

**COUNCIL OF LEGAL EDUCATION**  
**NORMAN MANLEY LAW SCHOOL**  
**LEGAL EDUCATION CERTIFICATE**  
**FIRST YEAR EXAMINATIONS, 1996**  
**LEGAL DRAFTING AND INTERPRETATION**

**(Friday, May 24 1996)**

**Instructions to Students**

- (a) Time 3 ½ hours.
- (b) Answer **FIVE** questions,
- (c) In answering any question, a student may reply by reference to the law of any Commonwealth Caribbean territory, **but must state at the beginning of the answer the name of the relevant territory.**
- (d) It is unnecessary to transcribe the questions you attempt.

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**PLEASE REMAIN SEATED UNTIL YOUR SCRIPT HAS BEEN COLLECTED.**

2D'96

**QUESTION 1**

The defendant, Slippery, a motorist, stopped his car on the near side of a street which was twenty feet wide, looked in both rear view and side mirrors and was unable to see any other vehicle. He then opened the door to the road about one foot and an over-taking vehicle collided with the door.

He was charged with having opened the door of a motor vehicle on a road so as to cause danger to other road users contrary to regulation 17 of the Road Traffic Regulations. That regulation states as follows:

"No person shall open or cause or permit to be opened any door of a motor vehicle on a road so as to cause injury or danger to any person."

In his defence he contended that the overtaking driver should have allowed himself greater clearance distance. He also argued that it was absurd that he should be guilty of the offence when he had done all that was reasonable for a driver to do in the circumstances. He submitted as authority the direction of Lord Blackburn in River Wear Commissioners v Adamson (1877) App. Cas. 743 at p. 764 -

"... that we are to take the whole statute together and construe it all together giving the words their ordinary signification, unless when so applied they produce an inconsistency or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification."

The magistrate before whom the matter was heard agreed with the submissions of Slippery and dismissed the case.

The prosecutor has appealed this decision by case stated to the Court of Appeal on the ground that the offence was absolute and the magistrate erred in law in arriving at his decision.

As a Judge of the Court of Appeal what is your judgment? Give reasons.

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## QUESTION 2

Mike Hogg, a farmer, has been suffering losses of his goats over the last six months from attacks by roaming dogs.

One morning, in March of this year his son Terry saw a large doberman pincer dog on a section of the farm very near to the highway and about a half mile from where the goats were grazing. When the dog saw him it started moving towards the highway. Terry nevertheless shot the dog because he was afraid it would harm the goats.

The dog in fact belonged to a neighbouring farmer, John Steer, who claimed that the dog was a very intelligent animal, a good house-dog and watch-dog and very useful around the farm. Further that Terry knew the dog. He claimed that on the morning in question his wife took the dog onto the highway on its lead and walked with it towards her aunt's house. She then allowed the dog to continue along the highway to meet him, as it often did in the morning. Apparently the dog then wandered onto Hogg's farm. The two farms are about one mile apart.

Steer initiated a civil action against Hogg and Terry to recover damages for the killing of the dog.

The magistrate held that the defendants were not liable. At common law, he stated, they would probably have been liable since the law was as follows:

"To kill, shoot or injure another man's dog without legal justification is an actionable wrong at Common Law. It is no legal justification that the dog was trespassing. In order to legally justify such an act it must be proved that it was done under necessity for the purpose of protecting the person or saving property in peril at the moment of the act."

However, the Control of Dogs By-Law provides as follows:

"A By-Law for restraining and regulating the running at large of dogs; and for seizing, and impounding dogs running at large contrary to the By-Laws; and for selling the dogs so impounded or any of them at such time or times and in such manner as may be directed by any By-Law in that behalf.

1. For the purpose of the next succeeding paragraph a dog shall be deemed to be running at large when found in a street or other public place and not under the control of any person.

2. It shall not be lawful for any dog to run at large unaccompanied by its owner or by such member of such owner's family and any dog except hounds, found so running at large a greater distance than one half mile from the premises of its owner and unaccompanied therewith may be killed by any resident of this municipality".

Steer seeks your advice as to whether he should appeal this decision.

What is your advice? Give reasons.

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### **QUESTION 3**

On November 14, 1995, premises used as a grocery shop at 27 Bay Street was raided by the police and Trickster and others were caught engaged in illegal gambling activities. The police also found paraphernalia associated with casino gambling.

In 1993 the shop was leased to Fingers for five years, but in 1994 he left for Canada and up to the time of the raid had not returned. In the meantime he had left Trickster in charge of the premises and manager of the business. Sometimes Trickster was therefore required to sleep there.

Trickster was charged under an information under the Gambling Act, to wit -

"Under section 4 (a) as being the occupier of a certain shop did unlawfully use it as a common gaming house".

The relevant provisions of the Gambling Act state as follows -

In this Part of this Law -

"Common gaming house" includes any place kept or used for gambling, to which the public, or any class of the public, has or may have access, and any place kept for habitual gambling, whether the public, or any class of the public, has or may have access thereto or not, and any place kept or used for the purpose of a public lottery; but does not include a club to which the Minister, subject to such terms and conditions as he thinks fit, grants express exemption.

"Unlawful gaming" includes -

1. Cock-fighting, whether for a stake or not, and whether practised publicly or privately;
2. The act of betting or of playing a game for a stake when practised-
  - (a) in or upon any path, street, road or place to which the public have access, whether as of right or not; or
  - (b) in any premises in respect of which a licence has been granted to distill, manufacture, sell or possess rum or any intoxicating liquor, other than the premises of a club to which the Minister, subject to such terms and conditions as he thinks fit, grants express exemption; or

- (c) in or at a common gaming house as defined under this Law.

A place shall be deemed to be "used" for a purpose, if it is used for that purpose even on one occasion only;

"Gambling" means to play at any game, whether of skill or chance, for money or money's worth.

3. Every common gaming house is hereby declared to be a common and public nuisance contrary to law.

4. Whoever -

- (a) being the owner or occupier, keeps or uses a place as a common gaming house; or
- (b) permits a place of which he has the use temporarily or otherwise, to be kept or used by another person as a common gaming house; or
- (c) has the care or management of, or in any manner assists in the management of a place kept or used as a common gaming house, or assists in carrying on a public lottery; or
- (d) commits an act of unlawful gaming, shall on conviction thereof be liable either to a fine not exceeding two hundred dollars or to be imprisoned, with or without hard labour, for a period not exceeding twelve months."

It was argued before the magistrate on behalf of the Crown /State that Trickster was an occupier within the meaning of the section charged in that he was in control of the premises and further that he sometimes slept there.

In reply, counsel for Trickster submitted that he was wrongly charged as he was not the occupier of the place within the meaning of section 4. He was merely the agent of one Fingers, who was the tenant of the premises in question. His client only managed the business and therefore he could not be said to be the occupier of the premises under section 4 (a). To support his submission he cited R v Alfred Tai (1933) 1JLR 59.

In R v Alfred Tai the court held that a person who has the control of the place even if not resident there is the occupier. One who is merely a manager and not the owner of a business is not the occupier of the premises.

The Magistrate then gave judgment in the following terms:

"In my opinion the term occupier must be construed with reference to the object of the particular Act in which it occurs and means the person who has control of the premises. I agree with the decision in R v Alfred Tai as to who is an occupier and hold that the accused was not the occupier in this case."

As Director of Public Prosecution/Attorney General would you appeal this judgment (a procedure permitted by the jurisdiction)? Give reasons for your decision.

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**QUESTION 4**

Your client, Con Ductor, was charged as follows -

"for that he on Sunday, February 20, 1996, at Bank Road in the parish of Saint Andrew then being the driver of a certain motor vehicle to wit, a minibus, on a certain road there called Dodswell Street, where a traffic sign indicating the route to be followed by traffic had been lawfully placed, unlawfully did fail to conform to the indication given by the sign, contrary to section 34 of the Road Traffic Act".

Before the magistrate the following facts were proved or admitted -

On Sunday, February 20, 1996, Constable Observant was on duty on Dodswell Street at a place known as Sharp Corner. There was a continuous white line painted on the road going around the corner. At about 9:30 a.m. Observant saw a Nissan motor car being driven towards Sharp Corner. Closely following the car was the Dina minibus driven by Con Ductor. As the car entered the corner the bus began to overtake it and proceeded on the right hand side of the road around the corner thus placing the whole of the bus on the outside of the white line.

The magistrate found that an offence had been committed contrary to Section 34 of the Road Traffic Act, and convicted Con Ductor and fined him.

Section 34 of the Road Traffic Act stated as follows -

- (1) A highway authority may cause or permit traffic signs to be placed on or near any road in their area.
- (2) The expression 'traffic sign' includes all signals, warning, signing posts, direction posts, signs or other devices for the guidance or direction of persons using roads.
- (3) Any person who fails to conform to the indication given by a traffic sign is guilty of an offence."

Con Ductor wishes to appeal this decision and has sought your advice.

What is your advice? Give reasons.

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### QUESTION 5

The Secretary of a co-operative society has written to you as follows -

"Dear Attorney -

A problem has arisen involving different interpretations of rule 42 of our new Rules. This rule states as follows -

42. 'The Board of Directors is vested with the power and authority to purchase, lease, or otherwise acquire real and personal property and to borrow money for that purpose upon the favourable vote of at least three-fourths of all the Directors.'

Some of the Directors are of the view that the provision means that decisions of this nature must be by a majority vote of at least three-fourths of the total membership of the Board. This has meant, on a number of occasions that an otherwise properly constituted meeting of the Board has been unable to make a decision on an urgent matter to do with the acquisition of property because there were less than twelve Directors present at a meeting (the Board consists of fifteen Directors) or that less than twelve persons, although constituting the required majority of the Directors present, voted in favour of a proposal.

Other Directors, however, are of the view that when the rule speaks of the "favourable vote of at least three-fourths of all the directors", it is saying that the decision requires a three-fourths, or more, majority of the directors who are present at a duly constituted meeting of the Board and that this would mean the favourable vote of less than twelve Directors, if the attendance was less than full. Rules 43 and 44 seem to support this view by providing that -

'43. The Directors shall meet together for the dispatch of business at least once in every three months, and subject thereto they may adjourn and otherwise regulate their meetings as they think fit.

Questions arising at any meeting shall be decided by majority vote. In case of any equality of votes the Chairman shall have a second or casting vote.

44. The quorum necessary for the transaction of the business of the Directors shall be a bare majority of the Directors.'

This is our current dilemma and we would appreciate your opinion at your earliest convenience as this is a matter of great urgency.”

What is your advice? Give reasons.

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### **QUESTION 6**

Mary Minto, who recently graduated from Law School, has been instructed to draft a guarantee by the senior partner of the firm in which she is an associate. This guarantee is with respect to an assignment of a lease.

The senior partner gives her the following instrument set out below as the precedent she should follow -

#### **“GUARANTEE**

The Guarantor in consideration of the Vendor making the foregoing assignment at the request of the Guarantor hereby covenants with the Vendor that the Purchaser will at all times hereafter duly pay the rent reserved by the Lease the service charges (if any) and all other payments and costs thereby provided for and will duly observe and perform all the covenants on the part of the Lessee and conditions therein contained and that the Guarantor will at all times hereafter duly observe and perform all covenants on the part of the Guarantor with the Landlord of the property and will at all times hereafter pay and make good to the Vendor on demand all losses costs damages and expenses occasioned to the Vendor by the non-payment of the said rents service charges or

other payments or the breach non-observance or non-performance of any of the said covenants and conditions or any breach of the Purchaser's covenants as to payments observance and performance and for indemnity expressed in this assignment and notwithstanding any termination of the obligations of the Purchaser or any successors in title of the Purchaser by reason of disclaimer by any Trustee in bankruptcy or liquidator or the winding-up or the Purchaser or any successor in title of the Purchaser being a Corporation IT IS HEREBY AGREED AND DECLARED that any neglect forbearance or indulgence of the Vendor in enforcing or giving time to the Purchaser (or any Trustee in bankruptcy receiver or liquidator of the Purchaser) for any payments or observance of performance of any obligation shall not in any way release the Guarantor in respect of the Guarantor's liability under this present guarantee."

Mary, however, 'fired up' with theories of a more modern drafting style re-drafted the instrument as follows -

#### **"GUARANTEE**

1. In consideration for this assignment by the seller, the guarantor agrees to:
  - (a) Comply with any covenant the tenant has broken; and

(b) Indemnify the landlord and the seller against any consequences of the tenant's breach.

2. The guarantor's liability continues despite:

(a) Lenience by the landlord to the tenant; or

(b) Disclaimer in the bankruptcy or liquidation of the tenant,"

Comment on the adequacy or otherwise of Mary's redraft.

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**QUESTION 7**

Your client, Notwell, has recently suffered a stroke. As a result he is unable to manage his affairs. He owns an apartment, a seaside cottage and a small dairy farm which he managed with the assistance of Mark Smartman.

As a result of his incapacity Notwell asked Smartman whether he would manage the business and his properties. Smartman readily agreed, but told him that he, Notwell, would have to give him legal authority in writing, to which Notwell agreed. Notwell then retained an attorney-at-law who prepared the power of attorney set out below which Notwell then duly executed. It was then registered/recorded.

**POWER OF ATTORNEY**

I, SIMON NOTWELL, of 22 Prince Street, St. John, Businessman, Hereby appoint MARK SMARTMAN of "Rose Cottage" St. Johns, Businessman, to be my true and lawful Attorney for me and in my name and for my use to act and conduct and manage all my affairs as he may think fit with power to execute documents of all kinds, to commence, prosecute or compromise legal or arbitration proceedings of all kinds, to compromise claims of all kinds and to deal with and manage any property of whatever kind or wherever situated in anyway whatever.

This power of Attorney shall be irrevocable for a period of five years from the date hereof.

AND I HEREBY AGREE AND UNDERTAKE to ratify and confirm all and whatsoever that my said attorney shall lawfully do or cause to be done by virtue of this Deed.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my Seal this 20th day of February 1996."

In early April 1996, Notwell's bank manager visited him seeking his confirmation that Smartman was authorised to withdraw money from Notwell's account. Notwell told the manager that he had given him no such authority. Notwell then tried to contact Smartman but was told that he had gone to Mexico for a few days. Two days later Notwell received a telephone call from a person who stated that he had just contracted to purchase Notwell's seaside cottage from Smartman but on investigating the title discovered that it was owned by Notwell.

Notwell, in a very agitated state, has come to see you. He tells you that it was never his intention that Smartman would be able to operate his personal bank account or be able to sell his properties both of which were tenanted. What he had intended was for him to be able to do the day to day management of the dairy farm and manage the apartment and seaside cottage.

He therefore seeks your advice with respect to the Power of Attorney he executed.

Advise him, giving reasons.

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#### **QUESTION 8**

On May 8, 1995, policemen of the Drug Squad carried out a raid on premises at High Lane. At the side of the premises three men were seen in the vicinity of a parked Lancer car. One of the men, Tough was seen with a parcel in his hand, which he placed in the car. As a policeman approached Tough, one of the other men, Tommo, ran but was apprehended by other policemen and taken back to the car. The third man, Johnny, had remained by the car.

On investigation, the car was found to contain 20 packages of ganja weighing all together 400 kilos. All three men were then arrested and charged with possession of dangerous drugs, dealing in dangerous drugs and transporting dangerous drugs. After being cautioned Tommo said -

"a wi boss Bigman pay wi to load the car."

On June 17, 1995, the Dangerous Drugs (Amendment) Act came into effect. This Act provided a new offence and replaced a new system of fines with that of mandatory imprisonment for offences with respect to dangerous drugs. The short title stated that it was to be read and construed as one with the principal Act. The definition of dangerous drugs includes ganja.



The new offence of transporting dangerous drugs provides as follows -

"Every person who uses any conveyance for carrying dangerous drugs or for purposes of selling or otherwise dealing in dangerous drugs or being the owner or person in charge of any conveyance knowingly permits it to be so used is guilty of an offence and on conviction shall be sentenced to imprisonment for a term not exceeding five years."

The new provision for possession and dealing in dangerous drugs provides as follows -

"Every person who possesses , sells or otherwise deals in dangerous drugs is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding three years."

Tough, Tommo and Johnny were found guilty on all charges and sentenced as follows -

Possession of drugs            3 years imprisonment at hard labour

Dealing in drugs                3 years imprisonment at hard labour

Transporting drugs            3 years imprisonment at hard labour

(the sentences to run concurrently)

All three wish to appeal these sentences and have sought your advice.

What is your advice? Give reasons.

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