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SUPREME COURT OF JUDICATURE (AMENDMENT) ACT 1993[1]

THE Supreme Court of Judicature (Amendment) Act is an important and substantial piece of legislation which came into force on 1 July 1993 by Ministerial appointment and notification in the Gazette. The changes it effects include the creation of permanent membership of the Court of Appeal, the reformation of the original civil jurisdiction of the High Court, the rectification of the original criminal jurisdiction of the High Court, the conferment of additional powers on the High Court, in particular the power to award damages in lieu of specific performance, the introduction of an innovatory fiat to transfer by allocation proceedings otherwise seizable in the High Court to the District Court, and the affirmation of the power to employ assessors in High Court trials.[2]

A. *Creation of Permanent Court of Appeal*[3]

The creation of permanent membership of the Court of Appeal is an advance towards autochthony.[4] An earlier important step was the drastic paring of Privy Council appeals *via* the Judicial Committee (Amendment) Act 1989 which removed Privy Council appeals in respect of most criminal cases[5]

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1 No 16 of 1993. GN S 1 and s 234/93. The Bill was passed on 12 April 1993.

2 This legislation comment will not discuss all the changes wrought by the Act such as the raising of the minimum limit for purposes of executing a writ of execution, the raising of the floor limit for the purposes of a right to appeal to the High Court, the empowering of the Registrar to authorise a solicitor to exercise the powers and perform the duties of an officer of the Sheriff and so on.

3 Permanent membership is a more accurate description of the changes but the Law Minister, Prof Jayakumar, certainly referred to them in these terms: see *The Straits Times,* 13 April 1993.

4 The Law Minister, Prof Jayakumar, has described it as a presage of the eventual abolition of Privy Council appeals. There can be little justification for two final courts of appeal and there is already little justification for a three-tier civil appeal from the subordinate court to the High Court to the Court of Appeal. See also the Application of English Law Act (No 35 of 1993), introduced after Act No 16; A Phang, "Cementing the Foundations: the Singapore Application of English Law Act 1993" (unpublished).

5 S 3(4) removes an appeal in any criminal matter except where the offence is punishable by death or life imprisonment and the decision of the appellate court is not unanimous.

while reserving civil appeals to the consent of all parties to the litigation.[6] Permanent membership of the Singapore Court of Appeal which is the second step comes not a moment too soon. The permanent members of the Court of Appeal are the Chief Justice, Vice-Presidents (who must be Judges of Appeal)[7] and Judges of Appeal. There are, however, vestiges of the earlier court in the two provisions (draw-down and draw-up provisions) which reduce the significance of permanent membership. A Judge of Appeal may sit in the High Court whenever the business of the High Court so requires. At the same time, a judge of the High Court may, on the request of the Chief Justice, sit as a judge of the Court of Appeal.[8]

Although the reasons for permanent membership are not easy to discern from the scanty comments passed during the Parliamentary debates and from the explanations provided in the explanatory notes, they are easy to speculate. Judges are men of like passions. A Daniel appointed at the tender age of 40 years will appreciate the prospects of elevation to a Judge of Appeal. But this piece of product differentiation of course serves a higher end and would be little to the purpose if it did not. Development of the local law is in view. To entrust the development of the local law to the best and wisest of Law's Empire is logical.[9] To signify their stature and to approve their counsel and wisdom openly, instead of leaving it to reputation and secret approbation is congenial. If the English experience is anything to go by – and perhaps the remarkable thing is that one has to go back quite a bit for a suitable parallel – a more vibrant legal system may ensue. Between 1703 and 1773, the average per year of House of Lords appeals and Exchequer Chamber appeals was 1.05 and 3 respectively compared with 8.9 Chancery appeals per year.[10] Two reasons accounted for the higher incidence and manifest vibrancy of Chancery appeals, namely, the absence of intermediate review and the fact that a new bench passed judgment on the case whereas in House of Lords appeals the practice of acting upon the advice and opinion of the judges of the superior courts meant "the same judges who had passed on the case in the intermediate courts of review were at least a considerable part of the actual tribunal."[11] A permanent Court

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[6] S 3(3) removes an appeal in a civil matter except where the parties have at any time before the hearing of the case by the appellate court consented in writing to be bound by an appeal to the Judicial Committee. See also the Legal Profession (Amendment) Act 1989, s 98(6).

[7] This is implicit in s 15(2). Presently there are two Judges of Appeal, namely, Thean J and Karthigesu J: see *The Straits Times,* 27 June 1993.

[8] It is presumably implied that he is not otherwise deemed to be a member of that court nor does he cease to be a member of the High Court.

[9] Especially in the light of changing conditions and for the purpose of adapting English law to local conditions.

[10] Roscoe Pound, *Appellate Procedure in Civil Cases* (1941), at 38.

[11] *Ibid,* at 39.

of Appeal, in the sense of a court with permanent members, in principle at least, will impart to its judgments a greater weight of authority.[12] Disembarrassed of inhibitory factors, it might strike sail in a way perhaps beyond the former court.

But the system set up is not yet a full flight response. Flexibility is promoted by a draw-up provision, as mentioned earlier, which ensures that the pool of talent will never be drawn low or drawn dry; a judge of the High Court with a known expertise may be prevailed upon. Since flexibility is inimical if it means that a man may be "tried" twice by the same judge, no Judge of Appeal may sit on appeal from a judgment or order, conviction or sentence, or in a consideration of any point reserved by him (as a judge of the High Court).[13] The uncertainty whether the Court can be made up entirely of *ad hoc* members is less justifiable and could have been unintended. If it may be so made up, that would be a defect. The Court of Appeal should in principle always comprise at least a permanent member and at most two *ad hoc* members;[14] and for what it is worth, the recent experience seems to bear this out.[15] In important appeal cases, the Court should be constituted entirely by permanent members; happily, this is easily accomplished within the framework of the Act by the Chief Justice refraining from requesting *ad hoc* membership.

So then, there is now the framework of permanent membership established, although there may not always be a truly permanent Court of Appeal. In time the draw-up and draw-down provisions should be left on the statute book as exceptional provisions. Too liberal invocation of the draw-down provision will also have its price. When the Master of the Rolls was also a judge of first instance of the Rolls Court, after the death of James LJ came the embarrassment of a relatively junior Court of Appeal sitting in judgment of the judgments of Sir George Jessel, the Master of the Rolls. This led to the elimination of the Master of Rolls' office as a first instance judge and his being made a permanent *ex officio* member of the Court of Appeal.[16] The Chief Justice is not only the President of the Court of Appeal; he is also a judge and President of the High Court.

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[12] With this change, the judgment of a court of three judges of the High Court constituted under s 21(2) can no longer stand alongside the judgment of the Court of Appeal; *cf Chia Kuek Chin* (1909) 13 SSLR 1.

[13] S 30(3).

[14] This may be the import of s 29. If the Chief Justice should request three judges of the High Court pursuant to s 29(3) to sit as judges of the Court of Appeal, the Court of Appeal might be argued to be improperly constituted. The trouble is that section 4 may be interpreted to support complete *ad hoc* membership.

[15] In criminal cases, the English practice is to constitute a court comprising a Lord Justice of Appeal and two puisne judges of the High Court.

[16] In 1881. See Goodhart, *Five Jewish Judges of the Common Law* (1949), at 21.

This not remarkable. The Lord Chancellor of England is President of the Equity Division of the High Court as well as President of the Court of Appeal. But the Lord Chancellor hardly sits as a first instance judge. What embarrassment must ensue if the Chief Justice or a Judge of Appeal regularly sits as a first instance judge whose judgments are reversed by the Court of Appeal!

There are other notable improvements in the appellate system. The fusing of the two formerly separate Courts of Appeal (the Court of Appeal and the Court of Criminal Appeal) is more than purely cosmetic. In the first place, there should never have been two separate courts. The English had a separate Court of Criminal Appeal as a result of the Criminal Law Act 1907. It had to be a separate court because its composition differed markedly from that of the Court of Appeal established under the Judicature Act 1873. Its members were High Court judges whereas the Court of Appeal members were the Lords Justices. In Singapore this was never so. But both courts were similarly constituted except that the Court of Criminal Appeal should be summoned in accordance with the Chief Justice's direction – an inconsequential difference.[17] Fusion will helpfully eliminate difficulties of binding precedent when two different courts of co-ordinate jurisdiction reach contrary decisions.[18]

The creation of a two-judge Court of Appeal for interlocutory cases is also a notable improvement. A two-judge Court of Appeal (resembling superficially the English Divisional Court) will decide appeals against an interlocutory order or any other order which is not a judgment obtained after trial or other hearing.[19] This amendment is a matter of economics. But its rigidity is surprising; since some flexibility in allowing the convening of a court of three or more Judges of Appeal would seem desirable where the order concerns an important point of law and perhaps where the interlocutory order is virtually a final order in practice.

As to the details, the presidency of the Court of Appeal may be criticized as employed in an ambiguous sense. It certainly does not entail that the Chief Justice as President must always preside in all sittings of the Court of Appeal. Where he is absent for any cause, the presidency shall be determined in accordance with the order of precedence prescribed in section 4A (*sic*).[20] The trouble is that section 4 suggests an absurdity, that in the absence of the Chief Justice, and the Vice-Presidents, and the other Judges of Appeal, the High Court judges which are also mentioned in section 4

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[17] S 43(1).

[18] See *Jackson's Machinery of Justice* (8th ed, 1989), at 201 on the problems of the English Court of Criminal Appeal.

[19] S 30(2). See also *Ruby Investment (Pte) Ltd* v *Candipark Pte Ltd* [1989] 3 MLJ 396.

[20] It may well be that where the office of Chief Justice is vacant, the Court of Appeal cannot properly be constituted.

in order of their seniority will be in turn Presidents of the Court of Appeal.[21]

Section 29A(1) has rather unhappily been left intact. Questions may still be raised as to whether the Court of Appeal may hear an appeal from the revisionary jurisdiction of the High Court in civil matters. There appears to be an interesting contrast with the revisionary jurisdiction in criminal matters. Although the exercise of the revisionary jurisdiction in criminal matters may not be reviewed, points may be reserved for the determination of the Court of Appeal.[22] Again, questions may be raised as to whether the decision of a High Court judge refusing leave to appeal is itself appealable to the Court of Appeal. That decision would not appear strictly to be made in the exercise of the High Court's original or appellate jurisdiction.

Some consideration of the supervisory jurisdiction of the High Court would have been invaluable for the avoidance of doubts. Whereas in England the original jurisdiction unquestionably includes the supervisory jurisdiction which the High Court exercises over inferior tribunals, the Supreme Court of Judicature Act which defines the original jurisdiction seems to restrict its meaning significantly to trial jurisdiction.[23] It remains doubtful whether an appeal to the Court of Appeal lies as to the exercise of the High Court's supervisory jurisdiction (under section 27); although cases proceed as a matter of course. If the appellate civil jurisdiction is exercised in respect of the exercise of the original and appellate jurisdiction of the High Court, and if the original jurisdiction does not include the supervisory jurisdiction, where is the authority to hear an appeal as to the exercise of the supervisory jurisdiction? Appellate jurisdiction is a creature of statute. If not provided for, it is non-existent; which leads to a more general comment. A general provision that the Court of Appeal shall have such appellate jurisdiction as is vested in it by other written law would not be superfluous if only because it would take in such jurisdiction as might otherwise be conferred by other written law.[24]

Still on the details, section 29A(2) describes and confers a very wide appellate criminal jurisdiction which is in contrast with High Court review

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[21] Although not made an *ad hoc* member of the Court of Appeal.

[22] S 60(5)(b).

[23] The supervisory jurisdiction therefore is provided for separately by s 27. *Cf* in the case of habeas corpus proceedings, s 335 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed).

[24] Admittedly, such provision is extremely rare; but see the Arbitration Act (Cap 10, 1985 Rev Ed) s 29(3). There is a provision that the High Court shall have such jurisdiction as is conferred on or vested in it by any written law. This apparently is treated as part of its original jurisdiction. There is another provision that the High Court shall have such appellate jurisdiction as is vested in it by written law: a paraphrase of s 20(c). The effect of ss 29A(1) read with 20(c) is to confer an appellate jurisdiction on the Court of Appeal whenever statute gives a right of appeal to the High Court from a decision of any tribunal.

of subordinate court trials. By section 256 of the Criminal Procedure Code,[25] not any decision of a subordinate court is appealable but only a final order which effectively disposes of the issues in the case.[26] But the Court of Appeal is not a court within the Code[27] and section 29A(2) must mean that any decision made by a High Court judge in the course of a trial may be appealed against to the Court of Appeal. A ruling rejecting a submission of no case to answer may apparently at once be appealed although not a ruling which finally disposes of the issue. This will be an awkward result[28] unless the reasoning in a 1987 case[29] is extended. There it was held that upon regard to the legislative history of section 44 (which section 29A(2) replaces), the words "any decision of the High Court" meant any final decision.[30] Since the draftsman may be imputed with knowledge of the pre-existing law, his employment of the same expression in section 29A(2) should attract the same consequence.

Section 29A(3) is important.[31] The Court of Appeal, it says, shall have all the authority and jurisdiction of the court or tribunal from which the appeal was brought. Authority is not synonymous with jurisdiction. Nor is the authoritativeness of a Court of Appeal judgment by this provision reduced to the level of the first instance judgment. But the provision will secure for the Court of Appeal the power to punish a contempt of court which is a challenge to the authority of the court.

As to more general criticisms, some criticisms may be made as to the classification of non-appealable matters and matters appealable with leave as contained in section 34. The provision is re-organized. Subsection (1) deals with non-appealable matters. Subsection (2) deals with matters appealable with leave. But there are also important changes. More matters are now non-appealable. The amount of the value of the subject matter at trial is raised to $30,000. Does this mean the sum sued for or the sum awarded? But in interpleader cases there is no restriction as to the value of the subject matter. Is this illogical? As leave is often given where an important question of law arises, why not specify expressly this important criterion in the giving

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[25] Cap 68, 1985 Rev Ed.

[26] *Maleb bin Su* v *PP* [1984] 1 MLJ 311.

[27] Although the term "court" is not defined section 6 clearly contemplates the courts of original jurisdiction.

[28] S 30(2) refers to the civil jurisdiction of the Court of Appeal and the fact that it contemplates that orders will be re-heard by a Court of two judges is unhelpful in the construction of s 29A(2).

[29] *Mohamed Razip* v *PP* [1988] 1 MLJ 84.

[30] *Ie,* the epithet "any" was intended merely to emphasize the competence of the Public Prosecutor to appeal against an acquittal, which was simultaneously being introduced in the Judicature (Amendment) Act 1973.

[31] *In pari materia* with s 15(3) of the English Supreme Court Act 1984.

of leave? Why not allow the parties to agree not to appeal if a judgment by consent is already non-appealable?

That no attempt was made to include leap-frogging provisions is regrettable. A three-tier appellate civil jurisdiction is pretty ample – perhaps it is too generous; but it can lead to great waste of resources where an appeal must be brought by reason only of conflicting judgments of the intermediate review court. The High Court is, for most purposes following the curtailment of Privy Council appeals, an intermediate review court. Without a leap-frogging provision, the subordinate court judge will be bound by conflicting High Court judgments. An appeal to the High Court will not resolve the dilemma since judgments of the High Court are not binding on High Court judges. Only direct appeal by way of leap-frogging the High Court will afford a satisfactory solution.[32]

That no attempt was made to reconsider the revisionary system is also regrettable. It was introduced in times when the inferior courts were and might sometimes be constituted by laymen. The most informal means were thought suitable to check on such inferior courts; so that notwithstanding the parties might not have raised an appeal, the High Court might call for the record with a view to ensuring its legality and propriety. But the climate of opinion has clearly changed. The subordinate courts are increasingly entrusted with the trial of cases previously out of their reach. The reform to be discussed later whereby the Chief Justice acting by fiat may allocate proceedings to the District Court must also be a vote of confidence in the subordinate judges. Again, transfer of proceedings from the subordinate court to the High Court has in modern times been extremely rare.[33] In the face of all this, to leave the revisionary jurisdiction intact is aberrational.

B. *Clarifying/Re-defining the Civil Jurisdiction of the High Court*

The clarification or re-definition which the Act brings to the civil jurisdiction of the High Court was procrastinated; and delay had begun to give strange doctrine full possession, namely that by virtue of the former section 16(1) the High Court was without jurisdiction by reason only that a defendant was present within the jurisdiction when served with a writ; that neither could a defendant submit to the in personam jurisdiction of the High Court; and that the assumption of jurisdiction was mandatory upon satisfaction of one of several of the grounds of jurisdiction which

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[32] *Cf* the English Administration of Justice Act 1969; and the Practice Direction in [1970] 1 WLR 97.

[33] For a statement of the judicial attitude towards the transferred criminal jurisdiction, see *Wong Hong Toy* v *PP* [1986] 2 MLJ 336; *Lin* v *PP* [1987] 1 MLJ 106.

the provision enumerated.[34] What was left but to argue that parties could submit their disputes as to property situate abroad to the High Court, obliging the court to try the dispute in spite of the *Moçambique* rule.[35] Contrary views were possible.[36] One remembers the powerful advice of Lord Cairns that established rights (and rights of access to the courts are not less rights) were not to be taken away as a matter of implication.[37] Since nothing in section 16(1) expressly denied the validity of presence and voluntary submission as grounds of jurisdiction, these were not to be taken as done away with by a provision which was manifestly enabling in character. In truth, the astonishing propositions were based on tacit notions of jurisdiction which were as radical as they were far-reaching. Whereas jurisdiction depends on a concurrence of ground (or nexus) and service of writ, the propositions made ground (or nexus) the singular touchstone. The courts rightly refused to see section 16(1) as having anything to say with regard to the exercise of jurisdiction. Section 16(1) was merely laying down the grounds of existence of jurisdiction. The court was not invariably obliged to exercise jurisdiction which existed and in its inherent jurisdiction always could control the exercise of jurisdiction according to the doctrine *offorum non* conveniens.[38] The courts appeared also to have continued to recognize presence as a valid ground of jurisdiction.[39] But when Michael Hwang JC rejected voluntary submission[40] as a ground of jurisdiction, judicial acceptance of unorthodoxy could no longer startle.[41]

Whether the amendments to section 16(1) are a clarification or a reinstatement of orthodoxy is neither here nor there.[42] The important thing

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[34] Mohan Gopal, "The Original Civil Jurisdiction of the Singapore High Court: Some Issues" [1983] 2 MLJ lxiv.

[35] [1893] AC 603. Which rule had clearly been adopted in *Leong Chek Yeng Tong* v *The Chinese Commercial Bank Ltd* (1922) 15 SSLR 246; *Foo Eng Siang* v *Allagapah Chetty* (1912) 1 MC 66; *Loke Wan Wye* v *Registrar of Deeds, Singapore* [1929] SSLR 234.

[36] YL Tan, "In Personam Jurisdiction of the Singapore Courts" [1989] 3 MLJ xli.

[37] *Green* v *The Queen* (1876) 1 App Cas 513 at 535. See also *M* v *G* (1904) 8 SSLR 82 at 85.

[38] Quite apart from Ord 25 r 4; see *Khaw Kok Sin* v *Khaw Gim Leong Co Sdn Bhd* [1974] 1 MLJ 180. See also Ord 92 r 4 and the convincing reasoning of Chan Sek Keong J in *Emilia Shipping* case [1991] 2 MLJ 379. See now the power in the First Schedule to dismiss or stay proceedings by reason of Singapore not being the appropriate forum.

[39] Although *Atmaran* v *Essa Industries* [1969] MLJ 44 is highly questionable.

[40] Distinguishable from an agreement to submit which is the subject of the former s 16(2).

[41] *Indo Commercial Society (Pte) Ltd* v *Ebrahim Yusef Abdul Rahman Rahmani* [1992] 2 SLR 1041. Chan Sek Keong J's pronouncement in *Emilia Shipping Inc* v *State Enterprise for Pulp and Paper Industries* [1991] 2 MLJ 379 that the jurisdiction was wholly statutory and radical was a little worrying and tended to approve of a mistaken proposition that the Singapore jurisdiction unlike the English was statutory. After 1873 the English jurisdiction is also wholly statutory: see Diplock LJ in *Garthwaite* v *Garthwaite* [1964] P 356 at 388.

[42] The latter would seem more likely since the explanatory note describes clause 10 as redefining the civil jurisdiction. There was a previous attempt to bring Ord 11 r 1(1) into

is that they establish the orthodox concept of jurisdiction.[43] The in personam jurisdiction, section 16(1) directs, will be well-founded if the defendant is served in Singapore or outside Singapore according to the Rules of Court or if he submits to the jurisdiction of the High Court. The specific reference to the in personam jurisdiction is welcome. This will avoid the awkward suggestion in the former provision that grounds of jurisdiction more suitable to personal actions were to be thrust upon all actions whether personal or not, such as probate, matrimonial, and bankruptcy causes.[44] Where the defendant is in Singapore, Order 10 must be complied with. This captures the ground of presence of the defendant. Order 13 confirms that a default judgment may be granted in his absence provided that he has been served. Where the defendant is outside Singapore, Order 11 rule 1(1) must be complied with. Leave must be obtained, which marks the jurisdiction as discretionary in nature. Order 13 likewise confirms that a default judgment may be granted in the absence of the defendant provided that leave was obtained. The specific reference to the Rules of Supreme Court (in that the court's jurisdiction is there defined) is an endorsement that, as in England, the Rules of Supreme Court may deal with matters of jurisdiction; but only to the extent as hitherto dealt with.[45]

All fundamental principles of jurisdiction should therefore continue,[46] For instance, para (b) is no licence to accept a dispute by virtue of submission even though it involves title to immovable property situate abroad. The fundamental principle that the court has no jurisdiction to adjudicate in such questions surely is part and parcel of the provision. Again, para (b) cannot justify assuming jurisdiction where the jurisdiction is specialized and the terms of that specialized jurisdiction are not met. Parties cannot create jurisdiction by consent where no jurisdiction exists. The ground of submission refers particularly and peculiarly to the in personam jurisdiction; as that is based on presence, submission is the conferring of presence which was otherwise lacking.[47] Where however the jurisdiction, say the admiralty

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conformity with s 16(1). These changes to s 16(1) had to move in tandem with further amendments in the Rules: see Supreme Court (Amendment) Rules 1993, GN S 211/93 which came into effect on 1 July 1993.

[43] They are clearly retroactive in nature. See also *PP* v *Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 14; *Raffles City Pte Ltd* v *Attorney-General* [1993] 3 SLR 580.

[44] YL Tan, *Conflicts Issues in Family and Succession Law* (1993), at 359-362.

[45] And therefore in a sense in spite of the restriction in s 80 of the Supreme Court of Judicature Act to rules of procedure and the exercise of jurisdiction. See also *The Siskina* [1979] AC 210 at 254.

[46] Even in a Code, fundamental principles are not to be taken as abrogated simply by reason of lack of mention of them: see *Yuvaraj* v *PP* [1969] MLJ 89.

[47] It matters not that this is conferred by statute. As Diplock LJ says, "in the case of courts created by statute, such as the Supreme Court of Judicature, comprising the High Court

jurisdiction, is based on some specific connecting factor other than presence, the absence of that connecting factor means the absence of jurisdiction; consent cannot create something out of nothing.[48]

Some criticisms of this amendment are serious and ought to be addressed. First, it has the effect of undermining the exclusive jurisdiction of the Syariah Court as a result of the failure to appreciate that the jurisdiction of the Syariah Court is not typically in personam but matrimonial in nature. Subsection (2) is in the wrong place. It should be qualifying the reference to matrimonial jurisdiction in section 17 as well; not only the in personam jurisdiction in section 16(1). Secondly, there is a failure to appreciate that section 16(1) as amended is no longer the general provision that it was previously. So subsection (3) which makes written law subject to the generality of the in personam jurisdiction in subsection (1) is nearly always meaningless unless the written law is affecting the in personam jurisdiction.

The removal or implicit elimination or destruction of the inherent jurisdiction is also a shortcoming. When section 16(1) provided that the High Court had the jurisdiction to try all civil proceedings, it provided for the inherent jurisdiction; since, as Terrell Ag CJ said of a similar expression in a precursor of section 16(1), it was apt to confer "the widest possible jurisdiction in all suits, matters and questions of a civil nature",[49] inclusive of the inherent jurisdiction. The amended provision by specifically referring to the in personam jurisdiction may be adverse to the existence of an inherent

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and the Court of Appeal, has been since 1873, the court has no power to enlarge its jurisdiction in the strict sense": *Garthwaite* v *Garthwaite* [1964] P 356 at 388.

[48] The *Avro International* [1988] 1 MLJ 147 affirming the decision in *The Avro Venture* [1987] 1 MLJ 16 seems to be the creation of something out of nothing. Properly understood, though admittedly the Court of Appeal's reasoning is obscure and the reliance on the *Bilbao* (1860) Lush 149 unconvincing, the case was correctly decided. The correct reasoning appears in *The Svale* [1928] SSLR 32. The admiralty jurisdiction must be well-founded in terms of s 3(4) of the High Court(Admiralty Jurisdiction) Act. If any of the paragraphs there enumerated is not satisfied, objection to the jurisdiction may be taken despite an unconditional appearance. Where the jurisdiction is clearly established (on an arguable basis) the defendant cannot merely by alleging that the claim is not well-founded oust that jurisdiction; their allegation is obviously a matter to be heard and determined at the trial of the cause: see *The Svale* at 37. How much more so where he has entered an unconditional appearance. The arrest of the ship "completes" the jurisdiction, being the equivalent 'service of writ'. S 4(4) of the Act (which mirrors s 3(4) of the English Administration of Justice Act 1956) requires that the ship to be arrested must belong to the defendant, the defendant being the person who would be liable in personam on the claim: see *The Permina 108* [1977] 1 MLJ 49. The fact that the ship belongs to another who would be liable in personam on the claim does not go to jurisdiction but merely determines which ship may be arrested. It follows that this liability to arrest is waivable. If bare-boat charterers acquiesce in the arrest of a ship they waive the right to object to the arrest of the ship.

[49] *The Motor Emporium* v *Arumugam* (1933) 7 FMSLR 21 at 26.

jurisdiction to grant declaratory relief as to the validity of a marriage.[50]

There is one attractive consequence, namely, the abrogation of the mysterious "quasi in rem" jurisdiction in the former section 16(l)(b). In an old case, the court gave effect to a fairly similar provision and affirmed the service of writ on an absent defendant.[51] As the absent defendant had property situate in Penang, the court held that it had jurisdiction to entertain a claim for damages for breach of contract. In countries, notably civilian, which accept a true quasi in rem jurisdiction, the possibilities of abuse are well recognized.[52] The property which may be so little as a door plate must lie in the hands of someone who is himself amenable to the jurisdiction although the owner and absent defendant are not. Naturally there are in these countries procedures for seizure of that property which commence the proceedings. But the quasi in rem jurisdiction in Singapore was very different. It was intended to be a discretionary jurisdiction, requiring leave for service of writ on an absent defendant outside the jurisdiction; hence, for instance, para (j) of Order 11 rule 1(1) of the Rules of the Supreme Court 1957.[53] The decision in the *Emilia Shipping* case[54] that the former section 16(l)(b) conferred jurisdiction on the Singapore court quite independently of the admiralty jurisdiction was no doubt correct.[55] Although no procedure for completing the jurisdiction had been laid down in the Rules of the (Singapore) Supreme Court,[56] this was merely an inconvenience.[57] The courts could, as a Malaysian case has held,[58] allow service of writ outside the jurisdiction quite apart from Order 11 whenever there was a proper ground or basis in section 16(1). The elimination of this ground of jurisdiction (for it does not appear in the new Order 11 rule 1(1)) should not occasion regret.

Another attractive consequence is in the restoration of the force of Order 70 rule 3. The restriction by that Order of the exercise of the in personam jurisdiction in collision cases was ever doubtful under the former provision. Since the admiralty jurisdiction in section 17 was stated to be without

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[50] See Stanley Yeo, "Bare Declarations on the Existence of a Marriage" [1982] 2 MLJ xviii; Leong Wai Kum, "The High Court's Inherent Power to Grant Declarations of Marital Status" [1991] SJLS 13; YL Tan, *Conflicts Issues in Family and Succession Law* (1993), at 327-329.

[51] *JMP Smith Sultan of Kedah* (1906) 10 SSLR 1.

[52] See, *eg,* Anton, *Private International Law* (2nd ed, 1990), at 188 *et seq.*

[53] See *Cantrans Services (1965) Ltd* v *Clifford* [1974] 1 MLJ 141.

[54] [1991] 2 MLJ 379.

[55] See also David Chong [1991] SJLS 204.

[56] Para (j) was left out in the Rules of the Supreme Court 1970.

[57] *Cf Ramasamy Chettiar* v *Meyapa Chettiar* [1936] MLJ 271.

[58] *Malayan Banking Bhd* v *International Tin Council* [1989] 3 MLJ 286. See also the old case of *Ramasamy Chettiar* v *Meyappa Chettiar* [1936] MLJ 271 at 272.

prejudice to the former section 16(1), the validity of Order 70 rule 3 might be questioned. How could the Order successfully impose any restriction on the in personam jurisdiction in the face of the generality of the grounds enumerated in section 16(1)? But now that section 16(1) directs the founding of jurisdiction in accordance with the Rules of the Supreme Court, Order 70 rule 3 will be as valid as Order 11 rule 1(1). Both will have to be complied with.

The attempt to maintain a clear distinction between jurisdiction and power is also an improvement. The Attorney-General, when a judge of the High Court, had been very clear as to this. In an important case,[59] he held that "[t]he jurisdiction of a court is its authority, however derived, to hear and determine a dispute that is brought before it"; whereas the powers of a court "constitute its capacity to give effect to its determination by making or granting the orders or reliefs sought by the successful party to the dispute."[60] For this reason presumably the powers are moved from section 18(2) back into a Schedule.[61] Again, the new section 29A(3) deliberately, it would seem, refers to the authority and jurisdiction of the Court of Appeal, leaving the powers to be spelled out in other provisions. Suppose an appeal from the High Court in the exercise of its original criminal jurisdiction. The High Court in its appellate but not original jurisdiction may order a re-trial.[62] By section 29A(3) the Court of Appeal has the authority and jurisdiction of the High Court in its original jurisdiction. If jurisdiction meant power, by this section there would be no power to order a re-trial since the High Court in its original jurisdiction has no such power. But section 54 and not this provision is the source of the power to order a re-trial of criminal proceedings.[63]

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[59] *Muhd Munir* v *Noor Hidah* [1991] 1 MLJ 276.

[60] But Chan Sek Keong J's definition which draws a distinction between the dispute and the relief differs from Thomson CJ's observations on jurisdiction and power in *Lee Lee Cheng* v *Seow Peng Kwang* [1960] MLJ 1. Thomson CJ employed the distinction between jurisdiction and power with great skill so as to show that the conferring on the Supreme Court of the "jurisdiction to enlarge the time prescribed by written law" meant no more than that it was the High Court which was vested in its original jurisdiction with the power to enlarge time; but that power must be exercised in accordance with the statute so that if the statute gave no power to extend time, the High Court could not make an order in contradistinction to the statute. Thomson CJ's understanding was that in a matter of relief, there might be a need to consider both the jurisdiction and the power to grant the relief.

[61] These powers are to be exercised in accordance with the Rules of Court and other written law. *Cf Abu Bakar* v *Jawahir* [1993] 2 SLR 738.

[62] S 256 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed).

[63] In civil proceedings, there is no problem of this kind because s 39 is an express provision. A similar provision is missing from the part of the Act which deals with the appellate criminal jurisdiction.

Of course, problems remain if only because an English-derived system must remain plagued by distinctions which are not always consistently maintained, being sacrificed to expediency as the occasion arises. There may sometimes be a failure to appreciate that a relief may be both a matter of jurisdiction and power. That the term "jurisdiction" is ambiguous is evident from the definition, which has yet to be improved upon, which Diplock J in one place ventured:

> In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed on its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject-matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issue which fall within its 'jurisdiction' (in the strict sense), or as to the circumstances in which it will grant a particular kind of relief which it has 'jurisdiction' (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances.[64]

Power by a synecdoche is sometimes put for jurisdiction; but not every relief is a matter solely of power. When the equity courts wrested business from King's Bench, they sometimes did so under cover of their auxiliary jurisdiction; so that sometimes jurisdiction really meant power. But in not a few cases, jurisdiction has its own significance. Hence the jurisdiction to award damages in lieu of specific relief is referred to as a jurisdiction in the Lord Cairns Act. So also, the authority in divorce petitions to grant ancillary orders in respect of maintenance and custody is referred to as an ancillary or incidental jurisdiction; not as an ancillary power.[65]

A distinction between jurisdiction and power is of value principally as an expression of the legitimate boundaries of judicial action. If by jurisdiction is meant a concern with matters that go to jurisdiction, the lack of which vitiates it, whereas power connotes matters which affect the exercise of the jurisdiction,[66] something of value is gained.

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[64] *Garthwaite* v *Garthwaite* [1964] P 356.

[65] See YL Tan, *Conflicts Issues in Family and Succession Law* (1993), at 105.

[66] Powers may of course be exceeded; but unlike a want of jurisdiction, excess of power may be cured.

C. *Clarifying the Criminal Jurisdiction of the High Court*

The amendment Act expands the original criminal jurisdiction by adding in particular para (f) which confers jurisdiction to try any criminal offence, wheresoever committed, which by written law is made triable in Singapore. On the view taken in a Malaysian case, *Rajappan* v *PP,*[67] of the inter-relations of the triability of an offence and the jurisdiction to try it, the absence of a para (f) was a serious deficiency. That view was that not only had the criminal offence to be triable but further and in addition there must be jurisdiction to try the offence within the territorial limits.[68]

The result of such a view is a creation of two questions where there was but one. There is added a new barrier, a highly technical barrier, which to the earlier courts was non-existent.[69] As to this, they were not wrong. As several English courts up to the highest appellate court have clarified, jurisdiction was by a misnomer put for triability.[70] Only triability is important since the court's jurisdiction depends on physical appearance of the criminal defendant. But if the criminal defendant appeared, the issues must further be triable.

Therefore it was sufficient that the Penal Code itself in sections 4 and 5 insisted on triability within the territorial limits of the jurisdiction. Again, where specific legislation provided for triability, that alone was sufficient. The former section 15(1) should have been regarded as a mere provision *ex abundante cautela.* It merely repeated the principle of triability in the language of jurisdiction. The fact that there was absent a para (f) could not preclude the criminal jurisdiction of the court provided the relevant criminal legislation made the case triable.

Fortunately, the view which seems to have been subscribed to by the draftsman can wreak little harm. The generality of para (f) is capable of taking in any statute whatsoever. Otherwise, the view would entail that whenever some statute had not been taken in, the court would be paralysed by a supposed deficiency which in truth is more imagined than real.[71]

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[67] [1986] 1 CLJ 175.

[68] In *Pong Tek Yin* v *PP* [1990] 3 MLJ 219 Thean J remarking that the two pronged questions were remarkably closely connected, treated them as one. Presumably this is also why the jurisdiction to try an offence of piracy is spelled out in s 15(1) while the triability is dealt with as an amendment to the Penal Code (Cap 224, 1985 Rev Ed) carried in the Application of English Law Act (No 35 of 1993).

[69] See *PP* v *Nai Prasit* [1961] MLJ 62; *R* v *Wee Huat* (1881) 2 Ky Cr 103.

[70] See Lord Salmon in *Stonehouse* v *DPP* [1978] AC 55 at 77; Lloyd LJ in *Exp Osman* (1990) 90 Cr App R 281 at 292.

[71] Unless that statute itself conferred the jurisdiction as arguably the Merchant Shipping Act (Cap 179, 1985 Rev Ed) did: see *Mohamed Mokhtar bin Sarjani* v *PP* [1976] 2 MLJ 153.

D. *Additional Powers on the High Court*

Tucked away in the Schedule is an apparently inconspicuous change which confers power (and not jurisdiction) to award damages in lieu of specific performance. The decision in one case, affirmed on a slightly different basis, that such a statutory jurisdiction was left out cannot seriously be faulted.[72] The equity courts always had jurisdiction to award compensation in its exclusive jurisdiction which it exercised over fiduciaries and trustees; so that an award might be made – and following common law principles of compensation – for breach of fiduciary duty. But the equity courts in their auxiliary jurisdiction which they exercised in aid of and as a complement to the common law jurisdiction, were extremely reticent in exercising a similar power to award damages in lieu of specific performance. Hence, the Lord Cairns' Act.[73]

A few words in the Schedule make all the difference. Damages in substitution for or in addition to specific relief (by way, for instance, of an injunction or specific performance) may be awarded. (Indeed, there is power to grant all relief at law or in equity.) The demarcation between jurisdiction and power, as has been discussed, is viable but the denomination of this jurisdiction solely as a power will be unfortunate if it obscures or worse, leads to a refutation of the several limitations (put in terms of jurisdiction) imposed on the power. For instance, there never was any jurisdiction under Lord Cairns Act to award damages where specific relief in the first place would be to compel the performance of an illegal act[74] or to compel an impossibility.[75] Such "defences" raise the more fundamental question whether the court may assume jurisdiction to exercise the power.[76] If they were conceived as being irrelevant, that would be no small loss.

Other notable powers conferred include the power to preserve evidence by seizure, detention, inspection, photographing, the taking of samples, the conduct of experiments or in any manner whatsoever.[77] Here is an

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[72] *Shiffon Creations (S'pore) Pte Ltd* v *Tong Lee Co Pte Ltd* [1988] 1 MLJ 363, aff'd [1991] 1 MLJ 65. See also Son Kee Bun, "Jurisdiction to Award Equitable Damages in Singapore" (1988) 30 Mal LR 79; Leong Wai Kum, "The High Court's Inherent Power to Grant Declarations of Marital Status" [1991] SJLS 13.

[73] 21 & 22 Vict c 27.

[74] *Norton* v *Angus* (1926) 38 CLR 523 at 534.

[75] *Ferguson* v *Wilson* (1866) LR 2 Ch 77.

[76] Generally, see Spry, *Equitable Remedies* (3rd ed, 1984), ch 7.

[77] This legislation comment will not discuss all the additional powers conferred such as the power to award interest on debts and the power to order interim payments. Notice that the power to distrain has been taken out; so it must now be sought solely in the Distress Act (Cap 84, 1985 Rev Ed).

extension of such powers as are already furnished in the Rules of the Supreme Court.[78] The power to order medical examination of a party is a useful innovation. This never was furnished in the Rules. Neither did it exist in the inherent jurisdiction.[79]

The Mareva injunction if its jurisdiction was ever in doubt is now put on a proper footing.[80] There is power to preserve assets for the satisfaction of any judgment which has been or may be made.[81]

The power to award provisional damages in personal injuries cases is by far the most significant new power bestowed on the High Court.[82] This will alter somewhat the way we have thought about these cases.[83] The power to award provisional damages is an abridgement of the lump sum rule of awarding damages. The plaintiff must plead that contingency which if it materialises will increase his loss. Damages will be awarded on a provisional basis disregarding that contingency. If and when the contingency materialises, the plaintiff is entitled to further damages reflecting his losses on account of the contingency. Forcing the plaintiff to specify a material contingency helps to put a defendant on notice; and that is fair to him.[84] Awarding further damages if the contingency materialises achieves fairness for the plaintiff. But as the Rules of Court go,[85] the defendant can take no advantage of a contingency which reduces his liability. The defendant cannot for instance plead a contingency that development of a successful cure for a medical condition will result in complete or partial rehabilitation of the plaintiff so many years into the future. In cases where the victim of negligence is reduced to a living vegetable, astronomical damages can only be avoided by an order awarding provisional damages which will cease upon the materialisation of a certain contingency, namely the death of the plaintiff[86] or by an order as to periodic payments which will take

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[78] See Ord 29 r 3 and Ord 35 r 5.

[79] *H* v *H* [1966] 3 All ER 560; *W* v *W* [1964] P 67.

[80] See George Wei, "The Mareva Injunction in Singapore: Some Recent Developments" (1983) 25 Mal LR 12.

[81] To the extent that an arbitral award may be registered or enforced as a judgment, will this power be available to the parties to arbitration?

[82] The powers to award provisional damages and order payment of damages in personal injuries cases are discussed in detail in KB Soh, "Powers of the Supreme Court of Singapore in Awarding Damages and Interest" (to be published).

[83] Ord 37 rr 7-10 match s 32A of the English Supreme Court Act 1981 and the accompanying English RSC rules which came into force in 1985.

[84] It would also help if the plaintiff is under a duty to mitigate in the sense of avoiding as best he can the fulfilment of the contingency. For instance, if the contingency is that his condition will worsen, he should have to seek such medical attention as in the meantime may hinder or impede a deterioration of his condition.

[85] (Cap 84, 1985 Rev Ed). See the definition of a provisional damages award in Ord 37 r 7(2).

[86] But if death is not a contingency, will it be an intervening event which wipes out liability for further damages even though the contingency arises?

into account material changes in the circumstances affecting the continuation of liability. Death, if it is a contingency, is a contingency which the plaintiff will never plead but the defendant may want to plead. How can it be fair to the defendant when he is not made to pay the costs of maintaining the victim alive who has died?

The power to award periodic payments in personal injuries cases in England was a recommendation of the Pearson Commission which was not taken up[87] while the recommendation as to provisional damages was. Has this power to order periodic payments been taken up? The marginal notes describe the power actually conferred as a power to order periodic payments. The actual wording of the power suggests more a power to order damages which have been assessed as a lump sum to be paid in periodic instalments. If so, it would not appear to be the kind of far-reaching power to order periodic payments envisaged by the Pearson Commission. The award of periodic payments towards medical expenses which will terminate upon death of the victim is very different from spreading out a lump sum award in several fixed instalments which can never be changed as circumstances change. The regret is that the terms of this power were not more clearly spelled out.

E. *Allocation of Proceedings to the District Court*

The allocation of proceedings to the District Court by fiat is something of an innovation. The Chief Justice may by order direct such class or classes or description of proceedings to be heard and determined by the District Court although under written law the District Court would otherwise lack the jurisdiction to try such cases. Two instances are isolated.[88] Since the in personam jurisdiction of the District Court is defined in terms of the quantum of the claim, the order allows the limits to be overcome. But the fiat should be impotent against the prohibition as to the determination of title in the District Court. This would not be a case where the District Court would not have jurisdiction by reason only of the excess of quantum. The second instance takes in the specialized jurisdiction mentioned in section 17 such as the probate jurisdiction, the matrimonial, the admiralty jurisdiction, and so on. The fiat can remove some categories of specialized jurisdiction where the Chief Justice considers it necessary or expedient for the improvement of efficiency in the administration of justice.

Criminal proceedings apparently are outside the scope of the Chief Justice's fiat. Although subsection (1) is capable of extending to criminal

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[87] Cmnd 7054-1 (1978), paras 555-576 and 586-589.
[88] In s 28A(2).

proceedings, the provision in subsection (2) is probably not an amplification of subsection (1) but a restriction. If so, subsection (2) would be an indication that only civil proceedings are in mind.

A mixed reaction to this innovation may be provoked. The litigant's right of access to justice must sometimes bow before the greater public interest in expeditious resolution of disputes. This innovation, however, goes beyond transfer provisions which smooth out aberrations which are inevitable in the best designed judicial system. In the transferred jurisdiction, a trivial case which involves a most momentous point of law may be worthy of trial in the High Court. Contrariwise, a case outside the jurisdiction of the District Court may by virtue of its straightforwardness be more suitably tried there. But to allow a fiat re-distribution is to allow a re-writing of the jurisdictional provisions by an individual other than the elected legislature. The right to sue in the High Court is no small privilege. The Rules Committee must make the rules; but the Chief Justice alone may change "the venue".

F. *Appointment of Assessors in the High Court*

The last reform brought in by the amendment Act was a subject of scepticism of a great judge, Dixon CJ. Out of his considerable experience as a trial judge came three objections which he expressed in a speech delivered to the Medico-Legal Society of Melbourne.[89] First, "[the use of scientific assessors] is directed to part only of the complete question to be decided." Second, "The range of scientific subjects which come before courts is very extensive, and any comprehensive scheme for the use of assessors would require the approval and enrolment of a very great number of persons from various departments of knowledge."[90] Third, if the assessors are a substitute for expert witnesses, they are a poor substitute which will deprive parties of the opportunity to put their case adequately. If they are an addition to experts, they are a doubtful addition which will raise the costs of trial.[91] The anecdote Dixon CJ gives succintly sums up his views:

> Cynics of the Admiralty jurisdiction say that the judge of the Admiralty Division usually considers that he is such a master of maritime knowledge that he consults assessors merely for the purpose of

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[89] "Science and Judicial Proceedings" in *Jesting Pilate* (1965), at 11.

[90] This point which refers to the English and Australian practice of drawing up a list of assessors is irrelevant for purposes of s 10A.

[91] I may be forgiven this little accretion.

> ascertaining whether they agree with him, or, on the contrary, fall below his standard of skill; that in the Court of Appeal the assessors are often concerned to expose the marine errors and misconceptions of the learned primary judge who conceived himself to be so well informed and experienced; but that in the House of Lords, the assessors, impressed with the splendour of the tribunal they attend, seem more anxious to convince it of their own superiority to their colleagues who misled the Court of Appeal.[92]

Any observation of Dixon CJ is worthy of note; and his objections may serve as a good guide to the application of this last reform, although such objections have not prevented it. Section 10A should not be taken or employed as a substitute for expert evidence or in addition to expert evidence. But judicious employment of assessors may serve to educate a judge in matters falling within the judicial notice as to which no proof has been forthcoming. In other cases, where expert evidence is less than satisfactory (because one party lacks the resources to adduce expert evidence) this facility will supply a deficiency which otherwise might impinge on the justice meted out. If the English experience is anything to go by, trial with assessors is still more exceptional than a regular feature of trial.[93] But then in England, the parties must request for it and there is no power to summon assessors independently of the parties. Section 10A is different in that it confers that independent power which is in England absent.

The effect of this reform is to place assistance by nautical assessors which is an admiralty practice of great antiquity[94] on a proper footing. Although assumed in the Rules of the Supreme Court,[95] there never was any clear provision as to the legitimacy of a trial with assessors.[96] Order 33 rule 1 simply stated that trial with the assistance of assessors was one of three prescribed modes of trial. Rule 4 merely said that such a trial should take place in such manner and on such terms as the court might direct. If the power existed, it arguably existed as an inherent power similar to the inherent power of the court to appoint court experts.[97] An express

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[92] *Supra,* note 89, at 20.

[93] See *Southport Corp* v *Esso Petroleum Co Ltd* [1953] 2 All ER 1204 at 1206.

[94] See *Re Rumney & Wood* (1541) Selden Society Vol 6 pp 102-104 (trans pp 213-215).

[95] Ord 70 r 27.

[96] With the exception of such provisions as s 26(2) of the Land Acquisition Act (Cap 152, 1985 Rev Ed) which made the employment of assessors compulsory.

[97] As to which see *Kennard* v *Asian* (1894) 10 TLR 213; *Colls* v *Home & Colonial Stores Ltd* [1904] AC 177 at 192.

provision such as section 10A clears away all doubts.[98]

The power to summon an assessor being rendered available in any proceedings before the High Court, it will be available in taxation proceedings where the High Court is reviewing a certificate of the taxing officer, in interlocutory proceedings, and in appellate proceedings. The wisdom of employing assessors in criminal proceedings is unproven.[99] That the trial judge may act on the secret advice of an assessor and that the accused should have no opportunity to cross-examine the assessor are objections not easily refuted. One hopes therefore that no one will miss the significance of the reference to the Rules of Court in the provision, a reference more consonant with civil than criminal proceedings.

The same power is available to the Court of Appeal. Section 29A(3) transmits all the powers of the first instance court to the Court of Appeal. Arguably that secures the power for the Court of Appeal. In any case, section 30(4) must remove all doubts.

The assessor is not, however, a court expert who can be cross-examined by the parties;[100] and there is some regret that a parallel power to appoint a court expert whether or not the parties request for it was left out.[101] In England as early as the 18th century the inherent power of the court to appoint court experts without the consent of the parties was recognized although rarely used.[102] Its drawback was that the case must be adjourned in order that an independent expert might be instructed.[103] In 1934, Order 40 of the English Rules of the Supreme Court while removing this impediment made matters worse. Court appointment was made to depend on party application in causes tried without a jury,[104] provoking the following comment from Lord Denning MR:

> Neither side has applied for the court to appoint a court expert. It is said to be a rare thing for it to be done. I suppose that litigants realise that the court would attach great weight to the report of a court expert, and are reluctant thus to leave the decision of the case so much in his hands. If his report is against one side, that side will wish to

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[98] *Cf* s 84 of the English Supreme Court Act 1981.

[99] *Cf Goh Ah Yew* v *PP* [1949] MLJ 150.

[100] *The Queen Mary* (1947) 80 LI L R 609 at 612; *Richardson* v *Redpath, Brown & Co Ltd* [1944] AC 62 at 70; *The Australia* (1946) 79 LI L R 521.

[101] *Cf* Ord 32 r 12 which, however, is limited to matters decided in Chambers.

[102] See also *A-G* v *Birmingham, Tame & Rea District Drainage Board* [1912] AC 788.

[103] *Kennard* v *Ashman* (1894) 10 TLR 213.

[104] Reported decisions are rare but *cf Re L (An Infant)* [1967] 3 WLR 1149.

> call its own expert to contradict him, and then the other side will wish to call one too. So it would only mean that the parties would call their own experts as well.[105]

The same Order 40 exists. The same criticisms of it may be made.

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[105] *Re Saxton* [1962] 1 WLR 968 at 972.

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