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COURT OF APPEAL, JAMAICA
CIVIL APPEAL NO. 16 of 1961

B E T W E E N

The Bustamante Industrial Trade Union)
The United Port Workers and Seamen Union) APPELLANTS
The Trades Union Congress of Jamaica)

A N D

The Shipping Association of Jamaica) RESPONDENTS

BEFORE:

The Honourable Mr. Justice Phillips P. (ag.)
" " Mr. Justice Lewis J.A.
" " Mr. Justice Waddington J.A. (ag.)

10th, 11th, 12th, 13th, 14th, 17th, 18th, 19th, 20th December, 1962

Mr. E. L. Parkinson for The Bustamante Industrial Trade Union
Mr. David Coore, Q.C. for The United Port Workers and Seamen Union
Viscount Bledisloe, Q.C. for Respondents
The Trades Union Congress of Jamaica not represented and do not appear.

J U D G M E N T

A trade dispute between the parties was referred to an Arbitration Tribunal, consisting of three arbitrators, under the provisions of the Public Utility Undertakings and Public Service Arbitration Law, Chapter 329.

The Arbitration Tribunal made its award on the 19th of April 1961 and the same was submitted to the Ministry of Labour, and in due course was sent to the parties.

By law the award takes its effect from its date, unless it is stated to the contrary. By section 12, sub-section 2 of Chapter 329 an award may be made retroactive to such date as the tribunal shall determine, and the decision of the tribunal as to such date shall be conclusive.

By section 8(c) of the Arbitration Law, Chapter 19, the arbitrators have the power to correct in an award any clerical mistake or error arising from any accidental slip or omission.

The award of the 19th April, 1961 related to the increase of wages for four separate categories of workers and were set out in four paragraphs. It was alleged in this case that an additional paragraph worded as follows:

"(3) that these wage rates should be retroactive to the 15th May, 1960,"

was omitted from the award by an accidental slip or omission. The

Respondents made an application by motion to set aside "any amendment of, or addition to," the award made by the Arbitration Tribunal dated 19th April, 1961.

The matter was heard by the learned Chief Justice, who stated in his judgment that he was satisfied that the award as signed on the 19th April, 1961, exactly expressed the decision of the arbitrators, at which they had arrived, and that the decision to include the paragraph (5) above, namely that the increase of wages should be retroactive as from the 15th of May, 1960 had not been arrived at on or before the 19th of April, but at a subsequent date after the 9th of May, 1961. This was not the case of a supplementary award.

The order made by the learned Chief Justice is as follows:

> "The association is therefore entitled to succeed and to obtain an order from this court in terms of the notice of motion, that any amendment of or addition to the award dated the 19th day of April, 1961, which purports to have been made after that date, be set aside."

The Appellants have appealed against this decision and order of the learned Chief Justice.

Mr. Parkinson, for the Appellant the Bustamante Industrial Trade Union, submitted that if the Association desired to challenge the correctness of any statement in the record that there had been an error arising from an accidental slip, it ought to have supplied the necessary evidence to establish this, by affidavits or otherwise, which they had failed to do. He submitted also that in reaching his conclusion the learned Chief Justice had drawn erroneous inferences, made unwarranted assumptions and speculations, and concerned himself with irrelevant considerations. He maintained that the Tribunal had made an accidental slip or omission which they had corrected, and had the power so to do; and, finally, that if there was any technical error in the manner of correcting the award of the 19th of April, 1961, this was a proper case for remission to the Tribunal so that such technical error may be regularised.

Counsel for the Respondents main submissions argued with consummate artistry were that the "masterly" judgment of the learned Chief Justice, and his finding of fact, should be accepted, that in any event this was not the case of any accidental slip or omission, consequently the award could not be amended - that any purported amendment had been made after the Tribunal was functus officio and that the burden of proof in this matter lies on the Appellants, but that if the onus of proof was on the Respondents that onus has been shifted by reason of the evidence disclosed on the record, and in particular the matters disclosed in the affidavit of Mr. John C. Wilman, of the 30th June 1961, filed by the Respondents and in which is set out the relevant facts.

Counsel for the Appellant, The United Port Workers and Seamen Union, in a very forceful argument, submitted that the burden of proof on the contrary rested on the Respondents which burden of proof the Respondents had failed to discharge. He, too, maintained that there had occurred on this occasion an accidental slip or omission which the Tribunal had within their powers properly corrected - that the Tribunal had not acted in excess of their jurisdiction as was claimed by the Respondents and that he would not dissent from the view that this may be a proper case for remission to the arbitrators.

It would be necessary, first of all, to examine certain aspects of the available evidence to see what reasonable inferences can be drawn.

I think I will deal at this point with the argument that there is no evidence as to how and when, and in what circumstances this alleged accidental slip or omission took place.

The parties were informed of the award on the 28th of April, and the Unions immediately brought it to the attention of the arbitrators that an important part of their submission

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had been omitted from the award, namely, that no retroactive date had been mentioned. The arbitrators apparently wished to rectify the matter, or "the point in issue", by consent of the parties, but decided to hold a meeting of the Tribunal in the presence of the parties, to hear their submissions.

The Appellants and the Respondents made sumissions to the Tribunal, whether this omission could or could not be set right under section 13 of Chapter 329, which deals with the interpretation of an award, or under section 8(c) of the Arbitration Law, Chapter 19, which deals with the correction of any accidental slip or omission. The Tribunal adjourned to give its decision on the next day, that is the 10th of May, 1961. On this day the Tribunal made a pronouncement, but for whatever reason there may be did not state how the slip or omission came to be made, and a great deal has been made of that fact.

I shall state the observations of the chairman of the Tribunal in full. It is as follows:-

> "Chairman: Gentlemen, you will remember when we adjourned yesterday, we adjourned to hand down our ruling this afternoon at three o'clock. We are a bit late but still we'll do our best. And here I read gentlemen -
>
> 'On the 1st of May, 1961, the Honourable Hugh Shearer addressed a letter to the Secretary of the Essential Services Tribunal and Shipping Association, requesting an interpretation from the Tribunal of the award on the question of the date on which the new rates should become operative as that was part of the issue put to the Tribunal. Consequent upon this letter and another received from the Honourable Thossie Kelly, the Secretary of the Tribunal convened a meeting yesterday, Tuesday, 9th May, 1961 at 2.15 p.m. at the Ministry of Labour. At this meeting submissions were made by Mr. Lett of Counsel and the Hon. Hugh Shearer and the Hon. Thossie Kelly. The Tribunal then adjourned and indicated that its ruling would be handed down today, 10th May.
>
> The Tribunal at this stage would like to state <u>that there is in the award an error arising from an accidental omission</u>. The Tribunal is of the view that this error once corrected will answer the question of the Hon. Hugh Shearer and the Hon. Thossie Kelly. <u>In the light of the foregoing the Tribunal has not addressed its mind to the submissions of yesterday, but having regard to Section 24 and Section 8(c) of the Arbitration Law, Cap. 19</u>, it will

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"endeavour to correct this error. The correction will be forwarded to the proper authority in due course and the interested parties will, we are sure, be informed of the nature and import of this correction."

Counsel for the Respondents, as also did the learned Chief Justice, regarded this failure to state then and there how the mistake had occurred as a rather peculiar circumstance, as it would have been more reasonable to expect, they suggest, that if the Tribunal had made its decision about retroactivity, before the 19th April, there was, at this meeting, a clear opportunity to have stated to the parties how this came about, but they never did so.

Mr. Coore, for the Union, on the other hand, pointed out that the arbitrators had to make their report or award, first to the Minister or the Ministry of Labour, and that the Ministry of Labour would in turn indicate the nature of the original award or any amendment thereto to the parties, and that whilst the Tribunal are not obliged to give reasons for their awards, they may have rightly or wrongly thought that any communication of that nature should have been made first to the Ministry of Labour. But it has also occurred to me that if there was in fact an omission, the Tribunal themselves may not have wished, rightly or wrongly, to expose their folly or their extreme carelessness, or might have been in some doubt as to the proper procedure, and were fearful of making another mistake. But these are all speculations. I would guard against the error of substituting attractive speculations for reasonable inferences of fact.

Two of the arbitrators, The Chairman and Mr. Johnson, gave affidavits with the object, no doubt, of showing that this decision as to the retroactive date had been in fact made before the 19th of April, and not afterwards: for otherwise there would scarcely be any necessity for the affidavits of two of the arbitrators. The learned Chief Justice did not accept

the affidavits as categorically stating that fact, but found that they were ambiguously worded and thoroughly unsatisfactory. It will be necessary, therefore, to examine in some detail this aspect of the matter.

Before doing so however it may be convenient to deal with the question of the burden of proof.

Lord Denning said in Brown vs. Rolls Royce Limited, 1961 (1) A.E.R., page 581, "it is important to distinguish between a legal burden, properly so called, which is imposed by the law itself, and a provisional burden which is raised by the state of the evidence."

In my view, the legal burden in this case was imposed by law on the respondents who sought to establish that there had been no amendment or omission in the original award, and the burden was on them to establish what they sought to prove. The learned Chief Justice in his judgment, thought that this burden had been discharged and shifted to the Appellants. The Appellants claimed otherwise: firstly, that the Respondents had not, by the evidence, discharged the legal burden of proof, and further, that the evidence contained in the affidavits filed by the Appellants had, at any rate, discharged any burden of proof which may have, on the state of the evidence, shifted to them - that is to say, the Appellants.

Counsel for the Respondents submitted that he was not alleging dishonesty in the arbitrators, but misconduct in the sense of exceeding their authority by purporting to make an amended award after they had become functus officio, and that any such purported amendment was not within the "slip rule" so called. On the other side it was suggested that it is impossible to escape the conclusion, from the learned Chief Justice's judgment, that dishonesty was imputed to the Tribunal.

The burden on proving bad faith or the like, is upon

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the person asserting it. (See Potato Marketing Board vs. Merricks, 1958, 3 W.L.R., page 149, per Devlin, J.). The issue clearly was, in this case, whether the decision as to retroactivity was made before the 19th of April or after that date, when the award had already been made.

After the meeting of the Tribunal on the 10th of May, by letter dated the 17th of May, 1961, it is alleged that the Tribunal informed the Ministry of Labour of this decision, and the Ministry in turn wrote to the parties on the 24th of May, 1961, in which it is stated that by an accidental slip or omission the retroactive date of the increases of wages from the 15th of May, 1960, had been omitted from the original award of the 19th of April, 1961. The Respondents applied to the Ministry of Labour for a copy of the letter of the 17th of May, 1961, but the Ministry replied that their request could not be acceded to. (However, it would seem that a copy of this letter was eventually sent to the parties.)

The conduct of the Ministry in not delivering a copy of that letter of the 17th of May was severely criticised by the learned Chief Justice in his judgment, with which I entirely agree.

On the 30th of June, 1961, the Respondents applied by motion to set aside this purported amendment to the original award of 19th April. After the hearing of this motion had actually commenced, the present Appellants filed the affidavits mentioned above, executed by the Chairman of the Tribunal, Mr. Noel Silvera, and another member of the Tribunal, Mr. Roy Johnson. The affidavits were submitted for the consideration of the court, no doubt with the object of showing that the retroactivity of the wage increases had not been made after, but before the 19th of April. For my own part, I cannot see that there can be any adverse criticism of the Tribunal, of the procedure they adopted of informing the parties through the Ministry of Labour. At any rate section 9 of Chapter 329 enacts that the Tribunal may

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regulate its procedure and proceedings as it thinks fit, and it was their duty to report to the Ministry.

It has been suggested that the letter of 17th May referred to, may not have been signed by one of the three arbitrators since its production had been refused, and the letter of the 24th of May had only been signed by the acting Permanent Secretary to the Ministry of Labour. A lot has been made of this letter of the 24th of May on both sides, and it is therefore necessary to set it out in full:

"Dear Sir,

RE: Arbitration 'to determine and settle the dispute which now exists between the Bustamante Industrial Trade Union, the United Port Workers and Seamen Union and the Trades Union Congress of Jamaica jointly representing the Port Workers on the one hand, and the Shipping Association of Jamaica on the other, over the Unions' claims for increased wages for Port Workers.'

In a letter dated 17th May, 1961, the Tribunal appointed under the Public Utility Undertakings and Public Services Arbitration Law, Cap. 329, to determine the dispute referred to above, informed the Ministry of Labour that the Award of 19th April, 1961, did not entirely reflect the decision of the Tribunal as the operative date of the Award was omitted and that this constituted an error arising out of an accidental omission.

2. The Tribunal in the aforesaid letter requested that the Award be corrected to read -

'(i) 8d per hour increase for dockmen now getting 3/8d to establish a rate of 4/4d per hour;

(ii) 8d per hour increase for holders now getting 3/9d (workers working in ships holds) to establish a rate of 4/5d per hour;

(iii) 8/- per day for foremen now getting 38/5d per day and 46/10d per day to establish a new rate of 46/5d and 54/10d per day, respectively;

(iv) 10d per hour for winchmen and gangway men now getting 4/- per hour to establish a rate of 4/10d per hour;

(v) that these wage rates should be retroactive to 15th May, 1960.'

Yours faithfully,
(sgd.) E. G. GOODIN
Acting Permanent Secretary
to the Ministry of Labour.

" The Chairman,
Shipping Association of Jamaica,
2 Port Royal Street,
KINGSTON.

c.c. Mr. Daniel Lett."

It would be monstrous if impropriety and dishonesty were to be imputed to the Government department and its officers on the flimsiest pretext, and without strict and clear proof.

The learned Chief Justice in his judgment makes the following observations about the two affidavits:

"(1) It is not stated in either affidavit that the decision as to the award was made upon the occasion of the meeting at the Ministry of Labour, which took place between the 7th or 11th April, and the 19th April.

(2) That decision may have been arrived at on the occasion then referred to, but it may have been arrived at on a subsequent occasion between the date of that meeting 19th April, the date of the award, because it was on that latter date that the Chairman informed the Secretary of 'the terms of the Award'.

(3) It was submitted by Counsel for the Unions that the date upon which the Chairman informed the Secretary of the terms of the Award was wrongly stated in the affidavit as the date of the Award, and that it was intended to state it as the date of the meeting at the Ministry of Labour. It may be that that was the intention but the affidavit clearly states that the communication was made on the 'said date of the Award', which was the 19th April, and which date was mentioned in the previous paragraph. I am not prepared to assume that a mistake has taken place in the affidavit.

(4) But assuming that the date of the decision was the date of the meeting, there is nothing in the affidavits to show that that decision was not subsequently altered. In fact, the inference to be drawn from the last paragraph of the Chairman's affidavit is that a change of opinion did take place. The terms of the Award, he said, were communicated to the Secretary upon the date of the Award. We know what were the terms of the Award, viz. increases in wages in respect of four classes of workers. It is clear therefore that what was communicated to Mr. Goodin was the amount of the increases, and nothing about retroactivity. I cannot see that there is any other inference available.

"(5) It has been submitted that the decision as to the retroactive date may not have been arrived at until after 19th April. This submission is based upon the failure of the deponents to state that their decision was arrived at on the date that the members met at the Ministry of Labour, and the communication to the Secretary of the terms of the Award on the date of the Award, and the fact that the Award made reference only to the increases of pay. I am of opinion that this submission is correct.

(6) No mention has been made in the affidavits as to how the draft of the Award was prepared or by whom. Presumably, a draft must have been prepared and checked, at least, by the Chairman. Nor has it been stated by whom the Award was typed. It is not known whether the original draft, if there was one, contained any reference to the retroactive date. There is no evidence as to the circumstances under which the Award was signed.

(7) The Award of the Tribunal having been received by the Secretary on the 19th April, must have been copied in his office for the parties. If Mr. Goodin had been informed that the arbitrators had agreed to make their award retroactive, how is it that when he checked the copies for the parties, he did not then notice the omission, and bring it to the attention of the Chairman?

(8) The Court has not had the benefit of any explanations from Mr. Geddes, the other member of the Tribunal, nor from Mr. Goodin, the Secretary. I was informed that both gentlemen have left Jamaica, Mr. Geddes on 26th September, and Mr. Goodin on 12th September."

When one considers what had transpired before:

(a) the Chairman's statement at the meeting of the 9th and 10th May, namely, that there was in the Award an accidental slip or omission,

(b) the letter alleged to have been written on the 17th May,

(c) the letter of 24th May, stating finally what was in fact the Award and the subsequent filing of the affidavits of two of the arbitrators,

and upon the reading on a whole of each of the two affidavits - one cannot say that one agrees with the conclusions arrived at by the learned Chief Justice.

First of all, what is the proper approach? In Mayer Vs. Leanse, 1958, 3 A.E.R., page 217, "the approach that the court makes to an award has always been to support the validity of the award and to make every reasonable intentment and presumption in its favour." I must say the same about these affidavits

which are a part of the record. It is either that the deponents are saying that the decision of retroactivity was made at or before the award of the 19th April, or that they are dishonestly and deliberately attempting to deceive the court, in order to give that impression which was false they having actually made that decision after the 19th April, and possibly after the 10th May as was suggested by the learned Chief Justice.

That the Respondents now disclaim allegations of dishonesty cannot now extricate them from that position nor can the fact that their notice of motion was so formulated as to cast upon themselves the burden of proving a negative.

The relevant part of the Chairman's affidavit reads as follows:

> "3. That the Tribunal consisted of myself as Chairman, Mr. Paul Geddes as Employers' Representative and Mr. Roy Johnstone as Workers' Representative.
>
> 4. That on a date subsequent to the 7th of April 1961 and prior to the 19th of April 1961 the Tribunal met at the Ministry of Labour, Kingston, and gave considerations to the submissions of the parties.
>
> 5. That it was unanimously decided by myself and the other members of the Tribunal that the increases should be made as stated in our Award dated the 19th April 1961 and also that these increases should be retroactive as of the 15th of May 1960.
>
> 6. That after our decision as stated above, I personally on the said date of the Award, informed Mr. E. G. GODIN and Secretary of the Tribunal of the terms of the Award."

The Appellants suggest that the word "Award" in the second line of paragraph 6 might be read instead as "decision". On the other hand, the Respondents suggest that in the first line of paragraph 5, after the phrase "that it was unanimously decided", it could have been there clearly stated on what date, but that it has not been so clearly stated, and that in a prosecution for perjury the deponent could in his defence correctly allege that he had not in his affidavit deliberately stated that the unanimous decision was before the 19th April.

Reading the affidavit as a whole, and without imputing

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dishonesty, I think it can be reasonably construed to mean what the Respondents contend. I am not prepared to impute impropriety and dishonesty on this evidence alone.

Mr. Roy Johnstone's affidavit reads as follows:

> "3. That the Tribunal consisted of Mr. Noel P. Silvera as Chairman, Mr. Paul Geddes as Employers' Representative and myself.
>
> 4. The Tribunal met on the 4th and 7th of April 1961 and heard the submissions of the respective parties.
>
> 5. That on the date between the 11th and 19th of April 1961 the Tribunal met at the Ministry of Labour, Kingston and gave considerations to the submissions of the parties.
>
> 6. It was unanimously decided by the Chairman of the Tribunal, Mr. Paul Geddes the Employers' Representative and myself that the increases should be made as stated in the Award dated the 19th of April 1961 and also that these increases should be retroactive as of the 15th of May, 1960".

In my view paragraph 6 read with the other parts of the affidavit, without imputing impropriety, agrees with the contention of the Appellants that the deponents wished to convey by their words that the decision as to retroactivity was not made after the 19th of April. If I am correct as to the interpretation of the words used in these affidavits, then it would seem that any burden of proof which might have been placed upon the Appellants had been discharged.

Counsel for the Appellants, however, further contended that as the Chairman and Mr. Johnstone were actually in court and were there for cross-examination by the other side if they wished, but which was declined, and as the learned Chief Justice himself may have asked those deponents any question he desired about the facts contained in the affidavits, but having declined to do so ought not thereafter to impute impropriety to the Arbitrators and that the learned Chief Justice was wrong in his findings of fact and his decision on the affidavits. Some weight was attached to this submission, and I must, therefore, refer to the decision in the case of Enoch vs. Zaretzki, 1910, 1KB.,

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page 317 - that "neither a judge nor an umpire has any right to call a witness in a civil action without the consent of the parties, and that arbitrators are bound to observe the rules of evidence no less than judges."

It would seem from the decision of Fallon and Calvert, 1962, A.E.R. page 346 - "that although a judge (or arbitrator) has no power to call witnesses without the consent of the parties, a witness who has in fact given evidence, orally (or by affidavit) may be recalled and may be asked any question by the court." The learned Chief Justice in this case exercised his discretion and did not ask the deponents any questions. In my view he was not obliged to do so.

Having come to the conclusion that the evidence, I underline evidence, taken as a whole establishes that the disputed decision of retroactivity was taken before 19th April, the next question to be determined is whether, the Award nevertheless ought to be set aside in the circumstances, or whether it ought to be upheld by reason of the fact that a correction had been made of an accidental slip or omission.

A number of cases have been cited on this point, and counsel for the Respondents relied strongly on the case of 13 Owley vs. Link, 1914, 2 K.B., 734 - the decisions in these cases, of course, must be examined on their particular facts and the principles extracted accordingly: An award will only be set aside on three grounds - namely, for an error of law, or for misconduct, or for an improper procuring of an award, (See Meyers vs. Leanse supra).

The local jurisdiction is contained in section 8 of the Arbitration Law, Chapter 19. The old law, on this topic, (before the modern introduction of the special powers of arbitrators, as contained in section 8(c) Chapter 19) is conveniently summarised in Comyn's Digest, and may be thus stated:

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"the arbitrators cannot reserve to themselves a further power, since that would enable them to make a double award without the interposition of those who empowered them at first.

The arbitrators cannot make their award by parcels at several times, for when they have made an award they have executed their authority and can do no more.

Therefore an alteration by the arbitrator in the award, though only to correct a mistake in figures, is void if made after the delivery of the award, and even after it is ready for delivery, and notice thereof given to the parties; but the award in its original state will stand good. Mamfree vs. Bromley, 6 East, 309. Irvine vs. Elnon, 8 East, 54. However, if the arbitrator make affidavit of his having committed a mistake, the courts will set aside the award unless the parties will consent to refer the matter back to him. Rogers vs. Dallimore, 6 Taunton, 115; but see Dowling and Rayland 774."

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The modern statutory power was enacted to give elasticity to the rigidity of the old law and to save time and expense. The slip or omission must be an important one, otherwise you do not want to remedy it. It is no use to make a rule correcting slips or omissions that are of no sort of importance, as Kennedy, J. said in Ogley vs. Link, supra; the question is more "whether or not the thing which is asked for is a thing, as it seems to me, which in discretion ought to be amended, and it matters not how great in importance the slip or omission may be."

In that case -

"the plaintiffs signed judgment in default of appearance against the defendant, a married woman, sued in respect of her separate estate. By mistake the judgment was drawn up in the ordinary form of a personal judgment against the defendant, instead of in the appropriate form laid down by the Court of Appeal in Scott v. Morley, 1887, 20 Q.B., 120. The plaintiffs having taken out a summons for leave to amend the judgment so as to follow the form of judgment prescribed in the case of a judgment against a married woman upon a contract made during coverture, a Master and a judge at chambers declined to make any order upon it.".

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However, Lord Buckley, J. in that same case (decided by majority) said:

> "To my mind an error in something means that the thing of which you are speaking contains parts which are right and parts which are wrong, and that you are going to alter so much of it as is wrong. It is not correcting an error in a thing which is wrong from beginning to end, to substitute for it something which is right.
>
> If this order applies I have to see whether this judgment contains something which is right and which I am to correct by adding something, if it be a mistake which arises from an omission, or by correcting something if it be something which requires modification or correction of some sort. So that to see whether the order applies or not it is vital in the first instance to see whether this is a document, parts of which are right and parts of which are wrong. If I am right in what I have said already, there is no part of it which is right. It is wrong altogether."

In my view in the case before us this award is right and which is to be corrected by adding something which was a mistake arising by an omission, and consequently the Tribunal had the power, under section 8(c), Chapter 19, to correct it.

Counsel for the Appellants submit that this Court has the power under section 11 of Chapter 19, to remit the matter to the arbitration Tribunal, but from the conclusion I have reached, the Tribunal having already made its decision that the increase of wages should be retroactive as from the 15th of May, 1960, there would be no matter for their reconsideration and so, no necessity to remit.

In this case this Court has equal opportunity to assess and evaluate the evidence.

When the question is:what is the proper inference to be drawn from the facts, an appellate court, though it will naturally attach importance to the judgment of the trial judge, should form an independent opinion.

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Benman v. Austin Motor Co.
1955 (2) A.E.R., page 421.

After full consideration of all the evidence in this matter I have come to the conclusion, with respect, that the learned Chief Justice came to a wrong decision as to the reasonable inferences to be drawn from the established facts. The evidence adduced by the Respondents if it amounted to a "strong suspicion" merely, did not discharge the legal burden of proof which clearly and unmistakenly rested on the Respondents.

For these reasons I would allow the appeal with costs to the Appellants here and the Court below. The Respondents will have the costs of the application for leave to call fresh evidence.

Dated this 31st day of December, 1962.

.....

Actg. President, Court of Appeal

I agree.

First: as to onus of proof, I am clearly of opinion that the onus lay upon the respondents to establish the alleged excess of jurisdiction. The general rule is that he who moves the court to act must prove the facts necessary to found the order he seeks. In this case, the respondents seek to have set aside the correction of an Award which the Arbitration Tribunal has purported to make by virtue of a statutory power. It is not suggested that a lack or excess of jurisdiction is shown on the face of the record. The court will only set aside that part of the award inserted by the correction, if it is satisfied that either there was in fact no omission or that the omission was not accidental, and it is the respondents who seek the order who must establish one or other of these alternatives.

Counsel for the respondents submitted that they should not be required to prove a negative. The answer to this is, as Bowen, L.J., said in the well known case of Abrath v. Northeastern Railway Company (1883) 11 Q.B.D., 440 at p. 457 -

> "If the assertion of a negative is an essential part of the plaintiff's case the proof of assertion still rests on the plaintiff."

It is essentially important in a case such as this, which is relatively bare of evidence, to bear in mind at all times where the legal onus of proof lies. For, assuming that the respondents established enough to shift the evidential burden of proof to the appellants, all that was necessary for the discharge of this burden was for them to equalise the probabilities. In other words, they must establish that there may have been, not, as the learned Chief Justice held, that there was, an accidental omission.

It may be convenient here to state that in the instant case the document amending the award has not been put in evidence for reasons to which it is unnecessary now to refer, and the case was fought and determined in the court below on the basis that the letter of the 24th May correctly recorded the amendment, and that only the question of jurisdiction was in issue. This court accordingly

ruled, during the hearing, that it would consider this appeal on the basis that, notwithstanding the use of the word "requested" in the Ministry's letter of May 24, the Tribunal did, by the document of May 17, purport to amend its award by the addition of a fifth paragraph.

As I have said, this case involves the purported exercise by the Arbitrators of their statutory power to correct an error arising out of an accidental omission in their award. The court was assisted by a very full discussion, by Counsel on both sides, of the principle upon which the Slip Rule is applied. I do not consider it necessary to deal at any length with the cases to which we were referred. It is clear that the rule must be applied with caution. The fact that the Arbitrators are of opinion, as in this case they stated they were, that the circumstances constitute an omission, does not conclude the matter. The court is entitled to enquire into the facts, and if satisfied that they do not fall within the strict limits of the Slip Rule, it will set aside the correction. The rule cannot be used for the purpose of inserting a fresh act of judgment or of substituting one act of judgment for an earlier one - Henfree v. Bromley (1856) East 309; Oxley v. Link (1914) 2 K.B. 734 - nor can it be used for the purpose of altering a decision which has been deliberately set out in words, where the words have proved inadequate to express what the Arbitrators intended - Sutherland v. Hannavig (1921) 1 K.B., 336 - or where something has been omitted because of a mistaken view of the law (Bentley v. O'Sullivan (1925) A.E.R., 546). But it is clear, and I did not understand this proposition to be disputed at the Bar, that where there is an error in the award because some part of the Arbitrator's decision was accidentally omitted from the award, the Arbitrators may correct it by adding what was omitted.

In Oxley v. Link (supra), Buckley, L.J., referring to Order 23, Rule 11, the Slip Rule Order, said, at page 41 -

> "In order to see if this Order applies I have to see whether this judgment contains something

> which is right and which I am to correct by adding something, if it be a mistake arising from an omission, or by correcting something, if it be something which requires modification or correction of some sort."

In their notice of motion the respondents alleged that the Tribunal had not made any error arising from any accidental omission. The court had, therefore, to determine whether, on the facts proved, it was established either that the Tribunal had not prior to the issue of its award of the 19th April, made a decision as to a retroactive date, or, if it had made the decision, its omission from the award was a deliberate act of the Tribunal. The learned Chief Justice held that no decision had been made.

Counsel for the appellants have submitted that this finding is unreasonable and cannot be supported by the evidence. The learned Chief Justice, they contended, did not give sufficient weight to the statements of the Tribunal made on the 10th May and in the letter of 17th May; misdirected himself in that he treated as facts his own unwarranted and question-begging assumptions; misdirected himself as to the meaning and purport of the affidavits sworn by Silvera, the Chairman of the Tribunal and Johnstone, a member of the Tribunal.

The reasons set out by the learned Chief Justice, or urged by Counsel for the respondents before us, as justifying the Chief Justice's finding, are as follows:

> 1. The failure of the Tribunal tostate promptly upon receiving letters from Kelly and Shearer that the retroactive date upon which they had decided had been accidentally omitted from the award; not until the 10th of May did they state that there had been an error, and even then they failed to state what the error was or how it had arisen.

2. The Tribunal, by its letter of May 2nd, summoned a meeting "to clarify the point at issue", and invited the parties "to make submissions on this matter." By so doing it impliedly admitted that it had not reached a decision as to the date.

3. Neither the statement of 10th May nor the letter of 24th May states clearly and unequivocally that the decision had been reached before the signing of the award on the 19th April, and had been accidentally omitted therefrom.

4. The affidavits are unsatisfactory; do not state categorically that the decision as to the retroactive date was arrived at at the same meeting at which the increased rates of pay were agreed, and leave room for an inference that that decision was made subsequently, at another meeting held between May 10 and May 17. Moreover, they do not state how the error occured, or explain how it was that no member of the Tribunal observed the omission at the time of signing the award.

I agree with Counsel for the appellants that some of the "established facts" set out by the learned Chief Justice as sufficient to shift the onus of proof, are really comments, and I am unable to accept certain of these comments as valid. But it cannot be denied that the failure of the Tribunal to announce promptly that there was an error in their award must raise in the mind of the court serious doubt as to whether the error did exist. The award itself recites that the Unions' claim included a request for increased wages retroactive to 4th April, 1960. It had been common ground at the hearing that the retroactivity arose on the reference to the Tribunal, and the Tribunal had heard submissions on this issue. It is reasonable to expect that on its being pointed out to the Tribunal that its award contained no decision on this issue it would promptly have stated the fact, if it was a fact, that its decision had been accidentally omitted. Even if, as has been submitted, the Tribunal felt itself bound in law to convene a meeting on the application of one of the parties it is hard to under-

stand why it did not make the announcement at the commencement of the meeting. Add to this silence the unusual circumstance that such an omission should pass unnoticed by all three members and the Secretary, and, further, the expressed willingness of the Tribunal to clarify the issue of the effective date of the award and its invitation to the parties to make submissions on this matter. In my view these facts are sufficient, in the absence of any satisfactory explanation, to arouse grave suspicion as to whether there was in fact an omission from the award, and to require a close examination of the facts which it is said constitute the accidental omission.

Counsel for the appellants submitted that the Tribunal on discovering the error may have been in doubt as to how it could legally be corrected, and hesitated to make a statement about it until they were sure of their power to do so. Counsel pointed out that the law (Cap. 329) under which the Tribunal was operating contains a power to interpret (section 13), but no reference to the applicability of the Arbitration Law (Cap. 19), section 8(c) of which confers the power to correct an error arising from an accidental omission. There is no evidence that the Arbitrators became aware of their power to correct until Shearer made his submission on May 9th, and it cannot be assumed that they had previous knowledge of it - there is no presumption that they know the law governing their powers and rights (see Kiriri Cotton Co. Ltd. v. Dewani, 1961, A.E.R. 177 per Lord Denning at page 181).

It was further urged that the letter of May 2nd is consistent with uncertainty on the part of the Tribunal as to its powers. It is useless to speculate now as to what course the proceedings on May 9th would have taken had Shearer made submissions when called upon by the Chairman. In the event no submissions as to clarification of the award were made for Mr. Lett, Counsel for the Shipping Association, took a preliminary objection to the jurisdiction of the Tribunal to clarify its award. The parties were heard on this objection. Shearer referred the Tribunal to section 8(c) of Cap. 19

and the Tribunal then adjourned to consider the submissions. On the following day, May 10, it made the announcement that it proposed to act under section 8(c) to correct the error in its award in the terms which have been referred to by the learned President in his judgment.

Pausing for a moment to consider the position up to this stage, in the light of these submissions, one is forced to ask oneself the question - when the Tribunal made its announcement on May 10 did it mean that the date decided upon had been accidentally omitted from its award, or that the Tribunal had omitted to decide upon a date and that this was an accidental omission? Had the case rested here I would have felt constrained to support the judgment of the learned Chief Justice, for I could not say that an inference that no decision had been reached was unreasonable. It seems to me, however, to be erroneous to say that at this stage the onus of proof shifted to the appellants, for the respondents' case included the Ministry's letter of May 24, the contents of which to my mind are important, and which the learned Chief Justice appears to have treated as part of the appellants' case. This letter states that the Tribunal had informed the Ministry that "the award of 19th April, 1961, did not entirely reflect the decision of the Tribunal as the operative date of the award was omitted." The clear meaning of this appears to me to be that the Tribunal, before issuing its award of 19th April, had made a decision which included the operative date, but that this part of the decision was not recorded in the award. The Tribunal then goes on to state that this omission was accidental. The wording may be rather laborious, but the meaning is clear.

The respondents have disclaimed any allegation of dishonesty on the part of the Arbitrators, nor is any alleged in their notice of motion, and I see no reason to assume that the Arbitrators were deliberately using words which clearly purport to convey one meaning for the purpose of veiling some other meaning. Nor is there any evidence that the decision as to a retrospective date, if made prior to the issue of the award, was deliberately omitted. In my opinion

the learned Chief Justice did not attach sufficient weight to the contents of this letter.

I turn now to consider the two affidavits. The learned Chief Justice in his judgment stated -

> "They purport to allege that the decision as to retro-activity, and that as to the increase of wage rates took place on the date when the members met, a date between 7th or 11th April and 19th April, and that both decisions took place on that same date."

But the learned Chief Justice, after a close analysis of their terms, held that they did not say what they purported to say. He considered their contents so vague and the omissions so many that they left room for the inference, which he held to be the proper inference, that although a decision may have been reached at the meeting prior to the 19th April, this decision was altered at a subsequent meeting held before the issue of the award, and that the decision stated in the corrected award was only reached after the 10th May.

I have carefully considered the learned Chief Justice's reasoning, as well as the submissions of Counsel for the respondents in support, and am unable to accept that this is a reasonable inference. The affidavits speak of only one meeting for the consideration of the submissions, and only one decision - a unanimous decision - and I can find nothing in them to justify the inference that there was a subsequent meeting for further consideration, or any change of opinion.

The learned Chief Justice said of paragraph 6 of Silvera's affidavit -

> "Paragraph 6 of the Chairman's affidavit must now be looked at -
>
> (d) "After our decision as stated above" suggests a reference to the two decisions arrived at as stated in paragraph 5.
>
> (e) "on the said date of the Award" and "I..... informed Mr. Goodin.....of the terms of the Award" certainly states that all Mr. Goodin was informed as being the Award was what was in the

Award, i.e. the increases of pay;

(f) and that gave rise to the inference that the terms of "the decision as stated above" which was communicated to Mr. Goodin, being only the decision as to the increases of pay, the decision as to retroactivity had not yet been made."

It will be noted that the learned Chief Justice here fell into the same error which he had earlier rejected, of confusing the "decision" with the "award". Both affidavits plainly state that the decision was in two parts, (1) increased wages, (2) retroactivity. The award contains only one part - increased wages. Silvera says that it was he who told the Secretary the terms or contents of the award. He does not say that he told the Secretary the terms of the decision. I come to the conclusion that Silvera omitted to tell the Secretary of the second part of the decision, namely retroactivity. This conclusion that the mistake was Silvera's is consistent with the silence of the Tribunal when the omission was discovered and with the otherwise inexplicable conduct of the Secretary, for it is the Chairman who would have to speak for the Tribunal, and there is no evidence that the Secretary knew more of the decision than what was stated in the award.

Counsel for the respondents submitted that if it subsequently turned out to be the fact that the decision as to retroactivity was made after April 19, the deponents could not be convicted of perjury because the paragraphs in their affidavits which refer to the decision arrived at and which are in similar terms, do not expressly state that this decision was made at the meeting referred to in the preceding paragraph. Assuming, without accepting, that this is correct, it still remains that the affidavits, having regard to the sequence of the paragraphs, clearly purport to convey that the decision as to retroactivity was taken at the only meeting to which they refer. I am not prepared to assume that they have been prepared and sworn with the object of concealing the truth and of evading a possible prosecution for perjury.

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It would undoubtedly have been preferable and more satisfactory

if the affidavits had set out fully the circumstances in which the error occurred so that the court inquiring into the matter might have all the facts before it, but the similarity of the two affidavits indicates that they were drafted by the same hand, and the two arbitrators who were not parties to the case may have been content to depose to what the parties' solicitors considered sufficient, so long as they were satisfied that what they were swearing towas substantially true. It was stated at the Bar that the two arbitrators were in court, ready to testify if required, but that Counsel for the appellants stated that they would not be required for cross-examination. It would be unfair, by innuendo or otherwise, to impute prevarication to them when the opportunity to investigate their statements in their affidavits was not taken. For my part, I am content to accept the affidavits as meaning what they purport to convey, and not to seek a hidden meaning based upon the niceties of language.

To sum up. It appearing on the face of the proceedings that the Tribunal had purported to exercise its statutory power to correct an error arising out of an accidental omission, the onus of proving that it acted in excess of that power lay upon the respondents who moved to set aside the amendment. The evidence as to the Tribunal's silence and its summoning a meeting to clarify its award and hear submissions on retroactivity, does suggest that no decision had been taken. The letter of May 24 and the two affidavits, however, sufficiently state that this decision had been taken prior to the issue of the award, and, as I see it, that the Chairman accidentally omitted to tell the Secretary about it. I do not think that the facts warrant the inferencesof a second meeting, a change of opinion, and then after May 10, a final decision on retroactivity, which the learned Chief Justice has drawn.

In my opinion the respondents failed toestablish that the circumstances did not fall within the ambit of section 8(c) of the Arbitration Law, and this appeal should be allowed. ~~with costs here and below.~~ I agree with the order proposed as to costs.

I regret that I find myself in the invidious position of having, with great respect, to dissent from the judgments delivered by my brethren herein.

It appears to me that the Tribunal having delivered its award of the 19th April 1961, became functus officio and could not therefore make any subsequent amendment of or addition to its award. Prima facie therefore the document of the 19th April 1961 must be taken as the award of the Tribunal. The Tribunal however purported to make an amendment to the award by the addition of clause V, making it retroactive to the 15th of May 1960. This it purported to do under the provision of S.8(c) of the Arbitration Law, Cap. 19, on the ground that the award contained an error arising from an accidental omission to include the clause as to retroactivity.

Whether or not the Tribunal could so amend the award depended on whether or not it had in fact arrived at the decision as to retroactivity before the award was signed and such decision was accidentally omitted from the award.

In these circumstances the question arises, on whom did the general burden of proof lie.

If the Tribunal had been made the defendants in this matter I think the burden would have been on it to establish the validity of the amendment. It is true that in this case the appellants are not seeking to enforce the award. Indeed there does not appear to be any power in the appellants to enforce the award, as it is provided by Sec. 10(5) of Cap. 329, that the award shall be binding on the employer and workers to whom the award relates, and shall be an implied term of the contract between the employer and workers. It would seem that only the workers could enforce the award. The appellants are however the representatives of the workers, and will obviously benefit if the amendment is allowed to stand. In these circumstances would there be any onus on the appellants to establish the validity

of the amendment? It is not an easy question to decide, but as it was the respondents who were seeking to set aside the purported amendment I am prepared to adopt the view that the onus was on them to show that the Tribunal had not made the decision as to retroactivity before they signed the award of the 19th April, ~~of~~ 1961. This they must do either by direct evidence or by evidence from which it would be reasonable and more probable than not to draw such an inference.

The evidence tendered by the Respondents show the following:-

1. The Tribunal sat on the 4th and 7th April, 1961 and considered the submissions made by the parties, including submissions on the question of retroactivity.
2. On 19th April, 1961, the Tribunal made its award granting increases in the rates of wages payable, but silent as to the issue of retroactivity.
3. The award was forwarded to the parties by the Ministry of Labour on the 28th April, 1961.
4. On the 28th April, 1961, Mr. Kelly wrote the Ministry of Labour, pointing out that the award did not contain an operative date, notwithstanding the fact that the Unions had sought to have it retrospective to the 3rd. April, 1960, and requesting clarification of the matter.
5. On the 1st May, 1961, Mr. Shearer wrote the Ministry of Labour pointing out that the award omitted reference to the portion of the dispute as to retroactivity, and requesting an interpretation by the Tribunal under Sec. 13 of Cap. 329 on the question of the date on which the new rates should become operative.
6. On the 2nd May, 1961, Mr. Woodin, the Secretary of the Tribunal, telephoned Mr. Wilman, the Solicitor for the respondents, advising that Mr. Silvera, the Chairman of the Tribunal, wished to know whether the

respondents would consent to the Tribunal dealing with Mr. Shearer's letter without a hearing, under Sec. 13 of Cap. 329. Mr. Wilman informed Mr. Goodin that the respondents did not so consent.

7. On the same day the Secretary of the Tribunal wrote the respondents referring to the letters from Messrs. Kelly and Shearer, and stating that the Tribunal was prepared to clarify the point in issue, and in accordance with Sec. 13 of Cap. 329 it decided to invite them to make submissions on the matter at 2.15 p.m. on the 9th of May, 1961.

8. On the 9th of May, 1961, the Tribunal met and after hearing submissions from the parties as to whether it could act under Sec. 13 of Cap. 329, or Sec. 8(c) of Cap. 19, adjourned to the 10th of May 1961, to consider its ruling on the point.

9. On the 10th of May, 1961, the Tribunal resumed its sitting and instead of making a ruling on the submissions which were made on the 9th of May, made the following announcement -

> "--------The Tribunal at this stage would like to say that there is in the award an error arising from an accidental omission. The Tribunal is of the view that this error once corrected will answer the question of the Honourable Hugh Shearer and the Honourable Thossy Kelly. In the light of the foregoing, the Tribuna has not addressed its mind to the submissions of yesterday, but having regard to Sec. 24 and Sec. 8(c) of the Arbitration Law, Cap. 19, it will endeavour to correct this error. The correction will be forwarded to the proper authority in due course and the interested parties will, we are sure, be informed of the nature and import of this correction."

10. On the 24th May, 1961, Mr. Goodin, who was then the Acting Permanent Secretary of the Ministry of Labour, wrote the letter appearing at page 157 of the record to the respondents stating inter alia:

> "the Tribunal...informed the Ministry of Labour that the award of the 19th April, 1961 did not entirely reflect the decision of the Tribunal, as the operative date of the award was omitted and that this constituted an error arising out of an accidental omission. The Tribunal in their aforesaid letter requested that the award be corrected to read ——(V) That these wage rates should be retroactive to 15th May, 1960."

It appears to me that if the Tribunal had come to a decision before the 19th April, 1961, that the increased wage rates should be retroactive to the 15th of May, 1960, but due to an accidental slip or omission this was not stated in the award of the 19th April, 1961, it would be reasonable and natural to expect that when the matter was brought to its attention by the letters of Messrs. Kelly and Shearer, it would h have immediately informed the parties that it had in fact made such a decision, but that the decision had been accidentally omitted from the award. Not only did the Tribunal not do so, but at no time during the meeting on the 9th of May, was it so stated. Even on the 10th of May, when, without addressing its mind to the submissions made by the parties on the 9th in respect of which it had adjourned to give a ruling on the10th, it stated that at that stage it would like to state that there was in the award an error arising from an accidental omission, one would have expected that it would at that stage have stated what the error was and how it came to be made.

In my view on the facts established by the respondents down to the 10th of May, 1961, the only reasonable and

probable inference to be drawn was that the Tribunal had not in fact made any decision as to retroactivity before the 19th April, 1961, whether from an oversight or otherwise, and as this was an issue in respect of which they should have made a decision, they purported to give themselves the power to do so under Sec. 8(c) of the Arbitration Law, Cap. 19, on the basis of having made an accidental slip or omission by their failure to decide that issue.

I do not think that the letter of the 24th of May, 1961 from the Ministry of Labour to the respondents is inconsistent with this inference. That letter may be construed as meaning that the Tribunal had made an error arising out of an accidental omission to include an operative date in the award and (the matter having been brought to their attention by the letters from Messrs. Kelly and Shearer resulting in the proceedings of the 9th and 10th of May) were now correcting that error, by inserting an operative date (decided on as a result of the proceedings of the 9th and 10th May). In these circumstances theaward of the 19th of April, 1961 would not reflect the decision of the Tribunal.

I agree with the view expressed by the learned Chief Justice (at page 180 of his Judgment) that enough was proved by the respondents to shift the onus to the appellants.

The only evidence tendered by the appellants were the affidavits of Mr. Noel P. Silvera, the Chairman of the Tribunal and Mr. Roy Johnstone, the workers representative on the Tribunal.

Now if the Tribunal had in fact decided on an operative date for the increases before the 19th of April, 1961, and this was accidentally omitted from its award, the circumstances in which this occurred would be peculiarly within the knowledge of Messrs. Silvera and Johnstone and one would expect that such circumstances would be stated clearly and unequivocally and in some detail in the affidavits which they swore on behalf of the appellants, particularly when at that stage it was known exactly

what the respondents were alleging. I regret to say that in my view neither of these affidavits could claim these qualities, and I think that most of the criticisms made in respect of them by the learned Chief Justice were justified.

But even if these affidavits could ~~could~~ be construed to mean that the decision as to retroactivity was made before the 19th of April, 1961, that would not be the end of the matter. The question would still remain whether the failure to include the decision in the award was due to an accidental slip or omission. Now the circumstances in which the alleged omission occurred could not be known to the respondents. Those circumstances would all be matters peculiarly within the knowledge of Messrs. Silvera and Johnstone, who had sworn affidavits on behalf of the appellants, and who could quite easily have stated the facts if there were any, showing how the accidental slip or omission had occurred. In my view the onus at that stage was on the appellants to establish not only that the decision as to retroactivity had been made before the 19th of April, 1961 but that the failure to include it in the award was due to an accidental slip or omission. Up to now no one knows whether:-

(a) Mr. Silvera communicated the ddcision as to retroactivity to Mr. Goodin, and if so, how the communication was made and how it came about that the decision was omitted from the award when it was being prepared, or

(b) Mr. Silvera omitted to communicate the decision to Mr. Goodin, and if so, how it came about that none of the members of the Tribunal discovered the omission when the award (a comparatively short document) was being signed.

The Court cannot presume that an accidental slip or omission had occurred. The appellants must establish this on a balance of probabilities, and in my view they failed to do so on the evidence which they tendered in the Court below.

Much has been made by the appellants of the fact that the respondents made no allegation of fraud or dishonesty against the Tribunal. An allegation of fraud or dishonesty is a serious allegation and one that can not be established except by some cogent and direct evidence. As pointed out before, the circumstances in which the alleged accidental slip or omission occurred were peculiarly within the knowledge of the members of the Tribunal and in those circumstances the respondents in my view very properly refrained from making anyallegation of fraud or dishonesty. The members of the Tribunal were the only persons who could say exactly how the alleged slip or omission occurred but they chose not to do so. The conduct of the Tribunal can only be guaged by a comparison with what one would expect of reasonable men in their position and if the Tribunal by its conduct lays itself open rightly or wrongly to suspicions of impropriety they only have themselves to blame for that.

I am not sure that I would have reached some of the conclusions reached by the learned Chief Justice in this case, but that is not the test. In my view he applied himself with great care to a difficult and unusual task and I find myself unable to say that he was wrong in the decision to which he came.

With regard to the question of remission, I do not agree that the absence of a motion to remit in accordance with 0.59, r.39 and 0.64, r.14 would preclude the making of an order for remission in this case if the circumstances otherwise warranted such an order. The learned Chief Justice did not, however, base his refusal to remit on the absence of a motion, but also considered the matter on the merits and in the exercise of his discretion refused remission. It has not been shown that he exercised his discretion on any wrong principle, and I can see ne reason to interfere. For these reasons I would dismiss the appeal with costs to the respondents.

I agree that the respondents should have the costs of th

application for leave to call fresh evidence.

(Sgd.) L. E. Washington

Judge of Appeal (Ag.)