J A M A I C A

IN THE COURT OF APPEAL

R. M. CRIMINAL APPEAL No. 81 of 1972

BEFORE: The Hon President, (Ag.)
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Edun, J.A.

R. v. GEORGE BARBAR

R. Alberga, Q.C., and J. Leo-Rhynie for the appellant.

C. Orr, Q.C., Deputy Director of Public Prosecutions and H. Downer for the Crown.

February 21, 22, 23, 26, 27,
May 31, 1973

Luckhoo, Ag. P.:

By an order made under the provisions of s. 5 of the Trade Law, 1955 (No. 4) the importation into Jamaica of furniture constructed of metal or of wood was prohibited except under special licence granted by the Trade Administrator to whom the appropriate Minister had delegated his functions in that regard. On March 12, 1971, the appellant George Barbar applied to the Trade Administrator for a licence to import certain articles of furniture which he described in his application as "Antiques". On March 17, 1971, the Trade Administrator granted the appellant a licence to import the articles specified in his application subject to certain conditions contained in the licence. On or about September 14, 1971, the appellant imported into Jamaica a number of articles of furniture some only of which purported to have been imported under the authority of the licence he had been granted by the Trade Administrator.

Examination by an expert in the furniture trade after unshipping disclosed that some of those articles which purported to have been imported under authority of the licence were made less than 100 years before the date of importation and were therefore not

to be regarded as antiques within the meaning of that term in the furniture trade. One of the conditions attached to the licence granted the appellant was that the articles mentioned in the licence should be "genuine antiques". As a result two informations were laid against the appellant in the Resident Magistrate's Court for the parish of Kingston. One information, which related to those goods which were not imported under licence, charged the appellant in the following terms -

> " ..... imported into the Island certain prohibited goods, to wit (setting out the goods) con(trary) to section 205 (1) of Chapter 89;"

and the other, which related to those goods which purported to be imported under authority of the licence granted the appellant, charged the appellant in the following terms -

> " ..... being a person to whom a licence was granted under section 5 of the Trade Law, Law 4 of 1955 for the importation of certain goods, namely, furniture, the importation of which (are) prohibited except under the authority of a licence under section 5 of the said Law, as amended by Act 7 of 1962, unlawfully did fail to comply with a certain condition subject to which the licence was granted for that he, the said George Barbar, imported the following items of furniture, namely, (setting out the goods) which said furniture were not genuine antiques accompanied by a certificate from the Antique Dealers Association of Great Britain or other recognised dealers association, contrary to s. 9 (1) (a) of Law 4 of 1955."

The appellant was convicted on both informations as laid. He has appealed against both convictions.

Information charging breach of s. 205 (1) of the Customs Law, Cap. 89.

Section 39 of the Customs Law, Cap. 89 provides that articles which may from time to time be prohibited to be imported by Law

shall be goods prohibited to be imported. By order made under s. 5 (1) of the Trade Law, 1955 (No. 4) as repealed and re-enacted by s. 4 (a) of the Trade (Amendment) Act, 1962 (No. 7) the importation of furniture made of metal or of wood was at all material times prohibited except under the authority of a licence granted by the appropriate Minister (or the Trade Administrator to whom he delegated those functions under the authority of s. 8A of that Law as amended by s. 7 of the 1962 Amending Act). Furniture made of metal or of wood imported into Jamaica without licence were therefore goods prohibited by s. 39 of the Customs Law, Cap. 89 to be imported.

There can be no question that the appellant when he imported into Jamaica those goods to which the abovementioned information relates without the authority of a licence was well aware that they were being imported into Jamaica contrary to the statutory prohibition. The point raised by this appeal in relation to the information laid under s. 205 (1) of Cap. 89 is whether it was necessary for the prosecution on such a charge to allege and prove an intention on the part of the appellant to evade the prohibition applicable to the goods specified in the charge. Section 205 (1) of Cap. 89 provides as follows -

> "Every person who shall import or bring, or be concerned in importing or bringing into the Island any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unloaded or not, or shall unload, or assist or be otherwise concerned in unloading any goods which are prohibited, or any goods which are restricted and imported contrary to such restriction, or shall knowingly harbour, keep or conceal, or knowingly permit or suffer, or cause or procure to be harboured, kept or concealed, any prohibited, restricted or uncustomed goods, or shall knowingly acquire possession of or be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing

> with any goods with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or applicable to such goods, or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any import or export duties of customs, or of the laws and restrictions of the customs relating to the importation, unloading, warehousing, delivery, removal, loading and exportation of goods, shall for each such offence incur a penalty of one hundred pounds, or treble the value of the goods, at the election of the Collector-General and all goods in respect of which any such offence shall be committed shall be forfeited."

It will be observed that in the information in question there is no allegation of an intent to evade the prohibition applicable to the goods specified in the charge. At the close of the case for the prosecution learned attorney for the defendant (appellant) submitted that the information as laid was bad in that it omitted to charge an intention on the defendant's part to evade the prohibition. For the prosecution it was contended that the offence contemplated by s. 205 (1) of Cap. 89 in relation to the importation of prohibited goods was one of strict liability and did not require that such an intent should be alleged or proved. A number of authorities were cited in the course of the argument before the learned resident magistrate and these have also been cited on appeal. The learned resident magistrate accepted the contention advanced by attorney for the prosecution and held that a prima facie case had been made out against the defendant. No evidence was adduced on the part of the defendant. The learned resident magistrate found the offence proved. The Collector General having elected that the defendant forfeit treble the value of the goods the defendant was fined $16,121 and in default of payment to be imprisoned for 3 months at hard labour.

The question in issue falls to be determined upon what is the proper construction to be put upon the provisions of s. 205 (1) of Cap. 89. These provisions first appeared in that form in the Laws of Jamaica in 1939 when the Customs Law, 1939 (No.34) was enacted. That Law appears to have been modelled on the English

Customs
/Consolidation Act, 1876 (39 & 40 Vict. c. 36) the provisions of s. 186 of which were in part enacted as s. 205 (1) of the local 1939 Law with such consequential changes as were considered necessary. One of the offences common to both s. 186 of the English 1876 Act and s. 205 (1) of the local 1939 Law (now s. 205 (1) of Cap. 89 of the 1953 Edition of the Laws of Jamaica) is "knowingly harbouring prohibited goods". Such an offence was charged in Frailey v. Charlton (1920) 1 K.B. 147 where the respondent, a ship's Steward, had on board his ship while lying in the Thames preparatory to her departure for a foreign port a quantity of soap which was intended for the use of passengers on the voyage. The export of soap was prohibited by proclamation but the respondent was not aware of that prohibition. The magistrate in dismissing the information was of the opinion that the offence charged involved an intention to contravene the prohibition. On appeal, the Divisionsal Court held that the magistrate was right and that the words "with intent ..... " must be read as applying to all the various offences created in the earlier parts of the section including the offence with which the respondent was charged. For the appellant, an officer of customs, it was submitted that the words "with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction applicable to such goods" in s. 186 of the 1876 Act were intended to be read only with the words immediately preceding them - "or shall be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with/any such goods." It was contended that the condition as to intent was introduced for the purpose of qualifying the very general language of the immediately preceding sentence and was not intended to apply to the offence of knowingly harbouring prohibited goods, or to any other of the offences created by the earlier paragraphs of the section. The Divisional Court considered that the language of the earlier paragraphs creating other offences in connection with the smuggling of goods - the Court took the view

that s. 186 was one of a series of sections which were designed for the prevention of smuggling - was equally general and there was no reason why the condition as to intent should not equally apply to them. The Court seemed to be greatly concerned that, unless such a condition were attached to the earlier paragraphs, an innocent labourer who helped to unship a barrel or an innocent merchant who took delivery of it on the quay side, provided he knew what the particular goods were with which he was dealing, would be liable to be convicted notwithstanding that he was entirely ignorant of the fact that there was a prohibition or restriction upon their importation, whereas a person who had been "concerned in carrying, removing or depositing" them would not if he could show that he had no intent to evade the prohibition or restriction.

In R. v. Franks (1950) 2 All E.R. 1172 n the appellant was convicted on an indictment charging him with being concerned in importing prohibited goods, contrary to s. 186 of the Customs Consolidation Act, 1876. An intent to evade the prohibition against importation of the goods was not alleged in the indictment. On appeal, it appears that counsel for the Crown conceded on the authority of Frailey v. Charlton (ubi sup.) that that omission was fatal to the conviction which was accordingly quashed by the Court of Criminal Appeal. Again in R. v. Cohen (1951) 1 K.B. 505 on appeal against conviction for knowingly harbouring uncustomed goods, contrary to s. 186 of the 1876 Act the Court of Criminal Appeal stated that an intent to defraud was one of the ingredients of the offence charged. In 1952 when the Customs Conslidation Act, 1876 and other customs legislation were repealed and the Customs and Excise Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 47) was enacted, the provisions of s. 45 (1) of that latter Act gave effect to the decision in Frailey v. Charlton whereby the condition as to intent was applied to each and every one of the offences therein specified including the offence of importing goods prohibited to be imported.

The question now arises whether this Court in construing s. 205 (1) of Cap. 89 is bound to adopt the construction put upon s. 186 of the English 1876 Act by the Divisional Court in Frailey v.

Charlton. When the provisions appearing at s. 205 (1) of Cap. 89 were enacted in 1939 Jamaica was a colony. For the appellant it was submitted that the Jamaican courts ought to apply the construction put upon those provisions by the English courts referred to above - more particularly that of the Divisional Court in Frailey v. Charlton - on the basis that where a colonial enactment has been passed in the same or substantially the same terms as an English statute the colonial courts in construing it should adopt such construction as has been put upon the English statute by the English courts. It was urged that the Jamaican courts after the 1939 Law came into force would have applied the Divisional Court's construction of the provisions of s. 186 of the Customs Consolidated Act, 1876 in Frailey v. Charlton had the question which falls for determination in the instant case arisen while Jamaica was a colony and that such a construction would continue to be applied after Jamaica achieved Independence. See Trimble v. Hill (1879) App. Cas. 342, where the Judicial Committee of the Privy Council in construing a colonial enactment passed in Australia in the same terms as an Imperial Statute was of the opinion that the latter having been authoritatively construed by the Court of Appeal in England such construction should be adopted by the courts in Australia in construing the former. See also the Jamaican case of Hart v. Campbell (1904) 2 Stephen's Report 1891 per Fielden Clarke C.J. Mr. Alberga referred to the fact that in British Guiana (now Guyana) the courts of that country have applied the construction put upon the provisions of s. 186 of the English enactment by the Divisional Court in Frailey v. Charlton to comparable provisions in the British Guiana (now Guyana) Customs Laws (modelled on s. 186 of the English 1876 Act) and that the Guyana Court of Appeal in the case of DaSilva v. Abrams (1969) 14 W.I.R. 315 has recently confirmed that approach. It was also submitted by Mr. Alberga that as the Jamaica enactment was passed after Frailey v. Charlton had been decided in England the Jamaican legislature must be deemed to have been aware of the decision in that case and to have intended

s. 205 (1) to have the same meaning as the English courts gave to s. 186 of the English 1876 Act.

For the respondent it was submitted that it was not necessary to the decision in Frailey v. Charlton that the Divisional Court should hold that the qualification of intent applied to all of the offences created in the earlier part of s. 186 of the 1876 Act and therefore in so far as that case goes it cannot be said to be a binding authority on the question of the construction of the earlier part of that section and in particular in respect of the first of the several offences created by that section i.e. importing prohibited goods, contrary to the prohibition imposed by law. Further, it was urged that the qualification of intent relates only to the words "shall knowingly acquire possession of or be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any goods." It was pointed out that in R. v. Aschendorf (1947) 5 J.L.R. 74 the then Court of Appeal in Jamaica had expressed the view that an intent to defraud was not an ingredient of the offence - shall knowingly keep any prohibited, restricted or uncustomed goods contrary to s. 205 (1) of the Jamaica enactment. That case was decided on appeal on another ground but it is curious to note that the judgment of the Court of Appeal was delivered by Savary, Ag. C.J. who, some years earlier when a judge of the Supreme Court of British Guiana, in delivering the judgments of the Full Court of the Supreme Court of British Guiana in Licorish v. D'Andrade (1931-37) L.R.B.G. 147 in 1933 and in Martin v. D'Andrade (1931-37) L.R.B.G. 387, in 1936, applied the English Divisional Court's construction in Frailey v. Charlton to charges of "being concerned in the unshipping" of 12 lbs. of saccharine on which duty had not been paid and of having "knowingly acquired possession of" 12 lbs. of uncustomed saccharine respectively. I did likewise when as Chief Justice of Guyana I delivered the judgment of the Full Court of the Supreme Court of that country in Soordas v. D'Oliviera (1966) (unreported) though I do not now recall the

offence which was charged in that case. It is also interesting to notice that when those charges were tried s. 203 of the relevant British Guiana Customs Ordinance provided that "on the hearing or trial of any information or complaint under this Ordinance or any Ordinance amending it, it shall not be necessary to proved guilty knowledge, unless otherwise expressly enacted, but the onus of negativing guilty knowledge shall be on the defendant." In Licorish v. D'Andrade the Full Court considered that the effect of that section "is that though the act must be done with an intent to defraud before an offence can be committed, yet the onus lies upon the defendant to prove the absence of such intent" which the Full Court said "is in effect the decision in Frailey v. Charlton." No similar provision appears in the English 1876 Act nor in the Jamaica Law, Cap. 89. Is this Court bound by the decision in Frailey v. Charlton as Mr. Alberga has in effect submitted it is? Putting aside for the moment the question whether the view of the Divisional Court was obiter in so far as it related to the language of the earlier paragraphs in s. 186 of the English 1876 Act, as I think it was, Trimble v. Hill would appear to support Mr. Alberga's contention. That case was decided in 1879. However, in Robins v. National Trust Co., Ltd. (1927) A.C. 515 decided some 48 years later the Privy Council was of the opinion (the Board was dealing with a question of the burden of proof regarding the validity of a will) that "when an appellate Court in a colony which is regulated by English laws differs from an appellate Court in England it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority is that of the House of Lords. That is the Supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board." Nevertheless in Chettiar v. Mahatmee (1950) A.C. at p. 494, and in Cooray v. R. (1953) A.C. 407 the doctrine in Trimble v. Hill was applied. I think the true position is that where a colonial

passes
legislature/a law in pari materia with an English Act the colonial appellate Court is not bound to follow decisions of the English appellate Courts construing the English enactment but such decisions are of course entitled to great respect. Further, as was held by the Privy Council in Chettiar v. Mahatmee (1953) A.C. at p. 492 (an appeal from Ceylon) "there is no presumption that a legislature, when it incorporates in a local Act the terms of a foreign statute, intends to accept the interpretation placed on those terms by the courts of the foreign country." There is no presumption therefore that in enacting the Customs Law, 1939 the Jamaica legislature intended to accept the interpretation places on s. 186 of the English 1876 Act by the Divisional Court in Frailey v. Charlton in 1920.

We must now attempt to construe s. 205 (1) of Cap. 89 bearing in mind the case of Frailey v. Charlton and the subsequent cases under s. 186 of the English Court of Criminal Appeal already mentioned. Prior to the enactment of the Customs Law, 1939 (No. 34) there was in force in Jamaica the Customs Consolidation Law, 1877 (as amended from time to time) which contained provisions relating to penalties on evasion of customs prohibitions, duties or restrictions. Those provisions were obviously copied from the provisions of s. 232 of the English Customs Consolidation Act, 1853 (16 & 17 Vict. c. 107). Section 157 of the local enactment provided as follows -

> "157. Every person who shall be concerned in importing or bringing into this Island any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, and whether the same be unshipped or not, or shall unship, or assist, or be otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty, the duties for which have not been paid or secured, or shall knowingly harbour, keep, or conceal, or shall knowingly permit, or suffer, or cause or procure to be harboured, kept, or

> concealed any prohibited, restricted, or uncustomed goods, or any goods which shall have been illegally removed without payment of duty from any warehouse or place of security in which they may have been deposited, or shall knowingly acquire possession of any such goods, or shall assist or be concerned in the illegal removal of any goods from any warehouse or place of **security** in which they shall have been deposited as aforesaid, or shall be in any way knowingly concerned in conveying, removing, depositing, concealing, or in any manner dealing with any goods liable to duties of Customs with intent to defraud Her Majesty of such duties or any part thereof, or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion or any duties of Customs relating to the importation, unshipping, landing, and delivery of goods, or otherwise contrary to the Customs Laws, shall for each such offence forfeit either treble the value of the goods or one hundred pounds, at the election of the Collector General, and the offender may either be detained or proceeded against by summons."

Section 159 of the local enactment provided a like penalty for unshipping, concealing, or conveying of goods liable to forfeiture and was the counterpart of s. 234 of the English 1853 Act save that the latter related only to the particular goods specified therein. Section 159 of the local Law provided as follows -

> "Every person who shall unship, or be aiding or concerned in the unshipping of any goods liable to forfeiture under this or any other Law relating to the Customs or Inland Revenue, or who shall carry, convey, or conceal, or be aiding, assisting, or concerned in the carrying, conveying or concealing of any such goods as aforesaid, shall forfeit for each such offence treble the value of such goods or the sum of one hundred pounds, at the election of the Chief Officer of Customs at the port; and every such person may be detained or proceeded against by summons."

Prohibited goods or restricted goods imported into Jamaica contrary to the prohibition or restriction were liable to forfeiture (s. 148). It is clear that the words "an intent to defraud Her Majesty of such duties or any part thereof" found no place in s. 159 of the local 1877 enactment nor did they in s. 234 of the English 1853 Act (unshipping, concealing, or conveying goods liable to forfeiture) whereas in both s. 157 of the local 1877 enactment and s. 232 of the English 1853 Act (penalties on evasions of the Customs prohibitions, duties or restrictions) those words appeared in juxtaposition to the words "or in any manner dealing with any goods liable to duties of Customs". Further there was no mention in either section of an intent to evade a prohibition or restriction and so under those earlier statutes the offence of importing prohibited goods "contrary to such prohibition" did not contain as an ingredient an intent to evade the prohibition. Now while it is true that forms contained in a schedule to an enactment cannot control the meaning of a provision contained in the enactment it is interesting to observe that in the forms of informations contained in Schedule B to the local 1877 Law as in Schedule (B) to the English 1853 Act the only count in which an intent was required to be alleged was that which charged a "dealing" with goods. Such an intent applied to the offences of being "in any way knowingly concerned in conveying, removing, depositing, concealing, or in any manner dealing with <u>any</u> goods liable to to duties of Customs". A count which charged the unshipping or harbouring of uncustomed goods was not required to allege an intent to defraud (see count 18 at Schedule B to the local 1877 Law and count 16 at Schedule (B) to the English 1853 Act). Section 157 of the local 1877 Law appears in the Laws of Jamaica Revised Edition 1927 as s. 157 of Cap. 8 and in the Laws of Jamaica Revised Edition 1938 as s. 160 of Cap. 176. Section 223 of Cap. 8 and s. 224 of Cap. 176 in the Revised Editions aforementioned respectively provide that "the form of information

given in the relevant schedule and the counts therein contained with reference to any offences created by or punishable under the several sections of the Law which the same or any of them relate shall be applicable to and sufficient for all purposes in the prosecution of such offences and forfeitures."

It will therefore be appreciated that under s. 159 of the local 1877 Law and s. 234 of the English 1853 Act "an innocent labourer who helped to unship a barrel or an innocent merchant who took delivery of it at they quayside, provided he knew what the particular goods were with which he was dealing, would be liable to be convicted notwithstanding that he was entirely ignorant of the fact that there was a prohibition or restriction upon their import or that the goods were uncustomed," the very result which appeared to cause so much concern to the members of the Divisional Court in Frailey v. Charlton and which appeared partly at any rate, to have caused them to conclude that a qualification of intent applied to all of the earlier offences contained in s. 186 of the English 1876 Act. I would therefore conclude in the light of the proper construction to be applied to the provisions of s. 157 of the local 1877 Law that a person concerned in importing or bringing into Jamaica (and this would include the actual importer) any prohibited goods contrary to the prohibition imposed would have been found guilty of an offence without proof of an intent to evade the prohibition. Further under s. 157 of that Law any person knowingly acquiring possession of uncustomed goods would have been guilty of an offence without proof of an intent to defraud as the words "intent to defraud" were referable only to the offences cognizable by the words "or shall be in any way knowingly concerned in conveying, removing, depositing, concealing or in any manner dealing with any goods liable to duties of Customs." The offences cognizable by s. 157 of the 1877 Law could be separated into distinct divisions e. g. (i) illegally importing (ii) unshipping (iii) harbouring (iv) acquiring possession (v) illegally removing from warehouse (vi) carrying (vii) fraudulent evasion

of duties of Customs. All the offences in those divisions which appeared in the section before "(vi) carrying" were such that it is not difficult to see, except perhaps in the case of acquiring possession, why qualification of an intent was not imposed by law.

In 1876 in England and in 1939 in Jamaica the earlier provisions were repealed and s. 186 of the Customs Consolidation Act, 1876 and s. 205 (1) of the Customs Law, 1939 respectively were enacted. The provisions of s. 157 of the 1877 enactment were now re-enacted by s. 205 (1) of the 1939 Law with certain changes -

(i) the words "or of any goods liable to duty, the duties for which have not been paid or secured" in relation to the offence of unshipping (unloading) are omitted;

(ii) the words "or any goods which shall have been illegally removed without payment of duty from any warehouse or place of security in which they may have been deposited" in relation to harbouring, keeping, concealing or permitting to be harboured, kept or concealed are omitted;

(iii) while the offence of "knowingly acquiring possession" of goods in the former law was related to prohibited, restricted or uncustomed goods or goods illegally removed without payment of duty from a warehouse or place of security, in the later law such an offence may be committed in relation to "any goods with intent to defraud Her Majesty of any duties thereon, or to evade any prohibition or restriction of or applicable to such goods";

(iv) the words "or shall assist or be concerned in the illegal removal of any goods from any warehouse or place of security in which they have been deposited as aforesaid" are omitted from that provision in the later law;

(v) the words "or to evade any prohibition or restriction of or applicable to such goods" appear in the provision in the later Law immediately after the words "with intend to defraud Her Majesty of any duties thereon".

Apart from the omissions in the later Law noted at (i) (ii) and (iv) above the only differences between the earlier and the later provisions are that -

(i) the offence of knowingly acquiring possession of prohibited, restricted or uncustomed goods is extended to embrace all goods where such possession is with an intent to defraud Her Majesty of duties of Customs therein or to evade any prohibition or restriction of or applicable to such goods;

(ii) the offences cognizable by the words "or be in any way knowingly concerned in carrying, removing, depositing, concealing or in any manner dealing with any goods" are no longer limited to cases where there is proof of an intent to defraud Her Majesty of duties of Customs but extend now to cases where there is proof of an intent to evade any prohibition or restriction applicable to the goods concerned.

The offences cognizable by s. 205 (1) of the 1939 Law fall into similar divisions as those under the 1877 Law save that illegally removing goods from a warehouse no longer comes within the particular provision. It is not difficult to see why it is now required to prove a specific intent in relation to the offence of "knowingly acquiring possession", for as Darling, J. has pointed out in Frailey v. Charlton (1920) 26 Cox C.C. at p. 508 in dealing with s. 186 of the English 1876 Act, where the wording in relation to knowingly acquiring possession is significantly different - "or shall knowingly acquire possession of such goods", that the contention for the prosecution in that case that the qualification of intent would apply only to the words "or shall be in any way knowingly concerned in carrying, removing ..... " would mean that "if it is proved that a person simply acquired possession of the goods then he is guilty and is liable to forfeit three times their value, or £100, as the commissioners choose, although he might have bought them perfectly honestly in a shop." Perhaps in view of Darling, J's observation s. 205 (1) of the local 1939 Law was drafted so as to avoid such a harsh result. As for the other

earlier offences in s. 205 (1) of Cap. 89 there seems to be no good reason why the construction to be applied thereto should not be the same as that which s. 157 of the 1877 enactment clearly indicated was intended to be applied to the offences created thereunder.

I would hold that the construction of s. 205 (1) of Cap. 89 contended for by the Crown is well founded and that the conviction of the appellant on the charge laid against him under that section cannot be disturbed.

Information charging breach of s. 9 (1) (a) of the Trade Law, 1955.

Under the provisions of s. 5 (1) (b) of the Trade Law, 1955 (No. 4) as repealed and re-enacted by s. 4 of the Trade (Amendment) Act, 1962 (No. 7) the approrpriate Minister is empowered by order to provide for prohibiting the importation of goods of any class or description of goods from any country except under the authority of a licence granted by the Minister.

Section 8 of the 1955 Law provides for the grant of import licences which may be absolute or conditional.

Section 9 (1) (a) of the Trade Law, 1955 as amended by s. 8 of the amending 1962 Act provides that any person who contravenes or fails to comply with any term, condition, or restriction of, or subject to which, any licence is granted under s. 8 of the 1955 Law shall be guilty of an offence and on summary conviction thereof before a resident magistrate shall be liable to a fine not exceeding $200 and in default of payment to imprisonment with or without hard labour for a term not exceeding twelve months.

It is common ground that the importation of articles of furniture constructed of metal or of wood was at all material times prohibited by order of the relevant Minister except under the authority of a licence granted by the Trade Administrator. The appellant wishing to import from abroad certain articles of furniture applied in writing for a licence to import such furniture, which in

his application he described as "Antiques". That application was granted subject to certain conditions one of which was in the terms already mentioned, that is to say -

> "3 - That the furniture mentioned in this licence be genuine antiques and shall be accompanied by a certificate from the Antique Dealers Association of Great Britain or other recognised dealers association."

The first question raised on behalf of the appellant is whether the licence issued the appellant was in fact a licence to import antique furniture as the appellant contends it was or was a licence subject to a condition as the Crown contends it was. If the former there was no condition attached to the licence so there could be no breach of condition and the charge laid under s. 9 (1) (a) of the 1955 Law would fail.

I have no doubt that the licence issued the appellant was a licence to import furniture of the types specified in the licence subject to a condition relating to the age of the furniture, that is that such furniture is genuine antique furniture and is accompanied by a certificate in that regard of the kind mentioned in the condition.

It was further submitted on behalf of the appellant that in any event the charge would fail because there was no proof of a guilty intent on the part of the appellant in that the evidence did not disclose that the appellant knew that the furniture was not antique in the sense relied upon by the prosecution and that he caused the furniture to be brought into Jamaica in the state of that knowledge. On the other hand for the Crown it was submitted that the offence charged under s. 9(1) (a) of the 1955 Law is one of strict liability and did not require proof of mens rea in the appellant alternatively, that if such proof were necessary there was in fact evidence from which mens rea in the appellant could be inferred.

There can be no doubt that the appellant in making the application for the grant of the licence knew and appreciated that

the importation of such furniture from abroad was prohibited by law except under and by virtue of a licence issued by the appropriate authority. He intimated to that authority that he wished to import antique furniture. He was granted a licence to import furniture of the type specified in the licence subject to a condition among others which indicated that the furniture was to be accompanied by a certificate from the Antique Dealers' Association of Great Britain or other recognised dealers association. He could thereafter lawfully import wooden or metal furniture only if he did so in compliance with the conditions imposed by the licence. Unless the contrary intention appears in a licence technical words in a trade, business or transaction used therein descriptive of the subject matter of the licence must be understood in the sense they are understood in that trade, business or transaction and it is not competent for the holder of the licence to say that he understood those words in a different sense. See Unwin v. Hanson (1891) 2 Q.B. at p. 119. In the instant case the words "genuine antiques" are technical words used in the furniture trade or business. According to Mrs. Buchanan, an expert in the furniture trade, whom the appellant employed as his adviser in the furnishing of his home and in the importation of the furniture for such a purpose, for furniture to be regarded as genuine antiques they would have to be at least 100 years old. Some of the furniture brought into Jamaica by the appellant under the licence did not comply with the condition attached thereto because they were in style reproductions of antique furniture and were not at least 100 years old. That part of the condition which required that the furniture be accompanied by a certificate from the Antique Dealers Association of Great Britain or other recognised dealers association ought by its content to have conveyed to the appellant that the licence did not permit him to bring into Jamaica newly constructed reproductions of antique furniture. Be that as it may, it was in this case sufficient for the prosecution to adduce evidence, as it did, to show (i) what

were "genuine antiques" as understood in the furniture trade and (ii) that the appellant imported furniture which were not genuine antiques within the meaning of that term in that trade. The learned resident magistrate was right when he held that a prima facie case was made out on the charge laid against the appellant. His conviction of the appellant on that charge cannot in the circumstances be successfully challenged.

I would dismiss the appeal against conviction on the charge laid under s. 9 (1) (a) of the Trade Law, 1955.

FOX J.A.:

It is a general principle of the criminal law that if a matter is made a criminal offence, proof of something in the nature of mens rea is essential. The prosecution must establish not only that the conduct of the accused was forbidden and punishable by law, but as well, and accompanying such conduct, the prosecution must prove the existence of a particular state of mind in the accused which has been severally described, but which may at this stage be conveniently but imprecisely labelled an evil or a guilty intent. With the rare exceptions noticed in Smith and Hogan, Criminal Law, 2nd edition at p.59, 60, criminal liability at common law requires proof of this mental element in an accused. The position is altogether different with statutory offences. "Either by the words of the statute creating the offence or by the subject matter with which it deals", - and both must be considered - (Wright J. in Sherras v. De Rutzen /1895/ 1 Q.B. 918, at 921) a court may be constrained to conclude that proof of guilty knowledge on the part of an offender is not essential. In such a situation the liability imposed by the law is considered to be so strict that even if the criminal conduct of the accused occurred without guilty intent, he would not thereby escape conviction. The mere doing of the prohibited thing, - the actus reus - in itself constitutes the offence. This was the position in Cundy v. Le Cocq (1884) 13 Q.B.D. 207, where a publican who had sold intoxicating liquor to a drunken person was held on appeal to have been properly convicted for an offence under s.13 of the Licensing Act 1872 even though he did not know, had no means of knowing, and could not with ordinary care have detected that the person served was drunk. The butcher in Hobbs v. Winchester Corporation /1910/ 2 K.B. 471 fared no better fate. He was unaware, and could not have discovered by any examination which he could reasonably have been expected to make, that meat which he had sold was unsound. The court of appeal held that the butcher who was suing the corporation to recover compensation for the meat which had been destroyed, was in default, and bound to fail in his action, because he was guilty of the crime of selling unsound meat. The judgment which had been entered in his favour was therefore reversed.

It may appear to be unjust that a person should become exposed to the rigours of the criminal law for activity which, unknown to him, constituted an offence. The courts have found a moral justification for this uncomfortable position by holding that the activity was forbidden by the statute in the public interest, and by inferring that the legislature intended that such activity should be carried out under conditions of strict liability which subordinated the interest of the individual to the welfare of the community. These considerations have been well stated by Lord Evershed in delivering the judgment of the Privy Council in Lim Chin Aik v. The Queen /1963/ A.C. 160 at 174 -

> "The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of mens rea. Thus sellers of meat may be made responsible for seeing that the meat is fit for human consumption and it is no answer for them to say that they were not aware that it was polluted. If that were a satisfactory answer, then as Kennedy L.J. pointed out in Hobbs v. Winchester Corporation, the distribution of bad meat (and its far-reaching consequences) would not be effectively prevented. So a publican may be made responsible for observing the condition of his customers: Cundy v. Le Cocq."

With these general observations, I turn now to examine the language of s.205 of the Customs Law, Cap. 89 and the subject matter with which it deals to ascertain if and to what extent offences of strict liability may have been created or whether the prosecution must in the final result discharge the burden of proving mens rea.

S. 205 is a penal section which makes it an offence to do certain acts in connection with prohibited, restricted or uncustomed goods, including importing them. The appellant was convicted for importing prohibited goods, namely items of furniture. The first part of the section contemplates four categories of offenders. These are described in four clauses separated from each other by a comma and the word 'or'. In each clause, the categories are further subdivided to cover the interlinked activities which that particular clause contemplates and seeks to proscribe. Thus, the first clause describes persons who import, or bring, or are concerned in importing or bringing into the Island any prohibited or restricted goods contrary to such prohibition

or restriction, whether the same be unloaded or not. The second clause deals with persons who unload, or assist, or are otherwise concerned in unloading prohibited or restricted goods. The third and the fourth clauses are introduced by the word "knowingly". This is one respect in which they differ from the first two clauses where the word is absent. In many cases, this difference has been considered important. In Cundy v. Le Cocq Stephen J. arrived at a conclusion that the words of the section amounted to an absolute prohibition by considering the general scope of the Act and by the fact that some of the sections contained the word knowingly which was absent from the section he was then construing. In construing the particular section of the Public Health Act, 1875 under which the butcher in Hobbs v. Winchester Corporation was considered to have been guilty of selling unsound meat, Cozens Hardy M.R. thought that this point made by Stephen J. was of "peculiar force". The task of the courts would therefore be simple if it could be said that wherever "knowingly" or a similar word is to be found, mens rea is required, and that wherever no such words appear strict liability is intended. Such simplification, however, is denied by numerous decisions indicating a contrary approach. In Sherras v. De Rutzen /1895/ 1 Q.B. 918, a publican was convicted for supplying liquor to a constable on duty contrary to section 16 (2) of the Licensing Act, 1872. The constable was not wearing his armlet which, it was admitted, is an indication that he is off duty. The publican was in the habit, quite lawfully, of serving constables in uniform but without their armlets. Consequently he made no enquiry and took it for granted that the constable was off duty. Section 16 (1) of the Act made it an offence for a licensee knowingly to harbour or suffer to remain on his premises any constable on duty. Section 16 (2) did not include the word knowingly. On appeal the conviction was quashed. In the opinion of Day J. the only effect of the textual position was to shift the burden of proof. "In cases under sub-section 1 it is for the prosecution to prove the knowledge, while in cases under sub-section 2 the defendant has to prove that he did not know." This approach was followed in Harding v. Price /1948/ 1 K.B. 695, but was doubted by Devlin J. in Roper v. Taylor's Garage /1951/ 2 T.L.R. 284. In the opinion of Devlin J. (at p.288) "all that the word 'knowingly' does is to say expressly what is normally implied". Reservations on the approach of Day J. were also expressed by the Privy Council

in Lim Chin Aik (at p.173 ibid). In Warner v. Metropolitan Police Commissioners [1968] 2 All E.R. 356 the approach of Day J. was rejected by Lord Pearce.

The highest significance which may therefore be given to the use of the word "knowingly" in one section of an act and not in another is that a strong but not a conclusive implication is raised up that proof by the prosecution of mens rea is required in the first case and not in the second. Where the difference occurs not in two separate sections, but in the same section, the implication receives added force. This was the position in Fraser v. Beckett and Sterling Ltd [1963] N.Z.L.R. 480 where s.46 of the Customs Act 1913 (N.Z.) fell to be construed by the Court of Appeal. Sub-section 1 made it unlawful to import into New Zealand any of the goods specified in a schedule. Sub-section 5 provided that "if any person imports into New Zealand or unships or lands in New Zealand any goods the importation of which is prohibited by this section or by any Order in Council made thereunder and in force at the time of importation, or is knowingly concerned in such importation, unshipment, or landing, he shall be liable to a penalty of two hundred pounds, and the goods shall be forfeited." The clear distinction which was drawn in sub-section 5 between the position of an importer and that of one who was merely concerned in the importation, unshipment or landing of prohibited goods was considered by North J. and McCarthy J. to support strongly their view that the legislature intended to impose a strict liability on importers. North J. thought that it would be very unusual for the draftsman "to use the word "knowingly" in respect of one class of persons and to omit that word in respect of other classes of persons merely for the purpose of altering the evidential burden of proof."(p.495). McCarthy put the point with clarity when he stated at p.497 that -

> " ..... two classes of offender are covered: he who imports prohibited goods; and he who is knowingly concerned in such an importation. In respect of the latter class, the section expressly demands knowledge - he must be knowingly concerned. No such requirement is expressed in the case of the importer. I recognise that Courts in other jurisdictions have not always drawn the same inference as I draw in this case from the inclusion of the word "knowingly" in respect of one offence and its omission in respect of another, and that is so especially where the offences are dealt with in different

but that in clauses one and two where the words are omitted, strict liability was intended to be created.

The question now is whether there is anything further in the language of section 205(1) which opposes the conclusion that as a result of the considerations outlined above, the legislature intended to impose a strict liability with respect to the activities described in clauses one and two. These descriptions are unconditional. To import, to bring into the Island, to unload prohibited or restricted goods are declared to be punishable offences. The verbs are not qualified by any such limiting term as "unlawfully" or "maliciously" to show that the legislature intended to import into the offences the element of awareness or foresight in a defendant that his action was wrong and would expose him to the sanction of the criminal law. The words of prohibition in clauses one and two are absolute. Mr. Alberga submitted that a total reduction of this seemingly impregnable position was effected by the words "with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or applicable to such goods." The question is whether these words apply to the four preceding clauses as Mr. Alberga contends, or to some only of these clauses, and if so, to which clause or clauses. In construing analogous provisions in s.186 of the Customs Consolidation Act, 1876 (C. 36) the Divisional Court in England held in Frailey v. Charlton [1920] 1 K.B. 147 that the words applied to the offences described in the preceding clauses so as to make an intent to defraud or to evade an essential ingredient in them all. The judgment of the court was unanimous. All three judges gave reasons for their decision. The Earl of Reading C.J. rejected the argument on behalf of the revenue that the words "with intent" etc. were intended to be read only with the words that immediately preceded them as a restriction on the generality of that language. He stressed that the language of the earlier paragraphs of the section was equally general and concluded that there was therefore no reason why the restriction should not apply equally to them. But the substantial reason which led him to hold that the words "with intent" etc. applied to all the offences created in the earlier parts of the section was that otherwise "an innocent labourer who helped to unship a barrel, or an innocent merchant who took delivery of it on the quayside ..... would be liable to be convicted notwithstanding that he was entirely ignorant of the fact that there was a

prohibition or restriction upon their import." Darling J. was similarly affected by the threat to innocent dealers in prohibited goods. He noted the unfair distinction which the argument for the revenue made between a person concerned in unshipping prohibited goods - such a person would be strictly liable - and one "concerned in carrying, removing or depositing" them, who would be allowed to show an absence of intent to defraud or evade, and felt compelled by the strangeness of such a result to conclude that the condition as to intent applied to all the offences created by the section. Avory J. considered that the views of his brethren "as to the reading of the section" were strengthened by its concluding provisions which, by making liable persons knowingly concerned in any fraudulent evasion of duties of customs, had effected "a complete and logical code."

With the greatest respect to the learned and distinguished judges who decided Frailey v. Charlton, I find myself obliged to regard as inadequate the reasons for their decision. These reasons may have sufficiently answered the particular argument of the revenue which had been advanced, but there are other arguments which were not noticed. Consequently, the decision cannot be uncritically accepted. "Each statute must be construed according to its terms and its objects. If, so construed, mens rea is not expressly or by necessary implication excluded, it is then that it will be regarded as essential." (Donovan J. in R. v. St. Margaret's Trust Ltd. [1958] 2 All E.R. 289 at 293). In that case a finance company was charged with disposing of a car on hire purchase without a deposit of at least 50 per cent of the purchase price having been paid as required by the Hire Purchase Order then in force. A car dealer and his customers had fraudulently misled the company into advancing more than 50 per cent by stating a falsely inflated price for the cars which were the subjects of the transactions. It was admitted that the company had acted innocently throughout and supposed that a deposit of at least 50 per cent had been paid. In convicting the company Diplock J. upheld the contention of the prosecution that the prohibition contained in the order was absolute in the sense that if a prohibited transaction was entered into an offence was committed even if the person concerned did so innocently. In rejecting the contention on appeal that the order should be construed so as not to apply where the prohibited act was done innocently, in other words that mens rea should be regarded as essential

to the commission of the offence, the Court of Criminal Appeal held that having regard to the object of the financial control of which the order was a part, its contravention was an offence although the act was innocently done.

This case demonstrates that punishment of conduct which is the result of blameless inadvertence is not in itself a sufficient reason for concluding that the relevant legislation was not intended to impose strict liability. Such a conclusion is valid only upon a sufficient and proper examination of the language and the objects of the legislation.

In Frailey v. Charlton, apart from the notice taken by the Earl of Reading C.J. that the section appeared in a series of sections designed for the prevention of smuggling, there is no recognition of its significance as a part of the machinery for collecting revenue and enforcing control of the economy. In addition, such analysis of the language of the section as the judgments undertook was inadequate in that no effect was allowed the discriminate use of the word "knowingly" and the other words importing mens rea in the offences in clauses three and four, and the absence of these words in clauses one and two. In Patel v. Comptroller of Customs [1965] 3 All E.R. 593 the Privy Council construed the provisions of s.116 of the Customs Ordinance (Fiji). The section created a number of offences set out consecutively and joined by the conjunction 'or'. The appellant was charged with making a false declaration on a customs import entry. In delivering the judgment of the Board, Lord Hodson pointed out that it was plainly required to construe some paragraphs so that no offence would be constituted unless mens rea was established and others so as to exclude that mental element. The Board rejected that construction of the section which would have involved the addition by implication of the word "knowingly" before the words "make any false entry", and held that the offence was complete upon proof that the entry was erroneous and that no proof of mens rea was required.

This case warns of the mistakes which may ensue from insisting upon reading a section so that it presents a completely logical code. In ascertaining the meaning of particular provisions, logic and consistency are not always safe guides. A differentiation may exist with respect to activities described next to each other. Thus in James & Son, Ltd. v. Smee [1955] 1 Q.B. 78; the court had to consider Regulations under which it was an offence "If any person uses or causes, or permits to be used" a vehicle

in contravention of the regulations. "Using", "causing" and "permitting" are three separate offences. The court held that using a vehicle in contravention of a regulation (in that it had a defective breaking system) was an offence of strict liability, but that permitting the use imported a state of mind.

Quite apart from the inadequacy of the reasoning of the judgments in Frailey v. Charlton, there is a further consideration which makes that decision an unsafe guide in construing the provisions of s.205(1). This consideration arises out of the concluding words of the section that "all goods in respect of which any such offence shall be committed shall be forfeited." These words do not appear in s.186 of the Customs Consolidation Act, 1876. Their significance was not considered in Frailey v. Charlton. In Jamaica on the other hand, the power to forfeit is directly linked to the commission of an offence in s.205(1). In this situation, as the Privy Council indicated in Commissioner of Trade and Customs v. Bell and Co. Ltd. [1902] A.C. 563, 568, it seems absurd to suppose that the legislature could have meant that the admission or exclusion of prohibited goods should depend upon the state of mind of the importer. This was the third point arising out of the text of s.46(5) of the Customs Act 1913 (N.Z.) which led McCarthy J. in Fraser v. Beckett & Sterling Ltd. to think that the penalty under that section was enforceable even though the importer may have had no knowledge of the circumstances which made the act of importing an offence. At p.498 McCarthy J. continued:

> "If forfeiture, which is traditionally the armament for stopping in limine the entry of prohibited goods, is to be exercisable only when knowledge of the incriminating circumstances is established, as I consider must be the case if knowledge is to be established before the offence is proved, then control would seem to be unworkable: the action of the authorities would be hesitant and uncertain, and in those cases when the matter of guilty knowledge is in doubt, they would be powerless to prevent the goods from entering, no matter how inherently mischievous those goods might be."

In the light of these considerations relating to the decision in Frailey v. Charlton I am obliged further to regard as unsatisfactory guides to the construction of s.205(1) the decisions of the Divisional Court in R. v. Franks, and R. v. Cohen, 34 Cr. App. Rep. 222, 239; and of the Guyana Court of Appeal in Da Silva v. Abrams (1969) 14 W.I.R. 315. In these cases Frailey v. Charlton was treated as a case of undoubted authority and was

uncritically followed. The decision of our former court of appeal in R. v. Aschendorf 5 J.L.R. 74 is an equally unsatisfactory guide to the interpretation of s.205(1), but for different reasons. In Aschendorf the appellant was convicted on an information charging that he unlawfully did knowingly keep certain goods with intent to defraud His Majesty of duties thereon contrary to s.205(1). This is an offence contemplated in the third clause of the section. In delivering the judgment of the court, Savary C.J. (Ag.) observed that s.205(1) created a number of offences, and continued at p. 75, -

> "It is a reproduction of section 186 of the English Customs Consolidation Act of 1876, but the punctuation of the English section, semi-colons, leaves no doubt that the words "with intent to defraud His Majesty of any duties thereon" have no relation to the words "shall knowingly keep any prohibited, restricted or uncustomed goods". The local section has commas instead of semi-colons but even with the local punctuation an analysis of the section produces the same result, so that the words "with intent to defraud His Majesty of any duties thereon" have no place in the information."

Aschendorf is an unsatisfactory guide to the interpretation of s.205(1) because Frailey v. Charlton was not considered and because the analysis of the language and of the objects of the section were inadequate. The decision is of importance however because it makes a judicial pronouncement on the meaning of s.205(1) which directly conflicts with the authority of Frailey v. Charlton. In this respect, the position in Jamaica at the present time is altogether different from the position in Guyana in 1969 when Da Silva v. Abrams was decided. In three previous decisions ranging over the years 1931 to 1966 Full Courts in Guyana had made positive judicial pronouncements in accordance with the authority of Frailey v. Charlton. The Guyana Court of Appeal held that there was no inconsistency in these previous decisions of the Full Court. They had settled the interpretation of the relevant ordinance, and were therefore binding on the Full Court in 1969. No similar fetter on the judgment of this court exists in Jamaica at the present time. It may also be relevant to admit that Frailey v. Charlton, R. v. Franks and R. v. Cohen, being the decisions of courts of appellate criminal jurisdiction in England, are of the highest persuasive

value in Jamaica. Very rarely has this court considered itself in a position to be convinced otherwise than in accordance with the decisions of the English Courts. They are not binding however on this court, and where, as here, their guidance seems inadequate, this court is free to follow the course dictated by its own judgment.

Having regard to the view which I hold that no decided case to which we have been referred provides a compelling guide to the construction of s.205(1) it is necessary to resort to first principles for this purpose. At the outset it must be appreciated that, suggesting as it does a single mental element common to all criminal offences mens rea is an imprecise and misleading term. It is for this reason that the translation of the term into English by Wright J. in Sherras v. De Rutzen [1895] 1 Q.B. 918, 921 as "evil intention or a knowledge of the wrongfulness of the act" is inadequate. In R. v. Tolson [1889] 23 Q.B.D. 168, Stephen J. said at 187 -

> "The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition."

This is a more helpful exposition of mens rea in that it allows for the varying states of mind which may constitute the necessary mental element in both common law and statutory offences. Thus mens rea may consist of an intent; to kill, permanently to deprive, to defraud etc.; or, to move to another category, mens rea may be knowledge of a defect, or wilful blindness, or reckless disregard for consequences, and even thoughtlessness, or to go to yet another category, mens rea may have to be ascertained from the words and subject matter of a statute, and in this respect qualifying adverbs such as maliciously, unlawfully, knowingly, and descriptive terms such as cause, permit, or suffer may provide the key to the nature of the particular mental element intended by the legislature to be present and accompanying conduct so as to give rise to the commission of an offence. Sometimes the words of a statute defining prohibited conduct are descriptive only of a physical act and connotes no particular state of mind in the actor. "Nevertheless", as Lord Diplock said in Sweet v. Parsley at 162,

"the mere fact that Parliament has made the conduct a criminal offence gives rise to some implication about the mental element of the conduct proscribed."

Lord Diplock continues at p.163, -

> "But the importance of the actual decision of the nine judges who constituted the majority in Reg. v. Tolson, which concerned a charge of bigamy under section 57 of the Offences Against the Person Act, 1861, was that it laid down as a general principle of construction of any enactment, which creates a criminal offence, that, even where the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element, they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and upon reasonable grounds, in the existence of facts which, if true, would make the act innocent. As was said by the Privy Council in Bank of New South Wales v. Piper [1897] A.C. 383, 389, 390, the absence of mens rea really consists in such a belief by the accused.
>
> This implication stems from the principle that it is contrary to a rational and civilised criminal code, such as Parliament must be presumed to have intended, to penalise one who has performed his duty as a citizen to ascertain what acts are prohibited by law (ignorantia juris non excusat) and has taken all proper care to inform himself of any facts which would make his conduct lawful."

In relation to this principle described by Lord Diplock, four important propositions must be carefully noted.

(1) There is no burden upon the prosecution to call evidence to prove the absence of any mistaken belief by the accused in the existence of facts which, if true, would make his act innocent. It is for the accused to give that evidence because only he knows on what belief he acted, and, on what ground the belief, if mistaken, was held. Then and only then would it become the duty of the prosecution to rebut that evidence by other evidence which enabled the jury to feel sure either that the belief was not held, or that there were no reasonable grounds upon which it could have been held. Woolmington v. Director of Public Prosecutions [1935] A.C. 462.

(2) The standard of care required of a person in informing himself of facts which would make his conduct unlawful varies with the subject matter of the legislation and ranges from the common law duty of care applicable to

the conduct of ordinary citizens in the course of their every day life, to an obligation to ensure prevention of the prohibited act "without regard to those considerations of cost and business practicability" which are relevant in determining the common law duty of care.

(3) Subject to proposition (4) below, this higher and stricter standard of care is imposed where the conduct prohibited involves potential danger to public health, the safety of the community, or morals.

(4) A strict duty of care will not be required of a defendant unless there is "something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control which will promote the observance" of the legislation. Lim Chin Aik v. The Queen [1963] A.C. 160, 174. By way of this proposition the rigidities which tended to disfigure the earlier law are made subject to judicial control.

In the light of these first principles, the difficulties in the interpretation of the provisions of s.205(1) are revealed to be more apparent than real. The objects of the section are obvious. They are to regulate and prevent importation, and to ensure collection of duties of customs which are payable. The section is an important part of the machinery established by government to effect two of its fundamental functions, namely collection of revenue, and control of the economy. Without revenue, a government is impotent. Without control of the economy a government is powerless to plan for the financial stability of the country. To varying degrees, all forms of conduct prohibited in s.205(1) are potentially dangerous to both functions and prima facie, therefore, attract that higher standard of care which is the genesis of strict liability. The legislature has recognised the variation in the degrees of danger not only by stipulating the nature and the extent of the guilty knowledge which must accompany the prohibited conduct to make it an offence, but also, by providing for shifts in the evidential burden of proving mens rea so that the objects of the section may be achieved without injustice to the accused. To take clauses one and two. The words which define the prohibited conduct in these clauses bear no connotation as to any particular state of mind on the part of the actor. To import, to bring, to be concerned in importing or bringing, to unload, or to assist in unloading, are unconditional descriptions of conduct. The effective

control of importation would break down if the provisions in clauses one and two are interpreted in a way which made it necessary to show that an accused had knowledge of the nature of the goods imported, or worse still, that he intended to defraud or evade. The liability imposed by clauses one and two is therefore strict. But an accused could avoid that liability by successfully invoking the principle of mistaken belief, (the innocent merchant in Frailey v. Charlton but not the owner or his agent who is fixed with the responsibility of handling goods by section 224). An accused could also escape by showing that he is within a class of persons whose conduct could not in any way affect the observance of the law. (the innocent labourer in Frailey v. Charlton). In clause three the scope of the prohibitions is widened to embrace uncustomed as well as prohibited and restricted goods. At the same time an onus of proving a mental element in the commission of an offence described in that clause is cast upon the prosecution by use of the word "knowingly." The prosecution must show that an accused knew the nature of the goods with which he was dealing. In clause four, all restriction on the type of goods made subject to the prohibitions is removed. The reference is to "any goods". In addition, the mental element necessary for the commission of an offence is intensified. The prosecution must prove not only knowledge in an accused of the nature and the relevancy of the goods with which he is dealing, but also an intent in him to defraud or to evade.

The evidence that the appellant imported prohibited goods is overwhelming. He has advanced no defence. In the light of the interpretation which I place upon the provisions of s.205(1) he is plainly guilty. I would dismiss his appeal against the conviction for importing.

I would also dismiss the appeal against the conviction under the Trade Law. However attractive the argument to the contrary, the inescapable fact of the matter is that, as plainly stated in the column in the licence describing the goods, the appellant was granted permission to import wooden furniture, - not furniture made of material other than wood. The licence also states that "Permission is granted to import the goods described above subject to such conditions as may be specified overleaf." These conditions were specified and no amount of sophistry can alter the plain position that the appellant must have been fully aware that he was given permission

to bring items of wooden furniture into the Island on condition that such items of furniture were genuine antiques, and were accompanied by the specified certificate. There is abundant evidence that the items of furniture named in the information were not genuine antiques but reproductions. No certificate has been produced by the appellant. In this situation the argument in connection with mens rea is misconceived. If upon reasonable grounds the appellant had made an honest mistake, or had been honestly misled as to breach of the conditions of the licence, the onus was upon him to adduce evidence to this effect. But no such defence was attempted. The conviction is plainly right.

EDUN J.A.:

I agree that both appeals be dismissed. In the appeal against conviction for the offence under section 205(1) of the Customs Law, Chapter 89 - on information No. 8444/71, I wish to add my reasons for not following Frailey v. Charlton (1918-21) 26 Cox C.C. p.500, in this case.

The earlier parts of s.205(1) read, thus:

Every person who -

A 1 "shall import or bring, or be concerned in importing or bringing into the Island any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unloaded or not, or

2 shall unload or assist or be otherwise concerned in unloading any goods which are prohibited, or any goods which are restricted and imported contrary to such restriction, or"

the later parts which use the words "knowingly", "intent to defraud ... or to evade any prohibition or restriction ... applicable to such goods" read thus:-

B 1 "shall knowingly harbour keep or conceal, or knowingly permit or suffer, or cause or procure to be harboured, kept or concealed, any prohibited, restricted or uncustomed goods, or

2 shall knowingly acquire possession of or be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any way dealing with any goods with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or applicable to such goods, or

3 shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any import or export duties of customs, or of the laws and restrictions of the customs relating to the importation, unloading, warehousing, delivery, removal, loading and exportation of goods, shall for each such offence incur a penalty ..."

[categories A 1,2 and B 1,2,3 and underlining mine]

The relevant portion of the charge in Information No. 8444/71 reads, thus: the defendant "..... imported into the Island certain prohibited goods, to wit:- the following items of furniture ..... contrary to s.205(1) of Ch. 89 ....." Learned attorney for the appellant submitted that the prosecution must allege in the information and prove in evidence that the appellant "knowingly imported" or "imported" certain prohibited goods ...

with an intent to defraud or to evade the prohibition or restriction applicable to the goods specified in the charge. As the prosecution did not allege and prove a necessary ingredient in the offence the magistrate's decision in convicting the appellant was wrong. In the main, he relied upon -

Frailey v Charlton (supra)
R. v. Franks (1950) 34 Cr. A.R. 222
R. v. Cohen (1951) 1 K.B. 505
Da Silva v Abrahams (1969) 13 W.I.R. 36. The last three cases followed Frailey v. Charlton as leading authority on the subject and I find no need to consider them.

In Frailey v Charlton, the respondent who was the Chief Steward of a steamer trading between London and Rotterdam in October 1918, when the steamer was in the port of London, had in his storeroom cupboard 30 tablets of toilet soap. Under s.2 of the Customs (War Powers) Act 1915, toilet soap was prohibited from being exported. The appellant was charged with knowingly harbouring certain prohibited goods, to wit, 10 lbs. of soap, contrary to section 186 of the Customs Consolidation Act 1876 (from which is modelled s.205(1) of the Customs Law, Ch.89). Before the magistrate it was contended on behalf of the respondent Charlton that the goods were for use as ship's stores on board the ship, and that consequently as a matter of law section 186 of Act 1876 did not apply. On the facts, the magistrate found that the soap was not intended to be exported to any foreign destination but was intended to be used on board the ship. On the law, the magistrate was of the opinion that -

1 the laws applicable to the charge had no application to goods shipped as ship's stores or for the purpose of use and consumption on the ship; and
2 the offence of knowingly harbouring prohibited goods under s.186 of Act 1876 involved an intention to contravene the prohibition, and that there was no intention by the respondent to contravene the proclamation and the Order in Council by exporting the soap within the meaning of the Customs Acts (underlining mine).

The magistrate accordingly dismissed the information. Frailey, the customs officer, appealed. A court of three eminent judges, Lord Reading C.J., Darling and Avory JJ. held that the magistrate's conclusions were correct and dismissed the appeal. At p.506 Lord Reading C.J., said: "..... If it is a necessary ingredient of the offence that in order to

constitute it the respondent must have done the act with intent to evade the prohibition, it is clear on the magistrate's finding of fact that no offence has been committed. The finding of fact binds us; we can only pronounce the law upon it. If, on the other hand, it is not necessary for the commission of the offence that the respondent should have done the act with intent to evade the prohibition, then, of course, other considerations will arise." At pp. 506-507, he continued: "... He /Mr Giveen for the appellant/ said that we ought to read the words 'or shall be in any way knowingly concerned' as a restriction on the generality of the language. I think that that is so, but it does not supply any reason why the restriction should not be equally applicable to the earlier part of the section, which says that 'every person who shall import or bring or be concerned in importing or bringing into the United Kingdom any prohibited goods ..... or shall unship or assist, or be otherwise concerned in the unshipping of any goods which are prohibited,' shall be guilty of an offence and then later there are the words 'or shall be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with such goods.' All those are words of most general application, and, if they are subject to no restriction, they would make a person liable who helps to unship a barrel or takes delivery of it on the quay-side, even though he might be a perfectly innocent labourer or foreman or merchant and they would make every person liable who know the fact that he was dealing with particular goods, notwithstanding that he did not know that there was a prohibition or restriction as to their import." Darling and Avory JJ. agreed with the views expressed by Lord Reading C.J. In Frailey v Charlton, the three judges were expressing their opinion on proof of cases where perfectly innocent dealers dealt with prohibited goods. They were not considering the case of an exporter of goods prohibited from being exported from the United Kingdom. In my view, they did that in Fox v. Kooman which was decided on the same day - July 31, 1919 - as Frailey v. Charlton.

In Fox v. Kooman (1918-21) 26 Cox C.C. 496 the question arose whether there had been an infringement of the provisions of a proclamation which prohibited the exportation of leather. Kooman was charged with being the exporter of goods prohibited from being exported from the United Kingdom. By section 8 of the Customs and Inland Revenue Act, 1879, certain specified

goods "may by proclamation or Order in Council be prohibited or either to be exported or carried coastwise," and "if any goods so prohibited shall be exported or brought to any quay or other place to be shipped for exportation from the United Kingdom .... they shall be forfeited and the exporter or his agent or the shipper of any such goods shall be liable to a penalty of one hundred pounds." On February 5, 1918, Kooman proceeded in a rowing-boat from the shore to a vessel and went on board taking with him eight new pieces of chamois leather. When questioned by the customs officer, he explained that he had taken the leather on board ship not for the purpose of exportation but for his own personal use and the magistrate believed him and dismissed the information. The customs officer appealed. The Attorney-General submitted that it was quite immaterial whether the leather was for the respondent's own use or not. It being taken out of the country, and one of the objects of the prohibition was that as leather was scarce it should be kept for use in the United Kingdom. That court allowed the appeal and remitted the matter to the magistrate for determination on the principle stated by the Court. As regards the principle -

> Lord Reading said at p.499: "... But the respondent in fact took the chamois leather away from the shore, and that is within the interpretation given to the word 'exported' in Muller v Baldwin /30 L.T. Rep. 864; L.R. 9 Q.B. 457/. The passage is as follows: "There is nothing in the language of the Act to show that the word 'exported' was used in any other than its ordinary sense - namely, 'carried out of port.' " In my opinion that is exactly what the word 'exported' means in the provisions now in question. It is not, however, to be interpreted in so narrow and rigid a sense as to prohibit a man from taking a piece of chamois leather for cleaning purposes. No one would set the law in motion for the purpose of dealing with such a case as that, and it might be treated as too trivial..."
> Darling J. said at pp. 499-500: "... If the respondent had bought a piece of leather and put it round his waist as a belt and had gone aboard while wearing it, I do not think that he would have been liable to be convicted under the provisions which we are considering. But here it is obvious that the respondent was going to take the leather aboard, and, if he made it into gloves after having taken it aboard, it seems to me that it would make no difference whatever whether he or someone else was going to wear them ..."

Avory J. at p.500. "I agree, on the assumption that the facts are as we presume them to be - namely, that, this was not a case merely of a small quantity of chamois leather taken on board by this respondent for his own use while he was on the ship."

The word "import" in s.2 of Customs Law, Ch.89 is defined thus: "with its grammatical variations and cognate expressions, means to bring or cause to be brought within the Island or the waters thereof." Though the words "import" and "export" are different words, the underlying principle governing the movements of prohibited goods must be the same. There are in my view, no inconsistencies in the principles of law enunciated and the application of the law to the facts in both Frailey v. Charlton and Fox v. Kooman. That is why I am prepared to hold that on a charge of importing prohibited goods, the word "import" should not be accorded the meaning of "knowingly import" certain prohibited goods or importing certain prohibited goods "with intent to defraud .. or to evade the prohibition or restriction ...."

There is a vast difference in the meanings of "import" and "knowingly import." The legislature in using the word "import" in an early part of s.205(1) must have intended to introduce strict liability to regulate and prevent importations of prohibited goods. In Cooper v. Whittingham (1880) 15 Ch.D., 501, the question arose whether the defendants committed the offence of "importing for sale" within the meaning of section 17 of the Copyright Act 1842. That section provided -

> "It shall not be lawful for any person not being the proprietor of the copyright, or some person authorized by him, to import into any part of the United Kingdom .... for sale or hire any printed book ... and if any person not being proprietor or person authorized as aforesaid, shall import or bring, or cause to be imported or brought for sale or hire ... into any part of the British Dominions, contrary to the true intent and meaning of this Act, or shall knowingly sell, publish, or expose to sale or let to hire or have in his possession for sale or hire, any such book, then every such book shall be forfeited." (Underlining mine).

The section went on to enact a penalty of £10 for each offence, and of a sum double the value of the forfeited copies, half of the former and the whole of the latter being made payable to the proprietor of the Copyright.

Jessel M.R. gave his opinion thus:-

> "It is therefore clear that the Act makes a distinction between importation and selling, for it does not say "knowingly import," although it does say "knowingly sell, publish, or expose for sale." It simply says "import," and for this reason, that people who import for sale or hire must carry on business at their own peril. Such persons are not like ordinary people who import for their own private use and reading, but are people engaged in business who are bound to be on the look-out, and to see that the books they import for sale are not piracies." (Underlining mine).

The offence under the Copyright Act 1842, s.17 was ... "import for sale .." contrary to the provisions of that section so that the words I have underlined in the above excerpt of Jessel M.R., do not detract from the clear distinctive meanings of "import" and "knowingly import." In Frailey v. Charlton (supra) the charge was "knowingly harbour certain prohibited goods." Lord Reading acknowledged that in order to constitute the offence in that case, the act must be done with intent to evade the prohibition applicable to the goods. He stated at p.505: "the question that we have to consider is whether the magistrate was justified in dismissing the information on the ground that he came to the conclusion of fact that there was no intent to contravene the prohibition or the Order in Council prohibiting export." From the magistrate's finding of fact there was no exportation of the 30 tablets of soap. It was not a case where there was an export of the soap and then liability depended upon the state of mind of the exporter.

In the earlier part of section 205(1) (categorised in the beginning of my judgment as A1), the words creating the offence are "shall import or bring into the Island any prohibited goods ...." In the instant case, there was importation of prohibited goods by the defendant. There was thus no necessity or obligation in the prosecution to allege "knowingly import" or "importing with intent to defraud .... or to evade the prohibition applicable to such goods ...." or to prove in evidence any facts which would convey the meaning that the importation of prohibited goods depended upon the state of mind of the importer.

In my view, Frailey v. Charlton and the cases following it, when properly considered and distinguished do not support the submissions of learned attorney for the appellant.