NOTES ON SELECTED CASES OF MR. JUSTICE TAN AH TAH

The following case notes have been prepared by members of the Faculty of Law of the University of Singapore, as illustrating something of the variety of cases dealt with by Mr. Justice Tan Ah Tah over the years.

ADMINISTRATIVE LAW

Vasudevan Pillai & Anor. v. *The City Council of Singapore* [1968] 2 M.L.J. 16.

This case, initially heard before Tan Ah Tah J., and finally reaching the Judicial Committee of the Privy Council, raised many points of interest, and is of prime importance in administrative law.

It arose in May 1957 from the dismissal of the plaintiffs, who were daily-rated unskilled labourers, from the defendants' employment on the ground of their refusal to obey the instructions of their superior officers. The plaintiffs claimed that the work they were asked to do (cleaning certain air heaters and ducts in a power station) fell outside the scope of their employment. An enquiry was held into the incident by the acting deputy electrical engineer, a Mr. Roper, the matter then being referred to the deputy president of the City Council. It was decided to terminate the services of the plaintiffs and they were informed of a right of appeal against the decision within seven days. This they utilised and the appeal was heard by the sub-committee of the establishments committee in July 1957. The appeal was dismissed.

The plaintiffs then asked for a declaration that they were wrongfully dismissed and alternatively, damages for wrongful dismissal. The case only came up for hearing five years after the incident before Tan Ah Tah J., who in 1963 gave judgment for the defendants. On appeal by the plaintiffs to the Federal Court of Malaysia, the appeal was dismissed. On further appeal to the Judicial Committee of the Privy Council, the appeal was again dismissed, once and for all, in 1968. However, the reasoning of Their Lordships in all of the courts was not lacking in variety although all concurred in the result.

Tah Ah Tah J. at first instance held, first, that the failure by Mr. Roper to record the statements of all the witnesses in the presence of the plaintiffs and the supplying of relevant information by him to the deputy president without the plaintiffs' knowledge constituted a breach of the rules of natural justice. However, the failure to comply with the rules was cured by the proceedings at the hearing of the appeal. Secondly, he held that the plaintiffs had wrongfully refused to do work being work requiring no skill, well within the capabilities of an ordinary labourer and which the plaintiffs and other labourers had done before.

In other words (not Tan Ah Tah J.'s) they had deliberately refused to do work which fell within the scope of their employment and were in breach of contract. This was the rationalisation of Tan Ah Tah J.'s findings on the evidence by the Federal Court.

Therefore, the plaintiffs were not successful in their action.

On appeal to the Federal Court, the Court upheld Tan Ah Tah J.'s decision, Thomson L.P. and Wee Chong Jin C.J. delivering separate judgments. Thomson L.P. based his judgment on the ground that the plaintiffs had relied on their ordinary contractual rights, and that "it is the plaintiffs who put an end to the contract and that should be the end of the matter". Therefore the rules of natural justice were irrelevant. Wee C.J. held that Tan Ah Tah J. was wrong in holding that a failure to observe the rules of natural justice could be cured on an appeal and therefore the plaintiffs were wrongfully dismissed; however he went on to hold that on the findings of fact of Tan Ah Tah J., (which were not challenged) the defendants were entitled to dismiss the plaintiffs summarily.

The appeal to the Judicial Committee was based on a denial of the rules of natural justice. The Committee's reasoning (Lord Upjohn delivering the judgment) was very different. First, they held that a short answer to the appeal was that the rules of natural justice did not apply *before* the decision to dismiss but only from the moment the employee was informed of his decision and was permitted the right of appeal to the establishments committee. Secondly, however, assuming that the "rules" of the Council as to recruitment, engagement and discipline of the staff formed part of the contract of employment or were a statutory instrument, the rules of natural justice did not apply, for this was a case of "pure" master and servant, the "rules" merely providing a scheme or code for the general administration by the staff of the council and their officers and providing guidance for the heads of departments. Finally, their Lordships added, *obiter*, that if natural justice applied at an earlier stage (before dismissal), they would have agreed with Tan Ah Tah J. that the procedure was defective although what followed had indeed cured the defect, since on the appeal there was a rehearing by way of evidence *de novo* from the witnesses.

It would therefore appear that Tan Ah Tah J.'s actual decision was upheld on both appeals and that his findings of fact were never challenged. Further, his holding that a breach of the rules of natural justice was cured on appeal was quite correct although it was not clear from his own judgment whether the defect was curable because there was a rehearing of evidence *de novo.* Tan Ah Tah J. could of course not have been expected to employ the approach in *Ridge* v. *Baldwin* [1964] A.C. 40, as the Judicial Committee did, not yet been decided. However, *Ridge* was not cited in the Federal Court, which clearly took the untenable approach of holding that the rules of natural justice were irrelevant (Thomson L.P.) or that although there was a breach of the rules the plaintiffs were liable to summary dismissal as they were in breach of contract (Wee C.J.).

The modern *post-Ridge* approach would be as follows: If an employee is entitled to a fair hearing because he holds an office where the employer is under a statutory or other restriction as to the kind of

contract which it can make with its servants, or the grounds on which it can dismiss them, so elevating the relationship of employer and employee to one higher than that of "pure master and servant", then a dismissal without that fair hearing would make the purported dismissal null and void in any event, whether or not the employee was in fact in breach of contract or had committed any misconduct warranting dismissal; the reason being that the court is here concerned with the breach of a fundamental *procedure*, and not with the merits of the dismissal. However, if the case is one of "pure" master and servant, the rules of natural justice have no application, the contract alone being relevant.

V.S. WINSLOW

Sithambaran v. *A.G.* [1972] 2 M.L.J. 175.

The plaintiff was a corporal in the Singapore Police Force. He was charged with certain disciplinary offences under s. 27 of the Police Force Ordinance. He was tried before a disciplinary inquiry conducted by a Superintendent of Police, one Mr. Koh, and at the end of it, was found guilty. An Assistant Commissioner of Police then sent him a letter informing him that Mr. Koh had recommended dismissal and that he (the ACP) concurred with the recommendation. A year later the plaintiff claimed a declaration that his dismissal was null, void and inoperative, and that he was still a corporal. The action was heard by Tan Ah Tah J.

The first and most interesting contention of the plaintiff was that he had not been permitted to be represented by an agent (either an ASP or counsel) at the inquiry, a right to which he was entitled.

The Police Regulations, 1959 were silent on whether subordinate officers could be represented at an inquiry. Tan Ah Tah J. cited *Enderby Town Football Club Ltd.* v. *The Football Association Ltd.* [1971] 1 All E.R. 215, where Lord Denning M.R. said (at 218): "When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the discretion of the [domestic] tribunal. It is master of its own procedure." He then held that Mr. Koh had such a discretion, but that since the plaintiff had, on his own admission, not made the request at the inquiry, the question of discretion never arose. Further, the plaintiff was in no way prejudiced or embarrassed by not being represented by someone. Thus the first contention was disposed of. It therefore became unnecessary for His Lordship to discuss the question whether a right to representation by an agent can be implied at common law. Indeed, there are some cases that do so hold. Lord Denning himself said, in a *dictum* in an earlier case of *Pett* v. *Greyhound Racing Association (No. 1)* [1968] 2 All E.R. 545, at 549, that when a man's reputation or livelihood or "any matters of serious import" are at stake, natural justice requires that he be defended, *if he wishes*, by an agent appointed by him. Such agent could of course be a lawyer and not necessarily a layman.

The same view was taken by Raja Azlan Shah J. in a Malaysian case, *Doresamy* v. *P.S.C.* [1971] 2 M.L.J. 127, where this appeared to be the *ratio decidendi*, and by an older Singapore case, *Mundell* v. *Mellor* [1929] S.S.L.R. 152, presaging even Lord Denning.

However, had such a discussion become at all necessary for Tan Ah Tah J.'s decision, it would have been of interest to know which line of reasoning His Lordship would have taken upon further legal argument on the point. His Lordship's pragmatic approach is reminiscent of the Privy Council judgment in *University of Ceylon* v. *Fernando* [1960] 1 All E.R. 631, where it was held that in the circumstances of that case, there was no requirement in the rules of natural justice that the University give the plaintiff an opportunity to cross-examine an "essential witness" unless he requested it, and as he had not, there was no breach of the rules. In other words, there was no duty to offer the witness for cross-examination where no such request had been made.

Another issue in the case was whether the plaintiff, being a member of the public service had been given "a reasonable opportunity of being heard" in compliance with Article 135(2) of the Malaysian Constitution (applicable to Singapore by virtue of the Republic of Singapore Independence Act, 1965). The only possible ground for alleging denial of such opportunity was, according to His Lordship, that the plaintiff was not informed about the proposed dismissal before his plea in mitigation was heard, and there was, to put it shortly, no decided case in Singapore directly in point. The case of *A.-G.* v. *Ling How Doong* [1969] 1 M.L.J. 154, was distinguishable as it "involved somewhat unusual and special facts" and was really a case of enhancement of punishment on appeal without due notice and a reasonable opportunity of being heard. His Lordship noted that the position was unlike that in India, where the Constitution required a police officer to be given before dismissal "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him".

Finally, it was argued by the plaintiff that an Assistant Commissioner of Police had no power to dismiss him, being "an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank", contrary to Article 135(1) of the Constitution of Malaysia (he had been appointed by the Commissioner). In other words, was there an unauthorised delegation of powers by the Commissioner? Tan Ah Tah J. held that by section 4(1) of the Police Force Ordinance, 1958 a power to delegate had not been conferred on the Commissioner, but any act which may be done by the Commissioner may, subject to his orders and directions (provided these are not inconsistent with the provisions of the Ordinance), be done by an Assistant Commissioner of Police. Therefore the power to dismiss was vested in the Assistant Commissioner, although if the Commissioner desired it, the dismissal could have been done subject to his orders and directions.

In the result, the plaintiff's claim was dismissed. The decision was not appealed against.

V.S. WINSLOW

BILLS OF LADING

Bank Negara Indonesia v. *Kie Hock Shipping Co. Ltd.* [1963] M.L.J. 138.

The plaintiffs were requested by a trading company to open an irrevocable letter of credit with their agents in London. In due course, the letter of credit was opened in favour of an Indonesian company, which shipped goods on board the defendants' vessels for carriage to London. Bills of lading were issued and made to the order of the plaintiffs. On 19th or 20th October 1959, the defendants delivered the goods to the trading company on the basis of letters of indemnity signed by third parties without requiring the company to produce the relevant bills of lading. On 18th November, the plaintiffs received the bills of lading from their agents in London, who had paid the Indonesian company under the terms of the letter of credit. The plaintiffs sued the defendants for damages for breach of contract and alternatively for conversion of the goods. The defendants joined several third parties claiming an indemnity.

The defendants were held liable to the plaintiffs. Their main argument was that the plaintiffs were not entitled to immediate possession of the goods at the time of the wrongful delivery to the trading company, and should not therefore succeed. Tan Ah Tah J. summarily dismissed this argument relying on *Bristol and West of England Bank* v. *Midland Railway Co.* [1891] 2 Q.B. 653.

This is a straightforward case, in which the defendants' liability was clear and incontestable. However, the reported judgment dealt solely with the issue of conversion, and did not distinguish between the claim in contract and the claim in tort. Although the plaintiffs sued in both contract and tort, it is submitted that they were not entitled to succeed in contract since by the nature of the transaction, they were mere pledgees of the goods and under the circumstances could not avail themselves of section 1 of the Bills of Lading Act, 1855. One's impression is that Tan Ah Tah J. could have been more precise and thorough in his analysis of the case as presented.

In addition, there was no discussion of the liability of the third parties on their letters of indemnity, which were presumably upheld. Such letters of indemnity have been enforced by the courts (e.g. Whitton J. in the Singapore High Court held the shipping company entitled to be indemnified by the bank in *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.* [1959] M.L.J. 200, 201) and the practice was widely discussed and tacitly approved by all members of the Scottish Court of Session in *Carlberg* v. *Wemyss Coal Co. Ltd.* [1915] S.C. 616. However, Scrutton L.J. in *Hannam* v. *Arp* 30 Ll. L.R. 306, 308 criticised this practice, which he recommended should not be followed, as it was tantamount to handing over someone else's goods to a person not entitled to them. Some current judicial comment on this point would not have been inappropriate.

COLIN A. YING

CARRIAGE OF GOODS BY AIR

The Borneo Co. Ltd. v. *Braathens South American & F.E. Air Transport A.S.* [1960] M.L.J. 201.

The plaintiffs delivered a case of watches to the defendants for carriage by air from Geneva to Singapore. The case never reached Singapore, and the plaintiffs claimed the full value of the consignment as damages for the loss. The defendants contended that under various provisions of the contract of carriage, they were either not liable, or liable only up to a limited amount. It was agreed that the carriage was subject to the Warsaw Convention.

The defendants were held liable to the full amount claimed under the terms of the Convention. Certain provisions of the contract embodied in the general conditions of carriage were held to be contrary to the terms of the Convention and therefore null and void e.g. exemption from liability unless the defendants were negligent; a time limit of 120 days within which to make a claim. In addition, the defendants failed to prove certain facts which they alleged and which, if proved, would have entitled them to succeed.

Tan Ah Tah J.'s decision on the various points raised was short, simple and swift. No complex point of law was raised or discussed. Only one brief paragraph was devoted to Article 8(i) of the Convention which was given the same literal interpretation as in the next case following (*Shriro's* case), but the arguments raised in that case did not appear to have been raised here, nor did His Lordship consider them in his judgment.

COLIN A. YING

Shriro (China) Ltd. & Ors. v. *Thai Airways International Ltd.* [1967] 2 M.L.J. 91.

Eight cases of watches were carried by air by the defendants from Bangkok to Singapore, and were stolen while in the defendants' possession at the Singapore airport. The terms of the contract of carriage were governed by the Warsaw Convention, 1929. The defendants claimed that Article 20 exempted them from liability, as the air consignment note had complied with the requirements of Article 8(i) of the French text of the Convention. The plaintiffs argued that the air consignment note had not stated either the volume or the dimensions of the goods, and it had therefore not complied with Article 8(i) of the Convention as set out in the First Schedule to the Carriage by Air Act, 1932, which was made applicable in Singapore by Order in Council. Article 8(i) as set out in the First Schedule provided that the air consignment note should contain particulars of the weight, the quantity and the volume or dimensions of the goods. Ambrose J. at first instance accepted the French text as authoritative, of which a literal translation of Article 8(i) specified that the air consignment note should contain the weight, the quantity, the volume or the dimension of the goods. His Lordship then found that the defendants had complied with one of the two possible

interpretations of the ambiguous French text, and found in their favour. The plaintiffs appealed to the Federal Court, and Tan Ah Tah F.J. gave the leading judgment, with which Wee Chong Jin C.J. (Singapore) and Chua J. concurred.

The Federal Court declined to rule on the defendants' submission that the French text should be regarded as the one binding on the parties. Under the circumstances, Ambrose J. was wrong in deciding that Article 8(i) was ambiguous, since it was the duty of counsel who wished to submit that the meaning of words in a foreign language was ambiguous to call expert evidence on the point and this was not done. Article 8(i) as set out in the First Schedule to the Carriage by Air Act, 1932 was the only English translation properly before the Court, and since the defendants had clearly not complied with its provisions (in that only the weight was stated in the air consignment note), they could not avail themselves of the exemption conferred by the Convention.

It is felt that Tan Ah Tah F.J. side-stepped an important issue in the case and ought to have ruled on the defendants' submission. Ambrose J. found there was no dispute as to the meaning of Article 8(i) of the French text and it is strange that His Lordship should feel the need for expert evidence on a point which was admittedly not in dispute. Moreover, the particular French words of Article 8(i) present no difficulties of translation and one could fairly agree with Devlin J's sentiments in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* [1954] 2 Q.B. 402, 421 (when His Lordship turned to the French text of the Hague Rules for assistance in construing the English text of that Convention) that "the appreciation of this particular point needs no more French than every schoolboy knows, and I think it would be pedantic to ignore it."

Clearly Tan Ah Tah F.J. preferred to rest his decision on the narrow ground that the English statute provided the only authoritative translation, and His Lordship then proceeded very briefly to give the words of the statute their literal meaning without considering any other reasonable construction. Such an alternative construction was in fact considered and preferred by the English Court of Appeal in *Corocraft* v. *Pan American Airways* [1969] 1 All E.R. 82, a case which raised the identical issue that came before Tan Ah Tah F.J. Lord Denning M.R. who gave the leading judgment commented on the nature and purpose of Article 8, the background to the Convention, and the need for a uniform interpretation of the Convention by all the parties concerned. After a wide-ranging survey and consideration of the English statute, Lord Denning concluded that the French text should prevail where there was any inconsistency between the French and English texts. Even if the English text were to prevail, Lord Denning opted for a liberal interpretation of Article 8(i), since "the letter killeth, but the spirit giveth life." He mentioned Tan Ah Tah J.'s judgments in both *The Borneo Co. Ltd.* v. *Braathens South American & F.E. Air Transport A.S.* and *Shriro's* case as symbolic of the age-old conflict existing between the most eminent of judges as to whether to give words a literal or liberal interpretation. In passing, it might be mentioned that the learned editors of the Third Edition of Halsbury's *Laws of England* (Vol. 5) felt that the English text of the Convention was authoritative for the purposes of English law (page 205, footnote (q)), while the Carriage by Air Act, 1961, which repealed the 1932 Act, specifically provides that the French text should prevail (section 1(2)).

It is thus thought that while the actual decision of the Federal Court can be supported, the Court did not subject the issues raised to as thorough or as searching an examination as it had the opportunity to do, and instead adopted a restricted and perhaps too legalistic an approach.

COLIN A. YING

CRIMINAL LAW AND PROCEDURE

Salha v. *R.* [1959] M.L.J. 110.

In *Salha* v. *R.* Tan Ah Tah Ag. C.J. (as he then was) sitting in the Court of Appeal quashed the conviction of the appellant, Salha, who had been convicted of murder and sentenced to death. In acquitting the appellant, the judge made reference to a fundamental concept in the law of evidence, namely, the rule against hearsay.

The rule against hearsay: Stephen's Code of Evidence, first introduced in India in 1872 and in the Straits Settlements in 1893, continues in the main to contain the rules of evidence in Singapore.[1] Although there is no direct rule prohibiting the reception of hearsay evidence, Stephen nonetheless did intend to exclude hearsay evidence.[2] He reasoned that to allow the reception of hearsay evidence would be to open a wide door to fraud and would result in the waste of an incalculable amount of time. The Republic's judges, and in particular Tan Ah Tah J., have had no hesitation in recognising that the rule prohibiting hearsay evidence was the law in Singapore and that it was contained in section 60(1) of the Evidence Act.

Salha had been convicted of the murder of Nia binte Yusoff. It had been submitted for the defence that the murder could have been committed by one Suhaime. Suhaime's defence in respect of this allegation was an alibi, namely, that on the day and time in question he was at Changi. The investigating inspector informed the court that he went to verify the alibi, and was satisfied that it was true upon being told by an elderly man and Suhaime's adopted brother that Suhaime had been there, at Changi, that day. Acting on this information, the trial judge summed up in words which suggested to the jury that Suhaime could not therefore be the person who committed the murder.

On appeal, Tan Ah Tah Ag. C.J. clearly realised that the inspector's evidence was hearsay and therefore inadmissible evidence. In the present case, such inadmissible evidence had been admitted 'to prove a fact', namely the truth of Suhaime's alibi. This brings to mind a passage from the judgment of the Judicial Committee of the Privy Council in *Subramaniam* v. *Public Prosecutor* [1956] 1 W.L.R. 965, at p. 969:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained

1. See Evidence Act, Cap. 5 (Singapore Statutes, Rev. Ed., 1970).
2. The Indian Evidence Act (I of 1872) p. 123.

> in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

This distinction between hearsay and original evidence which escaped the trial judge, was certainly not missed by Tan Ah Tah Ag. C.J. who concluded that the trial judge in acting upon the inadmissible evidence of the inspector in his summing up, had clearly misdirected the jury, and had thereby gravely prejudiced the fair trial of the appellant.

In allowing the appeal and quashing the conviction, His Lordship said, "In view of the inadmissible evidence and the misdirection and the many other unsatisfactory features of this case we were of the opinion that it would be unsafe to allow the conviction to stand. . . ." In this passage, one sees a reminder to the prosecution that it has the burden of proving its case against the accused beyond reasonable doubt, and the court as the guardian of the liberty of the individual has the duty of ensuring that inadmissible and detrimental evidence is not admitted and applied to the prejudice of the accused.

HARBAJAN SINGH

Ling Ngan Liong v. *P.P.* [1964] M.L.J. 20.

In *Ling Ngan Liong* v. *Public Prosecutor*, the accused a medical practitioner was convicted on a charge of raping one of his patients, a thirteen-year-old girl. Although the trial judge had stated he considered the complainant's evidence unreliable, he nonetheless decided to convict the accused upon examining what he described as "extraneous evidence", namely, that the accused had after the alleged offence handed over three cheques totalling $10,000 payable to the complainant's family.

Tan Ah Tah J. giving the judgment of the Federal Court of Criminal Appeal had no hesitation in quashing the conviction. He accepted the submission of the appellant's counsel that having regard to the width of the bed, "it was virtually impossible for the appellant to have committed the act in the way described by the complainant". Additionally, he noted that the complainant in giving evidence had contradicted herself on several occasions. Thirdly, he held the evidence relating to the payment of the cheques by the appellant to be equivocal and capable of more than one interpretation.

It has been the practice of courts both in Singapore and Malaysia to caution themselves before acting on the uncorroborated evidence of a complainant in a sexual assault case. The warning is advisable on the rationale that "sexual cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed."[1]

1. G. Williams, "Corroboration — Sexual Cases" (1962) Cr. L.R. 662.

In the present case, the complainant's evidence was not corroborated in any sense. The conduct of the accused in making payments to the family of the complainant could be construed as an admission that he had sexually assaulted the girl and thereby amount to corroboration of the complainant's evidence. An admission, however, can be explained away,[2] and in this case the accused stated in evidence that he was prepared to make the payments to avoid the publicity of a trial which would ruin his practice and, secondly, to avoid being physically assaulted. There being no corroboration of the complainant's evidence and her evidence being in some regards suspect, His Lordship had no hesitation in quashing the conviction and allowing the appeal. Reading the judgment, one cannot help but be impressed by the learned judge's knowledge and application of the rules of evidence. In the present case, although not expressly stated, it could be gathered that the following principles were uppermost in his mind, namely,

a. it was the task of the prosecution to establish its case beyond reasonable doubt;

b. in a prosecution for rape, it is desirable that the complainant's evidence be corroborated;

c. in the absence of corroborative evidence, the court should caution itself on acting on the uncorroborated evidence of the complainant;

d. where, as in this case, the complainant's evidence was suspect, coupled with the fact that she was a young girl, with perhaps a tendency to fantasize, and where the conduct of the accused in making the payments had been explained as to become "equivocal", it could not be said that the prosecution had proved its case beyond reasonable doubt.

This judgment cannot but be respected by one and all, and stands as a bulwark against any feeling of scepticism about the administration of justice and such remarks as "the law is an ass".

HARBAJAN SINGH

Sunny Ang v. P.P. [1966] 2 M.L.J. 195.

In *Sunny Ang* v. *Public Prosecutor*, the accused was charged with and convicted of the murder of one Jenny Cheok. The interesting aspect of this case was that the body of Jenny Cheok was never found, and the prosecution's case was based entirely on circumstantial evidence. On a prosecution for murder, the facts in issue would be:

(a) the *corpus delicti*, which could be established either by the fact of death or the dead body,

(b) that the accused caused the death,

2. See s. 31, Evidence Act.

(c) that the accused caused the death with the necessary intention or knowledge as required by section 300 of the Penal Code, and

(d) that there are no defences open to the accused.

In the present case, the prosecution could not establish directly that Jenny Cheok was dead nor could they produce her body, not to mention their other difficulties of establishing that the accused had caused her death with the necessary intention or knowledge, and of proving their case beyond reasonable doubt.

The weight of the circumstantial evidence led the jury to return a guilty verdict, despite the fact that no body was ever found. On appeal, it was argued, *inter alia,* (a) that the learned trial judge erred in law in failing to direct the jury on a possible verdict of culpable homicide not amounting to murder, and (b) that the learned trial judge erred in law in failing adequately to direct the jury on the danger of convicting an accused person upon circumstantial evidence. In respect of submission (a), Tan Ah Tah Ag. C.J. (as he then was), who gave the judgment of the Federal Court of Criminal Appeal, summarily dismissed the argument on the ground that "the case was one in which the appellant was either guilty of murder or not guilty of any offence whatsoever."

In respect of submission (b), the learned judge reviewed the circumstantial evidence. He found that:

(a) the accused and Jenny Cheok had gone out to sea in a boat and on the accused's direction, they had gone out to sea near Sisters Islands;

(b) the accused's explanation was that they had gone there to collect corals;

(c) he had fastened the diving equipment on Jenny Cheok;

(d) he had knowledge that she was a novice diver; further he knew the waters in that area to be dangerous;

(e) one of the flippers had been previously cut;

(f) Jenny had been insured with several insurance companies and the principal beneficiary was the accused's mother;

(g) on the day in question, the accused had renewed the policies taken out on Jenny's life but not those on his own.

Tan Ah Tah Ag. C.J. also noted that the accused had been made a bankrupt; that the principal beneficiaries of the insurance policies taken out on Jenny's life were the accused's mother and Jenny's estate; that Jenny had left a will leaving all her property to the accused's mother.

In addition to all these, the learned judge was obviously troubled by the fact that when Jenny failed to surface, the accused made no effort to look for her. In his view it was open to find "that there was a lack of urgency in the conduct of the appellant at the relevant time".

Finally, less than 24 hours after Jenny's disappearance, the accused, apparently unconcerned, made formal claims on the three insurance companies.

His Lordship then reviewed the summing-up of the trial judge to the jury, and in the light of the above evidence, concluded that the summing-up was in order and that the conviction be upheld. He was satisfied that the fact of death can be proved, like any other fact can be proved, by circumstantial evidence, that is to say, by evidence of facts which lead to one conclusion, provided that the jury are satisfied and are warned that the evidence must lead to one conclusion only,[1] and that in the present case this principle of the law had been satisfied.

HARBAJAN SINGH

COMPANY LAW

Re Asian Organisation Ltd. [1961] M.L.J. 295.

This was an appeal from a decision of the High Court which refused an application under section 101 of the Companies Ordinance (Cap. 174) [now section 162 Companies Act, Cap. 185], to rectify the register of members by deleting the name of J.R.H. Moggre therefrom as holder of 500 ordinary shares in the company.

The evidence revealed that Moggre was issued with a share certificate for 500 shares signed by both joint managing directors. Correspondence referred to Moggre as a partner and as holder of 20% of the company's shares and he had been elected chairman of a company meeting. The allotment of shares to him was impugned on the ground of the absence of any directors' meeting to approve it.

Tan Ah Tah Ag. C.J. held, in consonance with English decisions, that even in the case of an invalid allotment of shares, there is a discretion in the court whether or not to order the rectification of the register of members.

On the question whether this discretion could only be exercised on sufficient legal grounds the learned judge found that the facts were sufficient to indicate acquiescence in the existing state of things by the applicants and that therefore there were sufficient grounds for saying that the discretion was properly exercised.

These two significant points indicate as settled law that an invalid allotment of shares may not necessarily result in the shareholder being expunged from the register and that principles analogous to estoppel/ acquiescence operate in deciding whether or not such an entry is to be expunged.

PHILIP PILLAI

1. *R.* v. *Onufrejczyk* [1955] 1 All E.R. 247 at 248.

Re Fraser & Neave Ltd: Tan Keng Siong v. *Tan Hock Kiang* [1967] 2 M.L.J. 282.

The appellant husband, holder of $5,000 ordinary stock in the company handed the certificate together with a transfer form (the usual or common form used in Singapore) to his wife. The signature of the husband was not attested although the form provided for attestation by a witness and it was undated and the consideration was not stated. The wife later signed the form and it was duly attested, dated and lodged with the company for registration; which registration was refused because of the absence of attestation of the husband's signature. The wife applied to the court for rectification of the register by removal of the husband's name and the insertion of her name in its place.

In the Federal Court of Malaysia, Tan Ah Tah F.J. held that the usual or common form in use in Singapore requires the signature of the transfer to be attested by a witness and the transfer submitted indicated the absence of attestation of the transferor's signature. This entitled the company to refuse to register the transfer.

The second question that arose was whether the wife had a good title to the stock, which in turn depended upon whether there was a complete gift. Following settled English cases, the court held that the gift would only be operative if the transferor had done everything he could, which was necessary for him to have done, to divest himself of his legal and equitable interest in the stock in favour of the wife. The lack of attestation of his signature indicated otherwise.

PHILIP PILLAI

Re Hume Industries (FE) Ltd. [1974] 1 M.L.J. 167.

This was an originating summons involving the interpretation of the rights of preference shareholders in the company on a construction of article 5 of the company's articles. The significant principles adduced in this case are:—

1. The articles insofar as they state the rights of preference shareholders are exhaustive and no further rights exist.

2. "Profits available for distribution" and "divisible profits" are not synonymous terms. "Profits available for distribution" means profits which the directors consider should be distributed after making provision for past losses, for reserves or for other purposes. "Divisible profits" means profits which the law allows the company to distribute to the shareholders by way of dividends. Capital reserves continue to be divisible profits but they are not profits available for dividends under article 5 of this company's articles. Share premiums are not profits available for dividends and are not divisible profits except in accordance with section 60 of the Companies Act (Cap. 185).

Both the above rules have been decided by English cases and crystallised in Palmer's *Company Law,* 21st Edition, which was extensively relied upon.

It is of interest to note that the cause of this action was the company's proposal to make a scrip issue only to ordinary shareholders. The Court action was followed by an intensive proxy fight which culminated in a reconstruction of the company which eliminated the category of preference shareholders by the conversion of preference shares into ordinary shares.

PHILIP PILLAI

ESTATE DUTY

Re Syed Ahmed Alsagoff, decd. [1960] M.L.J. 147.

In the present case, an originating summons was taken out to determine, *inter alia,* certain questions relating to the payment of director's fees to one Mr. Phillips, a trustee of the Will of the deceased, who had been appointed a director (which appointment was made by himself and his co-trustee) of Raffles Hotel Ltd. The Hotel held a lease of premises forming part of the trust estate. Under the terms of the lease, the lessor had a power to appoint a director to sit on the company's board of directors, and the company's Articles of Association contained a provision for the payment of fees to directors.

Tan Ah Tah J. had to consider whether Mr. Phillips was entitled as of right to retain the director's fees. In an oral judgment, the learned judge held that Mr. Phillips was not entitled to retain the director's fees as of right. In the result, an alternative question was raised for his decision, *viz.,* whether Mr. Phillips was entitled to additional remuneration for acting as a director of the company on the ground that he was doing "work for the benefit of the testator's estate".

After reciting the well-established principle that a trustee must not put himself in a position where his interest and duty may conflict, the learned judge held that the principle had been infringed. In his opinion,

> it is clearly the duty of the trustees' nominee on the board of directors to see that the covenants contained in the Lease are duly observed.... If the board of directors were to propose to carry out some plan which would involve a breach of the covenants, the trustees' nominee (who is himself a trustee) might well find himself in a position where his interest and duty would conflict. He might not wish to risk incurring the displeasure of his co-directors and the shareholders of the company and might give his consent to a plan of action which, if he were doing his duty as a trustee, he should have opposed. He would then be failing in his duty to the beneficiaries of the testator's estate.

There is no reason to think that the decision of the learned judge would be different in the light of the recent decision of the House of Lords in *Boardman* v. *Phipps* [1966] 3 W.L.R. 1009. On the contrary, the elaboration by the Law Lords of the scope of the fundamental principle that a fiduciary must not place himself in a position where his

duty and interest may conflict lends support to the judgment of Tan Ah Tah J. In particular, Lord Upjohn said,

> The phrase "possibly may conflict" requires consideration. In my view it means that a reasonable man looking at the relevant facts and circumstances of the particular case would think there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in conflict.[1]

This elaboration by Lord Upjohn of the scope of this fundamental principle would lend strong support to the decision of Tan Ah Tah J. in *Re Syed Ahmed Alsagoff, decd.*

HARBAJAN SINGH

INCOME TAX

In re A.B. Ltd. [1957] M.L.J. 143.

The taxpayer company carried on the business of rubber planting on estates in Singapore and Johore prior to the Japanese occupation. After the war, it was considered unprofitable to reuse the Singapore estate for rubber-growing, and the company decided to use part of it as a cemetery. A licence was obtained, an approach road made and certain building erected. The Comptroller assessed to income tax the profits derived from the "business of sale of burial plots". The company appealed on the ground that the receipts arose from the sale of capital assets, and were therefore not taxable as gains or profits of a business. Alternatively, the company argued that if the receipts were assessable, then the cost of the land should be deductible therefrom.

The Court of Appeal (Whitton, Buhagiar and Tan Ah Tah JJ.) held that the true nature of the transaction was not an outright sale of plots of land or an alienation of capital assets by the granting of perpetual burial rights, but a sale of rights of burial over the plots of land, with the taxpayer company continuing to have ownership of the land. The various transactions of sale amounted to carrying on a trade in the circumstances, and the receipts were therefore assessable to tax under section 10(1) (a) of the Income Tax Ordinance. It was further held that the cost of the land was not deductible from these receipts since section 14 of the Ordinance did not permit this deduction.

The crucial point in the case was the nature of the transaction, and having determined this from the form of the transaction and all the relevant circumstances, the court experienced no difficulty in reaching a decision on the merits. Tan Ah Tah J.'s judgment was clear, succint and neatly arranged. The issues raised were dealt with in a simple, logical manner, in contrast to the rather tortuous and somewhat strained judgment of Whitton J. The case follows established law and does not introduce any new legal principle in income tax law.

COLIN A. YING

1. [1966] 3 W.L.R. 1009, at 1067 (expressly adopted by Roskill J. in *Industrial Development Consultants Ltd.* v. *Cooley* [1972] 2 All E.R. 162 at 171-2).

The Comptroller of Income Tax v. *R.S.T. (No. 1)* [1962] M.L.J. 216.

The defendant taxpayer appealed to the Court from a decision of the Registrar giving the Comptroller leave to sign final judgment against the defendant under Order 14 of the Rules of the Supreme Court. The Comptroller had issued a writ claiming an amount of tax due from the defendant. The defendant's case was that although assessments had been made, he had objected thereto and since negotiations were still continuing between the parties, the assessments were not final and conclusive, and that until then the Comptroller had no right to sue for payment. Furthermore, as certain triable issues had been raised, the defendant should have been given leave to defend.

Tan Ah Tah J. summarily dismissed the appeal, holding that sections 86 and 90 of the Income Tax Ordinance provided the Comptroller with a complete cause of action. Payment of tax was to be due at a certain time notwithstanding any objection or appeal, and section 84 which determined the point of time at which an assessment became final and conclusive had nothing to do with the point of time at which tax levied under the relevant provisions of the Ordinance became payable. It was further held that the triable issues raised were a matter for the determination of the Board of Review and did not affect the Comptroller's claim in the present case.

This was the first reported decision affirming the Comptroller's right to sue for and obtain immediate payment of tax due notwithstanding a taxpayer's objection to the assessment and notwithstanding the merits of the taxpayer's case. It might be thought that this is unusual, in that under ordinary circumstances, leave to sign final judgment cannot be obtained under Order 14 for a sum alleged due if the defendant shows that there are certain issues in the case which ought to be tried. But the Income Tax Ordinance did provide for a special procedure to be followed on appeal, and as the learned judge said in the course of his judgment:

> If the legislature chooses to make the tax become payable at an earlier stage it only means that, so long as he brings himself within the relevant section, the plaintiff is entitled to sue for and recover payment of the tax at that earlier stage.

This decision is clearly in keeping with the wording and intent of the statute, and numerous later cases have reaffirmed the principle. However, Tan Ah Tah J. gave a misleading summary of the English and Australian positions in the course of citing support for the policy adopted in the local Ordinance. In England, the position at that time was that a debt due to the Crown and recoverable by action was constituted only when an assessment became final and conclusive *i.e.* when the Commissioners determined an appeal or when the time limit for making an appeal expired. In other words, no tax became payable prior to the Commissioners' determination if there was an appeal — see, for example, Donovan J. in *B.P. Refinery (Kent) Ltd.* v. *Kent River Board* [1957] 1 Q.B. 84, 97, 98. If the taxpayer then wished to appeal to the High Court, he was obliged to pay the tax due notwithstanding the appeal. Tan Ah Tah J. referred to the section in the U.K. Act which set out this latter point as illustrative of his decision, but it is submitted that this was not so. The learned judge also referred to section 201 of the Australian Assessment Act, and to an Australian case decided there-

under. However, section 201 deals with the position on an appeal to the High Court or a reference to the Board of Review, and not with the position where the taxpayer is negotiating with the assessing authority prior to his first appeal against the ultimate decision of that assessing authority. It appears that it was not until 1966 that an Australian court first gave a ruling to the same effect as Tan Ah Tah J. — see *Deputy Commissioner* v. *Hissink* 10 A.I.T.R. 102, and the New Zealand case of *Clifford* v. *Inland Revenue Commissioner* 9 A.I.T.R. 610, 614.

COLIN A. YING

S.T.U. v. *The Comptroller of Income Tax* [1962] M.L.J. 220.

The Comptroller assessed to tax certain unsubstantiated credits in the taxpayer's personal current account with a company, remittances received by the taxpayer in Singapore and certain other items alleged to be chargeable income, thinking that the taxpayer was making secret profits from an undisclosed source. The taxpayer adduced oral and documentary evidence that the sums were capital in nature and not taxable. Confirming the assessments, the Board of Review stated that they were not impressed with the taxpayer's evidence, and that some explanations given by the taxpayer to the officers of the Income Tax Department had been rejected on the ground that there was no documentary evidence to support them.

Tan Ah Tah J. held that the taxpayer's evidence should have been accepted as his witnesses were all speaking the truth. Consequently, the taxpayer had discharged the onus of proof placed on him by statute, and his appeal should be allowed.

This is one the rare reported cases in which the taxpayer in a dispute with the Comptroller has been held to have satisfactorily discharged the onus of proof that lay on him as a result of an assessment. The honest taxpayer who has a genuine case but little evidence to support it will be comforted by the bold and sympathetic approach of the learned judge. The dice not infrequently seem loaded against the individual in an open clash with the Revenue authorities on the issue of the acceptability of his stuttering explanations, made more often than not in the absence of documentary corroboration. In such a situation, His Lordship's observations in this case (at p. 221) may assist the despairing taxpayer:

> In this case certain explanations given by the appellant to the officers of the Income Tax Department were rejected on the ground that there was no documentary evidence to support them. No doubt documentary evidence can in many cases be very cogent and convincing. The lack of it, however, should not invariably be a reason for rejecting an explanation. Not every transaction is accompanied or supported by documentary evidence. Much depends on the facts and circumstances of the case, but if the person who is giving the explanation appears to be worthy of credit, does not reveal any inconsistency and there is nothing improbable in the explanation, it can, in my view, be accepted.

COLIN A. YING

Q. v. *Comptroller of Income Tax, Singapore* [1969] 1 M.L.J. 225.

The taxpayer was an advocate and solicitor who practised in partnership. He retired from the partnership and became a partner in another legal firm. The Comptroller made an additional assessment on him on the ground that he had commenced to carry on or exercise a trade, business, profession, vocation or employment on joining the new partnership and therefore the commencement provisions under section 35(3) of the Income Tax Ordinance applied to him. The taxpayer contended that section 35(3) was inapplicable, and the Board of Review upheld his contention. The Comptroller appealed.

Tan Ah Tah F.J. held that in the case of a partner who has a profession, the source of his income is the partnership and not the profession. This view was based on the wording of section 36(1). It therefore followed that the commencement provisions of section 35(3) applied when the taxpayer joined the new partnership, and section 36(2) had no relevance to the facts.

(The Federal Court — Wee Chong Jin C.J., Chua and Kulasekaram JJ. — reversed Tan Ah Tah F.J.'s decision on appeal, holding that a partnership was not taxable *per se,* that the exercise of the profession and not the partnership was the source of income, and that therefore since the taxpayer clearly did not commence but simply continued to exercise his profession on joining the new partnership section 35(3) was inapplicable. It was further held that the learned judge's construction of section 36(2) was incorrect, and on a true construction the taxpayer's case was covered by that section.)

The writer agrees with the decision and reasoning of the Federal Court, which was in accord with the scheme and wording of the local taxing statute. It may be that Tan Ah Tah F.J. was subconsciously influenced by the different treatment of partnerships under the U.K. statute, by virtue of which a partnership was a separate taxable entity, and there would have been a deemed commencement if the identical fact situation had arisen in the U.K. The commencement provisions which were the subject of decision in this case were abolished together with the cessation provisions in 1969, as it was found that both these provisions facilitated a large measure of tax avoidance.

COLIN A. YING

Comptroller of Income Tax v. *S. & Co. (Pte) Ltd.* [1972] 2 M.L.J. 234.

The taxpayer was a private limited company which failed to furnish any income tax returns or proper accounts for several years. The Comptroller thereupon raised five estimated assessments under section 72(3) of the Income Tax Ordinance. It was alleged by the taxpayer and admitted by the Comptroller that the latter had taken into consideration only two out of four sources of income possessed by the former. The four sources of income were:

1. a retail trade as a departmental store;

2. a wholesale trade of textiles, etc.;
3. sub-lettings made by the taxpayer on leases which it enjoyed;
4. interest on loans to firms in which the taxpayer was a partner or proprietor.

The Comptroller had ignored the taxpayer's trading activities (sources 1 and 2 above) since he was unable to ascertain the profits therefrom. The taxpayer argued that the Comptroller should have taken into account all known sources of income, and if he had done so, the capital allowances due to the taxpayer would have resulted in a loss. The High Court held that the Comptroller could not be said to have exercised his best judgment in accordance with section 72(3) since he had admittedly attributed no figure to two known sources of income which might or might not have produced income.

The Court of Appeal (Wee Chong Jin C.J., Chua and Tan Ah Tah JJ.) reversed the decision of the High Court, holding that in order for the taxpayer to discharge the onus of proving that the estimated assessments were excessive it must not only be able to show that the Comptroller had ignored certain sources, but it must show in what way and by what amount they were excessive. It was therefore for the taxpayer to prove a loss or losses incurred in respect of the sources of income ignored by the Comptroller.

COLIN A. YING

MUSLIM LAW

Re Mutchilim alias Ashrin, decd.; Haji Mawar v. *Attorney-General* [1960] M.L.J. 25.

In this case one Mutchilim, a Singapore Muslim of the Shafi school of law, had died intestate and without issue or other relatives surviving him on 6th May, 1931, and the question that fell for decision was whether his widow (the plaintiff) was entitled to the whole of the estate of the deceased, or whether she took only a quarter, the remainder escheating to the Crown.

The case was argued by N.A. Mallal for the plaintiff, and Ahmad Ibrahim (Senior Crown Counsel) for the defendant, and is of peculiar interest in that in his judgment Tan Ah Tah J. extracts and analyses the origins and authority of the relevant principles of the Shafi school. Taking as a basis "the rule in ancient times (which) was that in default of shares and residuaries the deceased's property lapsed to the *Bait-ul-Mal* which may be described as a public treasury maintained for the benefit of the general body of Muslims", the learned judge dealt with the development and refinement of the rule. In this context reference to Indian cases was made, essentially in order to extract therefrom the opinions of the Muslim jurists, and recourse had to the *Minhaj et Talibin* (in the English translation of van den Berg's French translation — hearsay is admitted, one must concede, in the field of written authority) and to Wilson's *Anglo-Muhammedan Law.*

The judgment is remarkable for a lucid exposition of a basic principle of the Shafi Law on distribution on intestacy, and also for a short concise delineation of the development of the doctrine of return, or *Radd,* in the Hanafi school: a development that was not paralleled within the Shafi school — so the State, and not the widow, was successful.

R.H. HICKLING

PARTNERSHIP LAW

Thiam Kok Cheong v. *Low Pui Heng* [1966] 2 M.L.J. 32.

Four partners carried on a business. Three of them, without the knowledge or consent of the fourth sold the business to a company formed by themselves to the exclusion of the plaintiff. The plaintiff commenced an action and the lower court held that the partnership was dissolved only when the plaintiff became aware of the change and that the sale of the business to the company was void and therefore the plaintiff was entitled to an account of her share of the business.

Applying the English case of *Chapple* v. *Cadell* 37 E.R. 953, Tan Ah Tah F.J. in the Malaysian Federal Court held that a majority of the partners in a firm have no power to sell the share of a dissentient minority.

PHILIP PILLAI

PORT AUTHORITY

Wing Tai Garment Manufactory (S) Ltd. v. *The Port of Singapore Authority* [1972] 1 M.L.J. 198.

The plaintiffs owned 50 cases of textiles which had been shipped from Japan and discharged into the defendant's godowns on arrival in Singapore. After 11 days, the plaintiffs requested the defendant to store the cases in its "cheap rate godown", since there was a lack of storage space on the plaintiffs' premises. The plaintiffs surrendered their delivery orders, and received storage orders which evidenced that the 50 cases were stored at the defendant's godown. Some days later, the plaintiffs applied for and obtained permission to remove 18 cases from the godown. The remaining cases were subsequently stolen, and the plaintiffs sued the defendant for damages for conversion of these cases. The defendant claimed it was protected from liability by section 88 of the Port of Singapore Authority Ordinance, 1963, in that the goods had been deposited with or placed in the custody or control of the Authority for the purpose of delivery. The plaintiffs argued that there had been a notional delivery of the 50 cases on removal to the "cheap rate godown", so that the transaction amounted to an acceptance of the goods for storage under section 96(1), and that therefore the defendant was not protected by section 88.

Tan Ah Tah J. held at first instance that the cases were in the custody of the Authority for the purpose of delivery even when they were removed to the "cheap rate godown", and there was no delivery, notional or otherwise, to the plaintiffs. Consequently the defendant was entitled to the protection of section 88, and the plaintiffs' claim was dismissed. His Lordship's judgment was affirmed by the Court of Appeal.[1]

COLIN A. YING

SHIPPING

Kwangtung Provincial Bank v. *Osaka Shoshen Kaisha* [1957] M.L.J. 179, 182.

The plaintiffs claimed against the defendants for failure to deliver certain goods said to have been shipped on board a vessel for carriage from Hong Kong to Singapore under a bill of lading given by the defendants in favour of the plaintiffs. The defendants who had delivered the goods without production of the bill of lading denied liability but joined a bank as a third party, maintaining that if they were liable to the plaintiffs, the third party was liable to indemnify them under the terms of a letter of indemnity. However, the plaintiffs discontinued the action and agreed to pay the defendants a lump sum for costs on a party and party basis. The defendants continued proceedings against the third party to recover the difference between the lump sum and the defendants' costs on a solicitor and client basis. The question was whether the plaintiffs' claim fell within the contract of indemnity, in view of the fact that there were discrepancies between the description of the goods in the bill of lading and that in the contract of indemnity.

The Court of Appeal (Whitton and Tan Ah Tah JJ., Buhagiar J. dissenting) held that the defendants had succeeded in showing that the goods set out in the letter of indemnity were the goods which were in fact delivered, and that the plaintiffs' claim was a consequence arising from or relating to such delivery. Therefore, having proved that the plaintiffs' claim fell within the contract of indemnity, the defendants were entitled to the indemnity claimed.

Tan Ah Tah J.'s judgment was certainly the best of the three judgments. His summary of the facts was clear and concise, his analysis of the issues lucid and penetrating. He singled out all the material facts with methodical efficiency and applied the relevant principles of law with an admirable economy of words. However, although this was a good judgment on the merits, no novel point of law was involved.

Incidentally, it is rather surprising that the plaintiffs discontinued their action, in view of the findings of fact by the court. It was mentioned that they did so in the light of the decision of Whyatt C.J. in *Bank of China* v. *Brusgaard Kiosterud & Co.* [1956] M.L.J. 124, where the bank failed in a claim based on similar facts. But there the action was in contract, and although Whyatt C.J. doubted whether the

1. [1972] 1 M.L.J. 200.

bank would have succeeded if it had sued in tort, it is submitted that there was clear authority which would have entitled the bank as pledgee to recover damages for conversion *eg. Bristol and West of England Bank* v. *Midland Railway Co.* [1891] 2 Q.B. 653; *Skibsalktieselskapet Thor* v. *Tyrer* (1929) 35 LI. L.R. 163, 171.

COLIN A. YING

Chan Buck Kia v. *Naga Shipping & Trading Co. Ltd.* [1963] M.L.J. 159.

By the terms of a uniform time charterparty the defendants hired a ship from the plaintiffs for a period of three months from 4th September, 1960. Hire was payable at the rate of $7,600 per 30 days payable in advance. During the second half of September, the ship sailed to an Indonesian port where it was detained by the Indonesian Government for the rest of the chartered period. One of the clauses in the charterparty provided: "If for any reason whatsoever the vessel shall be detained at any port by any authority having dominion over that port the Charterers shall continue to pay the charter hire as provided for in this Agreement...." The plaintiffs claimed the balance of hire due and the defendants pleaded frustration. The defendants had previously paid hire for 30 days in advance.

Tan Ah Tah J. held in a brief judgment that on the true construction of the contract, the clause in question was a provision which was intended to have effect in the circumstances that arose, and full effect was to be given to it. Consequently the contract was not frustrated, and the plaintiffs were entitled to succeed.

Although there was little discussion, the law was correctly stated in this case, in that if the parties not only contemplated the event in question but also expressly made full and complete provision therefor, its occurrence would not frustrate the contract. It is, however, suggested that Tan Ah Tah J. adopted too simplistic an approach to the facts and the law and that a more critical and penetrating analysis could have led to a different conclusion. Case law has indicated that the doctrine of frustration applies not only when performance of the contract has become literally impossible but also where circumstances have so supervened that the commercial foundation of the contract has been destroyed and it would be unreasonable to require the parties to go on. There are numerous English decisions on the effect of delay on a charterparty,[1] and while delay has been said to be an incident of maritime adventure clearly within the contemplation of the parties and does not automatically result in frustration, still if by reason of delay performance becomes in effect performance of a different contract, then the contract can be regarded as frustrated. The question would then arise as to whether the parties made full and complete provision for the frustrating contingency. There are cases where provision was made,

1. See, e.g., *F.A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* [1916] 2 A.C. 397; *Bank Line* v. *Capel* [1919] A.C. 435; *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* [1926] A.C. 947; *The Penelope* [1928] P. 180; *Taten* v. *Gamboa* [1939] 1 K.B. 132.

but was held to be inadequate with the result that the doctrine applied *e.g. Bank Line* v. *Capel* [1919] A.C. 435; *The Penelope* [1928] P. 180. In view of the fact that hire (or freight) is paid in consideration of the use of a ship, and "where the freighter derives no beneficial use from the ship there ought to be a clear express stipulation in order to charge him with the payment of freight" *(per* Bayley J. in *Gibbon* v. *Mendez* (1818) 2 B. & Ald. 17, 24), a more detailed examination of the circumstances and the relevant clauses would have been apposite to determine whether the clause in question was intended to and did cover detention of an indefinite duration such as would ordinarily frustrate the commercial purpose of the adventure, or only such periods of detention as would be consistent with the due performance of what was bargained for. Indeed, the time charter in *The Penelope (supra)* was held frustrated by the coal strike of 1926 in spite of its strike provisions, since these provisions contemplated an interruption of work due to a local withdrawal of labour and not the total impossibility of any export of coal for upwards of eight months, and this change of circumstances prevented performance of the charter according to its true intent, Moreover, it will be observed that the coal strike did not last for the duration of the charterparty, whereas in the present case the ship was detained until and even after the expiration of the charterparty as well as for almost the whole period of the hire.

COLIN A. YING

The Mutual Life Insurance Company of New York v. *The Saint Christopher (Owners)* [1969] 1 M.L.J. 213.

The plaintiffs were mortgagees of the "Saint Christopher" and procured the arrest of the vessel, which was subsequently sold by public auction by the Sheriff. The question arose as to the basis on which the Sheriff's commission in connection with the sale of the vessel should be charged. Rule 27(1) of the Admiralty Procedure Rules read:

> For all proceedings in connection with admiralty suits the same fees shall be payable as are payable for the same or analogous proceedings in cases within the ordinary jurisdiction of the court in conformity with the fees and percentages in Schedule B to the Rules of the Supreme Court, 1934.

Item 115 of Schedule B of the said Rules stated (*inter alia*) :

> Commission of 5 per cent to be charged on the first $1,000 and 2½ per cent upon all above that sum when levied by seizure and sale, such sum to include auctioneer's commission.

It was held that those proceedings where a vessel which had been arrested under a warrant of arrest was actually sold by the Sheriff were analogous to proceedings in which goods seized by the Sheriff under a writ of seizure and sale were sold by him. Consequently the Sheriff's commission should be charged in accordance with Item 115 of Schedule B of the said Rules.

COLIN A. YING