlawful and that Mr Gouriet's proper course, as a citizen, was to draw the matter to the attention of the Attorney-General so as to see if he would himself take action or, alternatively, would give his consent to Mr Gouriet

1 *R v Metropolitan Police Comr, ex parte Blackburn* [1968] 1 All ER 763, [1968] 2 QB 118

2 *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority* [1973] 1 All ER 689, [1973] QB 629

himself taking action to stop it. If the Attorney-General took action himself, it would be what we call an action ex officio, in which he would put the whole weight of his office and authority behind it. If he did not take action himself, but gave his consent for Mr Gouriet to take action, his fiat as the lawyers call it, then it would be what we call a 'relator action', that is an action by the Attorney-General 'on the relation of Mr Gouriet', or, more understandably, on the information given by Mr Gouriet. In that case the Attorney-General would himself be, in strictness of law, the party to the suit, but Mr Gouriet would be, as an old writer put it, 'the life of the suit': see Calvert on Parties[1]. If it failed, Mr Gouriet would be liable to pay the costs. But Mr Gouriet, as relator, would be acting not on behalf of himself alone, or of the association of which he was secretary, but on behalf of the public at large.

At 12.45 p m on the Friday, the Attorney-General was asked for his consent. At 3.32 p m he refused, saying:

> 'Having considered all the circumstances, including the public interest . . . I have come to the conclusion that in relation to this application I should not give my consent.'

Thereupon Mr Gouriet issued a writ in his own name against the union, asking for an injunction to restrain the UPW from breaking the law. He applied to the judge in chambers for an injunction. It was refused. On Saturday, 15th January Mr Gouriet appealed to this court. We granted an injunction which the trade union obeyed. So the proposed boycott did not take place.

Was the boycott illegal?

At the heart of this case lies this question: suppose a trade union, or its officers, call on the workers in the Post Office to detain or delay any letters which are addressed to a named firm or to a named country; is their action lawful?

In some quarters doubts have been expressed. As recently as 4th November 1976, in the House of Commons, the Secretary of State for Employment[2] said that the question 'has never been tested in a court . . . in the absence of any court decision as guidance, it would be most improper for me to express a view whether a criminal act had been committed'. This doubt was repeated by the general secretary of the UPW on television on Thursday, 13th January, when he said: 'This matter has never been tested in the courts. The laws relating to it date from Queen Anne and are more appropriate for dealing with highwaymen and footpads.'

Seeing that these doubts have been expressed in such high quarters, I must say, as firmly as I can, that if a trade union or its officers gave such a call to its workers, it would be acting unlawfully. It matters not that the call was in contemplation or furtherance of a 'trade dispute'. May be it was. May be it was not. No matter. The very call to the workers would be a criminal offence by the trade union and its officers; and every worker who obeyed the call would himself be guilty of a criminal offence. The union itself could be prosecuted in the criminal courts in its own name: see s 2(1)(*d*) of the Trade Union and Labour Relations Act 1974. Its officers could be prosecuted too. So could each one of the workers. The prosecution could be undertaken by the police, or by any private citizen. Any one of them could undertake a prosecution. If it was proceeded with, no one could stop it except the Attorney-General. He could enter what we lawyers call a 'nolle prosequi', that is, he could say that he was not willing that the prosecution should continue: although, I must say, that I cannot imagine him doing it in any such case as I have visualised—at any rate not if he was doing his duty.

It was suggested that this offence was out of date, that it was fitted for the days of Queen Anne, and not for present times. To this Parli[illegible] itself has given the answer. The offence, it is true, dates back to the year 1710. That was the year in which the General Post Office was first established. By s 40 of 9 Anne c 10, it was made an offence wilfully to detain or delay any postal letter or packet. The penalty was £20 for every such offence. That would be about £500 now. It could be recovered by any informer by action or information in the civil courts. Moreover, any worker in the Post Office so offending lost his job, and he was debarred for ever from being employed by the Post Office. They were pretty strict in those days. Since that time Parliament has re-enacted the law in virtually the same words, but altering the penalties, making it simply imprisonment or fine. This law was re-enacted by the Post Office Acts in the days of coaches and horses in 1837, of railway trains in 1907, of motor cars in 1953, and of aircraft in 1969. The modern language is s 58 of the Post Office Act 1953 (as amended):

> 'If any officer of the Post Office, contrary to his duty opens . . . any postal packet in the course of transmission by post, or wilfully detains or delays, or procures or suffers to be detained or delayed, any such postal packet, he shall be guilty of a misdemeanour and be liable to imprisonment for a term not exceeding two years, or to a fine, or both.'

Section 68 provides:

> 'If any person solicits or endeavours to procure any other person to commit [such an offence], he shall be guilty of a misdemeanour, and be liable to imprisonment for a term not exceeding two years.'

Those enactments are so clear that I see no reason for any one to require the position to be tested in the courts. If the trade union, or its officers, asked for the advice of any lawyer, the answer must have been: 'You cannot do it. It is contrary to law.'

I would only add this one word about a 'trade dispute'. If the trade union, or its officers, made the call in contemplation or furtherance of a 'trade dispute', they could not be sued in tort. No private individual could sue them in respect of his private rights either for damages or for an injunction: see s 14 of the Trade Union and Labour Relations Act 1974; but this would not relieve the union, or its officers, or the workers, in the slightest degree of their responsibility before the criminal law.

It was half suggested that the dispute in this case might be a 'trade dispute'; but that will not bear examination for one moment. This was not a dispute 'between employers and workers, or between workers and workers' within s 29 of the 1974 Act. It was a dispute between the International Confederation of Free Trade Unions and the South African government, which would not affect the workers in Great Britain in the slightest.

I would mention one interesting sidelight. It is about some other vital industries. In 1875 Parliament put the workers in gas or water works on the same footing as post office workers. They were guilty of a criminal offence if they did anything wilfully to deprive people of their gas or water supply: see s 4 of the Conspiracy and Protection of Property Act 1875. The same also applied to electricity workers: see s 31 of the Electricity (Supply) Act 1919. Those provisions as to gas, water and electricity were repealed in 1971: see the Industrial Relations Act 1971, Sch 9. But the provisions as to post office workers have remained unrepealed to this very day. I expect that the Union of Post Office Workers think that this is unfair discrimination against them by Parliament. If the workers can deprive the public of their gas, water or electricity without being subjected to the penalties of the criminal law, why should not the post office workers likewise be at liberty to deprive the public of their postal services? The answer is that Parliament has not thought fit to do so. It has re-affirmed the law as it has existed for the last 266 years, that if any employee of the post office wilfully delays [illegible]ains a letter or postal packet he is guilty of an offence. Unless and until the law is repealed by Parliament, the Union of Post Office Workers must obey it. So must all the postal workers. Let there be no mistake about it.

1 Calvert's Treatise upon the Law respecting Parties to suits in Equity (2nd Edn, 1847), p 398

2 918 H of C Official Report (5th series) cols 1646, 1647

A person who suffers special damages

Mr Gouriet comes, as I have said, as one of the public at large. He does not come as a man who has suffered or will suffer special damage. But I must say what would happen then. Suppose that there was someone in England who would suffer greater damage or inconvenience from the boycott than the generality of the public. For instance, if a businessman had to exercise an option in South Africa by Wednesday, 19th January, and the boycott would prevent him; or, if a father wanted to cable money to his son in South Africa to pay for medical attention. Such a person would, under our law, in the ordinary way, have a standing of his own to come to the court to complain of a wrong to him personally, that is, of a tort: see *Benjamin v Storr*[1]; and *Southport Corpn v Esso Petroleum Co*[2]. But in this case he would be met by a formidable objection. It was explained to us by counsel for the UPW. He would find his complaint blocked by the provisions of s 14 of the Trade Union and Labour Relations Act 1974. That section gives a great immunity to a trade union. It cannot be sued in tort either for damages for a wrong already committed, or for an injunction to prevent wrongs which are about to be committed.

So great is this immunity—and so formidable was this objection—that counsel for Mr Gouriet did not put forward anyone as plaintiff who had suffered or would suffer special damage from the boycott. He declined to add any such person as plaintiff. He put forward Mr Gouriet as simply one citizen out of many—one out of all the public at large—who would be adversely affected by the boycott, just the same as everyone else. If he wished to communicate with anyone in South Africa during the week, the boycott would prevent him.

Counsel for Mr Gouriet pointed out, too, another objection. He gave us an account of a case last November, when the UPW imposed a boycott on all mail to and from a mail order firm. It was suffering special damage and brought an action against the union to stop it. Within four days the union settled the case with that company, leaving itself free to impose a boycott in other cases. Counsel for Mr Gouriet did not want this case to go off like that one; because here he was concerned for the public at large, and not for any one individual.

The public at large

Now, so far as the public at large are concerned, the law has provided a special machinery for the protection of the public. It shuns the thought of every one of the public being able himself to bring an action. That would be highly inconvenient. So it has laid down that, whenever the rights of the public at large are affected, the proper person to sue, in respect of the public interest, is the Attorney-General himself: see *Attorney-General v Great Northern Railway*[3]; and *Attorney-General & Spalding Rural District Council v Garner*[4]. The correct course is for the complainant to lay the matter before the Attorney-General and ask for his consent to bring a 'relator action'. In every case in the books so far, there has been no difficulty about getting the consent of the Attorney-General. In every case where there is a sufficient public interest to be considered, he has given his consent. This is the first case in our books where he has refused his consent. So it is a case of the first importance.

It is clear that, in granting his fiat, the Attorney-General has a discretion. It has been said that this discretion is absolute—I will consider that a little later—but, meanwhile, as I read our books, the first and paramount consideration for him is that the law should be observed and respected. It was well stated nearly 100 years ago by a lord justice who had himself been a law officer, Baggallay LJ, in *Attorney-General v Great Eastern Railway Co*[5]:

1 (1874) LR 9 CP 400, [1874-80] All ER Rep Ext 2000
2 [1954] 2 All ER 561 at 571, [1954] 2 QB 182 at 197
3 (1860) 1 Drew & Sm 154 at 161, 162, 29 LJCh 704 at 800
4 [1907] 2 KB 480 at 486, 76 LJKB 905 at 908
5 (1879) 11 Ch D 449 at 500, 48 LJCh 428 at 444

'It is the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed or threatened to be transgressed . . . it is the duty of the Attorney-General to take the necessary steps to enforce it, nor does it make any difference whether he sues *ex officio* or at the instance of relators.'

In doing his duty, the Attorney-General should not allow himself to be influenced by the merits or demerits of the particular relator; because it is not his interests which are in question but those of the public at large: see *Attorney-General v Logan*[1]. The relator may be acting as a member of a pressure group, of whom he disapproves, but that is immaterial. If there is a public interest which is sufficiently serious as to need protection, the Attorney-General should give his consent.

No doubt the Attorney-General may consider what his predecessors have done in similar cases. He may consider, too, the repercussions that may follow on his decision. On this he may consult his colleagues in the government who may be better informed than he. They may have confidential information of which he ought to be aware. But he must not let his decision be directed by them. He must make up his mind himself, remembering, however, that he must rigorously exclude any advantage or disadvantage that may assist or beset his own political party as a result of his decision. This may be difficult for him to do, especially because he is, as he told us, a 'political animal'. But still he must do it.

The nature of the discretion

It has been submitted that the discretion of the Attorney-General is an absolute discretion which will not be enquired into by the courts. I agree with this when he has exercised it by granting his consent to his name being used. Even if he gave his consent in a trifling or unsuitable matter, the courts will not review it. That was made clear by Lord Halsbury LC in his oft-quoted dictum in *London County Council v Attorney-General*[2] in the House of Lords. But that dictum does not cover a case when he has refused his consent. I am sure that Lord Halsbury LC did not have such a case in mind, for the simple reason that it had never arisen for consideration at that time; and it has never arisen since until now.

So it falls to us to consider it. The Attorney-General tells us that, when he refuses his consent, his refusal is final. It cannot be overridden by the courts. He is answerable to Parliament, and to Parliament alone. He declines even to give his reasons for his refusal.

This is, to my mind, a direct challenge to the rule of law. Let me take some instances; only hypothetical of course, but to test this claim of his. Suppose that he refused his consent for corrupt motives, or in bad faith. The Attorney-General went so far as to say that even this could not be questioned. That is an extreme hypothesis which can be put on one side. But take a lesser hypothesis. Suppose that he refused his consent for party political reasons, and not in the interests of the public at large. Is he then to be answerable to Parliament alone? Where he would, perchance, be supported by his own political party? Or, even a still lesser hypothesis. Suppose he refused his consent because he considered that the information was laid by a pressure group, of which he disapproved; but yet it was a matter which ought to be taken up in the interests of the public at large. Would his refusal then be justifiable? In all these cases he would be failing in his duty, as I have earlier stated it. Does it mean then that nothing can be done about it? That no one can come to the courts and inform us of it? I should have thought that, in order to dispel suspicion, he could come and tell us what his reasons were, or, at least outline them without disclosing anything confidential or secret. But that he declines to do.

1 [1891] 2 QB 100 at 103, 65 LT 102 at 104
2 [1902] AC 165 at 168, 169

These instances are, of course, entirely hypothetical. I would not suggest for one moment that they existed here. But the possibility of them convinces me that his discretion to refuse is not absolute or unfettered. It can be reviewed by the courts. If he takes into account matters which he ought not to take into account, or fails to take into account matters which he ought to take into account, then his decision can be overridden by the courts. Not directly, but indirectly. If he misdirects himself in coming to his decision, the court can say: 'Very well then. If you do not give your consent, or your reasons, we will hear that complaint of this citizen without it.'

I adhere, therefore, to the declaration which I made when the late Mr McWhirter came to us. I repeat it now[1]:

> '... I am of opinion that, in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can apply to the court itself. He can apply for a declaration, and, in a proper case, for an injunction, joining the Attorney-General, if need be, as defendant ... I regard it as a matter of high constitutional principle that, if there is good ground for supposing that a government department or a public authority [or, I will add now, a trade union] is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of her Majesty's subjects, then in the last resort, anyone of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced.'

The Attorney-General disputed that principle. He said that there was nothing to support it. But I have discovered that there is. Only three years ago. No less an authority than the Supreme Court of Canada. It is *Thorson v Attorney-General of Canada*[2]. The Parliament of Canada had passed a statute which affected every taxpayer in the land. Mr Thorson sought to challenge it as being unconstitutional. He asked the Attorney-General to take proceedings; but the Attorney-General refused. Mr Thorson then brought an action on his own. The court held that he was entitled to do so. The judgment of the majority (six to three) was given by Laskin CJ. He referred to the case of Mr McWhirter, and drew on it. He said[3]:

> '... where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the Court must be able to say that as between allowing a taxpayer's action and denying any standing at all when the Attorney-General refuses to act, it may choose to hear the case on the merits.'

Similarly, the Supreme Court of the United States has likewise admitted a taxpayer to come on his own: see *Flast v Cohen, Secretary of Health, Education and Welfare*[4].

Crown prerogative

I would test the matter in another way also, remembering the way it was put by the Attorney-General. He says that this is a prerogative of the Crown on which he is entitled to insist. Although there is threatened a plain breach of the criminal law—to the prejudice of all Her Majesty's subjects—then, without his consent, no one of them can apply to the courts to stop the breach.

If this be so—if the Attorney-General's submission be correct—it means that he and his predecessors and successors—can, one after another, suspend or dispense with the execution of the laws of England. Take the sequence of events in regard to this very union. There are three previous occasions which have been drawn to our attention.

1 [1973] 1 All ER 689 at 698, 699, [1973] QB 629 at 649
2 (1974) 43 DLR (3d) 1
3 43 DLR (3d) 1 at 18
4 (1968) 392 US 83

In 1971 there was a strike in which the postal workers stopped work for several weeks. I would not be prepared to assert that this was a breach of the criminal law. It could be said that, by stopping work, they did not wilfully detain or delay the mail. It was, moreover, a trade dispute for which the union was not liable in the civil courts. Howsoever that may be, no action was taken in the courts at that time to test the legality of the action. But then, in 1973, there was an occasion which was very parallel to the present. The French government was about to conduct nuclear tests in the Pacific ocean. By way of protest the UPW decided to boycott the mail to France. No action was taken by the Attorney-General of the day (Sir Peter Rawlinson) to stop the boycott. No one asked his consent for a relator action. No one came to the courts. This incident has been regarded by the UPW as a precedent to be followed in the present case. The general secretary of the UPW is reported as saying: 'It is totally illogical that the law lords should allow Rawlinson to do nothing and then complain bitterly when Silkin does the same thing.' The truth is, of course, the contrary. The trade unions are complaining that they cannot repeat today the illegal action that they took in 1973. Just as the Conservative Attorney-General did not intervene then; so the Labour Attorney-General was right not to intervene now. The latest incident was in August 1976, when there was a trade dispute in North London. The employees of a mail-order firm came out on strike. They were supported by the UPW. On 29th October 1976 the UPW authorised its members not to handle mail to or from the company; and they did so. From Monday, 1st November 1976, the postal workers refused to accept outgoing mail, or to hand over incoming mail. The Attorney-General did not intervene. I do not know whether he was asked or not. He might have had very good reasons for not intervening or allowing his name to be used. At any rate he did not intervene. And the mail-order firm themselves issued a writ against the union. They applied for an injunction. Four days later, on Thursday, 4th November 1976, the UPW instructed its members to work normally. This was announced during a debate in the House of Commons on that very day. Now if the contention of the Attorney-General were correct, it would mean that the mail-order firm had no right to come to the court at all. They could not come to enforce any private right of their own, because it might be blocked by the Trade Union and Labour Relations Act 1974. They could not come as members of the public at large—to enforce the criminal law—unless the Attorney-General gave his consent.

What then does it all come to? If the contention of the Attorney-General is correct, it means that he is the final arbiter whether the law should be enforced or not. If he does not act himself—or refuses to give his consent to his name being used—then the law will not be enforced. If one Attorney-General after another does this, if each in his turn declines to take action against those who break the law, then the law becomes a dead letter. It may be that each Attorney-General would have good reason of his own for not intervening. He may fear the repercussions if he lends the weight of his authority to proceedings against the infringers. But as one like situation follows another—as it does here—it means that a powerful trade union will feel that it can repeat its performance with impunity. It will be above the law. That cannot be.

Take warning from history. Not from a previous Attorney-General; but from a King himself. James II claimed that, by virtue of his prerogative he could suspend or dispense with the execution of all penal laws in matters ecclesiastical. He had reasons which, to him at least, were most compelling. He desired religious toleration and civic equality. But the people of England would have none of this prerogative. The jury showed this at the trial of the Seven Bishops[1]. And at the very first opportunity Parliament enacted the Bill of Rights of 1688[2]. It declared:

> '... that the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall: [and] that the

1 (1688) 12 State Tr 183
2 1 Will & Mar Sess 2 c 2

pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath been assumed and exercised of late is illegall.'

Mercifully our Constitution has, I believe, provided a remedy. It is what I have said already. If the Attorney-General refuses to give his consent to the enforcement of the criminal law, then any citizen in the land can come to the courts and ask that the law be enforced. This is an essential safeguard; for were it not so, the Attorney-General could, by his veto, saying 'I do not consent', make the criminal law of no effect. Confronted with a powerful subject whom he feared to offend, he could refuse his consent time and time again. Then that subject could disregard the law with impunity. It would indeed be above the law. This cannot be permitted. To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago: 'Be you never so high, the law is above you.'

Procedure

But when a citizen comes in this way on his own—to enforce a right owed to the public at large—he ought, I think, not only to sue the infringers, but he ought also to join the Attorney-General as a defendant. That is, I think, clear from what Lord Kingsdown said in *Lang v Purves*[1], and Viscount Maugham said in *London Passenger Transport Board v Moscrop*[2]. For once the Attorney-General is there—as plaintiff or defendant—to give his assistance for or against—the court can make a declaration of what the law is. So that the defendant thenceforward will have no excuse for not obeying it. That follows from *Dyson v Attorney-General*[3]; especially from the judgment of Farwell LJ[4]. As there, so here. It would be a blot on our system of law and procedure if there was no way by which a decision on the scope of the criminal law could be obtained save by launching a private prosecution. And, if the court can grant a declaration, I see no reason why it should not grant an injunction against the infringers; even a final injunction. For the last 100 years, ever since the Supreme Court of Judicature Act 1873, the courts have by statute had jurisdiction to grant an injunction 'in all cases in which it appears to the court to be just or convenient' that such order should be made. I know that it has been said by Ormrod J in *Montgomery v Montgomery*[5], and by me in *Thorne v British Broadcasting Corpn*[6] that this only applies to an injunction 'to protect a right'. But that was too narrowly stated: see Spry on Equitable Remedies[7], incidentally, a book from Australia. It is now established by decisions of this court that an injunction can be granted to prevent the commission of a criminal offence. It can certainly be granted when one of the public sues with the consent of the Attorney-General: see *Attorney-General v Harris*[8]; and *Attorney-General v Chaudry*[9], where I said, I believe rightly: 'The High Court has jurisdiction to ensure obedience to the law whenever it is just and convenient to do so.' And if the court has jurisdiction when the Attorney-General is the plaintiff, so also it has a jurisdiction when a member of the public is the plaintiff.

Of course, it does not follow that, if the court grants an injunction, it will be followed up, in case of disobedience, by committal to prison or sequestration of assets, or anything of that kind. I trust that this will never be necessary. The trade union in this case has very properly obeyed the law. If it should happen in the future—I trust it never will—that a trade union should disobey the order of the court—then consideration would have to be given to the measures necessary to enforce it. But that I would leave till another day. All that is necessary today is to declare what the law is.

1 (1852) 15 Moo PCC 389 at 422
2 [1942] 1 All ER 97 at 104, [1942] AC 332 at 345
3 [1911] 1 KB 410; *subsequent proceedings* [1912] 1 Ch 158
4 [1911] 1 KB 410 at 421
5 [1964] 2 All ER 22 at 23, [1965] P 46 at 50
6 [1967] 2 All ER 1225 at 1226, [1967] 1 WLR 1104 at 1109
7 (1971) pp 309, 310
8 [1960] 3 All ER 207, [1961] 1 QB 74
9 [1971] 3 All ER 938 at 947, [1971] 1 WLR 1614 at 1624

Conclusion

Returning to the present case. Our decision that Saturday has been justified by events. We issued an injunction. It was obeyed. The boycott was called off. If we had held that Mr Gouriet had no locus standi, we could have done nothing. The law would have been broken. The boycott would have continued. This proves to my mind that we were right to hear him and to issue an injunction. There is no need to continue the injunction. The week has passed quietly. There is no threat of a further boycott. But the great constitutional issue remains. It has been retained in the form of this question: notwithstanding the refusal of consent by the Attorney-General to bring relator proceedings, was the plaintiff entitled to proceed in his action for an injunction against the trade union? My answer is that the plaintiff was entitled so to proceed. I would not strike the action out. I would, if need be, grant a declaration.

There is one thing more. The Attorney-General told us that, if we decided as we do today, we should be changing the law; and that we had no right to do so. It could only be done by Parliament. In one sense that is true. In another it is not.

It is true when we are considering the enacted law. That is, in this case the law which says that postal workers must not detain or delay any letters in the course of transmission by post; and which says that no one shall solicit or endeavour to procure them to do so. That is the law enacted by Parlament. It is, I take it, the will of Parliament that it shall be obeyed. Even by the most powerful. Even by the trade unions. We cannot change that law. We sit here to carry out the will of Parliament. To see that the law is obeyed. And that we will do.

In another sense the proposition put forward by the Attorney-General is not true. It is not true when we are considering the powers of the Attorney-General and the prerogative which he claims. Parliament has passed no enactment on it. There is no binding precedent in our books on it. It is a new thing. Whenever a new situation arises which has not been considered before, the judges have to say what the law is. In so doing, we do not change the law. We declare it. We consider it on principle; and then pronounce on it. As the old writers quaintly put it, the law lies 'in the breast of the judges'. And when the Attorney-General comes, as he does here, and tells us that he has a prerogative—a prerogative by which he alone is the one who can say whether the criminal law should be enforced in these courts or not—then I say he has no such prerogative. He has no prerogative to suspend or dispense with the laws of England. If he does not give his consent, then any citizen of the land—any one of the public at large who is adversely affected—can come to this court and ask that the law be enforced. Let no one say that in this we are prejudiced. We have but one prejudice. That is to uphold the law. And that we will do, whatever befall. Nothing shall deter us from doing our duty.

LAWTON LJ. The issue in this case, in my judgment, is not whether the Attorney-General is answerable to the courts as to the discharge of his functions, but whether the plaintiff, after the Attorney-General's refusal to consent to a relator action for an injunction against the UPW, has any right to ask the court to stop a threatened breach of the criminal law. If he has, it is my judicial duty to ensure that he gets what he is entitled to. Chapter XXIX of Magna Carta[1] says so.

There is no question of a clash between the courts and Parliament. Still less is there any question of this court impugning, as has been suggested, the honour, reputation and r[illegible] Parliament, and in particular of the House of Commons. The

1 (1297) 25 Edw 1

opposite is the case. In 1953 Parliament enacted the Post Office Act with its prohibition, under the penalties of the criminal law, of the wilful detaining or delaying of any postal packet. The same Act, by s 68, forbade any person to solicit or endeavour to procure any person to detain or delay postal packets. Parliament considered this Act again in 1969 and amended it[1]. Postal workers continued to be subject to the prohibitions set out in s 58 of the 1953 Act. Persons who were not postal workers (and this would include trade unions and their officers) were still to be bound by s 68. In 1969 it cannot have escaped the notice of many members of both Houses of Parliament that this section would prohibit trade unions and their officers from urging industrial action which would interfere with the mails; yet s 68 remained in force. I infer that Parliament intended the law as set out in those two Acts to be enforced. It would not have enacted either Act if it had not so intended.

It is my judicial duty to ensure as best I can within the jurisdiction invested in me that the law, as enacted by Parliament, is obeyed. The oath, which as required by Parliament, I took when I became a judge required me to 'well and truly serve our Sovereign Lady the Queen' and to 'do right to all manner of people after the laws and usages of this realm without fear or favour, affection or ill will'. I should be acting in breach of my oath and of my duty to the Sovereign and Parliament if on being asked to enforce the law as laid down by Parliament I did not do whatever I could to see that it was not broken.

The Attorney-General has submitted firmly that without his consent no citizen can ask the court to enforce the clear provisions of an Act of Parliament even though there is ample evidence that if no action is taken in all parts of the realm there are likely to be widespread breaches of the law which will interfere with the rights of all Her Majesty's subjects. This is not a new contention by a law officer. The previous holder of the office of Attorney-General, Sir Peter Rawlinson, made the same submission in *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority*[2]. This court queried the submission which the Attorney-General made but was not called on to decide then, whether it was well founded, as in the end he gave his consent to relator proceedings. In this case the Attorney-General has stood his ground. For the first time ever this court has been called on to adjudge whether his submission, which accords with the opinions of many of his predecessors, is sound. Although the issue is one of general constitutional importance, as in all cases, it must be considered against the background of facts. Lord Denning MR has said what they are. I will deal solely with what seems to me to be the consequences which must have followed from Mr Tom Jackson's appearance on television on Thursday, 13th January 1977, and were likely to follow if after midnight on 16th January the members of his union did what the union seemed about to tell them to do.

Had not this court intervened on Saturday, 15th January, on the following Monday tens of thousands of ordinary law-abiding citizens, some young, some nearing retirement, would have had to choose between being loyal to their union or breaking the law. Mr Jackson's reference to the antiquity of the law may have led some to think that the law was obscure and out of date. It was neither. Refusal to obey union instructions could have had unpleasant and serious consequences; so could breaking the law. If ever a situation called for someone in a position of authority and influence to state what the law was, this was it.

The public generally was likely to be affected by the threatened union action. For seven days they would be unable to use such facilities as the Post Office provided for communication with South Africa. Some, like the plaintiff, would not be badly affected; they would merely be deprived of the facilities if they wanted to use them. Others, such as those engaged in industry and commerce, might be badly affected.

1 Post Office Act 1969, s 87(1)

2 [1973] 1 All ER 689, [1973] QB 629

They might have to face heavy losses. Exports orders could have been lost. Communication between family and friends would have been interrupted. Lastly, but not least, the many people in this realm, who to their credit, try to help, encourage and sustain the coloured population of South Africa would have been deprived of the channels of communication.

Those who were likely to be affected financially in their business may, as individuals, have been unable to prevent loss and damage by applying to the court for an injunction to restrain what seemed to be threatened criminal acts. This is what counsel for the UPW and the POEU submitted in a clear and powerful argument. An action to restrain a trade union from committing an illegal act which is likely to cause financial loss is, he said, an action in tort even though it is also a crime. Section 14 of the Trade Union and Labour Relations Act 1974 provides that no such action shall lie. It follows, if this be right (and it may be), and the Attorney-General also is right in his submission, then a citizen who is likely to suffer financial loss if a crime is committed cannot ask the courts to stop the threatened crime. All he can do, submitted counsel for the UPW is to prosecute after the crime has been committed. By the same reasoning, as was pointed out in the course of argument, if a union instructed a picket line to prevent by force a man from entering his own property, he could not ask the courts for protection. All he could do would be to prosecute after he had been assaulted.

The Attorney-General was not in court when counsel for the UPW made his submission so I do not know whether he agrees with it; but if counsel's submission is right, this might well be the state of the law. If it is, the public in my opinion have cause for concern. In this case we do not have to decide whether counsel for the UPW's submission is right because the plaintiff has not asked us to protect his personal right to use the facilities of the Post Office. He has asked us by injunction to try to stop what seems to be a threatened breach of the criminal law, the Attorney-General having refused to take action himself or consent to the plaintiff doing so in his name.

If there is a gap in the law which leaves citizens unprotected, I am mindful of the Attorney-General's courteous and tactful reminder to the court that we have no right to legislate to fill that gap. This is for Parliament to do. I agree. But is there such a gap as to leave the judges powerless to prevent a threatened breach of the criminal law? Our predecessors on the bench have not in the past been stopped from doing justice according to the law and usages of the realm because of procedural difficulties. From such researches into the past as counsel have been able to carry out in the short time available to them, the relator action itself was a procedural device evolved by the old courts of Chancery and Exchequer to enable justice to be done.

What does justice require in the kind of circumstances arising in this case? First, that no person (and that includes a trade union) should be allowed to put himself above the law. Secondly, that the law should be applied to all without fear or favour, affection or ill will. Thirdly, that no one, be he judge or minister, should dispense with or suspend the laws and their execution without the consent of Parliament. The Bill of Rights (1688)[1] says so. Now the law does not enforce itself. Someone has to act in the name of the law. In these days there are many persons and bodies who have the duty of enforcing the law. At the head of them all stands the Attorney-General. Any such persons, other than the Attorney-General, who do not discharge their duty can be obliged to do so by order of the court: see *R v Metropolitan Police Comr, ex parte Blackburn*[2] per Lord Denning MR and Edmund Davies LJ. No order can be made against the Attorney-General because he acts on behalf of the Crown. If for his own reasons he decides not to enforce the law this court cannot make him do so. Nor can it make him reveal what his reasons for not acting were. It does not follow that if he will not act, no one els[illegible].

1 1 Will & Mar Sess 2 c2

2 [1968] 1 All ER 763 at 769, 777, [1968] 2 QB 118 at 136, 148, 149

Law enforcement has two aspects, the prevention of law breaking and the punishment of law breakers. It is a principle of the day-to-day administration of the criminal law that law enforcement officers such as the police are better employed trying to prevent the commission of offences than by prosecuting offenders. In the Attorney-General's law enforcement capacity this principle should, in my opinion, apply to him too. If he applies for an injunction, the threatened criminal act may never be committed. He must, of course, have a discretion. He is no one's lackey to put the law into operation at the behest of busybodies and mischief-makers. But a citizen, such as the plaintiff, who invites the Attorney-General's attention to threatened widespread breaches of the criminal law which, if committed, will affect everyone in the realm, and some gravely, should not be regarded either as a busybody or a mischief-maker. In his prosecuting capacity, in my opinion, the Attorney-General's discretion is much wider. He is not then concerned with preventing breaches of the law but with securing the punishment of offenders. He must act in mercy. He can look at each case; but if he approaches his function of preventing breaches of the criminal law in the same way, there is a danger that he may unwittingly end by dispensing with the law in favour of individuals. That the courts must do their best to prevent. Even when the Attorney-General does decide not to prosecute, any private citizen can do so unless Parliament has expressly taken that right away.

Some long time ago (it is not clear when, may be in the 17th century) the relator action began. It seems to have been a procedural device. Its history, as far as it is known, is set out in Professor S A de Smith's Judicial Review of Administrative Action[1]. By the middle of the 19th century it is clear from the reports that the relator action was much used when there had been an alleged breach of the law having public consequences which did not affect the relator any more than any one else. In cases involving charities it seems that in some cases the Attorney-General could be required 'to call upon the Courts to give relief and assistance to the objects of a charity who do not apply for it themselves'; see *Attorney-General v Magdalen College, Oxford*[2]. There is evidence from the reports of this period that the getting of the Attorney-General's consent for legal processes had become little more than a formality. Thus in cases where a party sought to repeal letters patent he applied to the Attorney-General for his fiat to issue a writ of scire facias. The writ seems to have issued as of course. Lord Langdale MR in *The Queen v Prosser*[3] said that it ought not to be so issued.

During the second half of the 19th century it does not seem to have been difficult to get the Attorney-General's consent to take relator proceedings to enforce rights having public consequences. Disputes arose as to whether he should have given his consent. The courts showed no reluctance to enquire into this question. The Attorney-Generals of this period did not seek to say that the courts had no jurisdiction to question their discretion. An example is provided by *Attorney-General v Great Eastern Railway Co*[4]. The Great Eastern Railway Co were alleged to have exceeded their powers. An action was commenced by the Attorney-General, at the relation of a manufacturer of rolling stock, to restrain the company from letting rolling stock on hire and from manufacturing any rolling stock for the purpose of so letting it. The Attorney-General, Sir John Holker, appeared. The Court of Appeal was concerned about his standing in that case. Argument was heard. The Attorney-General did not submit that the court had no jurisdiction to enquire into his standing or to challenge his discretion in giving his consent to the relator proceedings. Between the members of the court there was a difference of opinion as to the right of the Attorney-General to intervene in the case. James LJ was of the opinion that the Attorney-General should

1 3rd Edn (1973), pp 385-388
2 (1854) 18 Beav 223 at 242
3 (1848) 11 Beav 306 at 313
4 (1879) 11 Ch D 449

not have given his consent. Baggallay LJ took the opposite view. He said[1] that the Great Eastern Railway Co had exceeded their powers and had done and threatened to do that which the law forbade. He went on[2]:

> 'It is the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed or threatened to be transgressed, as in my opinion it has been by the *Great Eastern Company*, it is the duty of the Attorney-General to take the necessary steps to enforce it, nor does it make any difference whether he sues *ex officio* or at the instance of relators.'

I infer from the cases that until the end of the 19th century everyone, including the judges and the law officers, appreciated that relator actions were a convenient procedural device enabling members of the public to enforce public rights when the public interest justified enforcement.

At the beginning of this century came the case of the *London County Council v Attorney-General*[3]. The headnote[3] of the report of that case includes this statement:

> 'The jurisdiction of the Attorney-General to decide in what cases it is proper for him to sue on behalf of relators is absolute.'

It is based on what Lord Halsbury LC[4] said, and what he said was concurred in by Lord Macnaghten[5]. In that case the statement was obiter because as Lord Halsbury LC[6] himself said: '... the thing has not been argued here at all ...' That does not matter because in other cases, and in particular in *Attorney-General v Westminster City Council*[7], which is binding on this court unless it can be distinguished on well-known grounds, the dictum was followed and applied. For my part I am of the opinion that I must follow it as far as it goes. I accept that the courts have no jurisdiction over the discretion of the Attorney-General as to when, and when not, he should seek to enforce the law having public consequences. The courts cannot make him act if he does not wish to do so; nor can they, as of right, call on him to explain why he has not acted. In this case he was given an opportunity to explain but, as he was entitled to do, he did not. I accept, too, that on the cases binding on me, this court cannot proceed in relation to the Attorney-General's law enforcement function on the same basis as it has proceeded when ministers have been alleged to have acted in excess of powers. I have in mind such cases as *Padfield v Minister of Agriculture*[8] in which the House of Lords rejected the minister's claim that he had an absolute discretion whether to refer a complaint to a statutory committee of investigation. The problem still remains, however, whether, after the Attorney-General's refusal to consent to a relator action, the plaintiff is without rights of any kind to try to get the criminal law enforced when its breach will deprive him and all other persons in the realm of their right to use the facilities provided by the Post Office.

Counsel on behalf of the Attorney-General submitted that this problem had been decided by *Thorne v British Broadcasting Corpn*[9] which was a decision of this court. Dr Thorne brought an action against the British Broadcasting Corporation claiming an injunction to restrain them from conducting propaganda of racial hatred against the German people contrary to the provisions of s 6 of the Race Relations Act 1965.

1 (1879) 11 Ch D 449 at 499, 500
2 11 Ch D 449 at 500
3 [1902] AC 165
4 [1902] AC 165 at 168, 169
5 [1902] AC 165 at 170
6 [1902] AC 165 at [illegible]
7 [1924] 2 Ch 416, [1924] All ER Rep 162
8 [1968] 1 All ER 694, [1968] AC 997 at 1016
9 [1967] 2 All ER 1225, [1967] 1 WLR 1104

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There was a short answer to this claim. It was given by Danckwerts and Winn LJJ[1]. Parliament by statute had given control of the remedies under the Race Relations Act 1965 to the Attorney-General. All the members of the court, however, adjudged that the plaintiff's claim also failed because he had not alleged, and did not have, any legal right of his own which had been infringed by the alleged acts of the British Broadcasting Corporation. Further, he had not tried to get the Attorney-General's consent to a relator action. I would distinguish that case from the present on the ground that in the present case the plaintiff had himself a right which was threatened. The fact that every other person in the realm had it too does not make it any less a right which he could use. He has asked this court to enforce the criminal law so that he and the rest of the public can enjoy that right.

The court cannot give him leave to bring a relator action: it has no jurisdiction to do so. It cannot invent causes of action. What it can do is to use, apply and, if necessary, adapt, existing procedures. One procedure which may be available is the declaratory judgment. It had been known for a very long time to the courts of Chancery and Exchequer. It fell into abeyance in the first half of the 19th century; but under the Supreme Court of Judicature Act 1873, it became part of the inheritance of the Supreme Court of Judicature.

Since 1883 the Rules of the Supreme Court have regulated the practice and procedure of the court in the making of declaratory judgments. This was done by RSC Ord 25, r 5, of the 1883 rules. The present rule is RSC Ord 15, r 16. Under the present rule no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought and the courts are empowered to make binding declarations of right whether any consequential relief is or could be claimed or not.

At first after 1883 the courts seem to have been reluctant to make declarations save in cases where other relief might have been claimed for a legal wrong and insisted that the jurisdiction should be exercised with great caution. Then came *Dyson v Attorney-General*[2]. Since then the jurisdiction to make declaratory judgments has often been used but it remains a discretionary one. Can the plaintiff obtain against the Attorney-General a declaratory judgment such as he is now seeking in his re-amended statement of claim?

The Attorney-General submitted that no one can obtain a declaratory judgment as to the criminal law without his intervention. RSC Ord 15, r 16 provides no such limitation. If it exists, it must be found elsewhere. Counsel for the unions submitted that it is to be found in the principle enunciated by the House of Lords in *London Passenger Transport Board v Moscrop*[3]. The question for decision was whether the appellant board had contravened the provisions of s 6(1) of the Trade Disputes and Trade Union Act 1927. The respondent asked for a declaration that they had. At the trial, which was before Morton J[4], no question arose whether in the circumstances it was competent for the court to make a declaratory judgment. In the House of Lords counsel are not reported as having raised any query about this. Viscount Maugham[5], however, did so in these terms:

> 'I cannot call to mind any action for a declaration in which (as in this case) the plaintiff claimed no right for himself, but sought to deprive others of a right which does not interfere with his liberty or his private rights. Still less can I think that there is any precedent for such an action in the absence of the persons who are interested in opposing the declaration. It has been stated again and again, and also in this House, that the jurisdiction to give a declaratory judgment should be exercised "with great care and jealousy" ... What special interest had the respondent to enable him to bring this action? We are not here concerned with anything but his civil right, if any, under the section. I think it is plain that there has been no interference with any private right of his, nor has he suffered special damage peculiar to himself from the alleged breach of the general prohibition as to certian acts directed to local or public authorities contained in sect. 6 ... Therefore, he could not sue without joining the Attorney-General."

Lords Russell of Killowen, Macmillan and Porter did not make any reference to the jurisdiction to make declaratory judgments; Lord Wright[1] did. He said:

> 'The respondent is not claiming any relief or advantage for himself, and the case is not one in which the court should exercise its discretionary power to make a declaratory judgment.'

The weighty opinions of their Lordships bear heavily on me. I have given most anxious consideration as to whether they apply to this case. If they did, I must accept them and give judgment accordingly. What the plaintiff has asked this court to restrain is a breach of the criminal law which will take away his own right to use the facilities of the Post Office. Having regard to s 14 of the Trade Union and Labour Relations Act 1974, it seems probable that save by means of a declaratory judgment and, if the law allows, an injunction to protect what Parliament intended the criminal law to protect, he would be left without the protection of the law. That surely cannot be.

If this court has jurisdiction to grant the declaratory judgment for which the plaintiff asks I can see no difficulty about granting an interim injunction. As counsel for the UPW pointed out, this court cannot make an interlocutory declaratory judgment; but pending making one it can grant an interim injunction if it is just and convenient to do so. Section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 says so. If, when a final order is made there seems any reason why the plaintiff's declared right, if any, is threatened, it will be for the Attorney-General to enforce the law, if he sees fit, under his ordinary powers. If he did not do so he would have to answer both to the Prime Minister and to Parliament. I am satisfied that the court has jurisdiction to hear and determine a claim for a declaratory judgment in circumstances such as these. At present the plaintiff's pleadings are not in order. Unless he amends his statement of claim to ask for declaratory judgments against the two unions, it will have to be struck out as far as it applies to them. In saying this, I have not overlooked the fact that the plaintiff did not ask the Attorney-General for his consent to relator proceedings against the Post Office Engineering Union. If he had, it is obvious that he would not have got it. These and other technicalities are of no importance if my approach to the issue by way of declaratory judgment is right.

I consider it important to stress that this is an interlocutory judgment. If the parties wish to have a final determination of the issue they are at liberty to do so. The Attorney-General as a defendant will be entitled to submit to the court that considerations of the public interest, which were not easily discernible to this court on 15th January last, point against the making of any declaratory judgment or the granting of an injunction: see *Adams v Adams (Attorney-General intervening)*[2] per Sir Jocelyn Simon P. If he did so submit, the court would give most careful consideration to what he said and would probably refuse the relief.

At the end of the argument counsel on behalf of the Attorney-General invited the court's attention to the kind of difficulties which might be met if members of the public were allowed to apply for injunctions for the enforcement of the criminal law.

1 [1967] 2 All ER 1225 at 1227, [1967] 1 WLR 1104 at 1109, 1110
2 [1911] 1 KB 410; *subsequent proceedings* [1912] 1 Ch 158
3 [1942] 1 All ER 97, [1942] AC 332
4 [1940] 3 All ER 225, [1940] Ch 775
5 [1942] 1 All ER 97 at 103, 104, [1942] AC 332 at 344, 345

1 [1942] 1 All ER 97 at 107, [1942] AC 332 at 351
2 [1970] 3 All ER 572 at 577, [1971] P 188 at 198

As far as the difficulties he envisages are procedural, they could be dealt with under the inherent jurisdiction of the court and the existing Rules of the Supreme Court. If new rules were necessary to stop abuse, they could be made.

I am more concerned about the basic problem in this case. I accept the Attorney-General's submissions first, that considerations of public interest have to be taken into account in the discharge of his duties of law enforcement; secondly, that he has access to sources of information which are not, and could not, be available to the courts; and thirdly, that he may be in a better position to weigh the factors affecting public interest than the judges. What I cannot, and do not, accept is that he and he alone, in relation to law enforcement through the civil courts, is the sole arbiter of what is the public interest. I have never doubted that no one can question in the courts his discretion whether, and when, to prosecute. In that sphere, the citizen who disagrees can prosecute himself, unless Parliament has enacted otherwise. The difficulty lies in the exercise of the preventive side of his functions. He does not claim infallibility. He may be wrong. If he is, many members of the public may be inconvenienced or suffer material loss. I envisage that it will only be in the rare case in which, so far as the court can see, there is no discernible reason why threatened breaches of the criminal law should not be restrained that the court will allow a plaintiff to proceed. If at any time, whether at the beginning of the case or at the final determination, the Attorney-General elected to reveal the factors of public interest which were not discernible, the court in the exercise of its discretion would assess the new information and judge accordingly. Further I envisage that the court would vigorously deny relief to busybodies, mischief-makers and anybody who was not likely to be personally affected by the threatened criminal acts. Someone living in Cornwall for example, would not be allowed to proceed with a claim for an injunction to restrain a local authority in the north of England from committing a statutory nuisance contrary to the provisions of the Public Health Act 1936. I would have thought, too, that a condition precedent for applying to the court would be that an application for consent to a relator action had been made to the Attorney-General and refused. I personally would regard the refusal of consent as strong evidence that the public interest was not involved.

For these reasons I would allow the action to proceed against the Attorney-General and against the two unions if the statement of claim is amended as I have suggested. I would discharge the interim injunction as time has removed the threat of illegality.

ORMROD LJ. This case raises not one but two questions of major constitutional importance, first, whether the Attorney-General is answerable to the court, or only to Parliament, for the exercise of his discretionary powers; and, secondly, whether there are any circumstances in which a member of the public may take proceedings to restrain illegal acts of a public nature without the assistance of the Attorney-General, or, as The Times put it, does the Attorney-General 'stand between the citizen and the courts'?

The first question may be answered, in my judgment, shortly and unequivocally. The Attorney-General's discretion is not subject to review by the court, he is not answerable to the court in this respect, and like everyone else, he cannot be compelled to act as a plaintiff against his wish. There is, therefore, no clash or conflict in this respect between Parliament and the court or between the court and the Attorney-General.

The second question, however, is extremely difficult. Hitherto, it has always been assumed that a member of the public has no locus standi to invoke the aid of the civil courts in respect of a so-called public right, unless he can sh[illegible] particular interest in the subject-matter, or special damage in some form, and [illegible]t only the Attorney-General can sue in such circumstances.

Counsel for the plaintiff, however, has challenged this assumption and asserts the

plaintiff's right, as a member of the public, adversely affected by the defendant unions' illegal acts, to come to the court himself to ask for relief. He expressly disclaims any attempt to overcome the difficulties by trying to find in the plaintiff some, however nebulous, particular interest or special damage. The weight of the tradition which he must displace if he is to win his case could hardly be greater but, in the best traditions of the Bar, he has not hesitated to attack what he submits is a false doctrine. I would like to pay my tribute to the exemplary way in which he has conducted an extremely difficult case.

The starting point of his submission is that, since the assumption has never been questioned before, the courts have never been called on to consider the position which arises when the Attorney-General declines to assist a member of the public to take relator proceedings. The position is therefore, res integra and there is no direct authority which stands in his way. It follows that there is no direct authority in his favour, so that his argument must proceed by way of principle and attack on the foundations of the assumption. The mere fact that it has stood unchallenged for so long is not conclusive; the court, particularly in matters going to jurisdiction, will not hesitate to examine the validity of long-standing rules, if their foundations can be shown to be insecure (see in a different context *Ross-Smith v Ross-Smith*[1]), but longevity may add much to the burden of the advocate of change.

At a late stage in his submissions counsel for the plaintiff posed a pregnant question. He asked why are there two concurrent and closely similar, yet distinct, proceedings by which, apparently, the Attorney-General can bring before the court, if he wishes, matters of the kind with which we are concerned in this case. The answer to that question, in my judgment, will throw much light on the problems in this case and may help to resolve some of the anomalies which make the reasoning and the argument so elusive.

The co-existence of two parallel and very similar procedural pathways to the same end suggests that, underlying them, there may be a legal fiction of the kind which is familiar to students of legal history in other areas, and which has been one of the most powerful evolutionary forces in our law. If this hypothesis is correct it will account for some of the difficulty of distinguishing between form and substance which bedevils this case.

The two procedures open to the Attorney-General are to proceed of his own motion ex officio, or to authorise relator proceedings to be taken, that is, the Attorney-General consents to appear as the plaintiff in such proceedings at the request of some other person or body. The former is quite straightforward and need not be further considered. The latter is another thing altogether and must now be examined in some detail.

These dual procedures are of great antiquity. They existed in Blackstone's day and are described in detail in the Commentaries[2] under their old name of 'Information':

> '[The] informations that are exhibited in the name of the sovereign alone . . . are also of two kinds: first, those which are [and I emphasise these words] *truly and properly his own suits*, and filed *ex officio* by his own immediate officer, the attorney general; secondly, those in which, though the Crown is the [and I emphasise the next words] *nominal prosecutor*, yet it is at the relation of some private person or common informer; and they are filed by the Queen's coroner and attorney in the Court of the Queen's Bench, usually called the master of the Crown-Office, who is for this purpose the standing officer of the public.'

Blackstone goes on to say that the objects of the species of information filed on the complaint or rel[illegible] of any private subject are—

1 [1962] 1 All ER 344, [1963] AC 280
2 Commentaries on the Laws of England (1857) Bk IV, pp 308, 309

'any gross and notorious misdemesnors, riots, batteries, libels and other immoralities of an atrocious kind, not peculiarly tending to disturb the government . . . but which, on account of their magnitude or pernicious example, deserve the most public animadversion.'

It is quite plain from these and later passages that, at that time, the relator action was a pure procedural fiction, which enabled private citizens to use a convenient procedure which, in theory, was available to the Crown alone. The remedy of quo warranto seems to have been made available to private citizens by a similar fiction, and to private persons wishing to challenge a patent by use of the writ scire facias[1]:

'If the grant be injurious to a subject, the sovereign is bound of right to permit him (upon his petition) to use his royal name.

In *The Queen v Prosser*[2] Lord Langdale MR commented in such a case: 'It has been said, that the writ issues of course, the fiat of the Attorney-General for issuing it being granted as of course.' Then he went on to say that this ought not to be the case.

The essentially fictional character of relator proceedings can in my judgment be demonstrated by an examination of the factual situation in most of the reported cases extending up to the present day. In case after case, the reality of the matter is that it is the relator who is seeking relief, sometimes for himself, sometimes on behalf of a group of citizens, sometimes on behalf of a wider public. He is the real plaintiff while the Attorney-General is the nominal plaintiff. Phrases such as 'the plaintiff must sue in the name of the Attorney-General', and references to the Attorney-General 'lending his name' which are used repeatedly in the reports indicate the fictional character of proceedings of this type. Sometimes, in other cases, it is overt, for example *Attorney-General v Sheffield Gas Consumers Co*[3], which seems to have been a relator action in which the real plaintiff was a rival gas company, where Lord Cranworth said[4]:

'In substance, however, I cannot but come to the conclusion, that the Attorney-General and the public here are a mere fiction, and that the real parties concerned are only those that were parties to the first suit.'

In the course of argument, counsel for the defendants[5] is reported as saying:

'Although the name of the Attorney General is used, it is quite clear that he has never been consulted and that any advantage from these litigations to the public is the last thing which those who have set it on foot have thought of.'

Attorney-General v Great Eastern Railway Co[6] was a relator action brought on the relation of a person representing a body of manufacturers of locomotive engines to restrain the defendants from letting engines and rolling stock on hire, which was said to be ultra vires. The real plaintiffs, obviously, were the manufacturers suing to restrain competition, but using the name of the Attorney-General to get over certain procedural obstacles. Sir John Holker, the Attorney-General, appeared in that case himself, which is unusual in relator actions, and seems to have had an awkward time. James LJ[7] held that it was not such a case of sufficient public wrong as to make it the duty of the Attorney-General to interfere. Baggallay LJ[8], however, said:

1 Op cit (1857), Bk III, p 261
2 (1848) 11 Beav 306 at 313
3 (1853) 3 De GM & G 304
4 3 De GM & G 304 at 313
5 3 De GM & G 304 at 309
6 (1879) 11 Ch D 449
7 11 Ch 449 at 479
8 11 Ch 449 at 500

'It is the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed or threatened to be transgressed . . . it is the duty of the Attorney-General to take the necessary steps to enforce it . . .'

Attorney-General v London County Council[1] was an action on the relation of a large number of proprietors of omnibuses in London to restrain the London County Council from running buses, on the ground that it was ultra vires. Again the real plaintiffs were the rival bus owners who were suing in the name of the Attorney-General to restrain competition. It is plain from the judgments in the Court of Appeal that injury to the public interest could only be founded on the broad ground that the law ought to be obeyed. The case went to the House of Lords, and the doubts about the Attorney-General's role in the case which had been forcibly expressed[2] by counsel for the defendants (Mr Haldane, QC) in the Court of Appeal, led Lord Halsbury LC[3] to make his well-known pronouncement about the position of the Attorney-General in these cases. He said in substance that if there was an 'excess of power' which concerns the public it was for the Attorney-General to decide whether or not to initiate litigation and not for the courts to determine whether or not he ought to have done so.

Then there is the large group of cases in which local authorities are the relators and often also plaintiffs. All of these followed from the decision in *Devonport Corpn v Tozer*[4] by Joyce J, that a local authority could not obtain an injunction to enforce its by-laws except by an information on the part of the Attorney-General. In all these cases ranging from *Attorney-General v Ashborne Recreation Ground Co*[5] to *Attorney-General v Harris*[6] and later cases, the real plaintiff is the local authority, the action is conducted by the local authority itself, the purpose of the litigation is to obtain an injunction, but the ground is said to be the invasion of public rights, which justifies the intervention of the Attorney-General as the nominal plaintiff, which in turn enables the court to grant the injunction, which is what the local authority wants. The consent of the Attorney-General to act as plaintiff is conclusive of the public interest but, nonetheless, it is said to be open to the court to refuse to grant an injunction if it does not consider it a proper case for relief: see *Attorney-General v Birmingham, Tame & Rea District Council*[7].

The situation is summed up in a passage in Professor Edwards's book[8] where he writes, quoting a speech by Sir Jocelyn Simon[9], then Solicitor-General, in the House of Commons on 1st December 1960:

'Although the Attorney-General is the nominal plaintiff in the action, in reality the action is brought by the complainant. Once the consent of the Attorney-General is obtained the actual conduct of the proceedings is entirely in the hands of the relator who is responsible for the costs of the action.'

This is exemplified by Sir Peter Rawlinson, the Attorney-General, in *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority*[10]. Having appeared in court as 'amicus curiae' on the question of the locus standi of the plaintiff, he stated that he would give his consent to relator proceedings if the pleadings were properly amended. He was then joined as co-plaintiff, whereupon he withdrew from the court,

1 [1901] 1 Ch 781
2 [1901] 1 Ch 781 at 793
3 [1902] AC 165 at 168, 169
4 [1902] 2 Ch 182, 71 LJCh 754
5 [1903] 1 Ch 101, 72 LJCh 67
6 [1960] 3 All ER 207, [1961] 1 QB 74
7 [1910] 1 Ch 48[illegible] LJCh 137
8 J LI J Edward[illegible] Law Officers of the Crown (1964) p 288
9 631 H of C Official Report (5th series) col 691
10 [1973] 1 All ER 689, [1973] QB 629

leaving the subsequent conduct of the proceedings to the relator, McWhirter (see the description of the proceedings in Professor S A de Smith's Judicial Review of Administrative Action[1]).

This brief and necessarily incomplete review of the cases supports the view that there is a fictional element in these relator actions which has varied in extent from time to time, depending, no doubt, to some extent on the views of the Attorney-General for the time being. Analysed in real terms, it could be said that this procedure is tantamount to the Attorney-General giving the complainant leave to proceed. Analysed in formal terms, it is a procedure by which the Attorney-General delegates to the complainant who has no particular interest in the subject-matter authority to apply to the court for an injunction to enforce public rights which the Attorney-General alone, in theory, can enforce.

Hitherto, it seems to have worked, largely because a crisis arising out of an irreconcilable disagreement between a complainant and the Attorney-General has not arisen. It has, however, not always worked smoothly. There are numerous cases in which defendants have attempted to question the Attorney-General's decision to give his consent on the ground that the public interest element in the case was trivial or too slight to justify his intervention: see, for example, *Attorney-General v Westminster City Council*[2] where counsel for the defendants sought to argue that the Attorney-General had no right to intervene to prevent a course of action which was not the subject of express statutory provisions and not contrary to the public interest. In this court it was held that the court must accept the discretion exercised by the Attorney-General to authorise the action.

Attorney-General v Harris[3] was another example. There, Salmon J said in his judgment at first instance[4] that he had 'no hesitation in holding in the special circumstances of this case that the defendants have caused no injury to the public'. His decision was overruled in this court[5] on the ground that the community has 'a larger and wider interest in seeing that the laws are obeyed . . .'

The crisis has now occurred. A complainant with, on the face of it, a strong prima facie case for saying that the unions were threatening to cause inconvenience, and even hardship, to the public by acts which appeared, equally clearly, to be illegal and, in fact, criminal, has been refused the Attorney-General's consent to a relator action. Has he in these wholly exceptional circumstances, the right to come before the court himself and ask for relief or is he barred in limine from making any application?

He is, in my judgment, in the absence of direct authority, entitled to ask the court to consider whether or not he can establish sufficient standing to proceed with his action. For that reason, an interim injunction was granted on the first hearing to preserve the position while this question was argued. He has now through his counsel put forward his contentions. The next question, therefore, is whether there is any jurisdiction in the court to grant him, not the Attorney-General, any relief. If there is, the refusal of the Attorney-General to allow him to proceed in relator proceedings will not bar him.

It is conceded that the plaintiff, as a member of the public, could prosecute the unions for offences under the Post Office Act 1958 and the Telegraph Act 1863, after illegal acts had been committed. In my judgment, he is also in a position to claim a declaration that the acts threatened would, if committed, amount to a breach of the relevant sections of these Acts of Parliament. I can see no relevant distinction between the present case and *Dyson v Attorney-General*[6], and I agree with Lawton LJ that

1 3rd Edn (1973), Appendix 3, p 527
2 [1924] 2 Ch 416, [1924] All ER Rep 162
3 [1960] 3 All ER 207, [1961] 1 QB 74
4 [1959] 2 All ER 303 at 306, [1960] 1 QB 31 at 39
5 [1960] 3 All ER 207 at 216, [1961] 1 QB 74 at 95
6 [1911] 1 KB 410; *subsequent proceedings* [1912] 1 Ch 158

Viscount Maugham's observations in *London Passenger Transport Board v Moscrop*[1] do not touch this case. The nature of the declaration sought in that case was quite different. *Dyson's* case[2] does not appear to have been cited and there seems to have been no argument on locus standi. The plaintiff in this case, like the rest of the public, has a very real interest in the availability of the postal and telephone services and a real interest in ensuring, if he can, that these facilities are not interfered with by the illegal acts of the defendant unions or others.

Although he does not claim a declaration in his statement of claim, it is a remedy which, in circumstances like the present, may be of real value. An authoritative statement about the law, made by a competent court, in the course of public proceedings, is likely to affect the minds of many people who are contemplating, or being asked to perform, acts which are illegal. Courts are entitled to assume, unless law and order has broken down completely, that responsible bodies like trade unions and their members will not, knowingly, act illegally, still less criminally. There are considerable potential advantages in removing from the minds of those contemplating illegal acts any real, or alleged, doubts about their legality. Indeed, much of the practical efficacy of injunctions is attributable to this factor, although the ultimate sanction of proceedings for contempt of court is not a negligible influence. An injunction which has to be enforced is an injunction which has failed.

The question whether a private citizen can go further than a declaration and apply for an injunction as a substantive remedy for an actual or a threatened invasion of a public right is another matter. This problem is usually discussed in terms of locus standi but I think it is better to consider it in terms of jurisdiction. If the court has jurisdiction, no question of locus standi arises. In the past, the courts did not grant injunctions as a substantive remedy to persons who could not show that their private rights were in danger or that they were likely to suffer some special damage over and above that suffered by the public generally; so it was said that such a person had no locus standi before the court. This aspect of the case has been touched on but not very fully argued.

In my judgment, it is necessary to draw a distinction between injunctions which are in the nature of final orders, made after a trial of the issues, and interlocutory orders which are made while proceedings are pending. The jurisdiction to make the former appears to have remained unchanged from that exercised by the courts of equity before the Supreme Court of Judicature Act 1873. Jurisdiction to grant the latter is governed by s 25(8) of that Act, which is now s 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925, which provides that the court can grant an interlocutory injunction whenever it is 'just and convenient so to do.'

There is, therefore, no jurisdiction, in my judgment, to grant injunctions of a final or permanent nature unless the plaintiff can bring himself within the limits set by the former courts of equity. This, the plaintiff cannot do, because he cannot show any particular interest or special damage. On the other hand, if he can bring an action for a declaration or for some other relief, the court in law has a discretion to grant him a temporary injunction whenever it is both just and convenient to do so, for instance, to preserve the position pending final judgment, but it will not exercise this discretion unless it is necessary to ensure that justice is done. In the circumstances which have happened in this case it is not now necessary to continue the injunction but it would have required an exceptionally strong case to justify continuing it any further.

I have said some harsh things about the relator procedure generally because it appears to me obsolete. It has the practical advantage of preventing a large number of frivolous, futile or merely mischievous cases coming to the courts but there are other ways of dealing with that problem. It has the grave disadvantage of putting the Attorney-General in the invidious position of appearing to be the prime mover in

1 [1942] 1 All ER 97 at 103, 104, [1942] AC 332 at 334, 345
2 [1911] 1 KB 410; *subsequent proceedings* [1912] 1 Ch 158

litigation conducted by some other person, with motives which may be quite different from his, or of forcing him to decide whether to sanction such proceedings as in the present case, and thus to appear to be standing between a private citizen and the court. Quasi-legal fictions may be intelligible to lawyers; in the public mind they produce nothing but confusion, and sometimes frustration.

My conclusion is, therefore, that on the facts of the present case and in the existing state of the law the plaintiff is entitled to sue the first and second defendants for a declaration. The court has an unfettered discretion to decide whether to grant or refuse such a declaration. The Attorney-General, who should be served with a copy of the proceedings, is entitled to intervene in the action at any stage. In very exceptional cases, the court may grant a temporary or interlocutory injunction for a short time to preserve the status quo until a full hearing can take place but the plaintiff cannot obtain a permanent or final injunction unless he is in a position to add the Attorney-General as a plaintiff in the proceedings.

Interim injuction discharged. Leave to plaintiff to amend statement of claim by claiming relief by declaration in terms to be agreed and approved by Court of Appeal. Leave to the Attorney-General and the UPW and POEU to appeal to the House of Lords.

4th February. The court considered the draft order which had been prepared with the agreement of counsel for all parties, and the further amendments to the plaintiff's amended statement of claim. The court approved the reamended statement of claim whereby the plaintiff claimed (i) an injuction against the UPW in the same terms as the original statement of claim; (ii) a declaration that it would be unlawful for the UPW to solicit or endeavour to procure any person wilfully to detain or delay any postal packet in the course of transmission between England and Wales and the Republic of South Africa; (iii) an injuction against the POEU restraining it from counselling, procuring or inciting any person in the employment of the Post Office wilfully or negligently to omit or delay to transmit or deliver any message in the course of transmission between England and Wales and the Republic of South Africa, and a declaration that any such act would be unlawful; and (iv) a declaration against the Attorney-General that notwithstanding his refusal to consent to relator proceedings the plaintiff was entitled (a) to proceed with his applications for declarations against the UPW and the POEU and (b) pending the final determination of those applications, to obtain relief by way of interim injunctions.

The court then made the following orders: (i) that the plaintiff's claim for final injunctions against the UPW and the POEU be struck out under RSC Ord 18, r 19; (ii) that the applications by the UPW and the POEU to strike out the plaintiff's claim for a declaration be dismissed; (iii) that the application by the Attorney-General to strike out the declaration claimed against him in the reamended statement of claim be dismissed; (iv) that all parties should have leave to lodge petitions of appeal to the House of Lords.

Orders accordingly.

Solicitors: *Trower, Still & Keeling* (for the plaintiff); *Simpson Millar* (for the UPW); *Shaen Roscoe & Bracewell* (for the POEU); *Treasury Solicitor.*

Sumra Green Barrister.

United Overseas Bank v Jiwani

QUEEN'S BENCH DIVISION
MACKENNA J
30th, 31st MARCH 1976

Estoppel – Representation – Prejudice suffered by party misled by representation – Prejudice making it inequitable to require party misled to make restitution – Money paid to party misled under mistake of fact – Money spent by party misled – Banker and customer – Banker mistakenly crediting sum to customer's account – Representation by banker to customer as to balance of account – Balance stated including sum mistakenly credited to account – Customer drawing on account to buy hotel as an investment – Customer would still have bought hotel with other resources if misrepresentation as to balance not made – Whether banker estopped from claiming restitution of sum wrongly credited.

In 1969 the defendant opened a bank account with the plaintiffs in Geneva. At the end of August 1972 the balance of the account stood at, approximately, $10,000. On 2nd October the defendant drew a cheque on the account for $20,000 in favour of P from whom he was planning to buy an hotel as an investment. On 6th October a Zurich bank informed the plaintiffs, by telex, that on the instructions of an unnamed client they were crediting the plaintiffs, as from 6th October, with the sum of $11,000 in favour of the defendant. That day the plaintiffs sent a credit advice to the defendant, who was in London, informing him of the transfer of the $11,000. On the same day, 6th October, the Zurich bank sent the plaintiffs a written advice of payment stating that they had transferred $11,000 to the plaintiffs in favour of the defendant. The advice was stamped with words indicating that it was sent in confirmation of the telex message but the plaintiffs' clerk who dealt with the advice overlooked the stamped words and treated the advice as if it were a new transfer of a second sum of $11,000. In consequence, two credit entries, each of $11,000, were made by the plaintiffs in the defendant's account, bringing the apparent balance of the account to, approximately, $32,000; and the plaintiffs sent the defendant a second credit advice informing him that the Zurich bank had transferred to the plaintiffs, in his favour, a second sum of $11,000. On 16th October the defendant enquired of the plaintiffs by telephone about the state of his account, and on 17th October he called at the bank to inquire about his account. On both occasions he was told that the balance stood at $32,000. The defendant thereupon requested the plaintiffs to transfer to P a further $11,000, in addition to the cheque for $20,000 drawn on 2nd October. The plaintiffs transferred the $11,000 to P under the mistake of fact that the Zurich bank had transferred two sums of $11,000 in favour of the defendant. After payments of the $20,000 and $11,000 to P, the defendant's apparent credit balance stood at $1,107.90. If the account had been correctly stated, after the payments to P it would have shown a debit of $9,892.10. On 20th October the plaintiffs discovered their error in crediting the second sum of $11,000. On 25th October they informed the defendant of the error and asked him to cover the overdraft of $9,892.10. The defendant received, but did not reply to, that letter. Subsequently the plaintiffs obtained a promissory note from him for the amount of the overdraft but it was dishonoured. The transfer of the $11,000 to P enabled the defendant to complete the purchase of the hotel, which was a good investment for him and his family, but if the plaintiffs had not transferred the $11,000 to P the defendant would still have purchased the hotel since he would have found money from other sources for the purchase. The plaintiffs brought an action against the defendant claiming the $9,892.10 as money had and received together with interest. The defendant denied liability contending that the plaintiffs were estopped from claiming restitution of the sum mistakenly credited to his account, since, in breach of duty, they had misrepresented to him the state of his account, that misrepresentation

In *Tampion v Anderson* (1973) 48 ALJR 11 the question before the Board on a petition for special leave to appeal against an order made in the Supreme Court of Victoria staying an action on the ground that it was frivolous, vexatious and an abuse of the process of the court was whether that order was final or interlocutory. It appears from the judgment of Lord Kilbrandon that the Australian courts accept as authoritative the English decisions on this topic. Lord Kilbrandon continued (at 12):

> 'It was submitted, and their Lordships would be inclined to agree, that the authorities are not in an altogether satisfactory state. There is a continuing controversy whether the broad test of finality in a judgment depends on the effect of the order made, as decided in *Bozson v. Altrincham U.D.C.* ([1903] 1 KB 547 at 549 *per* Lord Alverstone C.J. or on the application being of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute—*Salaman v. Warner* ([1891] 1 QB 734). But the difficulty seems to arise out of attempts to frame a definition of "final" (or of "interlocutory") which will enable a judgment to be recognized for what it is by appealing to some formula universally applicable in any contingency in which the classification falls to be made.'

Their Lordships are mindful of the great reliance placed by the Federal Court on English precedents and of the observation made by Lord Parker CJ in *Smith v Leech Brain & Co Ltd* [1961] 3 All ER 1159 at 1162, [1962] 2 QB 405 at 415 that 'it is important that the common law, and the development of the common law, should be homogeneous in the various sections of the Commonwealth'. But it must be remembered that in England the practice with respect to appeals from orders in summary proceedings refusing the defendant unconditional leave to defend an action has since 1925 been governed by statute. The Supreme Court of Judicature (Consolidation) Act 1925 provided in s 31 2 (now repealed and substantially re-enacted in s 18(2)(*a*) of the Supreme Court Act 1981

> 'An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of this section.'

The effect of this is to give a defendant an appeal as of right against an order giving leave to a plaintiff to sign final judgment against him in summary proceedings. Moreover it would seem to their Lordships that it would be wrong to overrule the Federal Court on a matter of procedure as distinct from substantive law, unless it can be clearly shown that the court has misconstrued the statute law of Malaysia. As Lord Westbury observed in *Boston v Lelièvre* (1870) LR 3 PC 157 at 163:

> 'Their Lordships would hesitate very much to interfere with the unanimous judgment of the Court below upon a matter of this kind, which is to be regarded as a matter of procedure only, unless they were clearly satisfied that the Court had made a great mistake in the construction put upon these Statutes.'

It appears to their Lordships that the Federal Court in *Ratnam v Cumarasamy* and *Peninsular Land Development Sdn Bhd v K Ahmad* (*No 2*) and subsequently in *Hong Kim Su v Malayan Banking Bhd* [1971] 1 MLJ 289, *Arumugam Pillai v Government of Malaysia* [1980] 2 MLJ 283 and *Ng Cheng Yoon v Mah Binti Mat Isa* [1981] 1 MLJ 218, all of which are unanimous, reserved judgments, has established over the years a settled practice of applying Lord Alverstone CJ's test in the *Bozson* case in order to determine whether an order is final or interlocutory. Their Lordships are unable to find any error in this reasoning; on the contrary their Lordships feel entitled to say that the test is both sound and convenient. In three of the five cases cited above the appeal was against leave to sign judgment in summary proceedings. Thus the effect of the practice adopted by the Federal Court in such cases is in line with the English practice as established by statute since 1925. In any event, this being a matter of practice and procedure, their Lordships, in accordance with their practice, will uphold the decision of the Federal Court.

Counsel for the appellant drew attention to the cases of *Naga[illegible]ngasamy Pillai v Lim Lee Chong* [1968] 2 MLJ 91, *Sri Jaya Transport Co Ltd v Fernandez* [1970] 1 MLJ 87 and *Thomas v Reddy* [1974] 2 MLJ 87 as well as the unreported case of *Malayan Banking Bhd v Yap Seng Hock* (11 October 1980) and invited the Board to express a view on what were said to be inconsistencies in the application of RSC (Malaysia) Ord 54, rr 22 and 22A. Their Lordships consider that they must decline from so doing first, because any views they express would be purely obiter in the light of the conclusion they have reached on the main issue in this appeal, and second, because the points raised are purely procedural and ought to be resolved by the Federal Court.

The second main issue in this appeal is whether the Federal Court was wrong in granting to the respondents unconditional leave to defend the claim brought by the appellant against them. It is also contended that the respondents were allowed on appeal to the Federal Court to put forward new and different grounds from that relied on by them before Harun J. As to the putting forward of new and different grounds, this involves the discretion of the court and since it has not been shown that the court proceeded on some wrong principle the Board will not intervene. As to the granting of unconditional leave the Federal Court had before it material which, among other things, showed that a number of important issues of fact are in contention between the appellant and the respondents including the precise circumstances in which the appellant accepted certificate 0227 and the memorandum of transfer signed by Dr Chong. It would be inappropriate for their Lordships to say more, at this stage, than that these issues require to be tried. There was in addition material showing that it may be impossible to restore the parties to their original positions, some 2½ years having elapsed before the matter came before the courts during which time the appellant and his associates had control of CH and made substantial changes in the company's affairs. These considerations commend themselves to their Lordships as justifying the conclusion reached by the Federal Court that the respondents should have unconditional leave to defend.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors: *Kingsford Dorman* (for the appellant); *Macfarlanes* (for the respondents).

Mary Rose Plummer Barrister.

Raymond v Attorney General

COURT OF APPEAL, CIVIL DIVISION
CUMMING-BRUCE LJ AND SIR SEBAG SHAW
12 JANUARY, 9 MARCH 1982

Criminal law – Proceedings – Duties of Director of Public Prosecutions – Undertaking conduct of proceedings – Scope of 'conduct' of proceedings – Whether undertaking conduct of proceedings including power to abort private prosecution – Prosecution of Offences Act 1979, s 4.

At committal proceedings before justices C gave evidence for the prosecution. The proceedings resulted in the committal of the appellant to the Crown Court for trial on various charges including conspiring to pervert the course of justice. C was to be a Crown witness at the trial. While the trial was pending the appellant laid informations against C alleging perjury and other criminal offences in regard to the committal proceedings. The justices issued summonses against C on the information but because C was a Crown witn[illegible]e pending trial the clerk to the justices notified the Director of Public Prosecutions of the issue of the summonses. The director took the view that the appellant might have instituted the proceedings to inhibit, or at least discredit, C as a Crown witness at the trial and that he ought to 'undertake ... the conduct' of the

appellant's proceedings against C pursuant to the power conferred on him by s 4[a] of the Prosecution of Offences Act 1979. Accordingly, a member of the director's office attended the magistrates' court and submitted that, because the director was satisfied that the appellant's proceedings were vexatious and designed to discredit C as a witness at the appellant's trial, it was in the public interest that the proceedings should not be continued, and he informed the court that no evidence would be offered against C. The justices therefore dismissed the information and discharged C. The appellant, having failed in the Divisional Court to obtain an order of mandamus requiring the director to pursue his charges against C, brought an action against the director and others, seeking declarations, an injunction and damages on the basis that the director had acted unlawfully in deciding not to proceed with the appellant's charges against C. The director applied for, and was granted by a master in chambers, an order striking out the claim as disclosing no reasonable cause of action. The master's order was upheld on appeal by the judge. The appellant appealed.

Held – Because s 4 of the 1979 Act enabled the Director of Public Prosecutions to 'conduct' any criminal proceedings, if he thought fit, and not merely to 'carry on' the proceedings, the director had power under s 4 to intervene in a private prosecution for the purpose of aborting it if it appeared expedient in the public interest to do so, and he was not limited to intervening for the purpose of pursuing or carrying on the proceedings. Accordingly, if it appeared to the director that there were substantial reasons in the public interest for not pursuing a private prosecution because, for example, matters might emerge from it adverse to a pending public prosecution which involved more serious issues, the director was entitled to intervene in the private prosecution for the purpose of aborting it, and unless his decision to do so was manifestly unreasonable it could not be impugned. It followed that the appellant's statement of claim disclosed no reasonable cause of action and that his action was vexatious and an abuse of the court's process. The appeal would therefore be dismissed (see p 491 *g* to *j* and p 492 *b*, post).

Turner v DPP (1978) 68 Cr App R 70 and dictum of Viscount Dilhorne in *Gouriet v Union of Post Office Workers* [1977] 3 All ER at 88 applied.

Per curiam. The safeguard against the Director of Public Prosecutions exercising his power under s 4 of the 1979 Act to abort private prosecutions unnecessarily or gratuitously is that under s 2 the director is answerable to the Attorney General for any abuse of his powers (see p 491 *j*, post).

Notes

For the duties of the Director of Public Prosecutions, see 11 Halsbury's Laws (4th edn) para 96.

For the Prosecution of Offences Act 1979, s 4, see 49 Halsbury's Statutes (3rd edn) 284

Cases referred to in judgment

Dyson v A-G [1911] 1 KB 410, CA; *subsequent proceedings* [1912] 1 Ch 158, CA, 11 Digest (Reissue) 693, 308.

Gouriet v Union of Post Office Workers [1977] 3 All ER 70, [1978] AC 435, [1977] 3 WLR 300, HL, 16 Digest (Reissue) 265, 2528.

Turner v DPP (1978) 68 Cr App R 70.

Interlocutory appeal

Steven Patrick Raymond appealed against the decision of Glidewell J on 7 May 1981 dismissing his appeal from an order of Master Creightmore dated 28 February 1980 striking out Mr Raymond's statement of claim, seeking declarations, an injunction and damages against the Director of Public Prosecutions and others, as showing no reasonable cause of action, pursuant to RSC Ord 18, r 19 and as vexatious and an abuse of the process of the court. The respondent was the Attorney General who was treated as the defendant to Mr Raymond's action. The facts are set out in the judgment of the court.

Louis Blom-Cooper QC and *Justin Philips* for Mr Raymond.
Andrew Collins for the Attorney General.

Cur adv vult

9 March. **SIR SEBAG SHAW** delivered the following judgment of the court: The appellant, referred to in this judgment as 'Mr Raymond', was, together with others, convicted in February 1980 in the Crown Court at St Albans of conspiring to pervert the course of justice. The trial in which he was involved had begun on 3 October 1979. At the outset Mr Raymond pleaded not guilty, but on 4 February 1980 he changed his plea in respect of a number of counts and was sentenced to terms of imprisonment.

Amongst those implicated in the offences of which the defendants at the trial were accused was one Desmond Roy Carne (referred to as 'Mr Carne'). His role was not, however, that of a defendant but of a witness for the Crown. He had given evidence on behalf of the prosecution in the committal proceedings before the examining justices at the St Albans Magistrates' Court which led to the trial at the Crown Court.

Those proceedings began on 5 September 1978, and continued until 11 March 1979, when the defendants (with one exception) were all sent for trial. On 11 May 1979, when that trial was still pending, Mr Raymond laid informations before the St Albans justices alleging that Mr Carne had committed perjury and other criminal offences in relation to the matters which had been the subject of the committal proceedings in which Mr Carne had given evidence for the prosecution.

The clerk to the justices took the step (very properly, in our view) of writing on 14 May 1979 to the Director of Public Prosecutions calling attention to the fact that the justices had issued summonses on the informations laid by Mr Raymond against a witness for the Crown who would in the ordinary course be called to give evidence at the trial then in prospect. The director's response at that stage was that he would take no action in relation to those summonses. However, he had second thoughts in the matter. One view of Mr Raymond's initiative in instituting criminal proceedings against Mr Carne at that time was that it was intended to inhibit, or at least to discredit, Mr Carne in his role as a witness for the prosecution. On 10 July 1979 the director intimated that he proposed, as he was satisfied it was appropriate in the circumstances, to exercise the powers conferred on him by s 4 of the Prosecution of Offences Act 1979. That section provides:

> 'Nothing in this Act shall preclude any person from instituting or carrying on any criminal proceedings; but the Director may undertake, at any stage, the conduct of those proceedings, if he thinks fit.'

Notice was accordingly given to the court and to Mr Raymond of the director's intended intervention. On 16 July 1979 Mr John Wooler, a senior member of the office of the Director of Public Prosecutions attended the St Albans Magistrates' Court. He outlined the history of the matter to the bench and explained that it had become apparent from what Mr Raymond had said when applying for the summonses that the allegations he intended to make against Mr Carne had already been canvassed in the earlier committal proceedings. He went on to inform the court that the director was satisfied in regard to a number of factors which, in his view, showed that the proceedings instituted by Mr Raymond were vexatious and were designed to discredit Mr Carne as a witness and not to bring him to justice in regard to the allegations on which the summonses were founded. Overall, the general public interest, and in particular the ends of justice, would be disserved if the summonses were proceeded with.

Accordingly, so Mr Wooler informed the court, he offered no evidence against Mr

a Section 4 is set out at p 489 *g*, post

Carne. The major offences alleged by Mr Raymond were triable only on indictment. The bench accordingly discharged Mr Carne.

Mr Raymond's first reaction was to seek judicial review by way of an order of mandamus requiring the director to pursue the charges laid against Mr Carne. Having obtained leave Mr Raymond moved the Queen's Bench Divisional Court according to Lord Widgery CJ dealt with the matter very concisely. He said that—

> 'the Director's conduct cannot be attacked except on the footing of proving bad faith, not just talking about it; or, alternatively, showing he worked on a wrong principle. We are all of the opinion that no progress has been made by the applicant on any of these matters, and that being the case the motion must be refused.'

Mr Raymond sought to appeal to the Court of Appeal but this proved abortive on the ground of jurisdiction, that court being of the view that the subject of the application to it was a criminal cause or matter within the meaning of s 31 of the Supreme Court of Judicature (Consolidation) Act 1925. In the course of his judgment Lord Denning MR said (see *R v DPP, ex p Raymond* (1979) 70 Cr App R 233 at 235):

> 'Mr. Raymond did put before us a suggestion that he might bring civil proceedings in order to obtain a declaration as to the powers . . . of the Director of Public Prosecutions. I would simply say that this is not the sort of case in which the Court in its discretion would grant a declaration.'

Undeterred by this intimation, which was given to him on 29 October 1979, Mr Raymond caused to be issued on 18 December 1979 the writ in the proceedings which give rise to this appeal.

By his statement of claim, which was indorsed on the writ, he sought a series of declarations as well as an injunction and damages. The defendants were the Director of Public Prosecutions, Mr Wooler, Mr Dowling (also in the office of the director) and Mr Carne. The real target of the action was, however, the director, whose conduct Mr Raymond seeks to call in question. As that officer of justice acts on behalf of the Attorney General that officer of the Crown is treated as the defendant in place of the first three defendants named in the writ.

In support of his prayer for the various forms of relief sought, Mr Raymond pleaded that the director had first declined to become involved in the proceedings instituted against Mr Carne but had, some two months later, reversed that attitude and that Mr Wooler had told the St Albans justices that the reason he was offering no evidence was that the prosecution of Mr Carne would complicate the proceedings in which that person was a witness. A further allegation was that Mr Carne had made it known that he would not be prepared to give evidence for the prosecution at the Crown Court if he was faced with further private proceedings.

There follows the allegation in para 10 of the pleadings:

> 'On the facts as they are known to me it appears that [the director of Public Prosecutions] has acted unlawfully by deciding as a matter of policy not to prosecute or allow to be prosecuted for any offence [Mr Carne] for many different offences.'

Then in para 11 it is alleged that:

> 'In all the circumstances it is clear that [the Director of Public Prosecutions] has improperly agreed with [Mr Carne] that he will not be prosecuted. . . . In return for this [Mr Carne] is going to give evidence against me and my co-defendants. Such course of action is a breach of the rules of natural justice and/or unlawful and/or ultra vires the provisions of the Prosecution of Offences Act 1979.'

The Director of Public Prosecutions applied to have the statement of claim struck out under RSC Ord 18, r 19 as disclosing no reasonable cause of action. The order sought was made by Master Creightmore on 28 February 1980. The plaintiff (Mr Raymond) appealed, and on 7 May 1981 Glidewell J gave judgment dismissing the appeal and upholding the striking out of the statement of claim as disclosing no reasonable cause of action and under the inherent jurisdiction of the court as being frivolous or vexatious or an abuse of the process of the court.

In the course of his judgment the judge cited the well-known passage from the judgment of Fletcher Moulton LJ in *Dyson v A-G* [1911] 1 KB 410 at 418, where it was emphasised that the—

> 'power of arresting an action and deciding it without trial is one to be very sparingly used and rarely, if ever, excepting in cases where the action is an abuse of legal procedure.'

Glidewell J went on to state that, as counsel for Mr Raymond acknowledged in this court:

> 'The major question is one of law, namely, what are the limits of the discretion of the Director of Public Prosecutions under s 4 of the Prosecution of Offences Act 1979 to "undertake the conduct of a prosecution commenced privately"?'

This question was considered by Mars-Jones J in *Turner v DPP* (1978) 68 Cr App R 70 at 76. He there stated that—

> 'having regard to the wide powers conferred by the statutes and regulations to which I have referred, it is impossible to argue that it was unlawful or *ultra vires* for the Director of Public Prosecutions to intervene in this private prosecution only for the purpose of offering no evidence. As [counsel for the Director of Public Prosecutions] has pointed out there is nothing novel about such a procedure. The Attorney-General could always enter a *nolle prosequi* in criminal proceedings before Courts of record, and the Courts have never sought to interfere with the exercise of that power.'

In *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 at 88, [1978] AC 435 at 487 Viscount Dilhorne observed:

> 'The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a nolle prosequi. . . . He need not give any reasons. he can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence.'

Section 4 of the 1979 Act has already been cited. It may be observed that while any person may institute or 'carry on' any criminal proceedings the director may undertake, at any stage, the 'conduct' of those proceedings. The word 'conduct' appears to us to be wider than the phrase 'carry on' and suggests to our minds that when the director intervenes in a prosecution which has been privately instituted he may do so not exclusively for the purpose of pursuing it by carrying it on, but also with the object of aborting it, that is to say he may 'conduct' the proceedings in whatever manner may appear expedient in the public interest. The director will thus intervene in a private prosecution where the issues in the public interest are so grave that the expertise and the resources of the director's office should be brought to bear in order to ensure that the proceedings are properly conducted from the point of view of the prosecution.

On the other hand there may be what appear to the director substantial reasons in the public interest for not pursuing a prosecution privately commenced. What may emerge from those proceedings might have an adverse effect on a pending prosecution involving far more serious issues. The director, in such a case, is called on to make a value judgment. Unless his decision is manifestly such that it could not be honestly and reasonably arrived at it cannot, in our opinion, be impugned. The safeguard against an unnecessary or gratuitous exercise of this power is that by s 2 of the 1979 Act the director's duties are to be exercised 'under the superintendence of the Attorney General'. That officer of the Crown is, in his turn, answerable to Parliament if it should appear that his or the director's powers under the statute have in any case been abused.

Mr Raymond, if he is still concerned to bring Mr Carne to trial, can seek to start again

[illegible] that his proper release date from prison was last

at the St Albans Magistrates' Court. The major reasons which prompted the intervention of the Director of Public Prosecutions in 1979 may no longer exist. Mr Raymond's insistence on justice being done might be better served by such a course than by the fruitless pursuit of those engaged in the important and sensitive duties attaching to prosecutions. We are by no means encouraging Mr Raymond to lay fresh informations. The justices might take the view that such a course would be oppressive, or in any case that the evidence was inadequate, or even, possibly, that the intended prosecution by Mr Raymond was itself tainted by mala fides or spite or some other oblique motive.

In our opinion the careful judgment of Glidewell J was entirely right in its reasons and its conclusions and we accordingly dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Hallinan, Blackburn Gittings & Co* (for Mr Raymond); *Treasury Solicitor.*

Henrietta Steinberg Barrister

R v Governor of Blundeston Prison, ex parte Gaffney

QUEEN'S BENCH DIVISION
LORD LANE CJ, LLOYD AND EASTHAM JJ
23 MARCH 1982

Sentence – Reduction – Period spent in custody – Concurrent sentences – Defendant spending separate periods in custody pending sentence for separate offences – Defendant sentenced to concurrent periods of imprisonment – Whether defendant's sentence should be reduced by both periods spent in custody pending sentence – Criminal Justice Act 1967, s 67(1).

In May 1979 the applicant was convicted by a magistrates' court of a series of offences and was committed to the Crown Court for sentence. He was detained in custody from 6 June to 2 July (the first custody period) pending sentence in the Crown Court. On 2 July the Crown Court deferred sentence and the applicant was released from custody. On 4 October during the deferment period the applicant was convicted by another magistrates' court of a second series of offences and was again detained in custody from 4 October to 7 December (the second custody period) pending sentence in the Crown Court. On 7 December the Crown Court sentenced him to 37 months' imprisonment for the first series of offences and three years concurrent therewith for the second series of offences, which effectively meant that the applicant was required to serve the longer sentence of 37 months reduced, under s 67(1)[a] of the Criminal Justice Act 1967, 'by any period during which he was in custody . . . in connection with [the] sentence or the offence'. The Home Office maintained that under s 67(1) the applicant's sentence could only be reduced by the time spent in custody during the first custody period, since he was not in custody during the second custody period in connection with proceedings relating to the sentence for the first offences. When his term of imprisonment, less the periods of custody, expired the applicant applied for a writ of habeas corpus addressed to the governor of the prison where he was detained to show cause why he should not be released immediately.

Held – On the true construction of s 67(1) of the 1967 Act the applicant was only entitled to have the time spent in custody during the first custody period credited against his sentence because that was the only period in which he had been in custody 'in connection with' proceedings relating to his sentence of 37 months for the first series of offences; the second custody period could only be credited against the sentence of three years imposed in respect of the second series of offences, and that sentence had been incorporated into the longer sentence for the first series of offences. Accordingly, the application would be refused (see p 494 *e* to *h*, post).

Notes

For the duration of a sentence, see 11 Halsbury's Laws (4th edn) para 497.

For the Criminal Justice Act 1967, s 67, see 25 Halsbury's Statutes (3rd edn) 894.

Application for habeas corpus

The applicant, Kevin Patrick Gaffney, was convicted in the Ipswich Magistrates' Court, on 14 May 1979, of receiving stolen property, theft, obtaining property by deception and forgery, and, on 24 May 1979, of handling stolen goods and failing to surrender to bail when he also admitted ten further offences. In respect of all those offences the Ipswich magistrates committed the applicant to the Crown Court for sentence and from 6 June to 2 July 1979 he was in custody pending his appearance in the Crown Court at Ipswich for sentence. On 2 July the Crown Court deferred sentence. On 4 October 1979, during the period of deferment, the applicant was convicted in the Middlesborough Magistrates' Court of a further series of offences involving dishonesty and in relation to those offences the Middlesborough magistrates committed him in custody to the Crown Court for sentence. He remained in custody until 7 December 1979 when the Crown Court at Ipswich sentenced him to 37 months in respect of the convictions in the Ipswich Magistrates' Court and to three years, concurrent therewith, in respect of the convictions in the Middlesborough court. In accordance with Home office practice in the case of concurrent sentences the department adopted the longer sentence of 37 months (for the convictions in the Ipswich court) as the one which determined the date of the applicant's release from prison, and, pursuant to s 67(1) of the Criminal Justice Act 1967, reduced the 37 months' sentence by the period spent in custody in connection with the Ipswich convictions between 6 June and 2 July 1979, but did not reduce the 37 months by the later period spent in custody from 4 October to 7 December 1979, on the ground that it was time spent in custody in connection with the convictions in the Middlesborough court and did not, under s 67(1), fall to be deducted from the sentence for the Ipswich convictions. Accordingly the Home Office maintained that the applicant was not due to be released from Blundeston Prison, where he was detained, until 23 May 1982. The applicant applied for a writ of habeas corpus ad subjiciendum addressed to the governor of Blundeston Prison to show cause why he should not be released from prison immediately, on the ground that the Home Office was erroneous in failing to deduct both the periods he had spent in custody from the 37 months' sentence and, on the basis that both periods were deducted, he was entitled to be released on 19 March 1982.

Graham Parkins for the applicant.
Simon D Brown for the governor.

EASTHAM J delivered the first judgment at the invitation of Lord Lane CJ. This matter came before McNeill J yesterday on an ex parte application, and by direction of the judge the m[illegible] was adjourned so that notice could be given to the governor of the prison involved and to the Treasury Solicitor. It is a short but difficult point for the decision of the court.

It is the submission of the applicant that his proper release date from prison was last

[a] Section 67(1), so far as material, provides: 'The length of any sentence of imprisonment imposed on an offender by a court shall be treated as reduced by any period during which he was in custody by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose . . .'