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REGINA v. HODGE.

THE decision of the Privy Council—that the Provincial Legislatures have power to impose the punishment of imprisonment *with hard labor*—has been sharply criticized by *The Canadian Law Times*, *The Legal News*, *The Law Journal* (Eng.) and *The Criminal Law Magazine*.

The two journals first named have each a preliminary objection to urge. Their criticisms will shew how impossible it is to please everybody or even all legal editors.

The Canadian Law Times finds fault as follows:—"If their Lordships of the Privy Council had confined themselves within the limits which they assigned themselves in giving judgment in this case, or if, at any rate, in overstepping their boundaries they had not transgressed the opinion of eminent authorities on criminal law, the judgment would have commanded more admiration and respect. The limits which they assigned themselves are those laid down by Hagarty, C. J. in another case, viz. 'That in all these questions of *ultra vires* it is the wisest course not to widen the discussion by discussions not necessarily involved in the decision of the point in controversy.' Now the constitutional question before the court was the right of the Legislature to create such a subordinate legislative body as the License Commissioners; the question whether the Legislature could

impose the punishment of hard labor in addition to imprisonment was not properly before them, nor was its decision necessary for the disposal of the appeal; yet their Lordships give their opinion upon it."

The Legal News has a somewhat different objection. After quoting the language of Hagarty, C. J. (*ante*) it proceeds as follows:—"It is as difficult to accept such generalities as to contradict them. In order to deal with them it is necessary first to determine their precise meaning. It may safely be assumed that what is meant is, that in interpreting a statute of the nature of the B. N. A. Act the courts should specially refrain from generalizing its terms. We contend, with all due deference, that *this is a fundamental error*; the true principle being that the whole scope of the Act has to be constantly kept in view so as to co-ordain the powers of both governments."

The latter objection is founded upon a misconception of the meaning of the words criticized, and the former upon a misconception of the case itself. The words mean no more than this, that when one point on the statute is raised the judges should not decide other points, and with this meaning they are unobjectionable. But it is said that although the Privy Council tried to observe this simple rule it was unable to do so. This strikes one as improbable. Surely if their Lordships made a real and conscientious effort to refrain from deciding a point the chances are that they would accomplish their purpose. The *C. L. T.* however says they made a total failure of it and have given judgment upon a point they had no right to meddle with. Let us see. For committing a breach of a by-law of the License Commissioners the defendant was condemned "to be imprisoned in the common gaol of the said City of Toronto and County of York, and there be kept at *hard labor* for the space of fifteen days unless &c." A rule *nisi* was obtained to quash this conviction upon various specified grounds, but the objection that the Legislature had no power to impose imprisonment with hard labor was not taken in the rule. The point was however taken upon the argument before the Privy Council

was debated by both sides, and if held good would have been fatal to the conviction. The Privy Council might indeed have disposed of the objection by refusing to allow argument upon any point not taken in the rule and so left the case as to such point undetermined, but every one surely will agree that it is better to completely dispose of a case when it is possible to do so; and, when no embarassment can accrue, not to bind down either party to the objections originally put forward.

Upon the main question, viz: whether under the B. N. A. Act the Legislatures have power to decree imprisonment with hard labor, all four journals agree that the Privy Council is wrong. With a good deal of industry they have shown that jurists and judges have always treated imprisonment with hard labor as something more severe than simple imprisonment. And we hardly think they will find in the Privy Council a lord who would wish to dispute this point with them. With similar care they have also proved "that no court can impose hard labor as a condition of punishment unless this power be specially granted by statute". This too is no doubt sound, but neither it nor the former proposition in any way conflicts with the judgment of the Privy Council.

Sec. 92 of the B. N. A. Act is as follows:—"In each Province the Legislature may exclusively make laws in relation to matters coming within the *classes of subjects* next hereinafter enumerated, that is to say:—

(15). The imposition of punishment by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section."

The Legal News therefore is quite correct when arguing that "It was comparatively easy to indicate in *general* terms the powers of each government and this is what was done. No one ever seriously contended that even the catalogues of sections 91 and 92 were perfectly conclusive. Therefore there must exist a doctrine resulting from, but undeveloped in, the words of the Act". This quotation is not, of course,

found in that part of the argument which is devoted to proving that the Privy Council is wrong in saying that the terms used are "very general terms". It would have been a little out of place there. But it is nevertheless indisputably true.

When a statute gives jurisdiction to a court it is accomplished with some attempt at accurate limitation; but in the distribution of legislative powers among legislative bodies schedules of "classes of subjects" or headings of jurisdiction are the only practicable means of giving expression to the intention of Parliament. Let us for a moment take the words as expressing a precise limitation and not as a heading of jurisdiction—let us in other words assume that the words are applied to a court and not a Legislature. The Legislature, in this view can only impose punishment by fine, penalty *or* imprisonment. It cannot for the same offence impose a fine *and* imprisonment. *M. S.* v. *Vickey 1 Har. & J. 427; State* v. *Kearney 1 Hawks. 53; Wilde* v. *Commonwealth 2 Met. 408.* The Legislature may impose imprisonment but it cannot compel the prisoner to pay the costs. It can impose a fine but it cannot award distress or process of any kind for non-payment. These considerations show at once that the words must be taken as headings of jurisdiction, and "Imprisonment" when used as a heading must include that which is usually incident to it, otherwise the Legislatures are without powers which beyond question it was intended they should possess.

But we imagine our contemporaries still clinging to the word *imprisonment* and telling us that we want to add "with or without hard labor" to it. It is certainly possible that the Imperial Parliament in passing the B. N. A. Act may have determined that the Provincial Legislatures should not have power to award or inflict hard labor upon any of Her Majesty's subjects, and our friends will urge that to do this it was only necessary not to bestow the power, and it was not necessary to enact that the power should not exist. We will grant the point for the sake of the argument which follows. The Provincial Legislatures are empowered by the

B. N. A. Act to make laws concerning "The establishment, maintenance and management of public and reformatory prisonsin and for the Province". It must therefore be within the power of the Legislatures to regulate the discipline of the prisons to which all breakers of Provincial laws are to be committed, and they have power to require those incarcerated to work for their living and to prevent them by habits of inactivity and laziness becoming more vagabondish than before their arrest. Prisons are not now as in the days of old mere dismal dungeons in which the prisoner risked his reason for lack of employment but are in large sense reformatories, places where habits of industry and usefulness are inculcated—where hard labor is part of the daily routine. Prisons in the Province of Ontario are not behind the age in this respect and its prisons to-day are peculiarly industrial, if at the same time penal, establishments. (That the Legislatures have power to make laws regulating the discipline of prisons is a fact probably not present to the minds of the writers in *The Law Journal* (Eng.) or *The Criminal Law Magazine* and may probably suffice to change their opinion upon the subject. With a hope for their conversion we continue the argument.) There is no doubt that if a court has power to imprison only, the prisoner may nevertheless be subjected to hard labor if that be a part of the discipline of the prison to which he is committed. Our contemporaries supply us with authorities for this proposition. Stephen's definition of imprisonment is as follows:— "The punishment of imprisonment consists in the detention of the offender in prison, and in his *subjection to the discipline* appointed for prisoners during the period expressed in the sentence". *The Criminal Law Magazine* says, "It is true that *where labor is part of the discipline* of a particular prison, then parties committed to such prison are obliged to submit to such discipline, though it is not part of the specific sentence". *The Canadian Law Times* admits that where imprisonment is defined as the restraint of a man's liberty simply, "Conformity to prison discipline is of course implied. *It is incident to imprisonment*;" and then it innocently asks "Are we, however, to infer from the judgment now in

review, that a man sentenced to imprisonment may be set at hard labor as an incident of his punishment?" Well, if "it is incident to punishment" we cannot see why the man should not be set at it "as an incident of his punishment." Do you, *C. L. T.*?

Let us now see how the argument stands:

It is asserted and denied that when power was given to the Legislatures to punish by imprisonment that power to imprison with hard labor was not intended to be included—that it was not intended to give the Legislatures power to administer hard labor as a punishment for offences against Provincial laws.

It is admitted that imprisonment with hard labor is a more severe punishment than mere imprisonment.

It is admitted that if the words in question were used in conferring jurisdiction upon a court, the court would have no power to impose hard labor.

It is admitted that the powers assigned to the Legislatures are expressed in general terms but it is contended that punishment by "imprisonment" is specific and not general.

It is proved that the Legislatures have power to prescribe hard labor as part of the discipline of the prisons to which offenders against Provincial laws are confined.

It is proved therefore that the legislative jurisdiction of the Province is sufficient to bring about the imprisonment with hard labor of offenders against its laws.

It is therefore proved that it was not intended by the B. N. A. Act to exclude from Provincial jurisdiction the power to impose imprisonment with hard labor.

And it follows that when power was given to imprison, and that power is found among clauses in which jurisdiction is given in the lump rather than specifically, the words must be taken as heading a jurisdiction and inclusive of all that which is usually incident to the power given—"with all the appurtenances thereto belonging or in anywise appertaining or with the same usually held, used, enjoyed or taken or known as part or parcel thereof".

STATEMENTS BY PRISONERS AND THEIR COUNSEL.

IT is strange that a question which might be raised upon every criminal trial should still remain unsettled. Can a prisoner, although not permitted to give evidence, state to the jury his own version of the facts? In the O'Donnell trial Mr. Russell proposed to state his instructions to the jury. He was not permitted to do so. After the trial the Attorney-General addressed a letter to the Lord Chief Justice upon the subject, to which the following reply was sent :—

ROYAL COURTS OF JUSTICE, Dec. 4, 1883.

My Dear Mr. Attorney-General:—I entirely agree with you as to the practical importance of the question you have brought to my attention. The paper I enclose will show you it is no new subject to me. Immediately after the trial of Lefroy at Maidstone, in which, as you may remember, Mr. Montagu Williams claimed to do what Mr. Russell did, I brought the matter before the judges, with the result which the paper enclosed will show you. At Maidstone the opinion of Lord Chief Justice Cockburn was said to have been founded on or supported by Lord Justice Lush and Mr. Justice Hawkins. Both those learned judges were present at the meeting called by me, and both disavowed in the strongest way ever having ruled or being inclined to rule in the manner suggested. Mr. Justice Denman authorizes me to say that if he had remembered the very strong judicial which I enclose he should have acted on it, and have refused a case if one had been asked for. Mr. Justice Stephen authorizes me to say that he should, as at present advised, not vote against the rule as formulated by the Master of Rolls, but approves of it, and should act upon.

My reason for bringing the matter before a meeting of the judges was this—that directly after the passing of the

Prisoners' Counsel Act, Lord Denman, the then Chief Justice, called the judges together, and they (as appears from the Judges' Book) agreed upon a course of practice which has always since been followed. It seemed to me that the question discussed in your letter was one of practice also, and that the best way of settling it was to pursue the course I took. Perhaps it might be well to make this resolution generally known, as there may be considerable difficulty in making the question the subject of a case reserved. Generally, I agree with you that the practice is wrong and not to be permitted, and that if permitted at all, it must, in justice and fairness, carry with it the right of reply on the part of counsel for the prosecution. Believe me to be, my dear Mr. Attorney-General, your obliged and faithful servant.

[Signed] COLERIDGE.

THE ATTORNEY-GENERAL, Q. C., M. P.

The paper enclosed was as follows:—

At a meeting of all the judges liable to try prisoners, held in the Queen's Bench room on November 26, 1881 (Present —Lord Chief Justice Coleridge, Lord Justice Baggallay, Lord Justice Brett, Lord Justice Cotton, Lord Justice Lush, Lord Justice Lindley, Justice Grove, Justice Denman, Baron Pollock, Justice Field, Justice Manisty, Justice Hawkins, Justice Lopes, Justice Fry, Justice Stephen, Justice Bowen, Justice Mathew, Justice Cave, Justice Kay, Justice Chitty, Justice North), Lord Coleridge stated the subjects for which the meeting was summoned, and Lord Justice Brett moved the following resolution: "That in the opinion of the judges it is contrary to the administration and practice of the criminal law, as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to put in evidence."

Justice Stephen moved the following amendment:— "That in the opinion of the judges it is undesirable to express any opinion upon the matter."

This amendment, having been put to the meeting, was negatived by nineteen votes to two. The original motion

was then put, and carried by nineteen votes against two (Justice Hawkins and Justice Stephen *diss.*). The question of the propriety of laying down a rule as to the practice of allowing prisoners to address the jury before the summing up of the judge, when their counsel have addressed the jury, was then considered, and after some discussion was adjourned for further consideration.

Mr. JUSTICE WILLIAMS afterward sent the following letter to the *Times* :—

SIR,—There seems to be a considerable, though, perhaps, not an unnatural misapprehension as to the nature and effect of the recent resolution adopted upon the above subject at a meeting of the judges.

So far as I am aware, this resolution is not, nor is it considered to be, binding upon any non-assenting person. It does not profess to be the enactment of a rule of practice, nor a 'decision' upon any point of practice or procedure, much less upon any question of substantive law. It is nothing more than a private and purely informal expression of opinion elicited from a certain number of the circuit-going judges as to what the practice had theretofore been according to their experience. It was not even a declaration of opinion by the judicial body as such, as I shall show in a moment. I was a member of the bench at the time, but I was not present at the meeting, from what cause I have no recollection. I never received any notice of any one's intention to propose such a resolution, nor have I ever to this day received any notice of such a resolution having been adopted, and I was in entire ignorance of its existence until the fact came to light in the course of the recent discussion that followed the O'Donnell trial. In the meantime, the question had several times arisen before myself; and under the impression that I was acting according to the accepted practice, as it had been laid down by Lord Chief Justice Cockburn, I allowed the prisoner, by the mouth of his counsel, to state his version of the facts to the jury without proof. And, in addition to this, I never refused liberty to a prisoner to make a further statement himself if he desired it.

The truth is, that there is not the slightest foundation for the statement which I have seen published—that the judges have attempted or desired to settle and determine in secret conclave and without public discussion or argument, even so little as a question of practice and procedure; and perhaps the statement scarcely deserves serious contradiction.

For my own part, I own that there seems to be a great practical objection to allowing a prisoner to state through counsel facts that he does not propose to support by evidence. If a prisoner, in his defence, desires to state facts which he is not in a position to support by evidence, he ought to be allowed free scope to do so. He is not permitted by law to give evidence, and it would be most unjust and even inhuman to restrict him giving his explanation. But if this explanation, woven, perhaps, skilfully and ingeniously, is presented through the mouth of counsel, this evil consequence immediately follows—that the Court and jury are without any sufficient guarantee that the full, unqualified statement of the prisoner is placed before them, because a cautious and skilful counsel might naturally be expected, as indeed it would be his duty, in framing the defence, to omit whatever might appear to him to amount to damaging admissions or silly and contradictory reasoning. This weak point tends to destroy the moral effect of unproved statements made through the mouth of counsel, a result which, in the case of a really innocent prisoner, may be deplorable. A remarkable instance of this occurred before myself quite recently. In a simple and apparently clear case against the prisoner, the counsel for the defence gave, without offering any proof, an extraordinary explanation of the affair with which the prisoner had furnished him; he did so in a most able and justly-reasoned speech; but it was evident to everyone that the explanation thus presented appeared to the jury more plausible and ingenious than probable. The summing up to the jury was concluded, when the prisoner appealed to me to know whether he could say something. I told him, certainly—that if he had anything to tell us that had not already been stated, he was at liberty to mention it to the jury now. He then, in a very simple and artless way,

told his story, which was evidently the basis of his instructions to counsel; but there was this important difference—that he frankly admitted an important and apparently damaging fact that had been conclusively established by the prosecution, but strenuously disputed by his counsel. But he told the whole story in such an artless fashion, and with slightly altered circumstances, that he threw an entirely new and unexpected light over the whole affair, and evidently deeply impressed the jury as well as the others. Certain of the witnesses were recalled at the instance of the jury, and interrogated respecting the new aspect of the question, with the result that the prisoner, who before his statement stood in decided peril of conviction, was immediately acquitted.

The recent discussion upon this subject seems to have brought to light the fact that it certainly has not been the general practice, when a prisoner has been defended by counsel, for him to be allowed to state without proof, through the mouth of counsel, any facts he may think fit to instruct his counsel to state and the latter may consider it prudent to repeat.

It seems to me also impossible to dispute that it is and ought to be the right of the prisoner, even when he is defended by counsel, to offer without proof any explanatory statement of his own; and for my own part nothing short of an Act of Parliament will ever induce me to deprive a prisoner of this right whenever he demands it, whether before or after his counsel's speech, or after the summing-up of the judge or even the deliberations of the jury.

I am, your obedient servant,

Beddgelert, Dec. 27. WATKIN WILLIAMS.

To this letter BARON BRAMWELL, writing over his initial "B.," sent the following reply:—

SIR,—In his letter to you Mr. Justice Williams says a prisoner 'is not permitted by law to give evidence, and it would be most unjust and even inhuman to restrict him in giving his explanation.' With submission to his lordship, there seems some confusion here. If 'explanation' means explanation of the facts already in evidence with no addition

to them, nobody has ever doubted the right of a prisoner to give such explanation. If 'explanation' includes placing additional facts before a jury, as thus, 'I explain my knocking down the prosecutor by saying he first knocked me down,' then it would be as well to call the thing by its right name. What his lordship really means is this. The prisoner ought to be allowed to state things he cannot prove. What is this but to give evidence, which, however, his lordship expressly says the prisoner himself is not 'permitted by law to do.' What the prisoner says, his explanation as his lordship calls it, is to influence the jury or it is not. In the latter case it is idle. If it is to influence, it is by the alleged existence of new facts. The result is, the jury will have before them evidence on oath, and which has, or might have, been cross-examined to, and evidence not on oath, and without the wholesome check of cross-examination. His lordship says that nothing but an Act of Parliament will induce him to deprive a prisoner of this right when he demands it. Nothing but an Act of Parliament ought to induce a judge to deprive a man of a right which would otherwise exist. But does this right exist? I say No, and that there is no precedent or authority for it, nor better reason for it than this—that because a man is not permitted to give evidence with the ordinary securities for its truth, he must be permitted to give it with no security. There is a fine high tone in his lordship's letter; but I would humbly suggest he should take the opinion of the Court of Criminal Appeal as to whether he is right.

Your obedient servant. B.

MR. JUSTICE WILLIAMS closes the correspondence:—

SIR,—Will you permit me to point out one or two inaccuracies of fact which have crept into the correspondence upon this subject, and which have confused and obscured the discussion of the practical question?

First, the assumption made by 'B.,' and adopted by others, that the opinion expressed by me in my letter to the *Times* is at variance with the resolution adopted at the meet-

ing of the judges in 1881 is really not correct; there is, in fact, no foundation whatever for it. The cardinal proposition for which I so strenuously—perhaps too strenuously—contended was that every prisoner has the right by law to defend himself by telling his story, introducing, if necessary, fresh facts, although he is not in a position to produce evidence in support of them. This proposition was categorically denied by 'B.' I, however, had gone one step further by asserting that this right was not taken away by the defence being conducted by counsel. This sub-proposition was naturally not adverted to by 'B.,' because no such question could arise if the right itself did not exist, as 'B.' holds. The resolution of the judges is in the following terms: 'That, in the opinion of the judges, it is contrary to the administration and practice of the criminal law as hitherto allowed that counsel for prisoners should state to the jury as alleged existing facts matters which they have been told in their instructions on the authority of the prisoner, but which they do not propose to prove in evidence.' The only opinion expressed by me upon the subject of this resolution was entirely in agreement with it, as appears by my letter.

A further question was raised at the same meeting of the judges as to the practice of allowing prisoners to address the jury when they are defended by counsel. No decision was arrived at, and the consideration of the question was adjourned *sine die*. The question of the prisoner's right when not defended by counsel to make a statement of facts which he has no means of proving was not even raised or discussed. There appears to be a general, if not complete unanimity of opinion upon the only resolution adopted upon this question by the judges, and there is no ground for the assertion that any opinion expressed by me is otherwise than in complete harmony with that of my brethern on the bench; and upon the other points discussed there appears to have been no general expression of opinion by the judges, either by resolution or otherwise.

Secondly, some of your correspondents have taken it for granted that meetings of the judges and of the council of

judges and of the body empowered to make orders and rules of court are one and the same thing. This is certainly not correct. They are three entirely different things. From time immemorial meetings of the judges have been held for the transaction of matters too numerous to detail, and at these meetings it has been customary to discuss disputed questions and to pass resolutions thereon. These resolutions, although of imperfect obligation and wanting the force of judicial 'decisions' or 'rules of court,' have nevertheless been found of great practical value as guides for future action.

The council of judges and the body empowered to make rules of court are entirely different from the first and from one another. They are created by statute. Their resolutions and rules and orders respectively, assuming them to be *intra vires*, are binding to the extent and in the manner provided by the statutes.

Your obedient servant,

January 11. WATKIN WILLIAMS.

THE MANITOBA LAW REPORTS.

THE Canadian Law Times suggests that the Manitoba Law Reports are occasionally "a faithful reproduction" of cases reported in its columns. We did reproduce one case, *Reid* v. *Whiteford*, but we carefully added "Above case and note are taken from *The Canadian Law Times*." This case was of importance to the profession here, and as our omniverous friend had secured the manuscript prior to the commencement of our reports, in a weak moment we determined to steal. The fact that having many sheep of our own we took the poor man's only lamb, of course adds heavily to the offence. Our contrition requires more than printer's ink. Pitiful reader, kindly imagine the writer prostrate on the ground, overwhelmed with sorrow, dust, ashes, and sarcasm.

The only other case in which there could be a suspicion of plagiarism, is the case of *Caston* v. *Scott*, *1 M. L. R. 117; 4 C. L. T. 151*. The grossest reprobate, hugging his new-born innocent to his bosom and swearing to the faithfulness of the reproduction, could not be more astray than is our suspicious friend in this instance. The question for decision in the case was, whether the ownership of unincumbered real estate in the Province was a sufficient answer to an application for security for costs. *The Manitoba Law Reports* gives the conclusion of the judge as follows: "it would not be *unreasonable* to say, that where the plaintiff owns real property, a mortgage, given to an officer of the court, conditioned to be void upon payment of a certain sum should costs be awarded against him, should be accepted." *The Canadian Law Times*, on the contrary, makes the learned judge say that "it would not be *reasonable* to say that where the plaintiff owns real property, a mortgage given to an officer," &c.

We need hardly add that *The Manitoba Law Reports* are correct, and that our inter-provincial friend is not more free from criticism in his reporting than in his advertising columns. If the reason of his errors really is attributable to lack of financial support (as our unfortunate friend seems to suggest), we will be glad to undertake, without charge, for a reasonable time, not only the inspectorship of his advertisements (a position he seems to be desirous we should assume), but also the supervision of his whole publication. We think that an impecunious friend ought always to be assisted—that is, of course, with advice. Perhaps, in advance of our installation in office, he will allow us to suggest the adoption of the somewhat useful page usually headed—"*Addenda et Corrigenda*." It would be an evidence of the editor's honesty and of our industry. Let it be in this form:—

Page 152, *line* 7 *from foot—for* "it would not be reasonable to say," *read* "it would not be unreasonable to say."

MR. JUSTICE SMITH.

ALTHOUGH not actually gazetted, it seems to be generally understood that Robert Smith, Esq., Q.C., of Stratford, Ont., has been appointed to the vacant judgeship. The feeling against the appointment of anyone outside of our own bar is very strong, and found vent the other day in a rousing cheer which made the court house ring again when a *Canada Gazette* was produced containing Mr. Smith's appointment to the deputy judgeship of the County of Perth instead of to the Manitoba Court of Queen's Bench. This was taken as evidence that no appointment had as yet been made to our court. We are informed, however, that the appointment has in fact been made, and that Mr. Smith's judicial employment in Ontario is merely temporary.

Of Mr. Smith we personally know nothing. He is reported to be a good lawyer, possessing a clear, logical and judicial mind. He, moreover, has the first requisite of a judge—he is a gentleman. Lord Ellenborough said that in selecting a judge, "care should be taken to appoint a gentleman. If he knows a little law so much the better." Apart from Mr. Smith's domicile we would, judging from report, approve the appointment. But it is humiliating to be (in effect) told that out of our whole bar there is not one fit to be a judge—that Manitobans are less advanced than the natives of India, from among whom her judges are now frequently appointed. But we should think that it was not advisable that a judge should be much superior to the bar. It is apt to spoil both judge and barristers, to render the former imperious and overbearing and the latter subservient and useless. Perhaps this view of the matter did not occur to the Dominion Government. If we are a poor lot we should be helped and not snuffed out. Mr. Justice Smith will have to try and bear with us.