H. D. Carberry.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 153 & 154/80

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

REGINA

VS.

RICHARD SCOTT

AND

DENNIS WALTERS

---

Mr. Berthan Macaulay, Q.C. and Dr. R. Williams for the appellant Richard Scott.

Mr. Dennis Daley and Mrs. D. Brice for the appellant Dennis Walters.

Mr. F. Smith, Deputy Director of Public Prosecutions, for the Crown.

April 1; May 25, 26, 27, 28; December 20, 1982.

CARBERRY, J.A.:

These applications for leave which we treat as the hearing of the appeals are from convictions of both appellants on a charge of murder in the Home Circuit, before Campbell, J. and a jury on the 25th September, 1980.

Abraham Roberts was a member of the Island Special Constabulary Force. As such he carried a revolver. On Thursday 11th May, 1978, in the afternoon, Roberts together with a lady whose name we do not know entered a bar on premises 9 Harris Street, Kingston, and ordered drinks. These they had while seated on stools apparently at the bar counter. The person then serving behind the counter was a boy called David Ridley, and the bar was operated by his mother who was away at the time. David Ridley was approaching twelve when he gave his evidence, and must have been about ten years old at the time of this incident.

He was in some respects an unsatisfactory witness, but considering the limitations of his age, powers of observation, and recall no doubt he did his best.

According to his evidence, while Roberts and his companion were seated at the bar, a person whom he describes as a "boy" entered and ordered and bought a soft drink. Some little while later another and "bigger boy" entered the bar and returned the empty bottle and demanded payment of ten cents, which David gave to him. The first "boy" had also re-entered the bar, and one or other snatched the revolver from Abraham Roberts' waist, there was an explosion and Roberts sank to his knees, mortally wounded as it turned out, while the two "boys" fled from the bar, with the gun. The lady companion of Mr. Roberts helped to lift him out the bar, took him outside on the street, and summoned a taxi which took them to the Kingston Public Hospital, where Roberts was admitted. He was seen there by the investigating officer, Det. Cpl. Cornelius Walker, that afternoon, bleeding from a gun shot wound to his left side. Roberts died four days later, on the 15th May, 1978.

It is fair to point out that David Ridley gave evidence in two segments: on his first venture into the witness box, he in effect stated that after serving the deceased Roberts and the first boy, he saw nothing, only heard an explosion, looked up and saw Roberts on the floor bleeding. He was however recalled by defence counsel for Richard Scott, for further cross-examination, in which the details given above were put to him on the basis of his deposition at the Preliminary Examination, and he confirmed them, leaving unexplained why he had at first said that he saw nothing of the incident. Whether it was that he was an unwilling witness who tried to say as little as possible, or whether he had on the first occasion forgotten, or perhaps had not been asked the correct question to unlock his mind or tongue remain

matters for speculation, as does the purpose of the re-call. His account of the incident however seems to be correct, and was never seriously challenged. What is of importance is that at no stage did he identify either accused as being concerned with the incident: he attended an identification parade held in respect of each accused, and did not identify them. Both accused live in the general area, but there is nothing to suggest that David knew either before the incident.

As to the lady with whom the deceased Roberts was drinking, one witness Cecil Gordon, whose evidence will be dealt with at greater length below, said that he saw her at the Denham Town Police Station later that day i.e. 11th May, 1978. She was not called as a witness and no explanation of her absence was ever given or apparently asked for; nor did she give evidence at the preliminary examination.

It appears from the evidence of Dr. Ramesh Bhatt, the pathologist who performed the post-mortem examination of the body of Abraham Roberts, that the deceased had been shot through the abdomen, that the bullet had pierced various portions of the intestines and stomach of the deceased, and that surgery had been performed in an effort to save his life. He had however died of pneumonia brought on by the gun shot wound and consequential surgery.

What then connects the two accused with the incident? The answer is to be found in the deposition of Cecil Gordon, given at the preliminary examination held before the Resident Magistrate, sitting at the Gun Court, on the 25th July, 1978. We set out the deposition in full hereafter, but for the moment, it is sufficient to comment briefly on it and to fit it into the general picture.

Cecil Gordon was apparently a sideman on a truck, and lived at premises on Harris Street, number 2 according to his deposition, number 4 according to Det. Cpl. Walker. According to the deposition he was on the 11th May in the vicinity of the bar, visiting other premises on Harris Street, saw the two accused lurking outside, passed them, went towards his own premises, heard a gun shot, turned round and saw both accused running from the bar, with the accused Richard Scott, whom he had known for some months before as "Owen", holding a gun, and shortly after he saw a lady holding up a man who was bleeding from his side come out the bar, walk past him down the street to the Spanish Town Road, where she called a taxi and they drove off to hospital. He went to the Denham Town Police Station and made a report. On the 19th May, 1978, which would be after the death and post-mortem examination of the deceased Roberts, Gordon went back to the Denham Town Police Station, spoke to Det. Cpl. Calvin Benjamin whom he knew, as a result of which both set out, accompanied by an armed police party, for a bingo game that was being played on the street near to the Majestic cinema on the Spanish Town Road. There were some 30 - 40 persons so engaged, and according to the evidence of Det. Cpl. Benjamin, Cecil Gordon went up to within two feet of the two accused who were at or round the bingo table, pointed them out to the police and said in a loud tone of voice: "This a two of the men who me see shoot the policeman along Harris Street." The two accused made no reply. Benjamin took the two accused into custody, took them to Denham Town Police Station where they were locked up. He communicated with Det. Cpl. Walker, the officer investigating the murder, on the next day, and he came and formally arrested the two accused on a charge of murder, when cautioned, neither said anything.

The case against these two accused rested then on the evidence of Cecil Gordon, and his purported identification, of them, save that there was some slight supporting evidence as to their actual identification, an informal identification parade so to speak, held in the evening or night along the Spanish Town Road, at the bingo table, in the presence of Det. Cpl. Benjamin. In cross-examination on behalf of the defence, it was suggested that some fifteen persons altogether were arrested from round the bingo table, including the two accused; who in their evidence denied that Cecil Gordon had pointed them out at the scene, or indeed at all. Walters was twenty-one at the time of the trial, and Scott twenty-four, which would have made them nineteen and twenty-two at the time of the incident: whether they could aptly be described as "boys" by the ten year old David Ridley would a matter for the jury.

Giving sworn evidence in their own behalf, each accused denied knowing the other prior to their appearance at the preliminary examination on this joint charge. Both denied involvement in the incident. Neither was able to say where he was on the fateful afternoon of the 11th May, 1978, save that it was nowhere in that area; both were arrested at the bingo game on the 19th May, 1978, each saying he did not know if the other was then arrested as both assert that many others were arrested, and both denying that Cecil Gordon pointed them out at that or any other time.

Cecil Gordon did not give evidence at the trial of the two accused. There was evidence that he had died - how or exactly when is not stated, but he died between the time of his giving evidence at the preliminary examination on the 25th July, 1978, and the trial which started on the 22nd September, 1980. The only real argument in this appeal turned on the admissibility of his deposition taken at the preliminary examination by the Resident Magistrate, in the presence of these

two accused, who were represented by counsel who cross-examined Cecil Gordon on their behalf, and it having been shown that the statutory formalities were all duly complied with.

This is a convenient place at which to set out in full the deposition taken from Cecil Gordon, omitting the formal captions et cetera, it reads thus:

> "This deponent Cecil Gordon, on his oath says as follows:'
>
> I am a sideman on a truck and live in the parish of Kingston. On the 11th of May, 1978, about 2.45 p.m. I was walking on Harris Street, Kingston 13, in the parish of Kingston, and after passing a bar, saw two men standing at a gate about half chain from the bar. I walked past these men who were about an arm's length from me and went into the yard. I then went to my gate about two chains away at 2 Harris Street. As I opened the gate I heard an explosion like a gunshot coming from the direction of the bar. I turned around and looked in that direction and saw the two men I had passed on the road running from the bar. One of the men who I had known about five months before that day was running in front with a gun in his hand, the other man was running close behind him. They ran across Harris Street, turned down a cross street and disappeared from my sight. I then saw a woman holding up a man and taking him out of the bar. They passed me at my gate. I followed them down to Spanish Town Road and saw the man leaning against a wall. I went up to him and he raised up his shirt. I then saw a wound at his side. The lady had left him at the time. She returned shortly after in a taxi, the man was placed in the taxi which drove away with him and the lady. I went to the Denham Town Police Station and made a report.
>
> On the 19th of May, 1978, about 9.00 p.m., I was walking on Spanish Town Road and saw the two men sitting around a table on the sidewalk playing a game with other men. I went to the Denham Town Police Station and made a report. I went back with the police to Spanish Town Road and saw the two men still playing the game. In the presence and hearing of the two men I told a policeman that they were the two men who had shot the policeman at the bar. The men made no statement. The policeman took them to the Denham Town Police Station. I went with them.
>
> The two accused in the dock are the men I saw running from the bar and who were pointed out to the police. The accused Richard Scott is the man I knew before that day. He was the man running in front with the gun in his hand. The accused Walters was running behind the accused Richard Scott.

"I knew Scott as Owen. Immediately after hearing the explosion I saw the two accused running from the bar and the lady holding the man and coming out after them.

Cross-examined by Miss Benbow:

I used to live at 11 Harris Street before going to 2 Harris Street. I do not know the number of the bar premises. I passed the bar before reaching the gate at 11 Harris Street. There are other buildings between the bar and 11 Harris Street. The buildings are houses. There is just one gate between the bar premises and 11 Harris Street. The two men were standing in front of the gate at 11 Harris Street. Other people are now living at 11 Harris Street. The two accused men were standing against the gate column of 11 Harris Street and looking in the direction of the bar. They were looking sideways down the road. I did not call to them."

Cross-examined by Miss Dyer:

I have been living on Harris Street for a long time. The gate of premises 11 Harris Street was open and the accused men were standing behind the column of the gate. The column was taller than the men. I had turned into premises 11 Harris Street and saw the men by the column at the gate. Premises No. 2 Harris Street is on the other side of the road from 11 Harris Street. I was going to see somebody at 11 Harris Street. I went into 11 Harris Street with the intention of picking some ackees, but they were not yet open. I just looked on the ackee tree and turned back through the gate. I did not stop to speak to anybody. The two accused men were still at the gate when I left the premises. I cannot say how long it took me to walk from 11 Harris Street to 2 Harris Street. I saw the faces of the two men when they were running.

To Court:

I did not know the lady who was holding up the man. I had never seen her before. I saw her at the Denham Town Police Station later that day. I didn't know the man with the wound before that day."

This is signed by the Resident Magistrate of the Gun Court, Mr. B. L. Myrie on the 25th July, 1978 and also by the witness Cecil Gordon. The deposition on the face of it, is clear and concise in so far as one can judge. It does not conflict with the statement of any other witness or witnesses on any material point. Gordon was cross-examined at some length by the respective counsel of the two accused.

The Crown tendered this deposition under the provision of Section 34 of the Justices of the Peace Jurisdiction Act. The Section, which is set out in its entirety reads thus:

"Examination

34. In all cases where any person shall appear or be brought before any Justice or Justices charged with any indictable offence committed within this Island, or whether such person appear voluntarily upon summons, or have been apprehended with or without warrant, or be in custody for the same, or any other offence, such Justice or Justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person who shall be at liberty to put questions to any witness produced against him, take the statement (according to Form (19) in the Schedule) on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing; and such depositions shall be read over to, and signed respectively by, the witnesses who shall have been so examined, and shall be signed also by the Justice or Justices taking the same; and the Justice or Justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such Justice or Justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, or is absent from this Island or is not of competent understanding to give evidence by reason of his being insane, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or solicitor had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the Justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not, in fact, signed by the Justice purporting to sign the same:

Schedule Form (19).

Provided, that no deposition of a person absent from the Island or insane shall be read in evidence under the powers of this section, save with the consent of the court before which the trial takes place."

It will be noticed that for emphasis two passages in the section have been underlined, the passage beginning "or is absent from this island .. .. being insane", and the Proviso

that appears at the end of the section, dealing with depositions of persons absent from the island et cetera, and providing that they shall be read into the evidence only with the consent of the court before which the trial takes place.

In Jamaica, for very nearly the last forty years, we have operated on the basis of a series of Codes, or Revised Laws of Jamaica. These came out in 1938, 1953 and 1972 respectively, the last being in loose leaf form to provide for updating by the issue of revised versions of the laws as they are altered from time to time. Jamaica, like many other Commonwealth territories, is heir to the English common law system; that system has been altered from time to time, very often by the passage of statutes enacted first in Westminister, and later copied or followed with variations large or small in the several territories, including our own. With a code, or series of codes, it becomes difficult, save with much time and trouble, to trace the growth and alteration of the common law principles, and from time to time this becomes necessary, in order to appreciate what the law was, before the alterations made, and then to evaluate the significance and effect of the alterations. This is certainly so in this particular case, and it becomes necessary to review with some care the growth and development of the law with relation to the holding of preliminary examinations in indictable offences, and in particular the object and purpose of taking depositions, and their use at any subsequent trial to which they relate. We are not singular in having the need to rediscover "ancient roots" in this particular field of the law, and in what follows we owe much to two recent English cases, and one each from Guyana, New Zealand and Australia. The cases are: R. v. Hall (1973) Q.B. 496; (1973) 1 All E.R. 1: R. v. Thompson (1982) 2 W.L.R. 603; The State v. Albert Browne (1977) 25 W.I.R. 51; R. v. Ferguson (1950) N.Z.L.R. 583 and R. v. Rea (1959) N.Z.L.R. 347 and A.G. for New South Wales v. Jackson (1906) 3 C.L.R. 730. These last three cases were cited in Browne's case to which we

were
/referred, while Thompson's case reached us after the close of the argument.

The story starts long ago in an age before preliminary examinations or inquiries, when proceedings commenced with accusations before Grand Juries: in the years 1554 and 1555, by 1 & 2 Phillip & Mary [illegible], and 2 & 3 Ph. & M. C 10, two laws were passed, the effect of which was that Justices of the Peace were required, before they could grant bail or commit a person accused of a felony, to conduct an "examination of the said prisoner, and information of them that bring him, of the fact and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony shall be put in writing before they make the same bailment." The second statute added that the writing should be made within two days after the said examination, and after providing for the binding over of the prosecutor and witnesses to give evidence, that the writings should be sent to the appropriate authorities for the next assizes or goal delivery.

This then was the start of the preliminary examination: it seems originally to have been designed to see that justices did not prematurely grant bail to those accused of manslaughter or felony. It is only necessary to say two things of the period that followed: gradually, by the Vexatious Indictments Act 1859 and by practice, emphasis shifted from the Grand Jury to the preliminary examination before the Justices, until eventually the Grand Jury was abolished first in Jamaica in 1871; in England not till 1933; and secondly that the object of taking depositions was to preserve records of evidence, rather than to see if there was a prima facie case to answer - a function that belonged to the Grand Jury and was only gradually transferred to the Justices or in Jamaica to the Resident Magistrate.

It is clear that at common law it became customary to tender depositions to be read at the trial where the witness was for some reason or another not forthcoming. The argument if any, was not as to their admissibility in principle, but as to why the witness was not forthcoming, and whether the deposition had been properly and duly taken, and particularly whether there had been an adequate opportunity for the accused to cross-examine.

In 1826, by 7 Geo 4 C 64 Section 2, the system of preliminary examinations set up by the 1554 & 1555 Acts was extended to cases of misdemeanour, while an Act of 1836, 6 & 7 William 4 C 114, by Section 3 for the first time gave to an accused the right to have copies of the depositions on payment for them.

The year 1848 in the United Kingdom was a year of consolidation and reform, particularly with regard to Justices of the Peace and the mode of their operation; there was passed 11 & 12 Victoria C 42: (now called the Indictable Offences Act 1848 but then: an Act to facilitate the performance of the duties of Justices of the Peace out of sessions within England and Wales with respect to persons charged with indictable offences); the companion measure 11 & 12 Vict. C 43, similarly entitled but dealing with summary convictions and orders; then there was C 44, protecting Justices from vexatious actions, and C 46 and 47 making significant amendments to criminal procedure.

The 1848 Acts found their way into the Jamaican Statute book with remarkable despatch, the two former C 42 and C 43 became Jamaica 13 Victoria Cap. 24, and Cap. 35, and the others followed suit.

U.K. 11 & 12 Vict. C 42 (The Indictable Offences Act 1848 or Jervis' Act): in Sections 16 and 17 in particular, dealt with the preliminary examination before Justices, and how it was to be taken. It was copied word for word in the Jamaican 13 Victoria Cap. 24 as Sections 9 and 10.

As to the reading of the depositions at the trial, the U.K. Section 17 provided, (omitting the earlier part of the section):

> "..... and if upon the trial of the person so accused as first aforesaid it shall be proved by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." (Emphasis supplied).

This is word for word the same provision that appears in Section 10 of the Jamaican Act 13 Victoria Cap. 24.

That section is repeated in the present code as Section 34 of the Justices of the Peace Jurisdiction Act, which was set out above, save that the words there underlined are an amendment that was introduced by Jamaica Law 19 of 1917, The evidence (Amendment) Law, 1917. For completeness, because copies of that Law are practically unobtainable, I set out the law in full:

> "A Law further to amend 'an act to facilitate the performance of the duties of Justices of the Peace out of Sessions within this Island with respect to persons charged with indictable offences' (13 Victoria Chapter 24.)
>
> [7th August, 1917]
>
> Be it enacted by the Governor and Legislative Council of Jamaica, as follows:-
>
> 1 - This Law may be cited as the Evidence (Amendment) Law, 1917.
>
> 2 - Section ten of the Act, 13 Victoria Chapter 24 is hereby amended by inserting after the words 'so ill as not to be able to travel' the words 'or is absent from this Island or is not of competent understanding to give evidence by reason of his being insane' and by the addition at the end of the said section of the following -

> "Provided that no deposition of a person absent from this Island or insane shall be read in evidence under the powers of this section save with the consent of the Court before which the trial takes place."

Before returning to consider the position in England, we would make the following comments: the English 1848 Act and that of Jamaica in 1850 dealt with two cases only: absence of the witness through death, or through illness creating inability to be in Court. That section applied here for over 67 years, before its alteration to embrace witnesses who were absent from the island, and those who were insane, and the addition of a proviso vesting in the trial judge a discretion with regard to those two cases, was made for obvious reasons: how long would the witness be absent? how long might he be insane? To anticipate, the amendment showed no intention to alter the pre-existing law so as to give to the Judge in the case of death or illness creating inability to attend court a discretion that he did not enjoy before. The discretion given by the 1917 Act related expressly to the two additional categories of non-attendance referred to in that Act.

It is clear, from the cases cited and referred to in the cases mentioned earlier, that long before the 1848 Act depositions taken at the preliminary inquiry were admissible and were received in evidence where for good cause the deponent was clearly not available, and never likely to be available. The most usual case in which this occurred was when the deponent had died before the actual trial. The tests applied as to admissibility were directed to asking whether the accused had been present and had had an opportunity of cross examining the deponent or witness with relation to the charge. Thus there are several cases in which at the time of the deposition the charge had been wounding or robbery, but the victim having died it had become a murder case: could the victim's deposition on the wounding charge be admitted on the charge for murder? The answer was yes: both arose out of

the same factual sitution: See R. v. Radbourne (1787) 1 Leach 457; 168 E.R. 330; R. v. Smith (1817) R & R 339; 171 E.R. 357. (These cases have been followed: R. v. Dillmore (1854) 6 Cox C.C. 52; R. v. Beeston (1854) 6 Cox C.C. 425; R. v. Lee (1864) 4 F & F 63; 176 E.R. 468; R. v. Williams (1871) 12 Cox C.C. 101; A.-C. New South Wales v. Jackson (1906) 3 C.L.R. 730; R. v. Edmunds (1909) 2 Cr. App. R. 257; R. v. Abbatto & Healey (1955) Crim. Law R. 645). On the other hand if the opportunity to cross-examine had not existed, the depositions would not be received: R.v. Peacock (1870) 12 Cox C.C. 21 (accused insane when deposition taken). R. v. Mitchell (1892) 17 Cox C.C. 503 (Magistrate stopped cross-examination fearing deponent would die).

Illness

Apart from death, even before the 1848 Act, depositions were received where the witness was so ill as to be never likely to come to court: R. v. Fogg (1833) 6 Car. & P. 176; 172 E.R. 1196; R. v. Wilshaw (1841) 1 Car. & M 145; 174 E.R. 447. On the other hand if the illness was temporary or there was a likelihood of recovery in a reasonable time, the deposition would not be received: R. v. Savage (1831) 5 Car. & P. 143; 172 E.R. 913 (pregnancy); R. v. Marshall (1841) 1 Car. & M 147; 173 E.R. 148 (insanity possibly temporary).

Mere absence from the jurisdiction was not generally a sufficient reason for allowing the deposition to be received: R. v. Austen (1856) 7 Cox C.C. 55, though in R. v. Hagen (1837) 8 Car. & P. 167 such a deposition was received on the request of the defence, with the consent of the Crown.

One of the clear cases in which prior to 1848 depositions would become receivable was where the absence of the witness was due to the contrivance of the accused and or his friends: See R. v. Scaife (1851) 20 L.J. (M.C.) 229 and 2 Den. 281; 169 E.R. 505 and R. v. Austen (supra).

The 1848 Act (Jervis' Act) having been passed, there was for some time a question as to whether it merely confirmed certain of the common law exceptions, viz. death and inability to attend court through illness, leaving others untouched, or whether it was meant to be exclusive, and to limit the reception of depositions to the two cases mentioned in the statute; the point was argued in R. v. Scaife (1851) (supra) and that court adopted the former view, and where it was shown that an accused through his friends had bribed the prosecutrix to depart, it was held that the deposition was receivable against him, but not against his co-accused who were not shown to have been privy thereto, see also R. v. Beeston (1854) Dears C.A. 405; 169 E.R. 782; 6 Cox C.C. 425. Perhaps one effect of the 1848 Act was to focus attention on the statutory conditions affecting the taking of the depositions. Prior to the Act consideration had been mainly directed to the question of the opportunity to cross-examine, and the reason for the absence of the witness. After the Act greater attention was paid to the authentication of the depositions and as to how they were taken, and the statutory conditions were insisted on to such an extent that failure to observe them might not only make the deposition inadmissible (R. v. Day (1852) 6 Cox C.C. 55) but might render the entire committal process void: R. v. Gee (1936) 2 K.B. 442; (1936) 2 All E.R. 89; R. v. Phillips & Quayle (1939) 1 K.B. 63; (1938) 3 All E.R. 674.

In general, both before and after the 1848 Act, there was no question but that depositions were receivable in evidence provided the need was shown to exist, that is that there was an acceptable cause for the witnesses' absence, (death, illness, contrivance of the accused), coupled with proof of the opportunity for cross examination when the deposition was taken, and proper observance and authentication of it. The approach of counsel and judges alike was to regard the problem posed as an example of the working of the "best evidence rule" rather

than that of an exception to the "hearsay rule". The taking of depositions was viewed as an attempt to preserve evidence against possible contingency, rather than an exercise to see whether there was a prima facie case for the accused to answer, a function that was then carried out by the Grand Jury, not the committing magistrate or Justice of the Peace. Admission of depositions in proper cases long preceded the development of the hearsay rule, and constitutes an "exception" older than the rule itself.

In Regina v. Ward (1848) 2 Car. & Kir 759; 175 E.R. 319 where defence counsel had complained that a crown witness had given evidence that was not contained in his deposition (a complaint made as often now as then), Creswell, J. remarked:

> "The learned counsel for the prisoner is in error in supposing that the depositions are taken for the purpose of affording information to the prisoner. The object of taking depositions is that if any of the witnesses, whose evidence is given before the magistrate, should be unable to attend at the trial, or die, there should not, by reason of this, be a failure of justice. That is the real ground on which the depositions are taken: and, until within a very few years, the prisoner had no right even to see them. It has, however, been thought right that the prisoner should see them, in order that he may know why he was committed. .... (Emphasis supplied).

In R. v. Hendy (1850) 4 Cox C.C. 243, counsel complained that though there had been cross-examination of the absent witness (illness) none of it had been recorded in the deposition. Erle, J. remarked that he did not think it the duty of the Justice to take down every word; and he observed:

> "..... that the requisites of the statute had been complied with - he had no discretion but to see that those preliminary requisites had been established, and that the witness was examined before justices in the presence of the accused party; that it had been taken down in writing; that the accused party had an opportunity of cross examination and that after that examination had been taken down the matter was read over in the presence of the accused and signed by the justices. All these requisites had been established upon the present occasion....."

He then admitted the deposition.

At no time in the period before or after the 1848 Act until very recently did the judges assert a discretion to refuse to accept a deposition: their concern was whether the conditions for its admissibility had been met, and with the interpretation of the statute, e.g. whether a witness who could in fact travel, but who could give no evidence because of a stroke fell within the statutory exception as to illness: R. v. Cockburn (1857) 7 Cox C.C. 265 (held: he did). R. v. Wilson (1861) 8 Cox C.C. 453 (softening of the brain: held within the statute).

As is pointed out in The State v. Albert Browne (1977) 25 W.I.R. 51 at 54, this view that the judge had no discretion to exclude has been taken in some commonwealth jurisdictions with similar legislation: See A.G. For New South Wales v. Jackson (1906) 3 C.L.R. 730 (High Court of Australia) Griffiths, C.J. at page 743 et seq. following Erle, J. in R. v. Hendy (1850) supra and more recently in New Zealand, R. v. Ferguson (1950) N.Z.L.R. 583 where it was argued that the use of the word "may" (as against "shall be lawful") in their statute imported a discretion in the judge to exclude a deposition. That case is of some interest as it appears that the New Zealand statute allowed depositions to be read where it was shown that the witness was absent from the jurisdiction, and that during the course of subsequent re-enactments the words "may be read" had been substituted for "it shall be lawful to read."

Giving the judgment of the New Zealand Court of Appeal, Northcroft, J. observed that the U.K. 1848 Indictable Offences Act had been adopted in a similar New Zealand Act of 1858, and observed at page 587: "There can be little doubt that, had the language of Section 170 continued to be "it shall be lawful to read such depositions," the present controversy could not have arisen". He noted that in an earlier case on the subject "the notion of any discretion in the Judge was not raised by

counsel or discussed in any of the four separate judgments. The words were treated as conferring a right upon the prosecution." (Emphasis supplied).

"It seems to us that the change of language made when the Act was consolidated in 1889 did not alter the position. To say that "such depositions may be read" is the same thing as to say "it shall be lawful to read such depositions" .... (the words) are in both cases permissive or declaratory of a right in the prosecution." ..... "In our opinion, as the witness in this present case was proved to be absent from New Zealand, and as the depositions were admitted to have been regularly taken, the learned judge was bound by s. 170 to permit the prosecution to have the depositions read to the jury." (Emphasis supplied)

It appears that the New Zealand Act does not contain the proviso which appears in the 1917 Jamaican Act, and interestingly enough cites R. v. Collins (1938) 26 Cr. App. R. 177 in support of the proposition that the judge has no such discretion. Ferguson's case was followed in New Zealand in R. v. Rea (1959) N.Z.L.R. 347.

Returning to the development of case law in England, it should be noted that The U.K. Criminal Law Amendment Act, 1867 (Russell Gurney's Act) (30 & 31 Vict. C 35) in section 6 introduced another form of deposition that might be admitted at trial, (usually referred to as the dying deposition) and the relevant portion of it reads thus:

> "Therefore, whenever it shall be made to appear to the Satisfaction of any Justice of the Peace that any Person dangerously ill, and in the Opinion of some registered Medical Practitioner not likely to recover from such illness, is able and willing to give material Information relating to any indictable Offence, or relating to any Person accused of any such Offence, and it shall not be practicable for any Justice or Justices of the Peace to take an Examination or Deposition in accordance with the Provisions of the said Act of the Person so being ill, it shall be lawful for the said Justice to take in Writing the Statement on Oath or Affirmation of such Person so being ill, and such Justice shall thereupon subscribe the same, and shall add thereto by way

> "of Caption a Statement of his Reason for taking the same, and of the Day and Place when and where the same was taken, and of the Names of the Persons (if any) present at the taking thereof, and, if the same shall relate to any indictable Offence for which any accused Person is already committed or bailed to appear for Trial, shall transmit the same with the said Addition to the proper Officer of the Court for Trial at which such accused Person shall have been so committed or bailed; and in all other Cases he shall transmit the same to the Clerk of the Peace of the County, Division, City, or Borough in which he shall have taken the same, who is hereby required to preserve the same, and file it of Record; and if afterwards, upon the trial of any Offender or Offence to which the same may relate, the Person who made the same Statement shall be proved to be dead, or if it shall be proved that there is no reasonable Probability that such Person will ever be able to travel or to give Evidence, it shall be lawful to read such Statement in Evidence either for or against the Accused, without further Proof thereof. If the same purports to be signed by the Justice by or before whom it purports to be taken, and provided it be proved to the Satisfaction of the Court that reasonable Notice of the Intention to take such Statement has been served upon the Person (whether Prosecutor or Accused) against whom it is proposed to be read in Evidence, and that such Person, or his Counsel or Attorney, had or might have had, if he had chosen to be present, full Opportunity of cross-examining the deceased Person who made the same."

The 1867 Act seems to have added to the 1848 Act, in that it clearly permitted depositions to be taken from dangerously ill persons other than in the course of a preliminary enquiry. However it contained similar safeguards to those in the 1848 Act: it required that reasonable notice of the intention to take such a statement be served upon the accused against whom it was proposed to use it, and that he should have had full opportunity of cross examining the deponent if he chose to be present. Subsequent case law has required that the notice be not only adequate but be in writing. R. v. Shurmer (1886) 16 Cox C.C. 94; 17 Q.B.D. 323.

So far we have not been able to trace in our own laws any adoption of the 1867 dying deposition provisions, though they appear to have been adopted in some other Caribbean territories. Jamaica did however adopt Section 3 of the 1867 Act

which provided for the taking of depositions on behalf of the accused: see Section 37 of the Justice of the Peace Jurisdiction Act.

A possible explanation may be that due to the provision in the 1848 legislation that the place where the preliminary examination is taken shall not be deemed an open court, it has proved possible to conduct the examination in places such as hospitals at the bed-side of the deponent: see for example R. v. Katz (1900) 17 T.L.R. 67 and R. v. Holloway (1901) 65 J.P. 712 and in practice in this type of situation in Jamaica, provided that the accused has been apprehended, preliminary examinations are sometimes started at the bed-side of the victim, the accused at that stage being charged with wounding with intent.

Be that as it may, the general position established as the result of the cases and the legislation was that depositions might be admissible either (1) at common law, or (2) under the 1848 Act provisions, or (3) under the provisions of the 1867 Act, and finally (4) they might be admissible as dying declarations by a homicide victim, a well established exception to the hearsay rule. In this latter case however admission was only to the actual words, it was not enough to prove by writing or orally words to the same effect: also it is necessary to show that the victim had a settled expectation of death. See for example R. v. Radbourne (1787) supra) and R. v. Mitchell (1892) 17 Cox C.C. 503; depositions might fail under one or other of these heads but succeed on another: R. v. Katz (1900) supra; R. v. Holloway (1901) 65 J.P. 712; or fail under all, as in R. v. Harris (1918) 82 J.P. 196; 26 Cox C.C. 143. In R. v. Quigley (1868) 18 L.T. (N.S.) 211 the deposition failed under both the 1867 and 1848 Acts which require the presence of the accused. Here the accused was hiding and had not been caught, but it was admitted as a dying declaration.

Thus far there had been no recorded U.K. case of which we are aware in which the judges had asserted a discretion to refuse the admission of a deposition provided that the statutory conditions, which were strictly enforced, had been met.

Later U.K. legislation commencing with the Criminal Justice Act 1925 Sections 12 and 13 re-enacted some of the provisions of the earlier 1848 and 1867 legislation, but preserved others. Section 13 (3) of the 1925 Act is in point; it provided the conditions under which depositions could be read at the trial. It added a new feature: where a witness had been bound over only conditionally to attend the trial, his deposition might be read in his absence. A witness might be bound over only conditionally where his evidence was merely formal, or where the accused had intimated he intended to plead guilty. The new section also added to death and inability to travel, insanity and the case of the witness kept out of the way by means of the procurement of the accused or on his behalf, thus giving statutory recognition to already existing common law provisions.

Basic to the argument of both the appellants in this appeal is the assertion that under the Jamaican Justice of the Peace Jurisdiction Act, Section 34, the trial judge has a discretion to exclude depositions not merely where the witness is absent from the island or insane (which is specifically provided in the proviso relating to the introduction of these two cases in the 1917 Jamaican Law), but generally and with reference to the two cases of death or illness of the witness causing inability to travel to court. Mr. Daley, as we understand it, submits that this discretion exists independently of the statutory provisions, and should be exercised in favour of the accused where the admission of the deposition would prove unduly prejudicial to the case of the accused. He submits

that this was the case here, and while conceding that the deposition was admissible argues that in the proper exercise of this alleged discretion the learned trial judge should not have admitted Cecil Gordon's deposition in this case. This submission is advanced also in relation to the other appellant.

Thus far the review undertaken of the legislation and the cases on it have shown no support for the existence of such a discretion in this area of the law. It is said however to have been shown to exist in recent English and Caribbean cases, and it is proposed to now review these.

The first case advanced in support of the appellants' contention is that of Wm. Patrick Collins (1938) 26 Cr. App. R. 177; (1938) 3 All E.R. 130. That case concerned the new provision in the U.K. Criminal Justice Act (1925), Section 13 which allowed the depositions to be read where the witness had only been conditionally bound over to attend the trial. Here the accused had intimated before the examining justices that he intended to plead guilty, and they had therefore only conditionally bound over the witnesses. At the trial they were not present. The accused then changed his mind, pleaded not guilty, and sought an adjournment to call his witnesses. The adjournment was refused, and his trial proceeded, and in the absence of the prosecution witnessss their depositions were read, he was convicted and sentenced. On appeal it was argued that this was an abuse of the provisions enabling the depositions to be read, and that the accused had been deprived of the opportunity to cross examine the witnesses before the jury. The Court of Criminal Appeal allowed this appeal. The

judgment of Humphreys, J. however points out that what was done here was not in breach of the statute, though the statute had not contemplated such an occurrence, the effect of which had been to deprive the jury of the opportunity of seeing and hearing the witnesses and observing their demeanour, and of asking questions and also seeing how they stood up to cross examination by the accused. Humphreys, J. thought that the trial judge should have exercised his discretion to adjourn the trial and summons the witnesses, but added:

> "The court has already said that what was done here cannot be said to be contrary to the language of the Act, and therefore on that matter alone this court would not find itself in a position to quash the conviction. ...."

In fact the conviction was quashed on other grounds, namely the inadequacy of the summing up.

Properly considered, this case is not authority for the existence of a discretion to exclude the depositions which the U.K. statute says "may, if the conditions hereinafter set out are satisfied, without further proof be read as evidence at the trial..."

The court directed its mind to the discretion to postpone the trial so as to secure the attendance of the witnesses, and Northcroft, J. giving the judgment of the New Zealand Court of Appeal in R. v. Ferguson (1950) N.Z.L.R. 583 at 587 regards the case as supporting the view that the section is permissive or declaratory of a right of the prosecution, and does not support the view that the trial judge has a discretion to exclude the depositions once the statutory conditions have been met.

The next case relied on is that of R. v. Linley (1959) Crim. L.R. 123. Here defence counsel argued that the new wording of the Section 13(3) of the 1925 Act, using the word "may .... be read", indicated that the Court had a discretion

to refuse to permit the deposition of the witness (too ill to travel) to be read and should exercise it here where the absent witness was substantially the only evidence for the prosecution. Somewhat surprisingly counsel for the prosecution conceded that the use of the word "may" imported such a discretion, but argued that the deposition should be kept out only in manifest cases of injustice. The report merely states "Ashworth, J. ruled that it would not be right to permit the deposition of Mr. Champion to be read at the trial."

The question of whether a discretion did exist to refuse permission to read the deposition was therefore never argued. No authorities were cited, nor was there any review of the previous case and statute law relating to this matter. In any event the statutory words involved were "may ... be read."

The next case relied on by the appellant is that of Bramble v. R. (1959) 1 W.I.R. 473 a decision of the Court of Appeal for the Windward and Leeward Islands, presided over by Henriques, C.J. This was a murder case, in which it was charged that the accused, amongst several other unknown persons, had "lynched" the deceased as a suspected (or actual) thief. The deposition in question was that of the deceased, who said in effect that while skinning a goat that he admitted he had stolen, he was set upon by the accused and others and chopped up by them. The deponent had now died, and the accused was charged with murder. It appears that the deposition was taken under a section that was based on the dying deposition provisions of Section 6 of the U.K. Criminal Amendment Act, 1867. These provisions require reasonable notice to be served on the accused of the taking of the deposition. In this case the notice was eight minutes only, and a number of other "technical" objections were taken to the admissibility of the deposition, including the omission to prove that the deposition had been read over to and signed or assented to by the deponent.

The court upheld this objection and held that the deposition was not admissible on this ground, and also because no reasonable notice had been given of the intention to take it, following such cases as Shurmer (1886) (supra) and Harris (1918) (supra). Having ruled against the admissibility of the deposition on the ground that the statutory conditions had not been complied with, Henriques, C.J. went on, obiter, to refer to R. v. Linley as showing "the modern tendency with regard to the reading of a deposition at a trial." The court seems to have approved that case on face value, but can hardly be said to have followed it. The judgment then observed on the need for proper direction to the jury in case a deposition is admitted, and on the need to warn them that they have not had the opportunity of seeing the witness give his evidence and so forth.

The case was decided therefore on the traditional basis of the need for compliance with the statutory conditions governing the admission of depositions: it does not assert, apart from the reference to R. v. Linley, a discretion to refuse to permit the deposition to be read where the statutory conditions have been fulfilled. The authority of Bramble's case is seriously weakened by the observations made on it by The Federal Supreme Court of the West Indies in Cato v. R. (1960) 2 W.I.R. 509 to the effect that the objection that the deposition must be shown to have been read over to the witness was not justified under the terms of that statute. Implicit in Cato's case is the view that if the statutory conditions are fulfilled the deposition is admissible.

We were next referred to Hamilton v. R. (1963) 5 W.I.R. 361; 8 J.L.R. 138, a case heard by this court. In this case the accused was charged with wounding with intent. The charge arose out of bar room brawl which spilled over into the streets, and in which there were some three separate

incidents. Identification of the accused as being one of the persons involved in one of these incidents was crucial. One of the bits of evidence offered was the deposition of a woman who allegedly saw a part of the fracas, but who was absent from the island at the time of the trial. She had not however attended any identification parade, and she did not know the appellant before that night. In the circumstances the court thought that bearing in mind that the jury had not had the advantage of seeing and hearing her in the witness box, and that she was the only person who purported to identify the accused, it would be unsafe to allow the conviction based upon the deposition of this absent witness to stand.

Hamilton's case does not suggest that the deposition of theabsent witness should not have been admitted, nor does it suggest that the judge had a discretion to refuse permission to the crown to tender it. The case shows merely that on a review of all the evidence offered, including the deposition, the court thought it unsafe to affirm the conviction. That is a value judgment based on the evidence before it.

We were then referred to R. v. Dockery & Brown (1963) 5 W.I.R. 369 also a decision of this court. In this case the accused had been convicted of obtaining goods by forged orders, and of uttering the same. One element in the case was the evidence of the delivery clerk who made the deliveries to them on the strength of the forged orders. At the preliminary examination he had stated that one of the accused looked like one of the men and had previously picked him out at an identification parade saying that he looked like one of the men. The delivery clerk was absent from the island at the time of the trial, and the crown offered his deposition under the provisions of the Justices of the Peace Jurisdiction

when
Law Cap. 188, Section 34. At page 374 giving the judgment of the court, Lewis, J.A. said:

> "It was submitted it was a wrong exercise of the learned trial judge's discretion to have admitted such inconclusive evidence as the only evidence of identification. With respect to this submission it is only necessary for us to say that the deposition was admitted under the provisions of sec. 34 of the Justices of the Peace Jurisdiction Law, Cap. 188 (J), which gives the trial judge a discretion whether or not he will admit the deposition. Unless it is shown to this court that the learned trial judge exercised his discretion on some wrong principle of law, this court will not interfere."

Lewis is correct up to this point in the Statute

This case concerned the deposition of a witness absent from the island, and the proviso to the section clearly gives the trial judge a discretion: it provides that the deposition may be read only with the consent of the judge.

Lewis, J.A. took the section at its face value, and correctly interpreted it. He did not assert that the discretion applied generally, or that independent of the statute there was such a discretion.

In R. v. Edwin Ogle (1968) 11 W.I.R. 439, a case heard before Crane, J. in Guyana, the accused was charged with the forging of receipts for money alleged to have been received by his company. The evidence against him rested on the depositions of witnesses who had left the jurisdiction and gone to reside abroad, and the actual trial followed some three years after his committal. The crown sought to present the depositions: the defence objected. It appears that the relevant Guyana Statute provided that depositions "may, if the conditions hereinafter set out are satisfied, without further proof be read as evidence on the trial of that person .." In other words the section seems to be similar to that in the U.K. Criminal Justice Act, 1925, Section 13 (3). Crane, J. treated R. v. Linley (1959 ante) decided by Ashworth, J. on the U.K. Statute as deciding that "may" imported a discretion in the trial judge to exclude. He said at page 440:

> "The word "may" I interpret in a permissive and not a mandatory sense, and in the exercise of my discretion I do so in a judicial manner. I must weigh the pros and cons of the application to admit the deposition by looking at both sides of the picture ...." (Emphasis supplied).

Looking "at both sides of the picture" he thought that the delay involved made it unfair to permit the presentation of the depositions at this stage, and was in breach of the constitutional requirement that persons charged with criminal offences should be afforded "a fair hearing within a reasonable time ..." and in the absence of any explanation of the delay. He also referred to the English case of R. v. Collins (1938) where the need for a jury to see and hear the witnesses themselves had been stressed.

It will be noted that Crane, J. interpreted the word "may ... be read" as giving the trial judge the discretion, whereas the New Zealand Court of Appeal in R. v. Ferguson (1950) (ante) had seen no real difference between "may" and "shall be read" (save that "shall be read" left no room for argument), and had held that both phrases were "permissive or declaratory of a right of the prosecution."

It is of interest to find the same English case - Collins being relied on in support of two such divergent views. However that may be, we are of the view that assuming the discretion on the basis that the word "may" imports one, it belongs to the prosecution rather than to the judge. Prior to the 1925 legislation the English Courts had never asserted a discretion in the judges to exclude such evidence in this field, though they had been asserting such a discretion in the field of confessions and admissions (the Judges' Rules), in the development of the "similar facts rule", and their treatment of the provisions of the Criminal Evidence Act, 1898, Section 1 (f) (cross examination of the accused as to character when permissible).

Our attention was next directed to two Jamaican Court of Appeal cases: R. v. Bariffe (No. 1) and R. v. Bariffe (No. 2) reported respectively at (1968) 11 J.L.R. 58 and (1969) 11 J.L.R. 459. In substance the accused was charged with robbery with violence from two tourists. They had testified at the preliminary examination identifying him, and one of them had identified a watch found in the accused's room as his, and had also identified him at an identification parade, saying that the accused was the man who took his watch and money. There was independent evidence of a taxi driver on the actual robbery, and of police witnesses to the identification of the watch (in the presence of the accused) and as to what was said at the parade. The two tourists had left the island after the preliminary examination and did not return. The trial judge in the first trial refused to permit the depositions of the tourists to be read. Under the Justices of the Peace Jurisdiction Act, Section 34, the consent of the judge is required for the reading of the deposition of an absent witness. The Court of Appeal, as it was ordering a new trial, expressed no view as to whether the trial judge had correctly exercised his discretion or not. The case turned on the admissibility of the evidence as to what happened when the watch was identified and at the identification parade.

In the re-trial, the trial judge decided to admit the depositions of the absent tourist victims. That decision was challenged in the second appeal, and is dealt with in the judgment of Luckhoo, J.A. at page 462 et seq. Granted that the judge had a discretion to consent to the reading of the deposition of a witness absent from the island had it been correctly exercised? The answer given at page 463 was "We feel that the exercise of the trial judge's discretion to admit Tricca's deposition cannot be impeached on this limb of counsel's submission". That submission had been that on an

issue involving identification the judge ought to exercise his discretion to exclude the deposition. It was rejected.

The appeal did however succeed on other grounds relating to the way in which the trial judge had handled the situation created at the second trial by the partial acquittal of the accused at the first trial.

This case is not authority for the proposition that in all cases of the admission of a deposition the trial judge has a discretion, and it does show that even where in a particular case the discretion exists, it is not necessarily an erroneous exercise to admit the deposition where it relates to the identification of an accused.

We were next invited to consider the decision of the Guyanese Court of Appeal in the case of George Sutherland v. The State (1970) 16 W.I.R. 342. In this case the accused was charged with manslaughter; he had severely beaten his wife and she had died. His defence appears to have been that she came by her injury accidentially when she slipped going down a neighbour's stair-case. The case turned primarily on the admissibility of certain admissions made by the accused to the police, and secondarily on the decision of the trial judge to admit the deposition of a deceased witness, the neighbour down whose stair-case the deceased was said by the accused to have accidentially fallen. That evidence negatived "accident" and suggested the accused had struck the deceased so causing the fall.

The Guyanese Court of Appeal took the same view of their statute that had been taken by Crane, J. in Ogle's case above, (and indeed Crane, J. was now a member of the Court of Appeal). They held that admissibility of the deposition in any case was not automatic, but depended upon the discretion of the trial judge, to be properly exercised. Proper exercise of the discretion required consideration to be given to the fact that the jury would not have the opportunity of seeing

and hearing the deponent (citing Collins' case (ante)). In his judgment Luckhoo, C. asserted, for the first time, a discretion of the trial judge, independent of the statute, to exclude depositions and to see that the interests of justice were not imperilled by admitting them. At page 346 D he said:

> "But whether at common law or under statute, there remains a judicial obligation to see that the interests of justice are not imperilled by taking the particular course, [i.e. admitting the deposition] ..... This should be an overriding consideration of paramount importance.....
>
> If for example, it should appear that although the evidence is strictly admissible, its probative value in reality is not only tenuous but inherently prejudicial and therefore likely to impair the fair hearing of the trial, then in such like circumstances, it would be right for the evidence to be disallowed....."

The learned Chancellor indicated that the nature of the evidence, its relevance and cogency should be first examined, even before the consideration of whether the statutory conditions for admissibility were ascertained, with a view to seeing whether its admission would be consistent with a "fair trial." In the event of admission it would be necessary to warn the jury as to what weight should be attached to a deposition when they had neither seen nor heard the witness. This had been done here, and in as much as the deposition confirmed some of the accused's evidence while refuting the defence of accident, he held it rightly admitted.

Crane, J.A. at page 349 repeated his view:

> " ... I will only observe what the law is, and that is that the judge has a discretion to admit or reject the deposition of an absent witness, subject of course to the requirements of justice, if the conditions for their admissibility have been established."

Both judges dismissed the appeal, with Cummings, J.A. dissenting, saying:

> "I am of the view that it was too dangerous in the circumstances of this case for the

"learned trial judge to have admitted the deposition."

On a reading of the case as a whole it is clear that the Guyanese Court of Appeal, interpreting its statutory provisions, has decided that there is a discretion in the trial judge to exclude depositions, though the statutory conditions for admissibility may be fulfilled. This discretion that court bases on (1) the use of the word "may" and (2) on the assertion of a general common law power in trial judges to exclude evidence "in the interests of justice." As we have seen, the Court of Appeal of New Zealand does not agree with the first proposition, and the second will have to be considered in the light of the observations made by their Lordships in the House of Lords decision in Sang v. The Queen (1979) 3 W.L.R. 263, which is considered below.

It is convenient to interrupt the chronological flow of cases to consider another similar decision by the Guyanese Court of Appeal, seven years later, in the case of The State v. Albert Browne (1977) 25 W.I.R. 51. In this case the accused was charged with robbery with violence of two persons in one incident. One of his victims gave evidence at the preliminary examination identifying him, having also identified him at an identification parade. The witness however departed from the jurisdiction before the actual trial, and the prosecution tendered and the trial judge admitted her deposition. This was the only evidence which identified the accused with the crime. The accused was unrepresented at the trial.

The Guyanese Court of Appeal reaffirmed its previous decision that the use of the word "may" in the relevant section governing the admission of depositions of absent witnesses vested a discretion in the judge; that admission was not automatic, i.e. on its being tendered by the prosecution after proof of the usual statutory conditions having been met. The judge not having purported to exercise his discretion in this

respect, a new trial was ordered. It was also ordered on the basis of a serious misdirection of fact in the summing up.

It is of interest that the Court there equated the admission of the deposition with the admission of a confession, and stated that a voir dire (trial within a trial) should be held in both cases, to see whether the conditions for admissibility had been met.

It is of even greater interest that for the first time in this series of cases a court which held the view that there was a discretion in the trial judge to exclude depositions even though they satisfied statutory conditions, became aware of the fact that on similar legislation the High Court of Australia and the Court of Appeal in New Zealand had held that there was no such discretion and that their statutes gave such discretion as existed to the prosecution: that it was the crown which had the right to put forward such evidence: see A.G. for New South Wales v. Jackson (1905) ante, and R. v. Ferguson (1950) ante; and R. v. Rea (1959) ante. Haynes, C. observed at page 55:

> "It might be significant that for the period from 1848 (when the original statutory provisions was passed) to 1958, there appears to be no reported decision that the word "may" gives the court a discretionary power only, and even in R. v. Collins (1938: ante) mention was only made of the judge's discretion to adjourn the trial."

However, the learned Chancellor prayed in aid once more the case of R. v. Linley (1959: ante) and then observed:

> "In this region (the Caribbean including Guyana), the judges have come down on the side that "may" in the relevant law gives a discretion to admit or exclude. In other words the law here now is not that once the conditions are satisfied the deposition is admissible and should be admitted unless the court exercises an inherent discretion to exclude it on the ground of unfairness or injustice; it is that it is a matter of discretion whether to admit it or not."

Haynes C. then cited for this proposition as regards the Caribben area the cases of: Bramble v. R (1959) from the Windwards and Leewards Islands Court of Appeal, discussed earlier; (a case turning on breach of the statutory conditions, and merely referring to Linley's case); Dockery & Brown v. R (1963) from the Court of Appeal of Jamaica (in which however that particular section of the statute did expressly give the judge a discretion, so not in point); R. v. Edwin Ogle (1968) discussed earlier, a decision of Crane, J. in Guyana; R. v. Bariffe No. 2 (1969) a case from Jamaica, discussed earlier: (like Bariffe's case it was a case of absence of a witness from the jurisdiction, where the Jamaica Statute was explicit); and then George Sutherland v. The State (1970) discussed earlier: another decision from the Guyana Court of Appeal; finally Haynes C. cited the case of R. v. Boyce (1971) 17 W.I.R. 54 from Barbados, which is discussed below.

The Guyanese Court of Appeal however made an additional contribution to this field of the law, for the judgment of Haynes C. moved from the invocation of phrases such as "prejudicial and not probative", or "unfair to the accused" to considering the suggestion put forward by the appellant that if the deposition is the only evidence implicating the accused, it is "unfair" or "prejudicial" to admit it. As to this Haynes C said, at page 56:

> "But as this submission is made repeatedly at trials, we feel we ought to express our opinion on it. As the power to admit this evidence is a discretion, no inflexible rules ought to be laid down for its exercise. It would be undesirable to hold that it is always a wrong exercise of this power to admit a deposition in any case where it is the only evidence implicating the accused and it is disputed. In some cases it might be so; in others not. ..... It all depends on the circumstances of the particular case....."

The judgment then proceeds to discuss the advice to be given to a jury where such evidence is admitted, and observes, after commenting that "To convict an accused on a

deposition only, as against sworn testimony by and for him may in some cases be a strong thing for a jury to do," that "In some cases the loss of the possible benefit of all these advantages (of seeing and hearing the witness) when a case is proved by deposition might well be counteracted by a strong and pointed caution in the summing up, or at least minimized. In some cases it might be necessary to give a stronger caution than in others, but we think a caution should always be given where the only or vital proof of material disputed evidence is in a deposition." The Court ordered a re-trial in Browne's case.

Haynes C referred to R. v. Boyce, (1971) 17 W.I.R. 54, as supporting the view that there was a discretion in the judge as to whether to admit the deposition of a witness absent from the jurisdiction; unfortunately the report does not set out the wording of the Barbados statute - it may for instance be similar to that in Jamaica - so that it is not possible to see whether the case supports the view that judges have a general discretionary power to exclude depositions. All that can be said is that the attack on admission seems to have centred on one of the technical conditions for admissibility in such cases, that is the need to show that the witness is indeed absent from the jurisdiction, and that it was here argued that the evidence fell short of that. The judgment of Douglas C.J. does however speak of the judge exercising a "discretion to admit the deposition," but it is not clear whether the point was argued or not, nor is it clear in what context.

Returning to a consideration of the development of the law on the subject of depositions and their admissibility in England, it should be noted that there have been changes in the legislation on this topic; apart from Section 13(3) of the Criminal Justice Act, 1925, a great many subsequent

statutory "restatements" have taken place, such for instance as The Magistrates' Courts Act 1952, and the Rules made thereunder, The Criminal Justice Act, 1967 and the Criminal Appeal Act, 1968. It is not necessary for the purposes of the present case to pursue the details of these enactments. They appear to have retained the fundamentals of the 1848 and 1867 (L.C.) Acts in requiring an opportunity for cross examination and supplying requirements relating to the taking of the depositions to ensure authenticity, but it does appear that they have tended to use the words "may be read" in place of the words "it shall be lawful to read," and that some have required the leave of the court.

Two important cases decided on this field in the English Court of Appeal in the period 1968 to 1973 were brought to our notice. Both were cases of re-trials, and at issue was the extent to which use could be made of evidence given at at the previous trial, by the prosecution or the defence. They did not involve the use of depositions taken at the preliminary inquiry, but they were treated as involving similar principles.

In R. v. McGregor (1968) 1 Q.B. 371; (1967) 2 All E.R. 267 the accused and his wife had been charged with receiving, and she had been acquitted, but the jury disagreed as to his guilt at that trial, and a re-trial took place. At the earlier trial he had given sworn evidence indicating possession by him of the stolen articles, but advancing an innocent explanation for this. At the re-trial the prosecution proposed to call a police witness present in court at the first trial when the accused gave evidence to prove these admissions of possession, (not strictly speaking a transcript of the evidence). The witness gave evidence of the admissions, and, under cross examination, of the accused's explanations. The accused did not give evidence at the second

trial and was convicted. Giving the judgment of the Court, Lord Parker, C.J. said at page 377:

> ".... this court can conceive of no ground upon which it could be said that this evidence was inadmissible. It was in the nature of an admission or confession made at the earlier trial on oath, and it is clearly evidence of possession, one of the relevant matters which the prosecution have to prove. The most that can be said about it is that it is a novel point; neither counsel nor any member of the court can remember a case when this has been done, but in principle, as it seems to this court, there is no ground whatever in such a case why the prosecution should not give that evidence."

Lord Parker then considered the argument that the admission of this evidence was "unfair" to the accused because it deprived him of the opportunity of making a no-case submission and in effect made it obligatory for him to give evidence. He observed:

> "Unfair in that sense it may have been, but unfair in the general circumstances of the administration of justice it was certainly not."

Interestingly enough Ashworth, J. (who decided Linley's case) was a member of the panel.

In R. v. Peter B. Hall (1973) Q.B. 496; (1973) 1 All E.R. 1 a re-trial was involved, but the situation was the converse of McGregor's case. Here it was the defence which sought to put in evidence the transcript of a prosecution witness who had died between the 1st trial and the re-trial. The accused had been charged with uttering forged $100 U.S. notes. His defence was that he got them from R. and cashed them, innocently, for him. R was called by the prosecution at the first trial and denied that he had ever given any such notes to the accused. The jury disagreed, and at the re-trial, R having since died, the accused sought to put in evidence the transcript of his evidence with a view to showing how unsatisfactory a witness R had been. The trial judge refused to allow this; he would have admitted R's

deposition but not the transcript, saying that what applied to depositions did not apply to the transcript.

Giving the judgment of the Court of Appeal, Forbes, J. explored the history of the common law with regard to both depositions and evidence at previous trials (between the same parties, and on the same issues). At page 504 he stated:

> "From this line of authorities, we think it plain that a deposition properly taken before a magistrate on oath in the presence of the accused and where the accused has had the opportunity of cross-examination was at least since 1554 admissible at common law in criminal cases if the original deponent was dead, despite the absence of opportunity (to the jury) to observe the demeanour of the witness." (Emphasis and the words in brackets supplied).

He continued:

> "The only difference between such a deposition and the transcript of evidence given at a previous trial is that the transcript is not signed by the witness. Provided it is authenticated in some other appropriate way, as by calling the shorthand writer who took the original note, there seems no reason to think that such a transcript should not equally be receivable in evidence."

It seems to us that the cases cited earlier support this view.

Forbes, J. however continued thus:

> "This is not to say that transcripts of previous testimony, because of this rule, are always to be received. The judge in a criminal trial still has a discretion to exclude such evidence if he considers it would be unfair to the defendant (though not to the prosecution) to admit it."

It is not altogether clear whether in this remark Forbes, J. was dealing with the common law position only, about which he had been talking, or whether he meant to go further and to assert independently of any statute a discretion in a trial judge to exclude evidence that was otherwise admissible. It may be that he had in mind this discretion: the extent of which is dealt with by their Lordships in Sang's case, considered below.

Forbes, J. added that in exercising the discretion "It may be that the absence of opportunity to observe the demeanour of the witness could be a powerful factor to be taken into account in considering the exercise of such discretion."

In the event then, the court ruled that the evidence or transcript was admissible, in the discretion of the judge. The judge had not exercised his discretion but wrongly ruled the transcript inadmissible. The conviction was quashed, the proviso not being applied.

Hall's case was not cited to the court in either The State v. Albert Browne or in R. v. Donald White, nor were the courts in either case given the benefit of research into the common law position with regard to the admissibility of depositions. Hall's case was valuable in its exploration of the common law, but it should be added that Hall's case is (apart from that in Linley) the only English authority in which a discretion to exclude a deposition otherwise admissible has been asserted, and that assertion did not rest upon consideration of the relevant statutes, but on the assertion of a residual general power that judges are stated to have.

Finally we were referred to R. v. Donald White (1975) 24 W.I.R. 305; 13 J.L.R. 217: a decision of this court. The accused was charged with the murder of the proprietor of a night club, who was shot by one of five armed men who staged a hold up on the night in question. The accused was alleged to be one of the men. The club had two gatemen. One gave evidence in which he was unable to recognize the accused as one of the gunmen. The other purported to identify the accused as one of the gunmen, and gave evidence to that effect at the preliminary inquiry. This witness was therefore the only person who purported to identify the accused. The witness was shot dead before the trial of the accused, and

the prosecution tendered his deposition under the provisions of Section 34 of the Justices of the Peace Jurisdiction Act. The trial judge admitted the deposition. He sent the jury out when he was hearing argument as to its admissibility, a course of action which Craham-Perkins, J.A. stated as a serious procedural error; it was appropriate to discussion of the admissibility of an alleged confession but not in these circumstances. It is of interest to recall that in The State v. Albert Browne (1977) the Guyanese Court of Appeal expressed the view that argument as to the admissibility of a deposition was akin to that on the admission of a confession and that a voir dire should be held in both cases! It is not necessary to express any opinion on that issue in this case, as here, the trial judge, with the consent of both sides sent the jury out during the discussion on admissibility.

In Donald White it was argued that on the construction of the statute the trial judge had a discretion, and that it was wrongly exercised when he admitted the deposition.

It is an unfortunate feature of the judgment that it sets out only a portion of Section 34 of the Act, and more particularly that it left out the proviso, which as we have seen expressly gives the trial judge a discretion in the case of absence of the witness from the jurisdiction and insanity. It also records dissent from the previous judgment of the court in R. v. Dockery and Brown (1963) as expressed in the judgment of Lewis, J.A. in the passage cited earlier above. It is not clear why it was found necessary to disagree with that passage. The proviso, to Section 34 expressly gives that discretion, and all that Lewis J.A. did was to point this out!

It appears however that Perkins, J.A. in his judgment was concerned to establish that independently of the provisions of the statute the court in Jamaica possessed a discretion to exclude the admission of the deposition, even where the statutory conditions were satisfied. If this is what he sought to establish, it is not, with respect, clear why he thought it necessary to deny that the statute itself gave a discretion in some instances, unless it was to meet the suggestion that the statute by giving such a discretion in some instances, it followed as a natural consequence that that discretion was excluded in the others, by necessary implication. Consequently there would exist a position in which the statute having excluded the discretion in those cases to assert a residual discretion independently of it would, in effect, amount to claiming the right to override the statute at the discretion of the judges.

It is not unknown for judges to claim from time to time the right to exclude evidence on the ground that its admission would be unfair to the accused, even though the evidence might otherwise be admissible by statute or common law. The extent of this power was reviewed in Sang's case, and its existence in the field of admission of depositions would appear a matter of possible doubt, and something to be carefully considered in the light of the dicta in Sang's case. We do this below.

Another feature in Donald White was the comment made on the investigation by the trial judge into the circumstances of the death of the witness. The common law position was not explored, before the Court of Appeal, nor were the older cases cited. These show that one of the grounds for admitting the deposition of an absent witness was whether that absence was due to the contrivance of the accused or others acting on his behalf. In fact the U.K. Criminal Justice Act of 1925

Section 13 (3) has recognized this common law principle in the conditions now set for admissibility of the deposition and expressly so provides, when it adds to provisions in respect of death, insanity, and illness "or to be kept out of the way by means of the procurement of the accused or on his behalf." It may be that it was this factor that motivated the trial judge, in making the actual enquiries and comments which he made.

Exercising the residual general power claimed by the court to exclude evidence in general and depositions in particular, the judgment in Donald White's case proceeded to address itself to the content of the deposition, to note that it dealt with the difficult problem of identification, to consider the circumstances under which the purported identification took place, and to note the inconsistencies between the evidence in the deposition and that contained in the evidence of the other watch man who identified no one. The judgment also noted the importance that would have attached in this case to the jury having the opportunity to see, hear the actual witness and consider his demeanour. This last is of course true but to say in effect that such a deposition would never be admissible on that score would not only be to fly in the face of the statutory provisions for admissibility, it would put a premium on the life of any such witness in any such case in future. All that would be necessary would be to kill the witness, assured that his deposition would never be admitted.

With respect, it would appear that in Donald White the court was really concerned not with admissibility but with the quality and content of the deposition so admitted and its relation to the other evidence in the case, and that as in the earlier case of Hamilton (1963: supra) the effect of the evidence was to lead the court to conclude that it

was unsafe to convict in those circumstances. It would we think have been safer to rest the decision on that ground than to rule that "the trial judge, in the proper exercise of his discretion ought not to have allowed Bowe's deposition to be placed before the jury."

Further, even if one assumes that there is power or a discretion to admit or exclude, it would seem that the approach of the Guyanese Court of Appeal in Albert Browne's case to the exercise of the discretion is more desirable. Such evidence should not be excluded because it is the only evidence: and if admitted the jury should be warned suitably. If it is considered that this is "a fleeting glimpse" case the authorities, including that of Oliver Whylie (1977) 15 J.L.R. 163; (1978) 25 W.I.R. 430, provide clear guidelines to the trial judge, which may be coupled with warning the jury as to the effect of loss of the opportunity to see and hear the witness themselves.

Subsequent to the conclusion of the argument in this case our attention was drawn to R. v. Thompson (1982) 2 W.L.R 603 a decision of the English Court of Appeal.

In that case the accused was charged with attempted robbery and blackmail. He had allegedly forced his way into the home of a businessman, at gun point, and in effect seized his wife and child, threatening to do them injury if the businessman did not take to a designated public house some miles away the entire proceeds of his sales for the day. This done he would release his hostages.

The plot eventually misfired. The wife was released. The accused was arrested some three or four months later. The wife identified him at an identification parade, gave evidence of the identification at the preliminary examination, and again at the subsequent trial. At that trial she was rigorously cross examined, and an issue arose as to the events

that had taken place at the identification parade: a second suspect thought to be the accomplice of the accused had also been put up to see if the wife could identify him, and there had been confusion on this score. Identification was therefore the central issue in the trial, and it depended entirely on the evidence of the wife.

Unfortunately, due to a strike in the prison service, the first trial aborted and came to a premature end. The trial now commenced de novo before another judge and jury. By this time the wife had become too ill to give her evidence a second time. The prosecution sought to put before the court a full transcript of the evidence that she had given at the first trial. The defence objected: the jury would not have had the benefit of seeing and hearing the witness cross examined in a case which turned entirely on her evidence.

This case was in a sense a reverse position to that in Hall (1973 ante) where it was the defence who wished to put in the transcript. But there was this difference: In Hall's case the transcript was to be put in not as "truth" but to show that the witness was lying and to buttress the defence who had blamed the witness as the villain in the piece. Here, in Thompson's case the Crown sought to tender the transcript as evidence of truth: that this accused was the man who had attempted this blackmail and robbery. He had been masked, but the wife had had an opportunity of seeing and observing him for the period of time that she had been held captive.

The trial judge, after conducting the equivalent of a voir dire as to the events at the identification parade, decided to admit the transcript.

On appeal on this occasion it was therefore the defence that argued (a) that the transcript was not admissible; and (b) that even if it were, the judge should have excluded it. It was conceded that the statutory provisions (with one

exception) related only to depositions taken at a preliminary examination not to actual transcripts of evidence, and once again it was necessary to re-examine the position at common law prior to and independently of the Indictable Offences Act 1848. The defence had argued that the common law exceptions were limited to death, and the case of the witness being kept out of the way by the procurement of the accused.

Examining the common law position in a careful judgment, Dunn L.J. who delivered the judgment reviewed the cases, most of which have been mentioned earlier, and came to the conclusion that both depositions and evidence in a former trial were alike admissible where the witness had become too ill to attend court. He said at page 611:

> "The preponderance of view in the early 19th century seems to have been that if the illness of the witness was only temporary, and his attendance at court could be secured by an adjournment of reasonable length, then the deposition was not admissible. But if his illness was such that he was unlikely to be able to attend court within a reasonable time, then the deposition was admissible. Jarvis' Act (1848) merely clarified the position by providing the simple test that if the witness was too ill to travel then his deposition should be admissible. In holding this to be the law, we think that schedule 2 to the Criminal Appeal Act 1968 does no more than state the Law ex abundanti cautela. We believe this to have been the law for at least the last 150 years, and we are not seeking to make any new exception to the hearsay rule, or to extend the existing exception. We think that the modern text book writers are right in the way in which they state the law, and in our view therefore the judge was right to admit the transcript of Mrs. Brailsford's evidence as a matter of law."

(The text book writers referred to were Cross on Evidence, 5th Edn. (1979) at page 568 and Phipson on Evidence, 12th Edn. (1976) p. 568. They had been cited earlier for the proposition thus set out at p. 608:

> "This ground raises the question of whether a transcript of evidence of a witness is admissible in evidence on a retrial of the same defendant on the same charge, if the witness is too ill to travel to court on the second trial. The modern text book writers say that such evidence is an exception to the hearsay rule, and is admissible on a retrial if the witness is unable to attend the retrial through death or illness."

At common law then, the cases of Ball and Thompson treat both depositions taken at the preliminary examination and transcripts of evidence in former trials between the same parties and involving the same issues in the same way. This still left for answer the second question raised in Thompson's case: assuming that the transcript was admissible in law, should the judge in the exercise of his discretion have allowed it in? Posed in this way, the question assumes that at common law, the judge has a residual discretion to exclude such evidence. The factors canvassed were that this was the only evidence as to identification, that the courts now adopt a specially careful attitude to identification evidence, and there were complaints of the unsatisfactory confusion attending the identification parade and a possible need to ask further questions of the missing witness. In Thompson's case /the leading English case on such identification evidence, R. v. Turnbull (1977) Q.B. 224, was cited. In addition it appeared that an attempt had been made to tamper with the jury, and, if it is relevant, that the jury had been out

for eight hours before returning a 10 - 1 majority judgment.

Without answering these arguments, the English Court of Appeal came to the conclusion that in a case which "involved a unique set of circumstances, a veritable chapter of accidents" they were left with a lurking doubt as to the verdict of the jury. Accordingly, they did in the event allow the appeal.

The result reached would appear to have turned on the Court's evaluation of the totality of the evidence, and the circumstances of the case, rather than on the admissibility of the evidence: indeed the judgment goes out of its way to say, at page 612:

> "We are not to be taken as saying that any one of the various matters raised in the grounds of appeal, taken by itself, was such that the judge should have exercised his discretion in a different way from that in which he did exercise it, in relation to any particular ruling."

In this respect, it is similar to the reaction of this court in Hamilton in 1963 and Donald White in 1975. Save that it is worth noting that The Judicature (Appellate Jurisdiction) Act in Section 14 still limits the power of this court in setting aside the verdict of a jury to cases where it is "unreasonable, or cannot be supported having regard to the evidence", whereas the Criminal Appeal Act 1968 in England allows the English Court of Appeal to set aside the verdict of a jury "on the ground that under all the circumstances of the case it is unsafe or unsatisfactory". This more flexible formula enables justice to be done where required in individual cases, without subjecting the Court of Appeal to the necessity of grasping at possibly unsound points of law to achieve justice, at the expense of creating uncertain and embarrassing precedents for the future.

It will have been noted that in Thompson's case the judgment prays in aid the 2nd Schedule to the Criminal Justice Act 1968, which makes special provision for "Procedural and other provisions applicable on Order for retrial", and amongst these in paragraph 1 of the schedule are provisions allowing the "transcript of the record of evidence given by any witness at the original trial may, with the leave of the judge, be read as evidence:

> "(a) by agreement between the prosecution and defence; or
> (b) if the judge is satisfied that the witness is dead or unfit to give evidence or to attend for that purpose, or that all reasonable efforts to find him or secure his attendance have been made without success,
>
> and in either case may be so read without further proof, if verified in accordance with rules of court."

This provision, said to reflect the common law, does give to the judge a discretion as to whether to permit the transcript to be put in or not. The assertion of the existence of such a discretion at common law with regard to transcripts does not in the circumstances involve any assertion of a judicial discretion in conflict with an existing statutory provision. Whether it existed or not, the English statute has expressly given or recognized it.

This is not so in the present case: the statute dealing with the admission of depositions does not use the word "may" but says "it shall be lawful to read", and further, by giving an express discretion to the judge in two cases, it impliedly refrains from conferring that discretion in the other two cases. If any general discretion exists in a trial judge to exclude a deposition otherwise admissible under the statute, it must, we think, be found to exist at common law and independently of the statute. Both Hall's and Thompson's case suggest a common law discretion in the judge to admit transcripts of the evidence at previous criminal trials involving the same issues and parties. Though both explore the common law as to the admission of depositions, it does not seem to us that they assert a discretion in the judge to exclude depositions, and if there was such a discretion neither case considered the effect of the Indictable Offences Act, 1848, upon it.

The cases that have so far been examined tend to show then that the deposition admitted in the instant case would have been admissible at common law, and is clearly admissible under the statute, section 34 of the Justices of the Peace Jurisdiction Act. What is at issue is do judges have a residual discretion to exclude such depositions? And if so should the judge in this case have excluded the deposition?

We are clearly of the view that the statutory provisions in our Act give no power to exclude the deposition where it is shown that the witness has died or become too ill to travel to court. Such discretion as the Judge enjoys under the statute relates only to witnesses who are absent from the island or have become insane.

Is there a discretion to exclude depositions which existed independent of the 1848 statute, and which has survived the statute and still exists today? Or has it developed since?

Graham-Perkins J.A. in his judgment in Donald White v. R. founded the assertion of a discretion to exclude depositions even where they fulfilled the statutory conditions on a dictum of Lord Parker C.J. in Callis v. Gunn (1964) 1 Q.B. 495 at page 501 where after citing Lord Goddard C.J. in Kuruma v. The Queen (1955) A.C. 197 he said:

> "As Lord Goddard C.J. points out, and indeed as is well known, in every criminal case a judge had a discretion to disallow evidence, even if in law relevant and therefore admissible, if admissibility would operate unfairly against a defendant. I would add that in considering whether admissibility would operate unfairly against a defendant one would certainly consider whether it had been obtained in an oppressive manner by force or against the wishes of an accused person. That is the general principle."

Lord Parker continued his observations in a similar vein at page 502. He was dealing with finger prints obtained from an accused without any prior caution, and said that they were admissible, subject to an overriding discretion to exclude them if they had been obtained by false representations, by a trick, threat, or bribes or anything of the sort. In fact he held them in this case admissible.

These dicta asserting this overriding power of judges to exclude evidence fell to be considered by the House of Lords in R. v. Sang (1979) 2 W.L.R. 263. At issue was whether the fact that an offence had been instigated by an agent provocateur could operate by way of a defence, or at least by

inducing the trial judge to exclude the evidence on the ground that it had been unfairly obtained or would operate unfairly against the accused. Their Lordships had no difficulty in affirming the Court of Appeal decision that the doctrine of "entrapment" was not part of the English common law. The evidence was admissible and the offence proved; the entrapment might be relevant as to sentence, but to nothing else. Their Lordships did however consider the wider aspect of the case, the assertion of a judge's power to exclude evidence and its limits, and reviewed a number of dicta similar to that expressed by Lord Parker C.J. and cited above. We briefly review the speeches in Sang's case.

Lord Diplock after considering the dicta, said to originate in a remark by Lord Goddard C.J. in Kuruma's case observed that there had been specific examples of the judges exercising such a discretionary power in certain fields viz the curtailment of cross examination of an accused as to his character under section 1 (f) of the Criminal Evidence Act, 1898; the development of the "similar fact rule"; and also of the Judge's rules in respect of confessions and admissions, and that these were examples of the judge's duty to see that the accused got a "fair trial according to law". As to this he observed that:

> "The fairness of a trial according to law is not all one sided; it requires that those who are undoubetdly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted."
> (at page 271-2)

He concluded thus:

> "(1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value.
>
> (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offece, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained."

Dealing earlier with the concept of a fair trial, and rule (1) above, Lord Diplock observed at page 271:

> "There should be excluded from the jury information about the accused which is likely to have an influence on their minds prejudicial to the accused which is out of proportion to the true probative value of admissible evidence conveying that information."

We would pause to note that part of the problem caused by the concept expressed in proposition (1) above, is due to the poverty of our language. Any and all evidence that shows that an accused committed a particular crime is "prejudicial" to him, and to his chances of acquittal. Yet it is clearly not evidence of that sort that is aimed at. What is being aimed at is evidence that is best illustrated by the rules as to character evidence of the accused. "Give a dog a bad name and you can hang him" expresses this feeling. In ordinary every day life, knowledge that an accused had previous convictions for the offence with which he is presently charged would induce a great many people to assume his guilt without carefully considering the actual facts and what he had to say; yet on this occasion he might in truth be innocent! At present we can only express this possibility by referring to the disproportion between the "prejudicial" evidence and the proof required to establish actual guilt. Needed is a word that conveys the idea of creating suspicion without adding anything of tangible proof.

Lord Dilhorne at page 275 doubted the observations of Lord Parker C.J. in Callis v. Gunn but was content to support the two propositions with which Lord Diplock concluded and which he had in fact suggested.

Lord Salmon expressed the view that it is a clear principle of the law that a trial judge has the power and the duty to ensure that the accused had a fair trial. This duty carried with it the power to exclude evidence in certain circumstances, but in his view "the decision as to whether evidence may be excluded depends entirely upon the particular facts of each case and the circumstances surrounding it - which are infinitely variable."

Lord Fraser, starting with the proposition that by the law of England all evidence which is relevant is also admissible, observed that nevertheless evidence that is admissible may in certain cases be excluded by the judge in the exercise of a discretion which he undoubtedly possesses. That discretion

arises out of a duty to ensure that every accused person has a fair trial. He saw the discretion to exclude evidence as wider than a rule applicable only to cases where the effect of the evidence would outweight its probative value, but thought it did not extend beyond evidence and documents obtained from an accused person or from premises occupied by him.

Perhaps most assistance is to be derived from the speech of Lord Scarman who asked "does not the prosecution also have rights which the judge may not by the exercise of his discretion override?" He stated his conclusions thus, at page 206:

> "In my judgment, certain broad conclusions emerge from a study of the case law. They are:
>
> (1) that there is one general discretion, not several specific or limited discretions;
>
> (2) that the discretion now extends further than was contemplated by Lord Halsbury and Lord Moulton in Christie's case, or even by Lord Simon in Harris v. The Director of Public Prosecutions (1965) A.C. 1001; 1024;
>
> (3) that the formula of prejudicial effect outweighing probative value which had developed in the 'similar fact' cases, is not a complete statement of the range or the principle of the discretion;
>
> (4) that the discretion is, however, limited to what my noble and learned friend, Viscount Dilhorne, calls the 'unfair use' of evidence at trial; it does not confer any judicial power of veto upon the right of the prosecution to prosecute or to present in support of the prosecution's case admissible evidence, however obtained." (emphasis supplied)

Exploring the limits of the discretion and the principle upon which it is founded, Lord Scarman noted how comparatively recent a judicial development this discretion is. (page 207), and observed at page 208:

> "The modern discretion is a general one to be exercised where fairness to the accused requires its exercise.
> Authority therefore, strongly suggests that the discretion is based upon, and is co-extensive with, the judge's duty to ensure that the accused has a fair trial according to law. The two faces of the law reveal the nature and limits of this duty. The accused is to be tried according to law. The law, not the judge's discretion, determines what is admissible evidence. .....
> Judges are not responsible for the bringing or abandonment of prosecutions: nor have they the right to adjudicate in a way which indirectly usurps the function of the legislature or jury. .....
> The role of the judge is confined to the forensic process. He controls neither the police not the prosecuting authority. He neither initiates nor stifles a prosecution.
> .....
> The judge's control of the criminal process begins and ends with trial, though his influence may extend beyond its begining and conclusion. It follows that the prosecution has rights which the judge may not override. The right to prosecute and the right to lead admissible evidence in support of its case are not subject to judicial control. Of course when the prosecutor reaches court, he becomes subject to the directions as to the conduct of the trial by the judge, whose duty is then is to see that the accused has a fair trial according to law.
> What does 'fair' mean in this context? It relates to the process of trial. No man is to be compelled to incriminate himself .....
> No man is to be convicted save upon the probative effect of legally admissible evidence. No admission or confession is to be received in evidence unless voluntary. If legally admissible evidence be tendered which endangers these principles (as for example in R. v. Payne) the judge may exercise his discretion to exclude it, thus ensuring that the accused has the benefit of principles which exist in law to secure him a fair trial; but he has no power to exclude admissible evidence of the commission of a crime, unless in his judgment these principles are endangered....."
> (emphasis supplied)

In the event, it appears to us that Sang's case does establish as a comparatively recent development of the common law that a judge in a criminal case has a discretion, in pursuit of his duty to see that an accused gets a fair trial according to law, to exclude evidence in certain circumstances. The limits and extent of this discretion are still to be worked out, but it

extends at least to the exclusion of evidence in which, in his opinion, the prejudicial effect outweighs any probative value it may have. Examples of the exercise of that discretion are to be found in cases on the "similar fact rule", the rules governing the admission of confessions (the Judge's rules), and cases arising under the statutory provisions allowing cross-examination of the accused as to his character in certain situations, and also in the rules protecting an accused from self-incrimination.

At common law prior to 1848, and in the cases on the English Indictable Offences Act, 1848, until 1959 (Kinley's case) there was no case that showed this general discretion to exclude evidence so as to secure a fair trial being applied to the admission of depositions taken under the 1848 Act. Two recent cases in England, have shown that with regard to the admission of transcripts of evidence given at previous trials English Judges have asserted a discretion, but recent statutory provisions in English Statutes have accorded such a discretion.

Apart from the case of Donald White v. R Jamaican courts like English courts prior to 1959 have not sought to assert this discretion to exclude depositions admissible under the relevant Jamaican section, section 34 of the Justice of the Peace Jurisdiction Act.

However, even before Sang's case, as is shown in R. v. Selvey (1970) A.C. 304 a unanimous House of Lords, consisting of Viscount Dilhorne, and Lord Hodson, Lord Guest, Lord Pearce and Lord Wilberforce had all been united in asserting that a trial judge had such a discretion. It may be useful to remember the way in which it was put by some of their Lordships in that case: Lord Hodson, at page 346 said:

> "There is abundant authority that in criminal cases there is a discretion to exclude evidence, admissible in law, of which the prejudicial effect against the accused outweighs its probative value in the opinion of the trial judge. It is true that the exercise of this discretion is not to be found until comparatively recent years. ...."

Lord Guest, at page 352 said:

> "In the face of this long established practice it is, in my opinion, now too late to say that the judge has no discretion. While I leave to others more versed than I am in English criminal law and practice to discuss the origin of this discretion, I would assume that it springs from the inherent power of the judge to control the trial before him and to see that justice is done in fairness to the accused."

It is also necessary to remember that that case was an example of this general residual discretion being applied to the interpretation of a statute, the Criminal Evidence Act, 1898 section 1 (f). The Crown had argued that once the statutory conditions for admissibility of questions and evidence as to the accused's bad character had been met, the Judge had no discretion to exclude such evidence. Lord Hodson cites Viscount Simon L.C. as observing of the discretion in Harris v. The Director of Public Prosecutions (1952) A.C. 694 at 707:

> "It is not a rule of law governing the admissibility of evidence, but a rule of judicial practice followed by a judge who is trying a charge of crime when he thinks that the application of the practice is called for."

Granted that this discretion exists, and that it can be applied even to cases where a statute provides in terms for the admissibility of certain evidence, there are still certain important points to be noted as to the application of that discretion to section 34 of the Justices of the Peace Jurisdiction Act.

The section in our Judgment makes the depositions of witnesses who have died or are too ill to travel to court admissible without the consent of the judge, whereas his consent is needed when it is a case of the witness being absent from the island, or affected by insanity. In the former case the Crown need only tender the deposition, and the onus of successfully appealing to the judge to exercise his residual discretion to exclude it, lies on the accused and his counsel. It is for the defence to establish the facts or factors that make it unfair for that evidence to be admitted, and to persuade the judge to exclude it . On the other hand, in the two latter cases it will be for the prosecution under the statute to secure the judge's consent to the admission of the deposition, and there will be therefore an onus on them to secure that consent. The application of the residual discretion of the trial judge will apply to all cases, but there will be important differences in the onus of

proof and in its application depending upon which particular cause for admitting the deposition is being advanced.

While Donald White's case shows the discretion being applied to the admissibility of depositions under the Justices of the Peace Act, section 34, it does not draw the distinction indicated above as to the onus of proof, or the onus of moving the court. The discretion basically is to exclude for cause to be shown, and the onus of showing that evidence otherwise admissible ought to be excluded is not a light one; it was not in fact discharged in either Selvey's case or Sang's case. As to review of the exercise of such a discretion it is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision.

We have therefore come to the conclusion that the deposition of the deceased witness Cecil Gordon was properly admitted under the provisions of section 34 of the Justices of the Peace Jurisdiction Act, and the consent of the trial judge was not required under that act for its admission. Further in our judgment, no case was made out for the exercise of such discretion as a trial judge may have to exclude that evidence in furtherance of his duty to secure a fair trial according to law for these appellants, and the trial judge properly refused to exclude such evidence. To meet obvious dangers the legislature has expressly provided that subject to the statutory conditions "it shall be lawful to read such deposition as evidence in such prosecution" and it can only be in the rarest cases that a trial judge may exercise a discretion to exclude lawfully admissible evidence. There was no suggestion in this case, as there was in that of Donald White, that the evidence in the deposition was in effect valueless, or so contradicted by other eyewitness evidence as to make it unsafe to convict the accused thereon. The grounds of appeal advanced on this issue, therefore fail. This disposes of the only real point of substance argued in the appeal.

There were other grounds faintly argued: it was suggested that there had been non-direction as to the burden of proof in that the Judge in his summing up had neglected to tell the jury that even if they rejected the