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LEGAL DRAFTING AND INTERPRETATION  
(Thursday, May 31, 1990)

Instructions to Students

- a) Time: 3½ 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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QUESTION 1

(a) The Golden Rule as laid down by Lord Wensleydale in Crey v Pearson has been consistently misunderstood by both judges and lawyers. It is in fact a very simple and logical rule to apply. Discuss.

(b) Constable Sharpeye obtained from a Justice of the Peace a warrant to search the premises of Shady. He had sworn on oath that he had reasonable grounds for believing that video tape recorders and cassette tape recorders were concealed in the house that Shady occupied.

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The search warrant was then executed but none of the articles listed in the search warrant was found. However, a large quantity of drugs and medical accessories was found under a bed in the house. These articles were seized by Sharpeye who then arrested Shady.

Constable Sharpeye then laid an information under section 36 (1) of the Summary Offences Act which states as follows -

"36.(1) It shall be lawful for any constable to arrest without a warrant any person having in his possession or under his control in any manner or in any place anything which the constable has reasonable cause to suspect has been stolen or unlawfully obtained".

At the trial before a magistrate, the charge was dismissed on the ground that the words "in any place" meant in any public place and therefore the arrest was unlawful. The magistrate further stated that the legislature could not have intended that the police would be allowed, without a warrant, to enter private premises at will.

Constable Sharpeye has appealed this decision. As a judge of the Court of Appeal, what judgment would you give? Give reasons.

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QUESTION 2

Smooth Tongue a witness for the prosecution at a preliminary inquiry into a charge of treason gave evidence under oath.

At the trial, some time later, he gave evidence by affirmation and in fact did so without the normal procedure for determining whether evidence under oath or by affirmation needed to be taken. In fact he was merely asked whether he wished to testify on oath or to affirm.

Part I of the Oaths Act provides as follows -

"2. In this Part the word "officer" means any person duly authorized to administer oaths.

3.-(1) Any oath may be administered and taken in the form and manner following, that is to say, the person taking the oath shall hold the Bible in his uplifted hand, and shall say or repeat after the officer administering the oath the words -

"I swear by Almighty God that....."

followed by the words of the oath prescribed by law.

(2) The officer shall (unless the person about to take the oath voluntarily objects thereto, or is physically incapable of so taking the oath) administer the oath in the form and manner aforesaid without question.

Provided that, in the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any manner which is now lawful.

4. Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, shall not for any purpose affect the validity of such oath.

5. If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question.

6.-(1) Every person upon objecting to being sworn, and stating as the grounds for such objection either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation, instead of taking an oath, in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath.

On appeal to the Court of Appeal it has been submitted by counsel for the defendant/appellant that the evidence given was not given in compliance with the provisions of the Oaths Act and in particular section 6. He further submitted that -

"...regardless of whether the evidence is reliable or not I submit the evidence of Smooth Tongue is no evidence at all and everything that he has said should be completely disregarded. The reason that I advance for this submission is that his evidence was not given on oath. The submission is that every witness must be sworn on oath before he gives evidence irrespective of the nature of the oath which may vary according to his particular religious belief, he must be sworn. A witness must be permitted to make a solemn affirmation in two circumstances and two circumstances only. One where he has no religious belief or two, where his religious belief precludes him from taking an oath".

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

QUESTION 3

In May 1989, Tom Strokes died leaving a will which he had written himself. He had not sought the assistance of a lawyer since he had often heard it said on the radio that a will was an easy document to make.

The will which was properly executed provides as follows -

"Mr Rolle is to be my executor  
To Mr. Malcom Rolle

This is to let you know that things with me is very bad and I am asking you to take wverything in hand and when you have taken your debt you can pay the balance to Mrs. Rolle. These are the people that I owe money to E.S. Daniel, N.B. Howell. The

Advocate money is in the Bank and the Bank Book is in the press with the other money".

The testator, who was born out of wedlock, was survived by his widow Ernesta Rolle and his mother Angelitta Rolle. The property which the testator possessed at the time of his death consisted of land and personal estate which included a chattel house, cash, furniture, a life insurance policy, a motor car, stock in trade and benefits in friendly societies. The total value was \$250,000.

The Executor, Malcom Rolle, by way of an originating summons has sought the determination of the court to the following questions:

1. whether the testator's whole residuary estate was included in the gift to Mrs. Rolle or only the part consisting of money;
2. whether any, and if so what part of the estate should be distributed as upon an intestacy and if so to whom.

As the judge in this matter what is your judgment? Give reasons. .

QUESTION 4

Farmer Thwistle has brought an action to recover damages from farmer Needle for the loss of two of his pigs which were killed by Needle's dog, Sugar.

As the presiding magistrate the following has been submitted to you by counsel for Thwistle -

1. Section 2 of the Dogs (Liability For Injuries) Act provides as follows -

"The owner of every dog shall be liable to damages for injury done to every person or any cattle or sheep by his dog and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog or the owner's knowledge of such previous propensity or that the injury was attributable to neglect on the part of such owner. Such damages shall be recoverable in any court of competent jurisdiction by the person injured or by the owner of such cattle or sheep killed or injured".

2. In *Child v Hearn* (1874-5) 9-10 L.R. Ex. 176, the word 'cattle' was extended to include straying pigs under the Railway Clauses Consolidated Act 1854 which imposed an obligation to fence against the straying of cattle.
3. In *Phillips v Bourne* [1947] 1 All E.R. 374, the word 'cattle' in Schedule D to the Income Tax Act 1918 (U.K.) was held to include pigs.
4. In *Anderson v Ledigster* (1955) 6 J.L.R. 358, the Jamaican Court of Appeal held that the word 'cattle' included goats.

On the other hand, counsel for Needle submitted that -

1. The Dogs Act 1865 (U.K.) section 1 of which was verbatim with section 2 of the Dogs (Liability for Injuries) Act was repealed in 1906 and replaced by a new Dogs Act in which cattle was defined to include "horses, mules, asses, goats and swine". Further, this definition was later amended in the Dogs (Amendment) Act to include poultry. Pigs were therefor not contemplated in the 1865 Act.
2. In *Tallents v Bell* [1944] 2 All E.R. 474 the plaintiff lost his claim for damages in respect of rabbits destroyed as a result of an attack by dogs. This decision was made under the most recent Dogs Act (U.K.).

What is your judgment? Give reasons.

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QUESTION 5

June Kiss died intestate on September 18, 1988, leaving real and personal property but without issue. She is survived by her widower Tom Kiss and a sister Kate Carr. She was also predeceased by three brothers one of whom left issue - two daughters and a son. The other two died leaving no issue. The deceased was also predeceased by her parents, grandparents, uncles and aunts.

Tom Kiss was appointed administrator of the estate in March 1989. Thereafter his lawyer wrote to the sister, nieces and nephew of the deceased advising them that they were entitled to a share of the deceased's estate.

In August 1989, however, the lawyer again wrote to the nieces and nephew informing them that by virtue of section 4 (1) (v) of the Intestates Estates and Property Charges Act, they were not in fact entitled to share in the deceased's estate.

The nieces and nephew, having already decided on how they were going to spend the legacy, are most distressed with this information. They have therefore applied by way of an originating summons for the interpretation of sections 4(1) (v), 5(1) (i) and 5(3) of the Intestates Estates and Property Charges Act.

These provisions state as follows:

" 4.(1).....

(v) if the intestate leaves no issue or parent then subject to the interest of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely: firstly, on the statutory trusts for the brothers and sisters of the whole blood of the intestate.

5.(1) Where under this part of this Act the residuary estate of an intestate or any part thereof is directed to be held on the statutory trusts for the issue of the intestate the same shall be held upon the following trusts, namely:

(i) In trust, in equal shares if more than one, for all or any of the children or child of the intestate, living at the death of the intestate, who attain the age of

eighteen years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of eighteen years or marry under that age, of any child of the intestate who predeceases the intestate, such issue to take through all degrees according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate.

(2) .....

(3) Where under this Part of this Act the residuary estate of an intestate or any part thereof is directed to be held on the statutory trusts for any class of relatives of the intestate, other than issue of the intestate, the same shall be held on trusts corresponding to the statutory trusts for the issue of the intestate as if such trusts were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate".

This matter has come before you as a judge. It has been submitted on behalf of the nieces and nephew that they were entitled by virtue of the combined effect of s.5(1) (i) and (3) to share in the residuary estate of the deceased notwithstanding the provisions of s.4(1) (v). It has been argued on behalf of the administrator that since their father had predeceased June Kiss, his issue could not be entitled to share in the residuary estate of the deceased.

What is your judgment? Give reasons.

QUESTION 6

Your client, Carefree Busdriver, was charged as follows -

"...for that he on Sunday, February 20, 1990 at Four Roads 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 49 of the Road Traffic Act".



Before the magistrate the following facts were proved or admitted -

On Sunday, February 20, 1990, Constable Sharpeye was on duty on Dodswell Street at a place known as Burton Corner. There was a continuous white line painted on the road going around the corner. At about 9:30 a.m. Sharpeye saw a Datsun Sunny motor car being driven towards Burton Corner. Closely following the car was the Toyota minibus driven by Busdriver. 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 49 of the Road Traffic Act, and convicted Busdriver and fined him.

Section 49 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 sign 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".

Busdriver wishes to appeal this decision and has sought your advice. What is your advice? Give reasons.

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QUESTION 7

The presumption that a statute should not be given retrospective application unless it expressly provides for this or requires it by clear implication, and the presumption that a statute should not be interpreted as prejudicially affecting vested rights are distinct presumptions and should be kept that way. Discuss.

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QUESTION 8

The Income Tax Act of 1986 came into force on January 15, 1987. On that date the previous Act (Act 2 of 1964) was repealed. James Smooth died in April 1986. In October 1986 his executors were informed by Bank of Commerce Ltd. that they had on deposit a sum of \$85,000 standing on credit to his estate. In November 1986 the executors reported the fact of this account to the Commissioner of Income Tax in order to ascertain whether this sum was liable to income tax.

In February 1988, the Commissioner advised the executors that an assessment of income tax has been made on the interest earned on the account for the years 1979 -1985 inclusive. The executors sought the advice of counsel who has challenged the assessment for the years 1979 - 1982 and has cited section 6 of Act 2 of 1964 and section 40 of the Income Tax Act 1986.

Section 6 provides as follows -

"6. Where the Assessment Committee discovers that any person liable to income tax has not been assessed in respect thereof or has been assessed at a less amount than that which ought to have been charged, they may within the year of assessment or within three years after the expiration thereof assess such person at such amount or additional amount as according to their judgment ought to have been charged, and the provisions of this Act as to notice of assessment, appeal, payment and recovery of income tax shall apply to such assessment or additional assessment".

Section 40 provides as follows -

"40. Notwithstanding the repeal of the Acts mentioned in the Fifth Schedule to this Act (Hereinafter called "repealed Acts") or the revocation of the rules and regulations made thereunder the provisions contained therein shall apply to all actions, appeals and legal proceedings which are pending at the coming into operation of this Act or may, thereafter be taken into relation to such matters arising out of the repealed Act".

The Commissioner on the other hand cited section 20 of the Act of 1986 as the basis for assessing the taxes due over a six-year period. Section 20 provides as follows -

"20. Where it appears to the Commissioner that any person has not been assessed or has been assessed to a less amount than that which ought to have been charged with, the Commissioner may, within the year of assessment or within six years after the expiration thereof assess such person at such amount or surcharge as according to his judgement ought to have been charged".

The matter has now come before you as a Supreme/High Court judge.

What is your judgement? Give reasons.

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