Constitutional Law & Legal Systems

As there was no legal basis for the rejection by the learned trial judge of the jury's first verdict on counts two, six and seven, that rejection was without lawful authority. The jury were, therefore, *functus officio* upon the delivery thereof, and the second verdicts of guilty on these counts were wrongly received and cannot stand. By reason of the misdirection on the issue of identity in relation to count one, the conviction and sentence thereon cannot stand and are set aside. This is not in our view a case in which the proviso to s. 14 (i) of the Judicature (Appellate Jurisdiction) Act could lawfully be applied.

For the above reasons, therefore, we allowed the appeals of the appellant, set aside his convictions, and ordered a new trial on count one only.

Appeals allowed.

MOSES HINDS, ELKANAH HUTCHINSON, HENRY MARTIN, SAMUEL THOMAS *v.* THE QUEEN AND THE DIRECTOR OF PUBLIC PROSECUTIONS *v.* TREVOR JACKSON ATTORNEY-GENERAL (INTERVENER)

[PRIVY COUNCIL (Lord Diplock, Viscount Dilhorne, Lord Simon of Glaisdale, Lord Edmund-Davies and Lord Fraser of Tullybelton), July 28, 1975]

Constitutional Law—Parliament of Jamaica passing legislation establishing a court to deal with firearms offences—Court comprising three divisions—Appellants tried and convicted in Resident Magistrate's Division—Constitutional validity of Resident Magistrate's Division and Circuit Court Division—Full Court Division constitutionally invalid—Whether provisions relating to Full Court Division severable—Gun Court Act 1974 [*J.*], ss. 3, 4, 5, 6, 8, 9, 10, 13, 17, 18, 21—*Firearms Act* 1967 [*J.*], *s.* 20—*Interpretation Act* 1968 [*J.*], *s.* 54—*Jamaica (Constitution) Order in Council* 1962, *ss.* 2, 13 (1), 20 (3) & (4), 21 (1), 25 (2) & (3), 44 (1), 97 (1), 103 (1) & (5), 110 (1), 111, 112 (2).

Constitutional Law—Trial—Gun Court—In camera hearings—Jamaica Constitution permitting in camera hearings in interest of public safety and public order —Gun Court Act 1974 *requiring Gun Court to sit* in camera—*Whether provisions of Gun Court Act in conflict with Constitution—Gun Court Act* 1974 [*J.*], *s.* 13 (1) —*Jamaica (Constitution) Order in Council* 1962, *s.* 20 (3) & (4).

Constitutional Law—Gun Court—Sentence—Detention at hard labour during Governor-General's pleasure—Review Board consisting mainly of persons not qualified under Constitution to exercise judicial powers—Review Board determining length of sentence and advising Governor-General thereon—Unconstitutionality of Review Board—Gun Court Act 1974 [*J.*], *ss.* 8 (2) & (3), 22.

Statute—Some provisions of statute ultra vires—*Severability—Test to be applied.*

In 1974 the Parliament of Jamaica passed the Gun Court Act 1974 (hereinafter referred to as "the Act") which purported to establish a new court called the Gun Court. The court was empowered to sit in three Divisions, namely, a Resident Magistrate's Division, a Full Court Division and a Circuit Court Division. One or other of these Divisions was empowered to try certain kinds of offences which, prior to the coming into force of the Act, were cognisable only in a Resident Magistrate's Court or in a Circuit Court of the Supreme Court of Jamaica. The Act provided, *inter alia*, that all trials should be held *in camera* and that for

certain specified offences the Gun Court should impose a mandatory sentence of detention at hard labour from which the detainee could only be discharged at the direction of the Governor-General acting in accordance with the advice of a Review board, a non-judicial body established by the Act. The five named individuals who are parties to the consolidated appeals to Her Majesty in Council, four appellants in the first appeal and one as respondent in the second appeal, were each convicted in the Resident Magistrate's Division of the Gun Court and sentenced to detention during the Governor-General's pleasure. Each of them appealed to the Court of Appeal against his conviction and sentence on the grounds, *inter alia*, that the provisions of the Act under which he had been tried and sentenced were in conflict with the Constitution of Jamaica and, therefore, void. The appeals of the first four were, by a majority, dismissed. The appeal of the fifth detainee was heard some months later and allowed. The unsuccessful parties to these appeals now appealed to Her Majesty in Council.

The attack upon the constitutional validity of those provisions of the Act under which the appellants were tried and sentenced by the Resident Magistrate's Division concerned (i) jurisdiction, (ii) procedure, (iii) sentence, and (iv) severability.

The inseverability of the provisions of the Act which create the three Divisions of the Gun Court was the main thrust of the appellants' challenge under the head of jurisdiction. This involved a direct attack, not upon the specific provisions of the Act under which the appellants were tried and convicted by a resident magistrate when looked at in isolation, but rather upon the constitutional validity of those provisions which purported to confer jurisdiction upon the Circuit Court and Full Court Divisions. In this connection it was argued that the Act embodied a comprehensive legislative scheme for the establishment of a single court with power to sit in separate Divisions, and to confer upon it jurisdiction to try certain categories of offenders for criminal offences of all kinds; that the jurisdiction exercisable by the court when sitting in a Resident Magistrate's Division was an integral and inseparable part of the jurisdiction intended to be conferred upon the court; and that a court consisting only of a Resident Magistrate's Division would be a different kind of court from that which Parliament intended to create.

With respect to (ii) *supra*, s. 13 of the Act provides that in the interest of public safety and public order the three Divisions of the Gun Court must sit *in camera*. The appellants contended that this was contrary to s. 20 (3) of the Constitution which provided that all proceedings of every court were to be held in public subject to certain exceptions which were inapplicable to the instant cases.

As to (iii) *supra*, s. 8 (2) of the Act prescribes a mandatory sentence of detention "at hard labour during the Governor-General's pleasure" for an offence under s. 20 of the Firearms Act 1967. A person detained pursuant to s. 8 (2) cannot be discharged "except at the direction of the Governor-General who shall act on that behalf on and in accordance with the advice of the Review Board established under the following provisions". The majority of the Review Board does not consist of persons appointed in the manner laid down in Chapter VII of the Constitution for persons entitled to exercise judicial powers. It followed, therefore, that the power to determine the length of any custodial sentence imposed for an offence under s. 20 of the Firearms Act was removed from the judicature and vested in a body of persons not qualified under the Constitution to exercise judicial powers.

As to (iv) *supra*, their Lordships, having formed the view that those provisions of the Act dealing with the jurisdiction of the Full Court Division and the mandatory sentence of detention during the Governor-General's pleasure were inconsistent with the Constitution, proceeded to apply the test as to severability

laid down by their Lordships' Board in *Attorney-General for Alberta* v. *Attorney-General for Canada* (7).

Held: (i) (a) that the provisions of the Act which purported to confer jurisdiction upon the Circuit Court Division enlarged the previously existing criminal jurisdiction of a Supreme Court judge holding a Circuit Court so as to confer upon him jurisdiction to try firearms offences committed outside the parish for which the Circuit Court was held if that Circuit Court was given the designation of a "Circuit Court Division" of the Gun Court; there was nothing in the Constitution of Jamaica that prohibited Parliament from extending the geographical limits of the criminal jurisdiction exercisable by a properly appointed Supreme Court judge in the exercise of the jurisdiction of a Circuit Court under the Judicature (Supreme Court) Law, whatever label might be attached by Parliament to the Supreme Court judge when exercising the extended jurisdiction; (b) that similar considerations applied to the Resident Magistrate's Division in respect of which the Act did no more than to extend in respect of certain specified offences the geographical limits of the criminal jurisdiction exercisable by properly appointed resident magistrates and to attach to him the label "Resident Magistrate's Division" of the Gun Court when exercising his jurisdiction over these offences; (c) (VISCOUNT DILHORNE and LORD FRASER OF TULLYBELTON dissenting) that the provisions of the Act which provided for the establishment of a Full Court Division consisting of three resident magistrates were in conflict with the Constitution of Jamaica and, therefore, void since their practical consequence was to give to a court composed of members of the lower judiciary jurisdiction to try and to punish by penalties, extending in the case of some offences to imprisonment for life, all criminal offences, however grave, apart from murder or treason, committed by any person who had also committed an offence under s. 20 of the Firearms Act 1967;

(ii) that the general rule in s. 20 (3) of the Constitution that trials should be held in public entrenches a previously existing common law rule; that rule was, however, subject to the exceptions laid down in s. 20 (4), and the relevant exception here was that which permitted persons other than parties of their legal representatives to be excluded from the proceedings "to such extent as the court . . . may be empowered or required by law to do so in the interests of . . . public safety, public order . . ."; in considering the constitutionality of those provisions of the Act requiring *in camera* hearings a court should start with the presumption that the circumstances existing in Jamaica were such that hearings *in camera* were reasonably required in the interest of public safety and order since it was for Parliament to decide what was or was not reasonably required in the interest of public safety and order; this presumption was, however, rebuttable but no evidence had been adduced by the appellants to rebut the presumption;

(iii) that the Parliament of Jamaica cannot, consistently with the separation of powers, transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders; it followed that the provisions of the Act relating to the mandatory sentence of detention during the Governor-General's pleasure and to the Review Board were a law made after the coming into force of the Constitution which was inconsistent with the provisions of the Constitution relating to the separation of powers and were void by virtue of s. 2 of the Constitution;

(iv) that what remained after the invalid provisions of the Act were eliminated still represented a sensible legislative scheme for dealing with persons charged with any firearm offence by providing for the speedy trial *in camera* of all such offences wherever committed in Jamaica by a centralised court; this result proceeded from the test as to severability the essence of which was that on a fair

review of the whole matter it could be assumed that Parliament would have enacted what survived without enacting that part that was *ultra vires*.

Appeals of the appellants Hinds, Hutchinson, Martin and Thomas against conviction dismissed. Sentences set aside. Appeal by the Director of Public Prosecutions allowed.

Cases referred to:

(1) *Liyanage* v. *The Queen*, [1967] 1 A.C. 259; [1966] 1 All E.R. 650; [1966] 2 W.L.R. 682.

(2) *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1925] A.C. 750; (1924), 4 D.L.R. 529.

(3) *Attorney-General for Australia* v. *Reginam and the Boilermakers' Society of Australia*, [1957] A.C. 288; [1957] 2 All E.R. 45; [1957] 2 W.L.R. 607.

(4) *Ladore* v. *Bennett* [1939], A.C. 468.

(5) *Deaton* v. *Attorney-General and the Revenue Commissioners*, [1963] I.R. 170.

(6) *The State* v. *O'Brien*, [1973] I.R. 50.

(7) *Attorney-General for Alberta* v. *Attorney-General for Canada*, [1947] A.C. 503.

(8) *Attorney-General* v. *Antigua Times*, [1975] 3 W.L.R. 232.

Consolidated appeals from the Court of Appeal of Jamaica dismissing and allowing respectively appeals against convictions and sentences in the Resident Magistrate's Division of the Gun Court.

Richard Mahfood, Q.C., Lloyd Barnett and *Ronald Henriques* (all of Jamaica) for the appellants Hinds, Hutchinson, Martin, Thomas and the respondent Jackson.

James Kerr, Q.C. (Director of Public Prosecutions for Jamaica), *Stuart McKinnon* and *Henderson Downer* (Jamaica) for the Crown.

Hon. Leacroft Robinson, Q.C. (Attorney-General of Jamaica), *Gerald Davies* and *Austin Davis* (Jamaica) for the intervener.

LORD DIPLOCK delivered the majority judgment of the Board: In 1974 the Parliament of Jamaica passed the Gun Court Act 1974 as an ordinary Act of Parliament. It had not been preceded by legislation passed under the special procedure prescribed by s. 49 of the Constitution for an Act of Parliament to alter provisions of the Constitution, nor does the Gun Court Act itself contain any express amendment of those provisions. All that it purports to do is to establish a new court called the Gun Court with power to sit in three different kinds of Divisions: A Resident Magistrate's Division, a Full Court Division and a Circuit Court Division, and to confer on one or other of these Divisions jurisdiction to try certain categories of offenders for criminal offences of every kind. Prior to the passing of the Act and at the date of the coming into force of the Constitution these offences would have been cognisable only in a Resident Magistrate's Court or in a Circuit Court of the Supreme Court of Jamaica. The Act also lays down the procedure to be followed in each kind of Division and, in particular, provides that all trials should be held *in camera*, and that for certain specified offences relating to the unauthorised possession, acquisition or disposal of firearms or ammunition, the Gun Court should impose a mandatory sentence of detention at hard labour from which the detainee can only be discharged at the direction of the Governor-General acting in accordance with the advice of the Review Board, a non-judicial body established by the Act.

The five named individuals who are parties to the consolidated appeals to Her Majesty in Council, four as appellants in the first appeal and one as respondent in the second appeal, were each convicted by a Resident Magistrate's Division of the Gun Court of an offence which carried with it under the Act the mandatory sentence of detention at hard labour.

Each of them appealed to the Court of Appeal against his conviction and also against his sentence, upon the grounds that the Gun Court Act 1974, or alternatively those provisions of the Act under which he had been tried and sentenced, are inconsistent with the Constitution of Jamaica and are therefore void under s. 2 of the Constitution. The appeals of the first four detainees were heard together and earlier than that of the fifth detainee. They came on before a court composed of SWABY, J.A., and ZACCA, J.A. (Ag.), presided over by LUCKHOO, P. (Ag.). Separate judgments were delivered by all three members of the court. LUCKHOO, P. (Ag.), and ZACCA, J.A. (Ag.), concurred in the result that the appeals should be dismissed although their reasons for doing so were not identical. SWABY, J.A., dissented. He would have allowed the appeals. The appeal of the fifth detainee was heard a few months later by a court that was differently constituted, inasmuch as GRAHAM-PERKINS, J.A., presided in place of LUCKHOO, P. (Ag.). This was enough to tip the balance. GRAHAM-PERKINS, J.A., and SWABY, J.A., delivered a joint judgment allowing the appeal although upon a ground different from those relied upon in the latter's earlier dissenting judgment. ZACCA, J.A. (Ag.), adhered to his previous opinion and was in favour of dismissing the appeal.

The unsuccessful parties to these appeals have now appealed to Her Majesty in Council under s. 110 (1) (c) of the Constitution. It is common ground that the constitutional issues raised by the appeal that was the subject of the later judgments in the Court of Appeal are indistinguishable from those raised by the four appeals that were the subject of the earlier judgments. Before their Lordships' Board all the appeals have been consolidated and all five detainees have been treated as appellants in the consolidated appeal.

The questions raised as to the true interpretation of Chapter VII of the Constitution which relates to "The Judicature" are of outstanding public importance. The attack upon the constitutional validity of those provisions of the Gun Court Act 1974, under which the appellants were tried and sentenced by a Resident Magistrate's Division of the Gun Court can most conveniently be dealt with under four heads: jurisdiction, procedure, sentence and severability.

The arguments have been wide ranging—and necessarily so, for when the constitutional validity of an Act passed by the Parliament of Jamaica is in issue, the problem cannot be solved by the court's confining its attention to those specific provisions of the Act that are directly applicable to the particular case. Looked at in isolation from the legislative scheme embodied in the Act when taken as a whole, it may be that those specific provisions, if separately enacted, would not have been inconsistent with the Constitution; but if other provisions of the Act are invalid a question of severability arises. The court accordingly cannot avoid the task of examining the constitutional validity of the other provisions of the Act in order to see whether those which must be struck down as invalid form part of a single legislative scheme of which the specific provisions applicable to the particular case are also an integral and inseparable part.

The inseverability of the provisions of the Gun Court Act 1974 which create the three Divisions of the Court was the main thrust of the appellants' challenge under the head of jurisdiction. This does not involve a direct attack upon the specific provisions of the Act, under which the appellants were tried and convicted by a resident magistrate, when looked at in isolation. What is attacked directly is the constitutional validity of those provisions of the Act which purport to confer jurisdiction to try offences upon the other two Divisions of the Gun Court—a Circuit Court Division and a Full Court Division. The next steps in the argument are: (i) the Gun Court Act 1974 embodies a comprehensive legislative scheme for the establishment of a single court, the Gun Court, with power to sit in separate Divisions; and to confer upon the Gun Court jurisdiction to try certain categories of offenders for criminal offences of all kinds; (ii) the jurisdiction

exercisable by the Gun Court when sitting in a Resident Magistrate's Division is an integral and inseparable part of the jurisdiction intended to be conferred upon the court. It cannot consistently with the legislative scheme of the Act survive the striking down of the jurisdiction exercisable by the other two Divisions; (iii) a Gun Court consisting only of a Resident Magistrate's Division would be a different kind of court from that which Parliament intended to create.

This was the argument on which the fifth detainee succeeded in his appeal to the Court of Appeal. It is, indeed, the only ground on which there is a majority judgment in the appellants' favour. In order to deal with it their Lordships cannot shirk the task of ruling upon the constitutional validity of those provisions of the Act which purport to confer jurisdiction to try offences upon the Circuit Court Division and upon the Full Court Division of the Gun Court. Such rulings, in their Lordships' view, cannot be characterised as *obiter dicta*. They form necessary steps in any reasoning disposing of the appellants' case in so far as it is based upon inseverability.

That the appellants' contentions under each of the four heads, jurisdiction, procedure, sentence and severability, raise questions of constitutional law of considerable difficulty is evident from the conflicts of opinion, particularly under the first head, that are disclosed in the four closely reasoned judgments of those judges of the Court of Appeal who sat in one or both of the appeals. Their Lordships desire to express their indebtedness to those judgments and to the arguments addressed to them by counsel for the parties at the hearing by this Board.

A written constitution, like any other written instrument affecting legal rights or obligations, falls to be construed in the light of its subject-matter and of the surrounding circumstances with reference to which it was made. Their Lordships have been quite properly referred to a number of previous authorities dealing with the exercise of judicial power under other written constitutions, established either by Act of the Imperial Parliament or by Order in Council made by Her Majesty in right of the Imperial Crown, whereby internal sovereignty or full independence has been granted to what were formerly colonial or protected territories of the Crown. These other constitutions differ in their express provisions from the Constitution of Jamaica, sometimes widely where, as in the case of Canada and Australia, they provide for a federal structure, but much less significantly in the case of the unitary constitutions of those states which have attained full independence in the course of the last two decades. In seeking to apply to the interpretation of the Constitution of Jamaica what has been said in particular cases about other constitutions, care must be taken to distinguish between judicial reasoning which depended on the express words used in the particular constitution under consideration and reasoning which depended on what, though not expressed, is nonetheless a necessary implication from the subject-matter and structure of the constitution and the circumstances in which it had been made. Such caution is particularly necessary in cases dealing with a federal constitution in which the question immediately in issue may have depended in part upon the separation of the judicial power from the legislative or executive power of the federation or of one of its component states and in part upon the division of judicial power between the federation and a component state.

Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future. All of them were negotiated as well as drafted

by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it has been developed in the unwritten constitution of the United Kingdom. As to their subject-matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which government was carried on, the legislature, the executive and the courts, reflected the same basic concept. The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.

Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a Legislature, an Executive and a Judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the Executive or of judicial powers by either the Executive or the Legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the Judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the Legislature, by the Executive and by the Judicature respectively. To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading—particularly those applicable to taxing statutes as to which it is a well established principle that express words are needed to impose a charge upon the subject.

In the result there can be discerned in all those constitutions which have their origin in an Act of the Imperial Parliament at Westminster or in an Order in Council, a common pattern and style of draftsmanship which may conveniently be described as "the Westminster Model".

Before turning to those express provisions of the Constitution of Jamaica upon which the appellants rely in these appeals, their Lordships will make some general observations about the interpretation of constitutions which follow the Westminster Model.

All constitutions on the Westminster Model deal under separate Chapter headings with the Legislature, the Executive and the Judicature. The Chapter dealing with the Judicature invariably contains provisions dealing with the method of appointment and security of tenure of the members of the judiciary which are designed to assure to them a degree of independence from the other two branches of government. It may, as in the case of the Constitution of Ceylon, contain nothing more. To the extent to which the Constitution itself is silent as to the distribution of the plenitude of judicial power between various courts it is implicit that it shall continue to be distributed between and exercised by the courts that were already in existence when the new constitution came into force; but the Legislature, in the exercise of its power to make new laws for the "peace, order and good government" of the state, may provide for the establishment of new courts and for the transfer to them of the whole or part of the jurisdiction

previously exercisable by an existing court. What, however, is implicit in the very structure of a constitution on the Westminster Model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the Judicature, even though this is not expressly stated in the Constitution (*Liyanage* v. *R.*, (1) [1967] 1 A.C. at pp. 287–8).

The more recent constitutions on the Westminster Model, unlike their earlier prototypes, include a Chapter dealing with Fundamental Rights and Freedoms. The provisions of this Chapter form part of the substantive law of the state and until amended by whatever special procedure is laid down in the constitution for this purpose, impose a fetter upon the exercise by the Legislature, the Executive and the Judiciary of the plenitude of their respective powers. The remaining Chapters of the constitutions are primarily concerned not with the Legislature, the Executive and the Judicature as abstractions, but with the persons who shall be entitled collectively or individually to exercise the plenitude of legislative, executive or judicial powers—their qualifications for legislative, executive or judicial office, the methods of selecting them, their tenure of office, the procedure to be followed where powers are conferred upon a class of persons acting collectively and the majorities required for the exercise of those powers. Thus, where a constitution on the Westminster Model speaks of a particular "court" already in existence when the constitution comes into force it uses this expression as a collective description of all those individual judges who, whether sitting alone or with other judges or with a jury, are entitled to exercise the jurisdiction exercised by that court before the constitution came into force. Any express provision in the constitution for the appointment or security of tenure of judges of that court will apply to all individual judges subsequently appointed to exercise an analogous jurisdiction, whatever other name may be given to the "court" in which they sit (*Attorney-General for Ontario* v. *Attorney-General for Canada* (2)).

Where, under a constitution on the Westminster Model, a law is made by the Parliament which purports to confer jurisdiction upon a court described by a new name, the question whether the law conflicts with the provisions of the constitution dealing with the exercise of the judicial power does not depend upon the label (in the instant case "The Gun Court") which the Parliament attaches to the judges when exercising the jurisdiction conferred upon them by the law whose constitutionality is impugned. It is the substance of the law that must be regarded, not the form. What is the nature of the jurisdiction to be exercised by the judges who are to compose the court to which the new label is attached? Does the method of their appointment and the security of their tenure conform to the requirements of the constitution applicable to judges who, at the time the constitution came into force, exercised jurisdiction of that nature? (*Attorney-General for Australia* v. *Reginam and the Boilermakers' Society of Australia*, (3) [1957] A.C. at pp. 309–10).

One final general observation: where, as in the instant case, a constitution on the Westminster Model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the Parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the peoples themselves. The purpose served by this machinery for "entrenchment" is to ensure that those provisions which were regarded as

important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws. So in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision.

Turning now to the Gun Court Act 1974, the purpose of the Act as described in its long title is "to provide for the establishment of a Court to deal particularly with firearms offences and for purposes incidental thereto or connected therewith." Their Lordships will deal first with the jurisdiction of the court established by the Act, secondly with procedure, thirdly with the mandatory sentence for offences against s. 20 of the Firearms Act 1967, of which the appellants were convicted, and finally with the question of severability.

Jurisdiction

Although the institution established by the Act is given a single name "The Gun Court" (s. 3 (1)) and provided with a single seal (s. 3 (3)), in substance it comprises three different courts called "Divisions" with differing status, differing composition, differing jurisdiction and differing powers. These Divisions, in their Lordships' view, call for separate consideration.

(1) *The Circuit Court Division*

The Division exercising the widest jurisdiction is called the "Circuit Court Division". It is constituted by a "Supreme Court judge exercising the jurisdiction of a Circuit Court" (s. 4 (c)); it is a superior Court of Record (s. 3 (2)), and its jurisdiction is the same as that of a Circuit Court established under the Judicature (Supreme Court) Law, except that the geographical limits of its jurisdiction in respect of "firearm offences" extend to all parishes of Jamaica (s. 5 (3)). The Chief Justice may designate any Circuit Court to be a Circuit Court Division of the Gun Court (s. 17 (1)) and may assign any Supreme Court judge to sit as the judge of a Circuit Court Division (s. 10 (1)). Nothing in the Act, however, is to be construed as divesting of any jurisdiction a Circuit Court not designated as a Circuit Court Division of the Gun Court (s. 21 (1)).

A "firearm offence" is defined as meaning:

"(a) any offence contrary to s. 20 of the Firearms Act 1967;

(b) any other offence whatsoever involving a firearm and in which the offender's possession of the firearm is contrary to s. 20 of the Firearms Act 1967."

Section 20 of the Firearms Act 1967 deals with the unauthorised possession of firearms or ammunition and creates offences all of which are triable summarily before a resident magistrate or on indictment by a Circuit Court.

In substance, therefore, all that is done by those provisions of the Act to which reference has been made is to enlarge the previously existing criminal jurisdiction of a Supreme Court judge holding a Circuit Court so as to confer upon him jurisdiction to try "firearm offences" committed outside the parish for which the Circuit Court is held, if that Circuit Court has been given the designation of a "Circuit Court Division" of the Gun Court. In their Lordships' view there is nothing in the Constitution of Jamaica that prohibits the Parliament from extending the geographical limits of the criminal jurisdiction exercisable by a properly

appointed Supreme Court judge in the exercise of the jurisdiction of a Circuit Court under the Judicature (Supreme Court) Law, whatever label may be attached by Parliament to the Supreme Court judge when exercising the extended jurisdiction.

(2) *The Resident Magistrate's Division*

Their Lordships will deal next with the Division of the Gun Court which exercises the most restricted jurisdiction. It is called a "Resident Magistrate's Division" and similar considerations apply to it. It is constituted by one resident magistrate (s. 4 (a)) and is a Court of Record; but unlike a Circuit Court Division is not a superior Court of Record (s. 3 (2)). Its original jurisdiction to hear and determine criminal offences summarily is the same as that of a Resident Magistrate's Court established under the Judicature (Resident Magistrates) Act, except that the geographical limits of its jurisdiction are extended to all offences committed in any parish of Jamaica in respect of (i) offences triable summarily under s. 20 of the Firearms Act 1967, and offences ancillary thereto created by s. 18 of the Gun Court Act, and (ii) all other summary offences committed by a specified category of offenders ("detainees") to which further reference will be made hereafter (s. 5 (1) (a) and (c); s. 9 (a); s. 10 (2)). The Chief Justice may designate any Resident Magistrate's Court to be a Resident Magistrate's Division of the Gun Court (s. 17 (2)) and may assign any resident magistrate to sit as a Resident Magistrate's Division.

In addition to this limited extension of the geographical limits of the original criminal jurisdiction previously exercisable by a properly appointed resident magistrate under the Judicature (Resident Magistrates) Act the Gun Court Act also makes a similar extension of the geographical limits of his jurisdiction to conduct the preliminary examination into any firearm offence which is a capital offence and any other capital offence alleged to have been committed by a detainee (s. 5 (1) (b)).

So here too the Gun Court Act 1974 does no more than to extend in respect of certain specified offences the geographical limits of the criminal jurisdiction exercisable by a properly appointed resident magistrate under the Judicature (Resident Magistrates) Act, and to attach to him the label a "Resident Magistrate's Division" of the Gun Court when exercising his jurisdiction over these offences.

(3) *The Full Court Division*

Different considerations, however, apply to a "Full Court Division" of the Gun Court which exercises a jurisdiction intermediate between that of a Circuit Court Division and a Resident Magistrate's Division. This is composed of three Resident Magistrates sitting together (s. 4 (b)) and acting by a majority (Interpretation Act 1968, s. 54). The Chief Justice may designate any Resident Magistrate's Court to be a Full Court Division of the Gun Court and may assign any resident magistrate to be a member of that Division (s. 17 (2)).

A Full Court Division is thus a new court in substance as well as form. Unlike a Circuit Court Division and a Resident Magistrate's Division it is of different composition from any previously existing court in Jamaica. Its jurisdiction too is different from that of any previously existing court. It does not extend to any capital offence but with this exception it extends to all "firearm offences" and to all other offences of whatever kind committed by detainees whether a firearm was involved in the offence or not, and its sentencing powers for such offences are co-extensive with those of a Circuit Court.

To appreciate how wide this jurisdiction is, it is necessary to examine those provisions of the Act which create the category of offenders whom their Lordships have hitherto referred to as "detainees". The Act provides that any court other than a Division of the Gun Court before which a case involving a firearm offence

is brought shall forthwith transfer the case for trial by the Gun Court (s. 6 (1)) and shall remand the accused in custody to appear before the Gun Court (s. 6 (3)). Upon his appearing before the Gun Court, the Act provides that the hearing of any charge against him of an offence of unauthorised possession of firearms or ammunition under s. 20 of the Firearms Act 1967 shall ordinarily be commenced within seven days of his first appearance (s. 8 (1)). The practical consequence of this provision is that the charge of unlawful possession will be heard and determined before any other offence that he may be charged with. Upon conviction of the offence of unlawful possession, the Act prescribes the mandatory sentence of detention at hard labour during the Governor-General's pleasure. Their Lordships will have occasion to consider the constitutionality of this sentence later. Its relevance for the purpose of considering the extent of the jurisdiction exercisable by a Full Court Division of the Gun Court is that the practical consequence of these provisions is to confer upon a Full Court Division jurisdiction to try all other crimes, however serious, short of capital offences, committed by any person who has also committed an offence under s. 20 of the Firearms Act 1967 even though those other crimes have nothing to do with firearms. The jurisdiction conferred upon a court consisting of three resident magistrates thus extends to all non-capital offences which were previously triable only on indictment before a Supreme Court judge exercising the jurisdiction of a Circuit Court of the Supreme Court, if the offender is a person who has been in unlawful possession of a firearm. Since committal for trial in a Circuit Court of the Supreme Court is preceded by a preliminary examination before a Resident Magistrate's Court, the practical consequence of the provision for mandatory transfer for trial by the Gun Court of cases involving a firearm offence is to ensure that all offences falling within the jurisdiction conferred upon a Full Court Division of the Gun Court shall be tried by that Division to the exclusion of a Circuit Court of the Supreme Court.

The attack upon the constitutionality of the Full Court Division of the Gun Court may be based upon two grounds. The first is that the Gun Court Act 1974 purports to confer upon a court consisting of persons qualified and appointed as resident magistrates a jurisdiction which under the provisions of Chapter VII of the Constitution is exercisable only by a person qualified and appointed as a judge of the Supreme Court. The second ground is much less fundamental. It need only be mentioned briefly, for it arises only if the first ground fails. It is that even if the conferment of jurisdiction upon a Full Court Division consisting of three resident magistrates is valid, s. 112 of the Constitution requires that any assignment of a resident magistrate to sit in that Division should be made by the Governor-General acting on the recommendation of the Judicial Service Commission and not by the Chief Justice as the Gun Court Act 1974 provides.

Chapter VII of the Constitution, "The Judicature", was in their Lordships' view intended to deal with the appointment and security of tenure of all persons holding any salaried office by virtue of which they are entitled to exercise civil or criminal jurisdiction in Jamaica. For this purpose they are divided into two categories: (i) a higher judiciary, consisting of judges of the Supreme Court and judges of the Court of Appeal, and (ii) a lower judiciary, consisting of those described in s.112 (2), *viz.* "Resident Magistrate, Judge of the Traffic Court, Registrar of the Supreme Court, Registrar of the Court of Appeal and such other offices connected with the courts of Jamaica as, subject to the provisions of the Constitution, may be prescribed by Parliament".

Apart from the offices of Judge and Registrar of the Court of Appeal which were new, these two categories embraced all salaried members of the judiciary who exercised civil or criminal jurisdiction in Jamaica at the date when the

Constitution came into force. A minor jurisdiction, particularly in relation to juveniles, was exercised by Justices of the Peace but, as in England, they sat part-time only, were unpaid and were not required to possess any professional qualification.

Common to both categories, with the exception of the Chief Justice of the Supreme Court and the President of the Court of Appeal, is the requirement under the Constitution that they should be appointed by the Governor-General on the recommendation of the Judicial Service Commission—a body established under s. 111 whose composition is different from that of the Public Service Commission and consists of persons likely to be qualified to assess the fitness of a candidate for judicial office.

The distinction between the higher judiciary and the lower judiciary is that the former are given a greater degree of scurity of tenure than the latter. There is nothing in the Constitution to protect the lower judiciary against Parliament passing ordinary laws (a) abolishing their office, (b) reducing their salaries while they are in office, or (c) providing that their appointments to judicial office shall be only for a short fixed term of years. Their independence of the good-will of the political party which commands a bare majority in the Parliament is thus not fully assured. The only protection that is assured to them by s. 112 is that they cannot be removed or disciplined except on the recommendation of the Judicial Service Commission with a right of appeal to the Privy Council. This last is a local body established under s. 82 of the Constitution whose members are appointed by the Governor-General after consultation with the Prime Minister and hold office for a period not exceeding three years.

In contrast to this, judges of the Supreme Court and of the Court of Appeal are given a more firmly rooted security of tenure. They are protected by entrenched provisions of the Constitution against Parliament passing ordinary laws (a) abolishing their office, (b) reducing their salaries while in office, or (c) providing that their tenure of office shall end before they attain the age of 65 years. They are not subject to any disciplinary control while in office. They can only be removed from office upon the advice of the Judicial Committee of Her Majesty's Privy Council in the United Kingdom given on a reference made upon the recommendation of a tribunal of enquiry consisting of persons who hold or have held high judicial office in some part of the Commonwealth.

The manifest intention of these provisions is that all those who hold any salaried judicial office in Jamaica shall be appointed on the recommendation of the Judicial Service Commission and that their independence from political pressure by Parliament or by the Executive in the exercise of their judicial functions shall be assured by granting to them such degree of security of tenure in their office as is justified by the importance of the jurisdiction that they exercise. A clear distinction is drawn between the security of tenure appropriate to those judges who exercise the jurisdiction of the higher judiciary and that appropriate to those judges who exercise the jurisdiction of the lower judiciary.

Their Lordships accept that there is nothing in the Constitution to prohibit Parliament from establishing by an ordinary law a court under a new name, such as the "Revenue Court", to exercise part of the jurisdiction that was being exercised by members of the higher judiciary or by members of the lower judiciary at the time when the Constitution came into force. To do so is merely to change the label to be attached to the capacity in which the persons appointed to be members of the new court exercise a jurisdiction previously exercised by the holders of one or other of the judicial offices named in Chapter VII of the Constitution. In their Lordships' view, however, it is the manifest intention of the Constitution that any person appointed to be a member of such a court should be appointed in the same manner and entitled to the same security of

tenure as the holder of the judicial office named in Chapter VII of the Constitution which entitled him to exercise the corresponding jurisdiction at the time when the Constitution came into force.

Their Lordships understand the Attorney-General to concede that salaried judges of any new court that Parliament may establish by an ordinary law must be appointed in the manner and entitled to the security of tenure provided for members of the lower judiciary by s. 112 of the Constitution. In their Lordships' view this concession was rightly made. To adopt the familiar words used by VISCOUNT SIMONDS in *Attorney-General for Australia* v. *Reginam and the Boilermakers' Society of Australia* (3) it would make a mockery of the Constitution if Parliament could transfer the jurisdiction previously exercisable by holders of the judicial offices named in Chapter VII of the Constitution to holders of new judicial offices to which some different name was attached and to provide that persons holding the new judicial offices should not be appointed in the manner and upon the terms prescribed in Chapter VII for the appointment of members of the Judicature. If this were the case there would be nothing to prevent Parliament from transferring the whole of the judicial power of Jamaica (with two minor exceptions referred to below) to bodies composed of persons who, not being members of "The Judicature", would not be entitled to the protection of Chapter VII at all.

What the Attorney-General does not concede is that Parliament is prohibited by Chapter VII from transferring to a court composed of duly appointed members of the lower judiciary jurisdiction which, at the time the Constitution came into force, was exercisable only by a court composed of duly appointed members of the higher judiciary.

In support of his contention that Parliament is entitled by an ordinary law to down-grade any part of the jurisdiction previously exercisable by the Supreme Court he relies on s. 97 of the Constitution which provides as follows:

"97. (1) There shall be a Supreme Court for Jamaica *which shall have such jurisdiction and powers as may be conferred upon it by the Constitution or any other law.*

(2) . . .

(3) . . .

(4) The Supreme Court shall be a superior court of record and, save as otherwise provided by Parliament shall have all the powers of such a court."

It is, in their Lordships' view, significant that s. 103 (1) and (5) which provides for the establishment of the Court of Appeal are in identical terms with the substitution of the words "Court of Appeal" for "Supreme Court".

The only other provisions of the Constitution which expressly confer jurisdiction upon the Supreme Court or the Court of Appeal are (i) s. 25 (2) and (3) which give them original and appellate jurisdiction respectively to hear and determine claims for redress for any contravention of the provisions of Chapter III relating to Fundamental Rights and Freedoms, and (ii) s. 44 (1) which gives to them original and appellate jurisdiction respectively in disputes about membership of either House of Parliament.

The jurisdiction that was characteristic of judges of a court to which the description of "a Supreme Court" was appropriate in a hierarchy of courts which included, in addition, inferior courts and "a Court of Appeal", was well-known to the makers of the Constitution in 1962. So was the jurisdiction that was characteristic of judges of a court to which the description of "a Court of Appeal" was appropriate.

In their Lordships' view s. 110 of the Constitution makes it apparent that in providing in s. 103 (1) that: "There shall be a Court of Appeal for Jamaica" the

draftsman treated this form of words as carrying with it by necessary implication that the judges of the court required to be established under s. 103 should exercise an appellate jurisdiction in all substantial civil cases and in all serious criminal cases; and that the words that follow, *viz.* "which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law", do not entitle Parliament by an ordinary law to deprive the Court of Appeal of a significant part of such appellate jurisdiction or to confer it upon judges who do not enjoy the security of tenure which the Constitution guarantees to Judges of the Court of Appeal. Section 110 (1) of the Constitution which grants to litigants wide rights of appeal to Her Majesty in Council but only from "decisions of the Court of Appeal", clearly proceeds on this assumption as to the effect of s. 103. Section 110 would be rendered nugatory if its wide appellate jurisdiction could be removed from the Court of Appeal by an ordinary law without amendment of the Constitution.

Their Lordships see no reason why a similar implication should not be drawn from the corresponding words of s. 97. The Court of Appeal of Jamaica was a new court established under the Judicature (Appellate Jurisdiction) Law 1962, which came into force one day before the Constitution, *viz.* on August 5, 1962. The Supreme Court of Jamaica had existed under that title since 1880. In the judges of that court there had been vested all that jurisdiction in Jamaica which in their Lordships' view was characteristic of a court to which in 1962 the description "a Supreme Court" was appropriate in a hierarchy of courts which was to include a separate "Court of Appeal". The three kinds of jurisdiction that are characteristic of a Supreme Court where appellate jurisdiction is vested in a separate court are:

(i) Unlimited original jurisdiction in all substantial civil cases.

(ii) Unlimited original jurisdiction in all serious criminal offences.

(iii) Supervisory jurisdiction over the proceedings of inferior courts (*viz.* of the kind which owes its origin to the prerogative writs of *certiorari*, *mandamus* and prohibition).

That s. 97 (1) of the Constitution was intended to preserve in Jamaica a Supreme Court exercising this characteristic jurisdiction is, in their Lordships' view, supported by the provision in s. 13 (1) of the Jamaica (Constitution) Order in Council 1962, that "The Supreme Court in existence immediately before the commencement of this Order shall be the Supreme Court for the purposes of the Constitution". This is made an entrenched provision of the Constitution itself by s. 21 (1) of the Order in Council, and confirms that the kind of court referred to in the words "There shall be a Supreme Court for Jamaica" was a court which would exercise in Jamaica the three kinds of jurisdiction characteristic of a Supreme Court that have been indicated above.

If, as contended by the Attorney-General, the words italicised above in s. 97 (1) entitled Parliament by an ordinary law to strip the Supreme Court of all jurisdiction in civil and criminal cases other than that expressly conferred upon it by s. 25 and s. 44, what would be left would be a court of such limited jurisdiction that the label "Supreme Court" would be a false description. So too if all its jurisdiction (with those two exceptions) were exercisable concurrently by other courts composed of members of the lower judiciary. But more important, for this is the substance of the matter, the individual citizen could be deprived of the safeguard, which the makers of the Constitution regarded as necessary, of having important questions affecting his civil or criminal responsibilities determined by a court, however named, composed of judges whose independence from all local pressure by Parliament or by the Executive was guaranteed by a security of tenure more absolute than that provided by the Constitution for judges of inferior courts.

Their Lordships therefore are unable to accept that the words in s. 97 (1), upon which the Attorney-General relies, entitle Parliament by an ordinary law to vest in a new court composed of members of the lower judiciary a jurisdiction that forms a significant part of the unlimited civil, criminal or supervisory jurisdiction that is characteristic of a "Supreme Court" and was exercised by the Supreme Court of Jamaica at the time when the Constitution came into force, at any rate where such vesting is accompanied by ancillary provisions, such as those contained in s. 6 (1) of the Gun Court Act 1974, which would have the consequence that all cases falling within the jurisdiction of the new court would in practice be heard and determined by it instead of by a court composed of judges of the Supreme Court.

As with so many questions arising under constitutions on the Westminster Model, the question whether the jurisdiction vested in the new court is wide enough to constitute so significant a part of the jurisdiction that is characteristic of a Supreme Court as to fall within the constitutional prohibition is one of degree. The instant case is concerned only with criminal jurisdiction. It is not incompatible with the criminal jurisdiction of a "Supreme Court", as this expression would have been understood by the makers of the Constitution in 1962, that jurisdiction to try summarily specific minor offences which attracted only minor penalties should be conferred upon inferior criminal courts to the exclusion of the criminal as distinct from the supervisory jurisdiction of a Supreme Court. Nor is it incompatible that a jurisdiction concurrent with that of a Supreme Court should be conferred upon inferior criminal courts to try a wide variety of offences if in the particular case the circumstances in which the offence was committed makes it one that does not call for a severer punishment than the maximum that the inferior court is empowered to inflict. In this class of offences the answer to the question whether the concurrent jurisdiction conferred upon the inferior court is appropriate only to a "Supreme Court" depends upon the maximum punishment that the inferior court is empowered to inflict.

At the time of the coming into force of the Constitution the maximum sentence that a resident magistrate was empowered to inflict for any of the numerous offences which he had jurisdiction to try was one year's imprisonment and a fine of one hundred dollars. It is not necessary for the purposes of the instant appeals to consider to what extent this maximum might be raised, either generally or in respect of particular offences, without trespassing upon the jurisdiction reserved by the Constitution to judges of the Supreme Court. The limit has in fact been raised to two years in respect of some offences including those under s. 20 of the Firearms Act 1967. Their Lordships would not hold this to be unconstitutional; but to remove all limits in respect of all criminal offences, however serious, other than murder and treason, would in their Lordships' view destroy the protection for the individual citizen of Jamaica intended to be preserved to him by the establishment of a Supreme Court composed of judges whose independence from political pressure by the Parliament or the Executive was more firmly guaranteed than that of the inferior judiciary.

It is this that, in respect of a particular category of offenders, is sought to be achieved by the provisions of the Gun Court Act 1974, relating to the jurisdiction and powers of a Full Court Division of the Gun Court. As has been pointed out, the practical consequence of these provisions as they stand would be to give to a court composed of members of the lower judiciary, jurisdiction to try and to punish by penalties, extending in the case of some offences to imprisonment for life, all criminal offences however grave, apart from murder or treason, committed by any person who has also committed an offence under s. 20 of the Firearms Act 1967. Even if, by reason of the invalidity of s. 8 (2) of the Act, the jurisdiction of the Full Court Division over that category of offender does not

extend to crimes in which no firearm is involved this would not, in their Lordships' view, affect the principle. It would not reduce the gravity of the class of offences which the Full Court Division had jurisdiction to try or the severity of the sentences which it had power to impose. Its only effect would be a reduction, which would probably be only slight, in the number of cases to be tried by a Full Court Division.

In their Lordships' view the provisions of the Gun Court Act 1974, in so far as they provide for the establishment of a Full Court Division of the Gun Court consisting of three resident magistrates, conflict with Chapter VII of the Constitution and are accordingly void by virtue of s. 2.

Procedure

It is provided by s. 13 (1) of the Act, which starts with the introductory words "In the interest of public safety, public order or the protection of the private lives of persons concerned in the proceedings", that all three Divisions of the Gun Court shall sit *in camera*. The court is also empowered to direct that no particulars of the trial other than the name of the accused, the offence charged and the verdict and sentence shall be published without the prior approval of the court.

The appellants contend that this is contrary to s. 20 (3) in Chapter III of the Constitution which provides that all proceedings of every court shall be held in public. This general rule that trials shall be in public entrenches in the Constitution of Jamaica a previously existing common law rule. It is, however, subject to a number of exceptions which are laid down in s. 20 (4). The exception relevant to the instant case is to be found in para. (c) (ii) and permits persons other than the parties and their legal representatives to be excluded from the proceedings

> "to such extent as the court . . . may be empowered or required by law to do so in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of twenty-one years or the protection of the private lives of persons concerned in the proceedings".

The introductory words of s. 13 (1) of the Gun Court Act 1974 amount to a declaration by the Parliament that the hearing *in camera* of the kinds of cases which fall within the jurisdiction of the Gun Court is reasonably required for the protection of the interests referred to, which include the public safety and public order. By s. 48 (1) of the Constitution the power to make laws for the peace, order and good government of Jamaica is vested in the Parliament; and *prima facie* it is for the Parliament to decide what is or is not reasonably required in the interests of public safety or public order. Such a decision involves considerations of public policy which lie outside the field of the judicial power and may have to be made in the light of information available to Government of a kind that cannot effectively be adduced in evidence by means of the judicial process.

In considering the constitutionality of the provisions of s. 13 (1) of the Act, a court should start with the presumption that the circumstances existing in Jamaica are such that hearings *in camera* are reasonably required in the interests of "public safety, public order or the protection of the private lives of persons concerned in the proceedings". The presumption is rebuttable. Parliament cannot evade a constitutional restriction by a colourable device: *Ladore* v. *Bennett* (4) ([1939] A.C. at p. 482). But in order to rebut the presumption their Lordships would have to be satisfied that no reasonable member of the Parliament who understood correctly the meaning of the relevant provisions of the Constitution could have supposed that hearings *in camera* were reasonably required for the protection of any of the interests referred to; or, in other words, that Parliament in so declaring

was either acting in bad faith or had misinterpreted the provisions of s. 20 (4) of the Constitution under which it purported to act.

No evidence has been adduced by the appellants in the instant case to rebut the presumption as respects the interests of public safety and public order. Unlike the judges of the Court of Appeal, their Lordships have no personal knowledge of the circumstances in Jamaica which gave rise to the passing of the Gun Court Act 1974. They have noted, however, the account contained in the judgment of LUCKHOO, P., in the Court of Appeal of matters of common knowledge of which he felt able to take judicial notice. These plainly negative any suggestion that the Parliament was acting in bad faith in declaring that s. 13 was in the interests of public safety and public order.

The reference to the protection of the private lives of persons concerned in the proceedings as well as to "public safety" and "public order" would appear to be based upon a misinterpretation of this phrase where it is used in s. 20 (4) of the Constitution. The phrase, which also appears in s. 22 (2) (a) (ii) as a limitation upon freedom of expression, is not directed to the physical safety of individuals but to their right to privacy, *i.e.* to protection from disclosure to the public at large of matters of purely personal or domestic concern which are of no legitimate public interest. Its use in s. 13 (1) of the Act in collocation with public safety and public order suggests that the draftsman was treating it as if it meant "the protection of the lives of private persons concerned in the proceedings" and was intended to refer to the intimidation of witnesses in cases involving firearms which LUCKHOO, P., referred to as being a matter of common knowledge. However that may be, this particular interest is relied on in s. 13 (1) only as an alternative to the interests of public safety and public order. Even if the words referring to it are struck out of the subsection, that which remains suffices to bring the provision for hearings *in camera* within the exception laid down by s. 20 (4) (c) (ii) of the Constitution.

In their Lordships' view s. 13 of the Gun Court Act 1974 is not in conflict with any of the provisions of the Constitution.

Sentence

Their Lordships have already had occasion to refer to the mandatory sentence of detention "at hard labour during the Governor-General's pleasure" which is prescribed by s. 8 (2) of the Act for an offence under s. 20 of the Firearms Act 1967. To ascertain what is the real effect of such a sentence it is necessary to turn to s. 22. Subsection (1) provides:

> "(1) Save as otherwise provided by section 90 of the Constitution of Jamaica, no person who is detained pursuant to subsection (2) of section 8 shall be discharged except at the direction of the Governor-General, who shall act in that behalf on and in accordance with the advice of the Review Board established under the following provisions."

The Review Board is to consist of five persons of whom the Chairman is to be a judge or former judge of the Supreme Court or the Court of Appeal; but none of the others is a member of the judiciary. They are the Director of Prisons and the Chief Medical Officer or their respective nominees, a nominee of the Jamaica Council of Churches and a person qualified in psychiatry nominated by the Prime Minister after consultation with the Leader of the Opposition. Thus, the majority of the Review Board does not consist of persons appointed in the manner laid down in Chapter VII of the Constitution for persons entitled to exercise judicial powers.

In substance, therefore, the power to determine the length of any custodial sentence imposed for an offence under s. 20 of the Firearms Act 1967 is removed from the Judicature and vested in a body of persons not qualified under the

Constitution to exercise judicial powers. The only function left to the Gun Court itself in relation to the length of the custodial sentence is the right, reserved to it by s. 8 (3) (b), to make recommendations for the consideration of the Review Board in any case which in the court's opinion so warrants; but the Review Board, though it must take the recommendation into consideration, is not obliged to follow it. The power of decision rests with the Review Board alone.

In the field of punishment for criminal offences, the application of the basic principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster Model makes it necessary to consider how the power to determine the length and character of a sentence which imposes restrictions on the personal liberty of the offender is distributed under these three heads of power.

The power conferred upon the Parliament to make laws for the peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law. (See Constitution, Chapter III, s. 20 (1).) The carrying out of the punishment where it involves a deprivation of personal liberty is a function of the executive power; and, subject to any restrictions imposed by a law, it lies within the power of the executive to regulate the conditions under which the punishment is carried out.

In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence—as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.

Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case. What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders. Whilst none would suggest that a Review Board composed as is provided in s. 22 of the Gun Court Act 1974 would not perform its duties responsibly and impartially, the fact remains that the majority of its members are not persons qualified by the Constitution to exercise judicial powers. A breach of a constitutional restriction is not excused by the good intentions with which the legislative power has been exceeded by the particular law. If, consistently with the Constitution, it is permissible for the Parliament to confer the discretion to determine the length of custodial sentences for criminal offences upon a body composed as the Review Board is, it would be equally permissible to a less well-intentioned Parliament to confer the same discretion upon any other person or body of persons not qualified to exercise judicial powers, and in this way, without any amendment of the Constitution, to open the door to the exercise of arbitrary power by the Executive in the whole field of criminal law.

In this connection their Lordships would not seek to improve on what was said by the Supreme Court of Ireland in *Deaton v. Attorney-General and the Revenue Commissioners* (5), ([1963] I.R. at pp. 182/183), a case which concerned a law in which the choice of alternative penalties was left to the Executive.

"There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case . . . The Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts . . . The selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive . . .".

This was said in relation to the Constitution of the Irish Republic, which is also based upon the separation of powers. In their Lordships' view it applies with even greater force to constitutions on the Westminster Model. They would only add that under such constitutions the legislature not only does not, but it *can* not, prescribe the penalty to be imposed in an individual citizen's case (*Liyanage* v. *R.* (1)).

It is contended by the respondents in the instant appeal that the sentence "to be detained at hard labour during the Governor-General's pleasure" prescribed by s. 8 (2) of the Gun Court Act 1974, is a fixed penalty applicable to all offenders against s. 20 of the Firearms Act 1967, and that, as such, it does not fall within the constitutional restrictions upon the exercise of legislative power. In support of this contention reliance is placed upon the fact that at the time when the Constitution came into force a similar form of sentence was prescribed for persons under the age of eighteen years convicted of a capital offence (Juveniles Law, s. 29 (1)) and for habitual criminals (Criminal Justice (Administration) Law, s. 49), and that in the case of both these categories of offenders the length of the period of detention of the individual was left to be determined by the Executive. Reliance is also placed upon the preservation by s. 90 of the Constitution of Her Majesty's Prerogative of Mercy, as amounting to a recognition that the length of all custodial sentences is a matter which may lawfully be determined by a body exercising executive and not judicial powers.

As their Lordships have already emphasised Parliament cannot evade a constitutional restriction by a colourable device. It is the substance of the sentencing provisions of s. 8 (2) and s. 22 of the Gun Court Act 1974 that matters, not their form. To adapt the words used in the judgments of the Supreme Court of Ireland in *The State* v. *O'Brien* (6) where a sentencing provision in similar terms to s. 8 (2) of the Gun Court Act was held to be unconstitutional:

"From the very moment of the sentence the convicted person is undergoing punishment for a term which the judge was not to determine but which was to be determined by [the Review Board]" (*per* WALSH, J., at p. 64); and "The section placed it in the hands of [the Review Board] to determine actively and positively the duration of the prisoner's sentence, and not just to effect an act of remission. The determination of the length of sentence for a criminal offence is essentially a judicial function" (*per* O'DALAIGH, C.J., at pp. 59–60).

Their Lordships would hold that the provisions of s. 8 of the Act relating to the mandatory sentence of detention during the Governor-General's pleasure and the provisions of s. 22 relating to the Review Board are a law made after the coming into force of the Constitution which is inconsistent with the provisions of the Constitution relating to the separation of powers. They are accordingly void by virtue of s. 2 of the Constitution.

Section 29 (1) of the Juveniles Law and s. 49 of the Criminal Justice (Administration) Law are of no assistance to the respondents' argument. They were passed before the law-making powers exercisable by members of the legislature of Jamaica by an ordinary majority of votes were subject to the restrictions imposed

upon them by the Constitution—though they were subject to other restrictions imposed by the Colonial Laws Validity Act 1865. The validity of these two laws is preserved by s. 4 of the Jamaica (Constitution) Order in Council. No law in force immediately before 6 August 1962 can be held to be inconsistent with the Constitution; and under s. 26 (8) of the Constitution nothing done in execution of a sentence authorised by such a law can be held to be inconsistent with any of the provisions of Chapter III of the Constitution. The constitutional restrictions upon the exercise of legislative powers apply only to new laws made by the new Parliament established under Chapter V of the Constitution. They are not retrospective.

The Royal Prerogative of Mercy, which has been exercised in Jamaica since it first became a territory of the British Crown, is expressly preserved by s. 90 of the Constitution, which provides that it shall be exercised on Her Majesty's behalf by the Governor-General acting on the recommendation of the Privy Council. It is, as is recognised by its inclusion in Chapter VI of the Constitution, an executive power; but, as an executive power, it is exceptional and is confined, as it always has been since the Bill of Rights, to a power to remit in the case of a particular individual a punishment which has already been lawfully imposed upon him by a court—whether it be a punishment fixed by law for the offence of which he was found guilty or one determined by a judge in exercise of his judicial functions. In contrast to this the function of the Review Board under s. 22 (1) of the Gun Court Act 1974 is not to remit in the case of a particular individual a custodial sentence whose duration has already been fixed by law or by a judge in the exercise of his judicial functions, but itself to fix the duration of a sentence which has not previously been fixed by anyone else. This, in their Lordships' view, is a power of a wholly different character from that of the Prerogative of Mercy. Even if it were an exercise of that exceptional executive power, the respondents would be faced by the dilemma that under s. 90 of the Constitution it is exercisable only on the recommendation of a different body, the Privy Council, and not on the recommendation of a body constituted in the same manner as the Review Board.

Severance

For the reasons that have been given under the previous headings "Jurisdiction" and "Sentence", their Lordships have held the Gun Court Act 1974 to be inconsistent with the Constitution to the extent that:

(i) it provides for the establishment of a Full Court Division of the Gun Court and confers upon that Division jurisdiction to try offences which lie outside the jurisdiction of the lower judiciary of Jamaica; and

(ii) it confers upon a Resident Magistrate's Division and Circuit Court Division of the Gun Court a power and obligation to impose a sentence of detention at hard labour during the Governor-General's pleasure and provides for the establishment of a Review Board with power to determine the duration of such sentence in the individual case.

Under s. 2 of the Constitution the provisions of the Gun Court Act 1974 dealing with these two matters are therefore void. The final question for their Lordships is whether they are severable from the remaining provisions of the Act so that the latter still remain enforceable as part of the law of Jamaica.

Regarded purely as a matter of drafting they are readily severable. All references to the Full Court Division, the Review Board and to the mandatory sentence of detention could be struck out, and what was left would be a grammatical piece of legislation requiring no addition or amendment. But this, though it may point strongly to severability, is not enough. The test of severability has

been laid down authoritatively by this Board in *Attorney-General for Alberta* v. *Attorney-General for Canada* (7), ([1947] A.C. at p. 518):

"The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all."

As regards the establishment and jurisdiction of the Full Court Division, its jurisdiction coincides, and is exercisable concurrently, with that of the Circuit Court Division, except that it does not extend to capital offences. If the Full Court Division were eliminated the whole range of firearm offences would still be cognisable by the two remaining Divisions of the Gun Court. The practical consequence would be that firearms offences which lie outside the jurisdiction of a resident magistrate under the Judicature (Resident Magistrates) Act, would be tried *in camera* by jury in the Circuit Court Division instead of being tried *in camera* without a jury in the Full Court Division. In their Lordships' view what remains after the elimination of the Full Court Division still constitutes a practical and comprehensive scheme for dealing with firearm offences which it can be assumed that Parliament would have enacted if it had realised that it could not confer upon a Full Court Division the jurisdiction which it purported to confer upon that Division by s. 5 (2). Their Lordships are confirmed in their view as to the severability of these provisions by the fact, of which they have been informed by the Attorney-General, that although a Resident Magistrate's Division of the Gun Court has been established and is operating satisfactorily it has not been found necessary up to the present to set up any Full Court Division.

Their Lordships would observe that the question of severance with which they are dealing is different from that which is dealt with in the judgment of GRAHAM-PERKINS and SWABY, JJ.A. They had held the establishment of the Circuit Court Division as well as that of the Full Court Division to be invalid. The elimination of both of these Divisions would transform the Gun Court from a court with comprehensive jurisdiction to try all "firearm offences" whatever their gravity into a court with jurisdiction confined to the trial of a limited number of comparatively minor offences. It is unnecessary for their Lordships to express any view as to whether upon this assumption the provisions relating to the establishment of the Resident Magistrate's Division would have been severable from the invalid provisions of the Act.

As regards the power of the Gun Court to impose a sentence of detention at hard labour during the Governor-General's pleasure, the length of which is to be determined by the Review Board, the practical consequence of the elimination of this power would be that (a) offences against s. 20 of the Firearms Act 1967 would still be tried speedily and *in camera* in a Resident Magistrate's Division or Circuit Court Division of the Gun Court but the maximum sentence to be imposed would be that prescribed by the relevant provisions of the Firearms Act 1967, which, it is to be noted, are not repealed expressly by the Gun Court Act 1974; and (b) the geographical limits of the jurisdiction of a Resident Magistrate's Division and a Circuit Court Division of the Gun Court would still extend to firearm offences committed in any parish in Jamaica, but would not extend to offences other than firearm offences committed outside the parish within which the Division sat by persons who had already been convicted of an offence under s. 20 of the Firearms Act 1967.

What remains after all those provisions of the Act that are invalid have been eliminated still represents a sensible legislative scheme for dealing with persons charged with any firearm offence by providing (i) for the trial *in camera* of all

such offences, wherever they have been committed in Jamaica, by a centralised court composed of members of the judiciary used to dealing with such offences; and (ii) for the trial for an offence of unlawful possession of a firearm to take place speedily and to precede the trial of the same offender for any other firearm offence he may have committed.

This may be only half the loaf that Parliament believed that it was getting when it passed the Gun Court Act 1974, but their Lordships do not doubt that Parliament would have preferred it to no bread. They would accordingly hold the invalid provisions of the Act to be severable.

Disposition of these Appeals

It follows that the appellants, who trials for offences under s. 20 of the Firearms Act 1967 took place before a Resident Magistrate's Division of the Gun Court, were convicted by a court of competent jurisdiction; but that the sentences imposed upon them, "that they be detained at hard labour during the Governor-General's pleasure", were unlawful sentences which the resident magistrate had no power to award. The appellants' appeals to the Court of Appeal included appeals against these sentences. By s. 13 (3) and s. 21 of the Judicature (Appellate Jurisdiction) Law 1962, the Court of Appeal, if they think that a different sentence ought to have been passed, "shall quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) . . . as they think ought to have been passed".

The sentence warranted by law in the instant appeals was such a sentence as a resident magistrate had power to pass under s. 20 of the Firearms Act 1967 upon the summary trial on information of an offence under that section.

Their Lordships have therefore humbly advised Her Majesty that (i) the appeal of Moses Hinds, Elkanah Hutchinson, Henry Martin and Samuel Thomas against their convictions be dismissed; (ii) the appeal of the Director of Public Prosecutions against the order of the Court of Appeal quashing the conviction of Trevor Jackson be allowed and his conviction restored; and (iii) the cases in both appeals be remitted to the Court of Appeal to pass such other sentences as they think ought to have been passed in substitution for the sentences passed by the resident magistrate.

VISCOUNT DILHORNE and **LORD FRASER** (dissenting): We do not agree with our noble and learned friends that the provisions of the Gun Court Act 1974 as to the Full Court Division of the Gun Court, its jurisdiction and powers conflict with Chapter VII of the Constitution of Jamaica. In our opinion those provisions were validly enacted by an Act passed in the normal way by the Parliament of Jamaica.

We agree that the provisions of that Act as to the Resident Magistrate's Division and the Circuit Court Division of the Gun Court did not contravene the Constitution. We agree also that the requirement that persons convicted of firearm offences must be sentenced to be detained at hard labour during the Governor-General's pleasure, the detention being terminable only on the advice of a non-judicial body, the Review Board established under the Act, was in conflict with the Constitution. We agree in holding that the provisions of the Act making such sentences mandatory and as to the Full Court, its jurisdiction and powers are severable from the rest of the Act.

The appellants in the first appeal and the respondent in the second were convicted in a Resident Magistrate's Division of the Gun Court and sentenced, as the Act requires, to detention at hard labour. Only if the provisions of the Act as to the Full Court Division and the mandatory sentences are not severable will their invalidity affect their convictions in the Resident Magistrate's Division. As we all agree that they are severable, it is not in our opinion necessary for the

disposal of these appeals or as part of the reasoning leading to the conclusions reached to decide whether the provisions establishing the Full Court are invalid.

That court has, we were informed, never sat. When considering particular provisions of an Act, it is, of course, right to have regard to its other provisions but it does not follow that the Board should pronounce on the validity of provisions when their validity does not affect the result of the case under consideration and it is not in our experience the normal practice of the Board to decide questions not directly relevant to the determination of an appeal. An instance where the Board refrained from deciding such a question is to be found in the recent decision of the Board in *Attorney-General* v. *Antigua Times* (8).

In the circumstances we consider that anything said as to the validity of the provisions of the Act relating to the Full Court Division cannot be anything but *obiter*. Reluctant though we are to add to *obiter dicta*, nevertheless as it is said that this case raises questions of outstanding public importance, we feel that it is incumbent on us to do so.

The creation of the Full Court Division with its jurisdiction and powers did not involve any transfer of judicial power to the executive. That Division, consisting of three resident magistrates sitting together, was given in relation to firearm offences and offences, other than capital, committed by persons detained at hard labour following conviction for firearm offences, jurisdiction and powers previously only exercisable by a Circuit Court presided over by a Supreme Court judge. The jurisdiction and powers of a Circuit Court were not reduced. After the enactment of the Gun Court Act, a Circuit Court which is part of the Supreme Court can still deal with firearm offences and other offences committed by persons convicted of firearm offences but we recognise that the machinery provisions of the Gun Court Act would lead to all such cases being dealt with in one or other of the Divisions of the Gun Court unless transferred by that Court to another Court. They would be tried either by the Circuit Court Division of the Gun Court presided over by a Supreme Court judge or, if not capital offences, by the Full Court Division.

LUCKHOO, P., in the course of his judgment said:

> "It is a matter of general public knowledge that in recent years crimes of violence in which firearms, unlicensed or illegally obtained, were used, gave cause for grave public concern and indeed alarm. The several measures taken over the past 6 or 7 years to control the rising incidence of crimes of this nature have proved unsuccessful. Persons were shot and killed by day and by night in the course of robbing, rape and other offences or for no apparent reason. Witnesses for the Crown at trial of persons accused of such crimes were often intimidated. Victims of the crimes themselves were not infrequently killed or shot at, most probably with a view to their elimination as eye witnesses who could testify against the perpetrators of these crimes."

It is not therefore surprising that the Government and Parliament of Jamaica should have decided that special measures to deal with such offences were necessary and the reason why Parliament made provision for the establishment of a Full Court with its wide powers and jurisdiction may have been that it was considered necessary to provide more facilities for the trial of such offences than were available in the Circuit Courts. It may have been thought that the case load of the Circuit Courts was such that the establishment of the Full Court Division was necessary to secure trials without undue delay. In this country for a long period of time Quarter Sessions had jurisdiction to try and to sentence offenders for a large number of crimes which were also triable at Assizes before a High Court judge and it was only comparitively recently that a Chairman of Quarter Sessions had to have legal qualifications. Crown Courts and Circuit

Courts in this country have each jurisdiction to try a wide range of offences and their powers as to sentence are the same. For the Parliament of Jamaica to create an intermediate court between a Resident Magistrate's Court and a Circuit Court cannot be regarded as very revolutionary. We do not doubt that before Jamaica became an independent territory and the Constitution came into force, there would have been no difficulty about the creation of a court with the powers and jurisdiction of the Full Court, consisting of three resident magistrates and that no special procedure would have to be followed to bring that about. Now it is said that, since the Constitution came into force, to create such a court by ordinary enactment conflicts not only with any express provisions in the Constitution but with something that is implied so that before such a court is validly established the Constitution requires to be amended to such an extent as will make provisions as to the Full Court Division no longer inconsistent with the Constitution.

The many Constitutions that have been drawn up in recent years and accepted by territories on their becoming independent, were, it cannot be doubted, the product of prolonged and detailed consideration. Though they differ in some respects, in the main they follow what our noble and learned friend LORD DIPLOCK has felicitously called "the Westminster Model". They are more sophisticated than many written constitutions of greater antiquity and none of them, which are not federal constitutions, we believe, limit the legislative capacity of the Parliament of the territory to which they apply. The Constitution of Jamaica certainly does not. Its Parliament can alter, modify, replace, suspend, repeal or add to any provision of the Constitution, of the Jamaica (Constitution) Order in Council and of the Jamaica Independence Act 1962, a United Kingdom Act. Certain provisions of the Constitution are entrenched, that is to say, they can only be altered or repealed or amended by Parliament if special procedures laid down in s. 49 of the Constitution are followed. A Bill to alter any of the provisions of the Constitution is not to be deemed to have been passed in either House unless it was supported in each House by the votes of the majority of all the members of each House and in some cases by the votes of not less than two-thirds of all the members. If a Bill is to alter certain provisions of the Constitution, the Jamaica (Constitution) Order in Council or the Jamaica Independence Act, there must be a delay of three months between the introduction of the Bill into the House of Representatives and the commencement of the first debate on it and a further three months delay between the conclusion of the debate and the passage of the Act. An amendment of the Jamaica Independence Act or of the Jamaica (Constitution) Order in Council also requires a referendum to the electors.

That the Parliament of Jamaica has power to create a court such as the Full Court Division, and give to three resident magistrates sitting together the jurisdiction and power given to the Full Court Division by the Gun Court Act is not open to doubt, but if any of the provisions doing so conflict with the Constitution in its present form, then it could only do so effectively if the Constitution was first amended so as to secure that there ceased to be any inconsistency between the provisions and the Constitution. The Constitution does not prescribe that any special procedure has to be laid down for the valid enactment of a Bill to which s. 50 (see below) does not apply which conflicts with the Constitution. It requires that a special procedure shall be followed for the amendment of the Constitution.

If the need for the Gun Court Act and for the establishment of the Full Court was urgent, as it may well have been, the passage of that Act and the establishment of that court would inevitably have been delayed for a considerable time if the Constitution had first to be amended before such an Act could have validity.

While one of the objects of a written constitution on the Westminster Model is to secure that changes in "entrenched" provisions are only made if strongly supported in the legislature, another important object is to make it easy to discern

in advance whether or not a particular legislative proposal conflicts with the Constitution. Section 2 of the Constitution provides that any law inconsistent with the Constitution is to the extent of the inconsistency void. This is subject to the exception contained in s. 50 which provides that an Act containing provisions inconsistent with ss. 13 to 26 inclusive of the Constitution shall if passed on a final vote in each House by the votes of not less than two-thirds of all its members, take effect, despite the inconsistency. It is not suggested that the Gun Court Act is inconsistent with these sections but the sections with which it is said to be inconsistent are not identified.

Chapter VII of the Constitution headed "The Judicature" deals in Part 1 with the Supreme Court, in Part 2 with the Court of Appeal, in Part 3 with appeals to the Privy Council and in Part 4 with the Judicial Service Commission. It does not deal with any other courts and it does not provide that the creation by Parliament of any other court is inconsistent with the Constitution.

Section 97 (1), the first section in that Chapter, is clear, precise and unambiguous. It is in the following terms:

"There shall be a Supreme Court for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law."

The Supreme Court cannot be altered or abolished without prior amendment of the Constitution. Its existence is entrenched. This section clearly distinguishes between the Supreme Court on the one hand and its jurisdiction and powers on the other. To find out what are its jurisdiction and powers one must look at the Constitution and the "other law". Those given by the Constitution can only be altered or amended by amendment of the Constitution. "Law" for the purpose of the Constitution is defined by s. 1 thereof as including any instrument having the force of law and any unwritten rule of law.

The Jamaica (Constitution) Order in Council contained transitional provisions. By s. 13 (1) it provided that the Supreme Court in existence at the commencement of the Order was to be the Supreme Court for the purposes of the Constitution and that the Chief Justice and other judges of that court should continue in office. It was silent as to the jurisdiction and powers of the court but it provided by s. 4 (1) for the continuance in force of laws existing at the date of the commencement of the Order. It is to those laws and to the Constitution itself that one must look to ascertain the jurisdiction and powers of the Supreme Court when the Constitution came into force.

One of the main functions of the legislature of Jamaica is to make laws. By such laws passed in the ordinary way it can add to the jurisdiction and to the powers of the Supreme Court. There is nothing in the Constitution to indicate that it cannot by a Bill passed in that way reduce or alter the jurisdiction and powers (other than those given by the Constitution) which by virtue of the Jamaica (Constitution) Order in Council the Supreme Court had when the Constitution came into force. There is also nothing in the Constitution to suggest that unless the Constitution was amended, the Supreme Court was to continue to possess all the powers and jurisdiction it had at that time. In fact there is nothing in the Gun Court Act which purports to alter the Supreme Court, its jurisdiction or powers (see Gun Court Act, s. 21 (1)), though, as we have said, the machinery provisions of that Act are designed to ensure that firearm offences and offences committed by those guilty of firearm offences are tried in one of the Divisions of the Gun Court, it may be in the Circuit Court Division of that court or in the Full Court Division.

We agree that the constitutions on the Westminster Model were evolutionary and not revolutionary but it does not follow from that that the Parliament of a territory cannot by ordinary enactment alter the jurisdiction and powers of any

court named in the Constitution. It is not necessary to express an opinion on whether, when a constitution is silent as to the distribution of judicial power between various courts, it is implicit that they retain the jurisdiction and powers they had on the coming into force of the constitution for it is expressly provided by s. 4 of the Jamaica (Constitution) Order in Council that all laws in existence when the Constitution came into force are, until amended or repealed, to continue in force. So apart from the jurisdiction and powers given by the Constitution itself, provision was expressly made for the distribution of judicial power between the courts of Jamaica by the existing laws and not changed on the Constitution coming into operation.

We agree that when a constitution on the Westminster Model speaks of a particular court in existence when the constitution comes into force, it uses the word "court" as a collective description of the individual judges entitled to sit and exercise its jurisdiction but we see no valid ground for assuming that it is contrary to the constitution for another court to be given power to try persons for offences previously only triable in the Circuit Court of the Supreme Court.

If s. 97 (1) had read:

"There shall be a Supreme Court which shall have such jurisdiction and powers as it had when this Constitution came into operation and such additional powers as are conferred on it by the Constitution or any other law"

then we would not dissent from our noble and learned friends but s. 97 (1) does not say that and should not be interpreted as if it did.

Section 97 (1) is the only section of the Constitution which refers to the jurisdiction of the Supreme Court. If the creation of the Full Court Division with its powers and jurisdiction contravenes the Constitution, it is presumably this section which would require to be amended. Presumably it would have to state that Parliament could by ordinary enactment give to another court powers and jurisdiction exercised by the Supreme Court. But the Constitution by s. 97 (1) already makes it clear that apart from that conferred by the Constitution itself, the Supreme Court is to have such powers and jurisdiction as is given to it by Parliament and in our view if Parliament can give jurisdiction to that court by a law passed in the ordinary fashion, it can alter that which has been given by such a law also by an ordinary enactment. If it can do this, it follows that it can validly enact without conflict with the Constitution that a new court is to be established and give that court powers and jurisdiction which are also exercisable by the Supreme Court.

In our opinion the Attorney-General's contention that any transfer of the Supreme Court's jurisdiction, other than that conferred by the Constitution, made by Parliament by ordinary enactment is not inconsistent with the Constitution, is well founded provided that the character of the Supreme Court as a superior court of record is not destroyed. It is not suggested that the creation of the Full Court Division deprived the Supreme Court of that character. Section 97 (4) provides that the Supreme Court "save as otherwise provided by Parliament, shall have all the powers of such a court". It is thus manifest that it is within the power of Parliament without contravening the Constitution to reduce the powers of the Supreme Court as a superior court of record below those normally possessed by such a court so long as its character as a superior court of record is not destroyed. This being so, it appears to us odd that it should be said that without any reduction of the powers of the Supreme Court, to make some of its jurisdiction exerciseable by another court is contrary to the Constitution.

The remaining sections of the Part of Chapter VII headed "The Supreme Court" deal with the appointment of judges and acting judges of that court, their tenure of office, remuneration and oaths. Parliament can without amendment of

the Constitution prescribe the qualifications for appointment as a Supreme Court judge (s. 98 (3)). It can also without doing anything conflicting with the Constitution, fix their remuneration and terms and conditions of service so long as they are not altered to the disadvantage of an existing judge. So Parliament could if it wished—it is inconceivable that it would—reduce the qualifications, salary and conditions of service for a new Supreme Court judge to those of a resident magistrate. But it is said that without amendment of the Constitution, it cannot give three resident magistrates power to try some offences triable by the Supreme Court.

It is also said that any express provision in a constitution for the appointment or security of judges of a particular court will apply to all individual judges subsequently appointed to exercise an analogous jurisdiction whatever other name may be given to the "court" in which they sit. For this proposition *Attorney-General for Ontaria* v. *Attorney-General for Canada* (2) is cited. We cannot see that that case supports any such proposition. All that that case decided appears to us to be that a provincial legislature had exceeded its powers and contravened the British North America Act. If that proposition is right, it means that jurisdiction in relation to firearm offences and other offences committed by persons guilty of such offences can only be exercised by a Supreme Court judge though the jurisdiction and powers of the Supreme Court are far more extensive than that. And it appears to us that this proposition is inconsistent with the clear terms of s. 97 (1).

In reaching their conclusion the majority attach significance to Part 2 of Chapter VII headed "The Court of Appeal". Section 103 (1) and (5) of the Part are precisely similar to s. 97 (1) and (4) apart from the substitution of the Court of Appeal for the Supreme Court. The other sections of this Part follow the same pattern as the other sections of Part 1. They deal with the appointment of judges, their tenure of office, remuneration, etc. Again Parliament can prescribe the qualifications for their appointment (s. 104 (3)) and their emoluments and conditions of service (s. 107).

We see no reason to construe s. 103 (1) and (5) differently from s. 97 (1) and (4) and we do not think that the terms of s. 103 provide any ground for not giving effect to the language of s. 97 (1). It is said that the words "There shall be a Court of Appeal" import that the judges of that court should exercise an appellate jurisdiction in all substantial civil cases and all serious criminal cases and that the words "which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law" do not entitle Parliament to deprive the Court of Appeal of a significant part of its appellate jurisdiction which it had when the Constitution came into force or to confer it on any other judges who do not enjoy the same security of tenure as judges of the Court of Appeal. Such a construction involves a limitation of the meaning of the words that it is to have the jurisdiction given by the Constitution and any other law and is to imply such a restriction on the same words in s. 97 (4).

Nor can we agree that s. 110 (1) of the Constitution which deals with appeals from the Court of Appeal to the Privy Council clearly proceeds on the assumption made by the majority with regard to the Court of Appeal. The contrast between s. 110 (1) and s. 103 (1) we think significant. Section 110 states when an appeal lies from the Court of Appeal. Section 103 does not say when an appeal lies to the Court of Appeal. To find out when an appeal does lie, one has to look at the other provisions of the Constitution and any other law and, save as provided by the Constitution, it is left to Parliament to decide by passing an ordinary Act when an appeal shall or shall not lie.

Importance is attached by our noble and learned friends to the Judicial Service Commission established by Part 4 of Chapter VII. Puisne judges are appointed

by the Governor-General on the advice of that Commission (s. 112 (1)) and by s. 112 (2) appointment to the offices of resident magistrate, Judge of the Traffic Court, Registrar of the Supreme Court and Registrar of the Court of Appeal and appointment "to such other offices connected with the courts of Jamaica as, subject to the provisions of this Constitution, may be prescribed by Parliament" is similarly made. We are not satisfied that a resident magistrate sitting in a Full Court Division of the Gun Court holds a new office. If he does it is not one so prescribed and s. 112 does not apply to it. He is still a resident magistrate and his salary, terms and conditions of employment remain, so far as we are aware, unaltered.

There is no question of anyone sitting in any Division of the Gun Court who has not been appointed on the advice of the Judicial Service Commission either as a judge of the Supreme Court or as a resident magistrate. For the purpose of constituting a Full Court Division the Chief Justice may assign any resident magistrate to that Division (Gun Court Act, s. 17 (2)). As one would expect the security of tenure, remuneration and conditions of employment of a resident magistrate differ from those of a Supreme Court judge but just as it is possible for Parliament by ordinary enactment to increase the powers and jurisdiction of a resident magistrate sitting alone, so in our view is it possible for Parliament without resort to any special procedure to give increased jurisdiction and powers to three resident magistrates sitting together in excess of those possessed by a single magistrate without contravening the Constitution.

So far we have considered the provisions of the Constitution which bear upon the question of the validity of the provisions of the Gun Court Act relating to the Full Court Division. In our opinion not only do they give no support to the view that those provisions of the Gun Court Act are inconsistent with the Constitution but they clearly show the contrary to be the case. They clearly distinguish between the Supreme Court and the Court of Appeal and the jurisdiction and powers of those Courts and there is in our view no basis for implying from the use of the words "Supreme Court" and "Court of Appeal" a limitation on the meaning of the words which follow in ss. 97 (4) and 103 (1).

A written constitution must be construed like any other written document. It must be construed to give effect to the intentions of those who made and agreed to it and those intentions are expressed in or to be deduced from the terms of the constitution itself and not from any preconceived ideas as to what such a constitution should or should not contain. It must not be construed as if it was partly written and partly not. We agree that such constitutions differ from ordinary legislation and this fact should lead to even greater reluctance to imply something not expressed. While we recognise that an inference may be drawn from the express provisions of a constitution (see *Attorney-General for Australia* v. *The Queen* (3), ([1957] A.C. *per* VISCOUNT SIMONDS at p. 312)) we do not agree that on the adoption of a constitution a great deal is left to necessary implication. If this were so, a written constitution would largely fail to achieve its object. If it does not define clearly what Parliament can do and cannot do by ordinary enactment, then the Government and Parliament of a territory may find that as a result of judicial decision after a considerable lapse of time all the time spent in legislating has been wasted and that laws urgently required have not been validly enacted.

No doubt the Constitution of Jamaica was drafted by persons nurtured in the common law. That is apparent from the Constitution itself. The principle that there should be a separation of powers between the three organs of Government is not just taken for granted. Effect is given to that principle by the written terms of the Constitution and consequently there is no room for the assumption.

No question arises in connection with the Full Court of any transfer of judicial power to the executive. The question to be decided is as to the division of judicial power and there is in our opinion not only no valid ground for implying that Parliament cannot by ordinary legislation validly alter the jurisdiction the Supreme Court had when the Constitution came into force under any law other than the Constitution but also the terms of ss. 97 (4) and 103 (1) negative any such implication.

It is for the reasons we have stated that we have come to the conclusion that the provisions of the Gun Court Act as to the Full Court Division and its jurisdiction are not void as inconsistent with the terms of the Constitution.

Appeals of Hinds, Hutchinson, Martin and Thomas dismissed.

Appeal of D.P.P. allowed.

NOVELETT BISH *v.* LEATHERCRAFT, LTD.

[COURT OF APPEAL (Edun, Graham-Perkins, JJ.A. and Watkins, J.A. (Ag.)), July 11, October 24, 1975]

Negligence—Duty of care owed by employer to employee—Employee sustaining injury by reason of employer's failure to provide proper system of work and effective supervision.

The respondent carried on a button-making business which involved, *inter alia*, the use of two types of button-pressing machines. These machines were fitted with a mould on which was placed the material prepared for processing into a button. A piston came down on to this mould, somewhat slowly but with a quite heavy pressure, and pressed the material placed thereon into the form of a button. The movements of the piston on one type of machine were effected by a button and a lever, pressure on the button causing the piston to rise and pressure on the lever causing it to be lowered. The piston on the other type of machine was operated by pressure applied to two buttons instead of one button and a lever. Efficient working of these machines required that buttons should be heated before being pressed since buttons not pre-heated tended to adhere to the piston. A button which adhered to the piston could be safely removed by a 3in. nail which the respondent provided for that purpose. On March 14, 1974, the appellant was assigned to operate a machine fitted with a button and a lever. She had been quite used to the operation of the machine fitted with two buttons but had never worked on a machine fitted with a lever. While operating this machine for moulding buttons which had not been pre-heated one of these buttons became lodged in the piston. As no nail had been provided in respect of this machine the appellant used her right index finger in an attempt to dislodge the button. While so doing her right elbow apparently came into contact with the unguarded lever whereupon the piston descended and crushed her finger. The appellant brought an action seeking to recover damages from the respondent for common law negligence. In awarding judgment in favour of the respondent the resident magistrate found that the buttons being moulded had not been pre-heated, that the nail required in this circumstance had not been provided and that no supervisor was available for consultation. He concluded that the proximate cause of the accident was not the omissions of the respondent and that the appellant had proved only that she had suffered injury while using the machine.

On appeal,

Held: that the respondent's duty to the appellant was, in the circumstances of the case, to provide adequate material, a proper system or method of work and effective supervision; in all of these respects the respondent was in default since the buttons had not been pre-heated and absence of the required nail obliged the appellant to resort to the use of her finger which exposed her to the risk of accidental touching of an unguarded lever; it was these faults that had set the stage for the accident and had precipitated it; and the respondent was, therefore, liable to the appellant in damages.

Appeal allowed.

Cases referred to:

(1) *Paris* v. *Stepney Borough Council*, [1951] 1 All E.R. 42; [1951] A.C. 367; [1951] 1 T.L.R. 25.

(2) *Wilson and Clyde Coal Co.* v. *English*, [1937] 2 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C.117; [1937] S.C. (H.L.) 46; [1937] Sc.L.T. 523; 157 L.T. 406; 81 Sol. Jo. 700; 53 T.L.R. 944.

(3) *Speed* v. *Thomas Swift & Co., Ltd.*, [1943] 1 All E.R. 539; [1943] K.B. 557; 112 L.J.K.B. 487; 169 L.T. 67.

(4) *Stapley* v. *Gypsum Mines, Ltd.* [1953] 2 All E.R. 478; [1953] A.C. 663; [1953] 3 W.L.R. 279; *reversing* [1952] 1 All E.R. 1092; [1952] 2 Q.B. 575.

(5) *Lilbert Gonzales* v. *A. G. O'Brien* [1973], R.M.C.A. No. 49 of 1973 (unreported).

(6) *Watt* v. *Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; [1947] L.J.R. 515; 176 L.T. 498; 63 T.L.R. 314.

Appeal from a decision of the resident magistrate for St. Catherine in an action for damages for negligence.

V. B. Grant, Q.C., for the appellant.

H. G. DeLisser for the respondent.

WATKINS, J.A. (Ag.): On July 11, 1975, we allowed the appeal in this matter, set aside the judgment entered in the court below in favour of the respondents, and entered judgment in favour of the appellant with a direction that the case be remitted to the court below for assessment of damages. We promised that we would put our reasons in writing and do so now.

The appellant sought to recover damages for negligence against the respondents in the following circumstances. The respondents, a registered company, were button-makers carrying on business at 85 Brunswick Avenue, Spanish Town, St. Catherine. Their business of button-making involved the processes of button-chopping and button-pressing and in their button-pressing department at least two types of button-pressing machines (types X and Y for ease of reference) were in use. They share certain common features, but in one material particular they differ. They each have a mould upon which is placed the material prepared for processing into a button, and above the mould is the piston which, in the words of Mr. Bennett Wolfeld, the plant manager, "comes down [upon the mould] at approximately slow speed, but with 12 tons of pressure" and makes the button. In type X machine, there are two buttons, A and B, the former on the left side, the latter on the right side, of the machine. When button A alone is pressed, the piston rises. By pressing both A and B simultaneously the piston descends. Both buttons are on the same plane with the sides of the machine on which they are respectively located. They do not project or extend out from the sides of the machine. In type Y machine, however, there is in place of button B, a lever standing some three inches above the right side. By pressing button A alone on this machine the piston rises. By what operation the piston in type Y machine is