ILLEGALLY OBTAINED EVIDENCE: IS THE KENYAN LAW ON ILLEGALLY OBTAINED EVIDENCE REALLY THE BEST FOR US?

A dissertation submitted in partial fulfilment of the Requirements for the L.L.B. Degree, University of Nairobi.

Dedicated to my Late Father, Samwel M'Rinjeu, who died ~~from~~ in a car crash on Monday, 1st April, 1971.

By:

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CHAPTER ONE

THE ROLE EVIDENCE PLAYS IN JUDICIAL DETERMINATION OF DISPUTES - JUSTICE OR TRUTH?

An attempt to answer the question whether the Kenyan law pertaining to illegally obtained evidence is the best for the Kenyan society would actually not be very helpful if the question as to what role the Law of Evidence plays in the determination of judicial disputes (i.e. whether affording justice to the parties or seeking the truth surrounding the disputes) is not answered. This is because any reccommendations reached would be very much influenced by the philosophical assumptions of the answer to the above question, whether the question is openly discussed or not. Dealing with the question right from the outset would greatly shape a consistent trend of the discussion and it is therefore proposed to deal with the question right away.

At the risk of subjectivity of approach, it is suggested that the role of evidence in judicial determination of disputes is really affording justice rather than seeking the strict truth of the circumstances surrounding the dispute. Quite a lot of evidence supports this suggestion and it must therefore be examined.

Generally speaking, courts are charged with administering justice. When a person becomes a magistrate, or an Advocate of the High Court for that matter, he becomes an officer of justice and he swears that he will "uphold justice according to law." When one becomes a judge of the High Court his name henceforth is prefixed with justice. Nowhere, so far, is truth mentioned. The implication is that the role of the court is really to administer justice. The law of evidence being part of the law administered by the courts, should therefore be seen as being part of the whole machinery of the court, and consequently having as its main purpose the administration of justice.

JUSTICE SHIELDS AV. INJUSTICE DUGDALE

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This argument becomes more credible when the Evidence Act[1] is read together with the Kenya Constitution[2] and both the Civil Procedure Acts[3] and the Criminal Procedure Code[4]. Chapter five of the Constitution gives those rights to the individual which will ensure that justice is done to him during the hearing of any criminal case. Section 77 of the Constitution, whose side-heading is "Provision to secure the protection of law," lays down the provisions which must be followed in a criminal trial to ensure that the trial is fair. For example Section 77(2)e provides that:-

> "Every person who is charged with a criminal offence shall be afforded facilities to examine in person or by his legal representatives the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf on the same conditions as those applying to the witnesses called by the prosecution."

Again, Section 194 of the Criminal Procedure Code[5] provides that:

> "Except as otherwise expressly provided all evidence taken in any trial or inquiry under this code shall be taken in the presence of the accused, or where his personal attendance has been dispensed with, in the presence of his advocate, if any."

Since the law of evidence must conform with the Constitution to be valid, it is submitted that it also should be seen as complying with Section 77 of the Constitution which inter alia, provides for the understanding of the proceedings by the accused, and the presumption of innocence on the part of the accused, until the contrary is proved.

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which he thinks fittest for himself; for in silence the accused might withhold some truth which could be adverse to his case. Moreover the exclusion of irrelevant evidence might withhold from the court such evidence as would be able to reveal what the truth was.

Admittedly, such evidence as hearsay is excluded when the circumstances are such that the truth of the testimony would be most suspect. The fear of perjury has militated against more liberal relaxation of such exclusionary rules as deal with hearsay evidence. Though realising the good intentions behind such arguments as are profounded in favour of such exclusionary rules, it is submitted that such exclusionary rules do not act as effective guards against untruth. Given a litigant willing to commit perjury, and counsel ready to encourage or wink at it, no exclusionary rule will deter them. The witness will be competent; counsel will swear up to the latest pertinent head note. Consequently the exclusionary rules as safeguards against perjury are a failure, and they should be looked at in the aspect in which they truly play some vital role - that of affording justice to the accused.

Even where evidence is technically admissible, and where there is no doubt at all that what has been presented before the court is true, such evidence might be disregarded on the ground that its admission would lead to a lot of unfairness to the accused person. In Kuruma s/o Kaniv V. The Queen [7], the court observed that "no doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused".

That observation had been made in Noor Mohammed V. R.[8] and in Director of Harris V. Public Prosecutions[9]. Clearly then what is to be considered is not the truth but the fairness to the accused.

It would also be of help to this discussion if we looked at the law relating to the admission of confessions. To be admissible, a confession must be voluntary and therefore one obtained by threats or promises held out by persons in authority cannot be admitted. Even though one might be tempted to lie in order to escape some calamity, it would be highly improbable in the case of inducement. It is therefore submitted that even here the main aim of excluding involuntary confessions is to afford the accused justice. This argument will be reinforced by a look at the opinion of judges in decided cases in Chapter Four.

Over and above what has been said above, it should be realised that the courts are not equipped for a scientific investigation into the discovery of the truth. What is to be investigated is determined by the parties themselves. The court must mainly rely on what the parties present in court. The event itself might have been witnessed by a few people, each of whom perceived it differently from the others. All this will be done according to the rules of evidence, which will refuse to admit quite a few facts. It will have to be done promptly and in circumstances which make some witnesses afraid and forget bits of their perception. The courts, manned by one or more persons skilled in law, is not necessarily skilled in the field which the dispute concerns. The finding of facts is only binding on the parties, and is only important for the determination of the dispute before the court. Consequently the parties must be satisfied with a rather rough approximation of what a scientific research would reveal for nicely accurate results cannot be expected.

Finally, there is the time factor to be considered. To get the strict truth of the dispute would be extremely laborious and would take long hours. Indeed, justice delayed is justice denied and that is why it is sometimes better to pass a "wrong" decision quickly than a "right" decision after undue procrastination for some concession must

be done to the shortness of human life.

In conclusion therefore it is submitted that all the above arguments lead to one inescapable postulate: that the law of evidence concerns itself more with ensuring that justice is done to the individual than unearthing the truth. Truth is difficult to investigate in a court of law but justice is not difficult to do. After all, law courts are courts of justice according to law. To be consistent with their mandate, they must therefore administer justice according to their fundamental preoccupation: law. Where truth is emphasized it is emphasized as one of the means of awarding justice.

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CHAPTER TWO

ILLEGALLY OBTAINED EVIDENCE IN THE COMMON LAW TRADITION AND IN SOUTH AFRICA

Illegally obtained evidence, for the purposes of this paper, should be taken as evidence obtained by a crime, to a breach of contract or confidence, invasion of privacy, trick or agent provocateur. An examination of the position adopted by courts in relation to such evidence would entail an examination of the position in America and in the Commonwealth. Since the courts in America adopt a different stance from the courts in the Commonwealth, it is fitting to examine the American position first, and then the position of such law in the Commonwealth.

AMERICA

The current American rules have been arrived at after quite some controversy which ensued after the fourth amendment to the American Constitution. The position before 1914 was that evidence was admissible even if it had been improperly obtained, the only consideration being whether such evidence was relevant or not. This position has changed, and it might change even more, but our task is to trace what the law in America actually is at present.

The fourth amendment to the American Constitution, which is based on the English Bill of Rights, and which was enacted in 1790, provides:-

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall be issued but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This provision does not state whether evidence obtained in breach of this Amendment is admissible or not, and hence the debate which ensued.

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The debate in America, just take in parts of the Commonwealth in relation to illegally obtained evidence as defined above, hinges on whether the individual should be protected from illegal and irregular invasions of his liberties by the State, or whether the State should be stopped from benefiting from decisive evidence simply because it was obtained illegally. Quotations from two opposing speeches by judges of great eminence would elaborate on this best. In support of the admission of illegally obtained evidence, Cardozo J. had this to say in People V Defore[1]

> "We are confirmed in this conclusion when we reflect how far-reaching in its effect upon society the new consequence would be. The pettiest peace officer would have in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious. A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to ~~neccect~~ convict the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free ..... We may not subject the society to such dangers until the legislature has spoken with a clearer voice."

On the other hand, in his dissenting speech in Olmstead V.U.S.,[2] Holmes J. said:-

> "We must consider the two objects of desire both of which we cannot have and make up our mind which to choose. It is desirable that crimes should be detected, and to that end too all available evidence must be used. It is desirable that the government should not itself foster and pay for other crimes when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces, that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoreable part."

In 1914 the Supreme Court decided in Weeks V U.S.[3] that evidence obtained in violation of the 4th Amendment was inadmissibl in Federal Criminal trials (not State trials) because if it could be used "the protection of the fourth Amendments ... (would be) of no value and .... might as well be stricken from the Constitution". The exclusionary laws were further extended to cases in which evidence was obtained indirectly from a breach of the fourth Amendment, such as statements overheard by driving a spike milk into the wall of a house,[4] or statements made to police during an unlawful search of the accused's house.[5] These are the so-called "fruits of the poisonous tree."

The position as regarded the admission of improperly obtained evidence in the States remained unchanged so that in 1949, in Wolf V Colorado,[6] the Supreme Court in a split decision ruled that unlawfully obtained evidence in a State might be admissible if the State law allowed its admission. Mr. Justice Frankfurter had this to say in Wolf V Colorado:[7]

> "As a matter of inherent reason one would suppose this to be an issue as to which men with complete devotion to the protection of the privacy might give different answers. When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat the remedy as an essential ingredient of this right."

Wolf V Colorado,[8] however, did not hold that State Courts were bound - as the Federal Courts were - by the exclusionary rules, the argument being that the State was entitled to rely on other effective methods of enforcing the fourth Amendment if it wanted. The court noted that many States did not operate the exclusionary rule.

The decision in Wolf V Colorado[9] however, was reversed in Mapp V Ohio[10] when the Supreme Court held that State Courts, just like the Federal Courts, were bound to apply the exclusionary doctrine. Mr. Justice Clark said in the majority opinion:-

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He was careful, however to add that

"No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused."

Lord Goddard had quoted with approval theview expressed by Crompton J. in R.V. Leatham[13] when he said

"It matters not how you get it, if you steal it even, it would be admissible in evidence".

It should be noted that this view is not applied in confessions where it is a cardinal principle that the evidence must be voluntary.

To understand what the law really is in practice, the frequency of the exercise of the discretion vested in the judges should be examined. A lengthy quotation from the judgement of Lord Widgery C-J in Jaffrey V Black[14] would throw a lot of light on this. He said at page 559:-

> "In getting an assessment of what this discretion means, magistrates ought, I think, to stress to themselves that the discretion is not a discretion which arises only in drug cases. It is not a discretion which arises only in cases where police can enter premises. It is a discretion which every criminal judge has all the time in respect to all the evidence tendered by the prosecution. It would perhaps give the magistrate some idea of the extent to which this discretion is used if one asks them whether they are appreciative of the fact that they have the discretion anyway, and it may well be that a number of experienced magistrates would be quite ignorant of the possession of this discretion. That gives them, I hope, some idea of how relatively rarely it is exercised in our courts ....."

The impression caused by the case above is that the discretion is used very rarely in England. An examination of the decided cases can fortify this impression.

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In Kuruma s/o Kaniu V The Queen[15] itself the court should have demonstrated the application of the discretion by excluding the evidence adduced to the court for at least three reasons. Firstly, the appellant was charged with a capital offence. Secondly the illegally obtained evidence was the only evidence implicating the accused. Thirdly the evidence itself contained very many discrepancies. Clearly then this evidence acted very much against the accused, and the only imaginable reason as to why the discretion was not exercised is that it is used sparingly.

In referring to this discretion Lord Parkes C.J commented in Callis V Gunn[16] that "... it would certainly be exercised in excluding the evidence if there was any suggestion of it having been obtained oppressively, by false presentations, by a trick, by threats, by bribes, anything of that sort." The judges in R V Murphy[18] had this to say about the above statement by Parkes C.J:

> "We do not read this passage as doing more than listing a variety of classes of oppressive conduct which would justify exclusion. It certainly gives no ground for saying that any evidence obtained by any false representation as trick is to be regarded as oppressive and left out of consideration. Detection by deception is a form of police procedure to be directed and used sparingly and with circumspection, but as a method it is as old as the constable in plain clothes, and regretable though the fact may be, the day has not yet come when it would be safe to say that law and order could always be enforced and the public safely protected without occasional resort to it."

It indeed is regretable if the courts in England do realise that official lawlessness is extremely undesirable as the judges in R.V. Murphy[19] pointed out, yet fold their hands and fail to do much about it.

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The discretion was exercised in R.V. Payne[19]. In that case the accused had agreed to an examination by a doctor to determine whether he was fit to drive a car but the doctor went ahead to testify that the accused was so much influenced by drink that he could not drive. Even though the doctor's evidence was clearly admissible, it was excluded because the appellant might have refused to subject himself to the examination if he knew the doctor would testify on whether he was drunk or not.

At any rate the case was doubted in R.V. Sang[20]. This case expressly overruled R.V. Murphy[21] in so far as the discretion of the judge is concerned. It went ahead to hold that because the court was not concerned with how evidence was obtained but merely with how it was used by the prosecution at the trial, a judge had no discretion, except in case of admissions, confessions and evidence obtained from the accused after the commission of the offence, to refuse to admit technically admissible evidence merely because it had been improperly obtained by the police. The effect of R.V. Sang[22] therefore is to make the discretion more narrow.

From the foregoing, it can safely be concluded that the discretion is exercised sparingly. In fact only R.V. Payne[23] is an authority in which the discretion was actually exercised. The consequence of the reluctance of the judges in England to exercise this discretion means that in almost all the cases in which the admissibility of illegally obtained evidence is contested the issue is resolved in favour of the prosecution. Even though this attitude may be okay for England, it is submitted it is not okay for Kenya, reasons for which will be given later.

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POSITION IN SCOTLAND

The law in Scotland is theoritically very similar to that in England but in practice the Scottish courts are very willing to exercise their discretion. The leading case on this point in Scotland is Lawrie V. Muir[25] in which Lord Cooper (Lord Justice General) had this to say:-

> "From the standpoint of principle it seems to me that the law must strive to control two highly important interests which are liable to come to conflict - (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interests of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely technical or formal ground. Neither of these objects can be insisted upon to the uttermost .... Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed."

A look at only a few of the Scottish cases would show that the Scottish courts are very much prepared to exercise their discretionary right. In Lawrie V Muir[26] the defendant was convicted of using milk bottles without the consent of the true owners. The Scottish Milk Bottle Exchange Ltd. carried on business of collecting and restoring the bottles to their true owners. It was approved by the Scottish Milk Marketing Board, all contracts between the Board and producers and distributors of milk provided that the company's inspectors might inspect the premises of any producer or distributor in contractual relations with the Board to examine bottles in their possession. Two inspectors displayed their warrant cards to the defendant who was entitled to refuse them permission to inspect because she was not in contractual relations with the Board. But she did not do so and the inspectors found the bottles. The High Court of Justificiary held that the evidence

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had been wrongly received, stating that persons in the special relation of these inspectors ought to know the precise limits of their authority and should be held to exceed those at their peril. Even though it was found that they acted in good faith here, none-the-less it was inconvertible that they obtained the assent of the appellant to the search of her shop by means of a positive misrepresentation made to her.

The willingness of the Scottish courts to exercise their discretion is further demonstrated by M'Govern V. H.M. Advocate[27]. Here the accused was suspected of blowing open a safe with explosives. Before arresting and charging him the police scrapped his fingernails for traces of explosives, which chemical analysis later proved to be present. This conduct amounted to assault since there was no right to search without warrant of arrest. This evidence was not admitted and the High Court of Justificiary observed that there was no option but to quash the conviction because, unless the principles under which police investigations are carried out are adhered to with reasonable strictness, the archer of the entire system for the public will soon begin to drag. It should be noted that in England, following R. V Sang[28], the judges would not have the discretion of excluding such evidence.

A quick look at H.M. Advocate V. Turnbull[29] would fortify the submission that the Scottish courts exercise their discretion more readily. Here a warrant was given to search for documents in the possession of the accused, an accountant. It was limited to documents relating to particular clients of the accused, but other documents were seized, and it was held that the latter were not admissible in evidence because they had been obtained by an illegal search or seizure. In excluding this evidence, Lord Guthrie remarked that "If such important evidence upon a number of charges is tainted by the method by which it was deliberately secured, I am of the opinion that a fair trial upon these charges is rendered impossible... It is submitted that the attitude is admirable.

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One can then safely conclude that whereas the position of the law on illegally obtained evidence in Scotland is that such evidence is admissible if relevant, the courts are prepared to use the discretion which they have in criminal cases to temper the unfairness which would be meted to the accused if all such evidence were admitted. Here then an important difference between the English and Scottish approaches becomes apparent.

SOUTH AFRICA

The general position in South Africa is that illegally obtained evidence is admissible if relevant unless the law specifically excludes its use. Before the South African courts finally reached this position, a clear trend is discernible.

In R. V Maleleke[29], illegally obtained evidence was held to be inadmissible because its admission would offend against the principle of Memo Tenetur Seipsum Prodere, for the accused had been "compelled to do something in order to produce evidence of his identity (the evidence concerned the taking of fingerprints) with the person whose spoors were found there to incriminate himself by act, or, as some of the writers put it, by 'real' evidence, though not by verbal testimony." This case was later followed in R. V. B.[30] but was finally outlawed in Ex Parte Minister of Justice: In Re R. V. Matemba[31], which was an Appellate Division decision. Here the admissibility of a palm print taken from the accused was contested. The court took the view that a distinction had to be drawn between, on the one hand, the legality of the methods used by the police in obtaining the print, and on the other, the admissibility thereof in evidence. "These two questions must be kept separate and not combined with one another, as is done when it is said that an accused person cannot be compelled to furnish evidence against himself". The Appellate Division was then of the view that the legality of obtaining evidence was of no consequence as far as the admission of evidence was concerned.

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Of great significance here is the fact that the court kept silent of the question of the discretion of the court in refusing to admit evidence if it would act unfairly against the accused. As a matter of fact the only pointer to circumstances in which illegally obtained evidence would be excluded is R V. Nhleko[32], a case in which evidence was excluded because the common law rules on the admissibility of admissions and S.244(1) of the South African Criminal Procedure Act (on confessions) provided for the exclusion of such evidence. The evidence that the accused, who was charged with murder, had pointed to a place was admitted, but his accompanying statement that this was the place where he had deposited the body of the deceased was excluded.

The position in South Africa is that illegally obtained evidence is admissible. What is unclear is the extent to which the Court can exercise its discretion in excluding evidence in criminal cases if that evidence would act unfairly against the accused. It is clear, however, that such evidence will not be admitted if some other law stipulates that it should not be admitted.

CANADA

Canadian courts have taken the view that illegally obtained evidence is admissible if it is relevant to the matters in issue, the only test being the relevancy. The courts have even narrowed the view on discretion by Goddard J. in Kuruma s/o Kaniv V. The Queen[33], holding that the judge has no discretion at all to refuse to allow evidence of great probative value even if such evidence is illegally obtained and it might be prejudicial to the accused person.

This can clearly be shown by the Canadian case of The Queen V. Wray[34]. During the trial of a non-capital murder the trial judge ruled that a statement signed by the accused was inadmissible as it was not voluntary. In the statement the accused told the police that he threw the murder weapon into a swamp and after the statement was taken he directed

them to the locality where the rifle was found the following day. The Crown judge refused to allow the Crown to adduce evidence as to the part taken by the accused in finding the murder weapon. The accused was acquitted and on appeal by the Crown the court of appeal affirmed the acquital on the basis that the trial judge in a criminal case has a discretion to reject evidence, even of substantial weight, if he considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice to disrepute. On a further appeal by the crown, the court held that the appeal should be allowed and a new trial directed. In reaching this decision, the court held:-

> "The admission of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately against the accused but not unfairly. It is only the admission of evidence gravely prejudicial to the accused, the admissibility of which is tendious and whose probative force in relation to the main issue before the court is trifling which can be said to operate unfairly. The trial judge's discretion to exclude evidence which is admissible is limited to those cases where he has a duty to ensure that the minds of the jury will not be prejudiced by evidence which has a great prejudicial effect. Even if the evidence has been obtained unfairly in the opinion of the trial judge it is not his duty to exclude it if its probative value is unimpeachable. If the trial judge did have a general broad discretion to exclude otherwise relevant and admissible evidence there would be difficulty in achieving any sort of uniformity in the application of the law. The trial judge therefore erred in excluding the relevant and admissible evidence dealing with the facts leading to the discovery of the murder weapon."

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In reaching this conclusion, the court relied very heavily on the words of Lord du Parcq in Noor Mohammed V. The King[36] when he said this on the discretion of the trial judge in criminal cases:-

> "It is right to add, however, that in all such cases the judge ought to consider whether such evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only have trifling weight, the judge will be right to exclude it."

The court argued that decisions of other cases on discretion are based on the above quotation and that judges in subsequent cases have widened that discretion than was envisaged in Noor Mohammed[36]. The end result of this argument is that in Canada the discretion has been extremely narrowed, with the effect that in practice the accused person has no safeguard against illegal searches and seizures, or the fruits of these two.

In Re A.G. Canada and Anti-Dumping Tribunal[37], a case subsequent to The Queen V. Wray, the court ruled that the Canadian Bill of Rights, which provides for the fundamental freedom of "the right of the individual to ..... enjoyment of property, and the right not to be deprived thereof except by due process of law" did not change the common law rule of the admissibility of illegally obtained but relevant evidence. Since the Queen V. Wray states the common law as it is understood in Canada, it is submitted that illegally obtained evidence is admissible if relevant. It is further submitted that the discretion of the trial judge in criminal cases is very narrow, so that Canada presents the narrowest discretion to the trial judge in the common law jurisdictions already examined.

THE POSITION IN AUSTRALIA

It is a general rule of Australian law that evidence is not rendered inadmissible *merely because* it was obtained unlawfully or improperly. This rule does not affect the discretion of the judge to exclude evidence. An examination of Australian cases on illegally obtained evidence shows that whereas the general rule of admitting such evidence is upheld, the courts readily use their discretion to exclude such evidence.

In R. V. Demicoli[38], a case in which a blood sample had been compulsorily obtained under the Traffic Acts for the purpose of being tested and subsequently used as evidence in a charge of dangerous driving causing grevious bodily harm, the majority of the court held that such evidence was admissible but it should have been excluded in the judge's discretion.

The position of Australian law on this point is further illustrated by R. V. Garside[39], a case in which improperly obtained urine sample was admitted on a charge of drunken drivin

R.V. Payne[40], already presented in the review of the English authorities is an Australian case and it goes to show that the discretion vested in the judges is readily exercised in Australia.

From the examination of the above cases on Australia then one can safely conclude that whereas the test of admissibility is relevancy only, the courts will readily exclude any evidence it deems particularly unfair to the accused in order to afford the accused justice. The law in Australia is therefore closer to the position in Scotland than to that in England.

CHAPTER THREE

It should be noted, right from the outset that the Kenya Evidence Act[1] is silent on the admisibility of illegally obtained evidence in Kenya. This means that whether illegally obtained evidence is admissible or not will be learnt by an examination of the other sources of law.

The leading case from Kenya is Kuruma S/O Kaniu V the Queen[2], a case whose appeals reached the Judicial Committee of the Privy Council. Lord Goddard, giving the decision of the Privy Council, stated that the only test in the admisibility of evidence was whether it was relevant to the matters in issue and not how it was obtained. In Kenya then evidence relevant to the matters in issue is admissible irrespective of whether such evidence was illegally obtained or not.

Lord Goddard, however, went ahead to state that "no doubt in a criminal case the judge always has a discretion to allow evidence if the strict rules of admissibility would operate unfairly against the accused". The application of this discretion in practice is, however , very higly doubted as will be shown later in this chapter.

That Kuruma S/O Kaniu V The Queen[3] represents the case law in Kenya cannot be doubted. The case has been followed in all subsequent cases on the point in areas where the law on the admissibility of illegally obtained evidence is similar , as has been shown in chapter two and it is expected the same would apply to Kenya if a similar case came up. Very unfortunately where the case has been mentioned in East Africa it has been in connection with whether a court can take judicial notice that an indictment took place where the indictment states, in the absence of any challenge to this[4] while it was also mentioned in connection with the discretion of a judge in a criminal case[5]. In the absence of any subsequent pertinent judgement in Kenya, and bearing in mind the esteem of Kuruma, it is submitted that it represents the position of case law on illegally obtained evidence in Kenya.

It would now be fitting to examine the discretion which Lord Goddard said every judge has in a criminal case. Under what conditions would the judge be called upon to invoke the discretion? The scope of this discretion can be determined by the failure to invoke it in the rather unusual facts of the Kuruma case. The appellant was an employee of a European farmer in Kenya. On his "day off" he cycled from his farm to his reservation along a route he knew to be regularly patrolled by the police. He could have reached his home by another route which was not patrolled by the police. Regulation 29 of the Emmergency Regulations of Kenya, under which he was arrested stated:-

> any police officer of or above the rank of assistant inspector with or without assistance and using force if necessary can ------ stop and search ------ any individual whether in a public place or not if he suspects that any evidence of the commission of an offence against the regulations is likely to be found on such ----- individual and he may seize any evidence so found".

While cycling home, the appellant was stopped by the police and was searched by policemen who were of rank below that of assistant inspector. Testifying for the crown, they reported having found two rounds of ammunition and a pocket-knife in the appellant's possession. On the strength of this evidence, the appellant was sentenced to death for having been in illegal possession of the ammunition. The pocket-knife was never produced in court, and the police had been witnessed by two people none of whom appeared in court as a witness. Yet Lord Goddard did not deem it fair to exclude this evidence, even though the appellant was charged with a capital offence.

had claimed the search

Goddard's assertion was withered! Yes!

The view we then form of the discretion as envisaged by Lord Goddard is that the discretion is extremly rarely used, if at all. It should be noted that Lord Goddard's idea of discretion is based on the decision in Noor Mohammed V R[6] in which the following words were emphasised:-

"If so far as ----- the circumstances of the case are concerned they have only trifting weight, the judge will be right to exclude it [the evidence].

In The Queen V Wray[7], the view expressed in Noor Mohammed V R[8], which Lord Goddard followed in Kuruma[9] the discretion was held to be extremly narrow as is shown in chapter two. The danger that the same may be held in Kenya is unabated. This becomes even more fortified when we look at the Tanzanian case of R V Makindi[10]. Here the Tanzanian High Court quoted 'Kuruma' in so far as the discretion to admit or exclude illegally obtained evidence is concerned, but the court went ahead to uphold the decision of the lower court in refusing to exclude the illegally obtained evidence adduced stating that the court was justified in refusing to exercise the discretion.

Only in R V Payne[12] was the discresion exercised. This is a case which followed Kuruma[13], and is a case whose history supports the view above. The case was subsequently very strongly questioned [14].

The discretion is then shown to be non-existent. If nowhereelse, the discretion should have been exercised in Kuruma[15]. It is then submitted that whereas the law is that illegally obtained evidence is admissible if relevant notwithstanding the mode it was obtained in, and that notwithstanding the strict rules of evidence the judge would exclude it if it became extremly unfair to the accused, such discretion to exclude it still remains uninvolked. It actually is not certain that such a discretion exists in pratice.

Throughout the above discussion it has only been mentioned that Kuruma S/O Kaniu V The Queen[16] ONLY represents the case law on this point. It is now proposed that we look at the case vis - a - vis some interesting decisions from Uganda and some provisions of the constitution of Kenya.

The Ugandan High Court has dealt.with some three very relevant cases on illegally obtained evidence without necessally directing itself to Kuruma[17].

In Mohanlal Trivedi V R[18], the Ugandan High Court, following Tajdin Kara V R[19] ruled that for evidence of the search of a house to be admitted where the search was based on a search warrant, it had to be shown that the house searched was the house named on the search warrant.

The second Ugandan case was Tenywa V Uganda[20]. Here an administrative officer had arrested a man who was suspected to have stolen a bicycle and had charged him under S. 299 of the Penal Code which had to be read together with S. 20 (1) of the Ugandan procedure code. For an accused person to be convicted under S. 299 of the Penal code, it was necessary to show that the arresting officer under S. 20 (1) of the Ugandan Criminal Procedure code was a policeman- Sir Udo Udoma, presiding over the Ugandan High Court, held that the accused person had not been arrested by a police officer and could therefore not be convicted under S. 299 of the Uganda Penal Code. It is submitted that this was inspite of the relevance of the evidence which was, however obtained in contravention of an Act of Parliament.

Very unfortunately the judges were not directed to the views in Kuruma[21], but should they have been the reaction would not be far to seek. It is submitted that the Court would have ruled that an Act of Parliament ranks higher on the hieractly of the sources of law than judicial decisions. The court would then have arrived at the same decisions which they made.

It is with this in mind that we now turn to the provisions of the Kenya Constitution[22]. The relevant Sub-Sections of section 76 which deals with entries and searches reads as follows:

76 (1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent or in contravention of this section to the extent that the law in question makes provision ------

(a) that is reasonably required in the interest of defence, public safety, public order, public morality, public health, town and country

planning, the development and utilization of mineral resources, or the development or utilization of any other property in such a manner as to promote the public benefit.

(b) That is reasonably required for the purpose of promoting the rights or freedoms of other persons, and except so far as the provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Kuruma S/O Kaniu V The Queen[23] was based on Regulation 29 of the Emergency Regulations. This Regulation states:

"any Police Officer of or above the rank of assistant inspector with or without assistance and using force if necessary ---------- stop and search ---------- any individual whether in a public place or not if he suspects that any evidence of the commission of an offence against this regulation is likely to be found on such ---------- individual and he may sieze any evidence so found"

These regulations could only have qualified S. 76 (1) if they could be shown to fall under section 76 (2) a of the constitution. Being emergency regulation they would seem to fall under S 76 (2) a and hence qualify S 76 (1). But being emergency regulations, this would hold during emergencies only and cannot be extended to times of peace. Indeed, If Kuruma[24] would have been tried at any other time (rather than an emergency) the emergency regulations would not have been in force and would then not have been based on such regulation. Many an argument would have been available against Kuruma[25] then. The regulations themselves were not observed as the arresting officers were not of the rank of assistant inspector or above and if the Ugandan cases are anything to go by the accused would not have been convicted.

In case Kuruma[27] was decided during times of peace, the relevant law under which he would have been arrested is S. 26 of the criminal procedure

Code. The relevant part of S. 2a reads:-

5 2a: Any police officer may, without an order from a magistrate and without a warrant, arrest -

(a) any person whom he suspects upon reasonable grounds of having committed a ~~conguitable~~ cognizable offence.

It is submitted that the above section is not as loosely worded as the emergency regulation. For a conviction to be based on section 2a of the Kenya Criminal Procedure Code reasonable grounds of suspicion must be shown. The facts in Kuruma, it is submitted, would not have pointed to any reasonable grounds of suspicions
The regulations then would not qualify S. 76(1) of the constitn. yet S. 3 of the constitution reads:-

"This constitution is the constitution of the Republic of Kenya and shall have the force of law throughout Kenya, and subject to S. 47 of this constitution, if any other law is inconsistent with this constitution this constitution shall prevail and the other law shall to the extent of that inconsitency be void".

Section 47 of the constitution only deals with the procedure of the amendment of the constitution.

It is therefore submitted that on the proper constrution of section 76 of the constitution as read together with S.3 of the constitution, Kuruma S/O Kaniu V The Queen[28] is not good law in times when emergency regulations do not ~~prevent~~ prevail. It is further submitted that even under emergency regulations Kuruma was wrongly decided since the arresting officers were not of the rank of assistant inspector or above.

Poor argument

stupid!

Isn't this the issue? – Wasn't it emergency day?

Bulky remedy is compensation for trespass

– nothing completely about Kenya.
a poor 3rd class response!

CHAPTER FOUR

RECOMMENDATIONS BASED ON PHILOSOPHICAL ARGUMENTS REACHED IN CHAPTER ONE, POSITION IN OTHER COUNTRIES AND KENYA'S CIRCUMSTANCES

In this chapter, it is proposed that using the philosophical arguments propounded in chapter one, and taking into account conditions and circumstances peculiar to Kenya and her people, reccomendations will be made at what law would be most suitable for Kenya as far as illegally obtained evidence is concerned.

In chapter one it was concluded that the rule of evidence is to afford the accused person justice according to law as it is very difficult for the courts to ascertain where the truth in any given case lies. That this is really the rule of the courts can be laid to rest by examining why involuntary confessions cannot be admitted in evidence. To justify the rule of admitting illegally obtained evidence if relevant in Kuruma S/O Kaniu V THE QUEEN [1] Lord Goddard at page 204 distinguished the physical or moral compulsion from the compulsion rule. His assertion was that the confession rule is based on the untrustworthiness of the evidence obtained as a result of the inducement or pressure rather than on a particular point of the self-incrimination principle. It is submitted that this is not the true position, and the following quotations from leading judgements will give testimony to the submission.

In Chalmers V H. M. Advocate[2], Lord Cooper had this to say on why involuntary confessions are excluded-

"The accused cannot be compelled to give evidence at his own trial and submit to cross-examination. If it were competent for the police interrogation and cross-examination and to adduce evidence of what he said, the prosecution would

> " In effect be making the accused a compellable witness and laying before the jury at second hand evidence which could not be adduced first hand, even subject to all precautions which are available for the protection of an accused person at a criminal trial.

It is clear from the quotation above that the courts exclude involuntary confessions because they carry with them the danger that an accused person might be led to incriminate himself, which according to the law on procedure would be very unjust. This is stated even more strongly in Rogers V Richnond.[3] In this case Frankfurter J had this to say:-

"This is not because such confessions are unlikely to be true [for in many cases indpedent corroborating evidence left very little doubt of the truth of what the defedant had confessed] but because the methods used to extract them offend our underlying principle in our enforcement of criminal law: that ours is an accusational and not an inquistorial system - a system in which the state must establish guilt by evidence indepedently and freely secured and may not by coercion prove its charge against the accused out of his own mouth ---------"

In Brown V Mississippi[4], the court had this to observe -

"Because the state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The state may not permit the accused to be hurried to the conviction under mob condemnation - where the whole proceeding is but a mask - without supplying corrective process ------ The state may not deny to the accused the use of counsel ---------- Nor may a state through the use of its officers, contrive a conviction through the pretence of at trial which is in truth "but used as a means of depriving the defedant of liberty through a deliberate deception of the court and the jury by presentation of testimony known to be perjured" . And the trial is equally a mere pretence where the state authorities have continued a conviction resting solely upon convictions obtained by violence --------- Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them has been the curse of all nations. It was the Chief iniquity, the crowning infamy of the star chamber and inquisition and other similar institutions -------- . The duty of maintaining constitutional rights of the person on trial for his life rules above mere rules of procedure".

The argumet that the law of evidence seeks to arrive at justice rather than truth will be concluded by citing the words of Kraus J. in the South African case of R V Maleleke[5]. He had this to say:

> "The objection to evidence so obtained is that it compels an accused person to commit himself out of his own mouth, that it might open the door to oppression and persecution of the worst kind, that is is a negation of the liberty of the subject and offends against our sense of natural justice and fair play ---------- public policy demands that the administration of justice shall be free of suspicion, and that the courts, which are the bulwarks of the liberty of the subject should not connive at or even ignore, anything which might, as Best puts it, pollute justice at its own source, and destroy the confidence of the community in the indepedence of the courts, especially as the executive authority is usually entrusted with the prosecution of persons for alleged crimes -------- [To admit the evidence] would be tantamount to adopting the obnoxious principle that the crown could avail itself of and connive at the commission of one crime to prove another. The detection of crime has become a science in itself and criminals are and should be brought to justice without resorting to methods which open thee door to violence or which would tend to reintroduce the medeval system of torture on the rack".

Need more said on this? Kenya should then adopt such a stance as will enable our courts to dispense justice so that the trials will be seen as just. It is with this in mind that it is very strongly reccommended that the competing interests between the state to use available evidence, even if illegal, to maintain security, law and order ~~and order~~ and the individual to safeguard his rights, should be resolved in favour of the individual. The courts should not only do justice but justice should be seen to be done if the courts have to retain the image of being bulwarks of the liberty of the individual.

In justifying the rule of admission of illegally obtained evidence as stated in Kuruma S/O Kaniu V The Queen[6], the courts give as a remedy inter alia that the accused person can sue the officer who is at fault or that such an officer could be prosecuted at the orders of the trial migistrate. It is submitted that this argument is of very little persuasive authority, if at all, in Kenya. Firstly, a vast majority of Kenyans are

are unaware of their legal rights, and especially of this right to sue. This problem becomes even more real when one considers that there is very little in the way of informing masses of their legal rights.

At any rate, even if the people knew of their rights not many would exercise them. There is the high cost involved in legal proceedings, which many people would not afford. Secondly, there comes the complexity of some of the cases and without the aid of counsel some cases would be difficult to prove. Noting that there is no provision for free legal representation, and the high fees charged by advocates, how would such cases be proved by the legally untrained and not-affluent citizen ? Thirdly, there is that fear which most people equate with the courts. Given this fear, and the lack of a clear prediction of what the outcome of the case would be, it is submitted that not many people would wish to venture into court action. The effect of all this is that such remedies would be non-existent in practice, and can therefore not be reccomended for Kenya.

Turning to the suggestion that erring police officers can be prosecuted at the instigation the courts it is submitted that this is a remedy which would not get off the ground. One police officer would, naturally, reason that he might well be the next victim and given the sympathies from such an officer, prosection would be half-hearted.

It would well be that the English adopt the position in Kuruma[7] because they have enough confidence in their police force to warrant such a position. But what about the Kenyan position? Ours is a small police force which took over from the colonial police force, and whose highest ranking officers were policemen during the colonial period. This being the case the training is such that even though the worst atrocities of the colonial police officers are not emphasized, they are trained on the same lines. It should be noted that during the colonial period the Africans, who were the main police victims, were regarded as being sub-human and like sub-humans they were treated. The submission here is that our police force has not rid itself of the colonial hang-over so that the constitutional provision that a person is deemed innocent until proved guilty has been completely watered down. Hence on arrest, it is common for a suspect to be physically mistreated. This could be shown by the many cases in which there are trials within - trials. Though covering a seemingly different area, the readiness with which our police officers shoot suspects on the flimsy ground that they failed to stop on orders to do so gives a pointer as to how much confidence we should give our police force. The submission here then is that our police force cannot be relied on very

much and present rules should be interpreted strictly in order to at least improve the force's propensity to observe these rules.

It would how be fitting to examine the judgement in Kuruma S/O KANIU V THE QUEEN[8] taking into consinderation the time at which it was passed, and the judge who passed it. Kuruma[9] was passed at a time when in Kenya a severe war of liberation raged on and when the British would have done anything to stop what they considered a war by savages. In many parts of Kenya Emergency regulations were applied. The courts at that time were being used by the government as instruments in the bitter struggle so that persons charged with offences pointing to connections with the freedom fighters would be lucky to escape sentence. History bears testimony to the fact that at this time very many Africans were sent to the gallows by courts which were manned by non-blacks. The bitterness against the May Mau was not nursed by whites in Kenya alone, but it extended to Britain. The aim of the courts - in Kenya and in Britain was to destroy and defeat the freedom fighters using any means available. Kuruma[10] is a case in which the accused was charged, in essence, with having connections with the freedom fighters. It could then be understood why the decision in this case, curious as the facts are, was left the way it is. That a decision passed at such a time should be upheld as good law in indepedent Kenya is unimaginable.

The argument above is reinforced when we look at the judge who passed the decision and laid down the law - Lord Goddard. It is the same man who upheld the conviction of Jomo Kenyatta as a Mau Mau "terrorist" despite the very clear lack of jurisdiction to try the case by Thaker, the trial magistrate. The following statements by Lord Goddard and observations about him while he was on the English bench will show us what sort of man he was: [11]

> "My sentiments are more in favour of the victims than for the murderers". "I have never yet understood how you can make the criminal law diterrent unless it is punitive. The two things, seem to me to follow one on the other".
> "The age-long causes of crime are still there. They are the desire for easy money, greed, passion, lust and cruelty.
> "If our criminal law is to be respected the public conscience has to be satisfied, and it will not be satisfied if gross violence, and sometimes bestial crime is not punished in a

way that will satisfy the public. There are old people who go trembling to their doors at night".

Mr. H.M. Kent of Worthing had this to say:-[12]

" ----- I can vouch for the impression he made while he was [C] on the British Public and on me ----------
that Goddard stood for what the public would and that was that human life was to be protected, if necessary, by viguour; that the growing tide of criminality ----------
was to be vigourously withstood ---------- "

That was Goddard, the man. Add to this his sympathies with the Government that was fighting the mau mau and you will understand why the discretion he talked about was not invoked. In no circumstances can such a case as Kuruma be reccomended for an independent Kenya.

In the third chapter the importance of the Kenya constitution was emphasised. The spirit of the constitution, and for the purposes of this paper, chapter five in particular, should be given effect to. Just like in America, we should give effect to this ~~the~~ highest legal norm in the land so that due recognition of the constitutioneal rights of the individual will be given. It is due to this that it is reccomended that the American position be adopted. The American judges have not restricted their analysis on narrow textual definitions but have themselves ranged broadly, relying on general principle of reason and of equity, and the traditional role of the court of maintaining a fair state - individual balance. It was observed in chapter three that the existence of the discretion in criminal cases in practice is doubtful. Our courts, bearing in mind their tendecy to 'ape' the English courts would deny such a discretion to the individual and the individual would really be at a loss. Scotland, Australia and South Africa have mutigated the injustice by liberally applying the discretion. Failure to adopt the American position would really place the liberty of every man in the hands of every petty officer.

It might be argued that such a position displays too tender a concern for criminals. Such criticism overlooks ofcourse, that the tenderness is not for the rights of the criminals but for the rights of accused persons, an unmeassured propotion of whom may be innocent. In answering the charge that the criminal is thus set free because the constaple has blundered Clark J. agreed in Mapp V Ohio[13] that this might sometimes be the result "but there is another result - the imperative of judicial integrity --------

The criminal goes free but it is the law that sets him free." He further went ahead and quoted a passage from <u>Olmsteed V United States</u>[14]

> "Decency, security and liberty alike demand that the government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws the existence of the government is the potent, the omipresent for good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law - breaker, it breeds comtempt for the law., it invites everyman to become a law unto himself, it invites anarchy. To declare that in the administration of criminal law the end justifies the means - to declare that the government may commit crimes to secure the conviction of a private criminal - would bring terribl retribution. Against that pernicious doctrine this court shall resolutely set its face".

All the foregoing leads to one conclusion - that clearly the American position is the most suitable for Kenya, given the fact that both of them have a constitution in which the rights of the individual are ~~ensholved~~ enshrined, such problems peculiar to Kenya as unreliable police force and the largely legally unaware citizens, the curious conditions as surround the judgement in <u>Kuruma</u>[15], the great doubt that a discretion to exclude evidence really exists, and the overall function of courts - the role to dispense justice to accused persons. It is therefore reccomended that the American position be adopted in Kenya.

You'll never become a 'lawyer' but can become a Magistrate.

Poor work!

FOOT NOTES

CHAPTER ONE:

1. Chapter 80 of the laws of Kenya.
2. Act Number five of 1969.
3. Chapter 21 of the laws of Kenya
4. Chapter 75 of the laws of Kenya.
5. Supra.
6. 1961 F.S.C. at 41
7. 1955 A.C. 197
8. [1949] 1 All E.R at 370
9. [1952] 1 All E.R at 1048

CHAPTER TWO

1. [1926] 24 N.Y 413
2. [1928] 277 U.S 438
3. 232 U.S 383
4. Silverman V U.S 1961 365 U.S 505
5. Wong Sun V U.S (1963) 371 U.S 471
6. 338 U.S 25
7. 16.d
8. 16.d
9. 16.d
10. (1961) 367 U.S. 656
11. 16.d
12. 1955 A.C. 197
13. 1861 3 L.T 777
14. ~~[1955] A.C 197~~
15. (1978) 1 All E.R 555
16. [1955] A.C 197
17. [1964] 1 Q.B 495
18. [1965] N.1 138
19. 16.d
20. [1963] 1 All E.R. 848
21. [1979] 2 All E.R. 46
22. 1965 N.1 38

23. [1979] 2 All E.R 46
24. [1963] 1 All E.R 848
25. 1950 S.C (J) L9
26. 16.0
27. 1950 S.C. (J) 33
28. [1979] 2 All E.R. 46
29. 1951 S.C (J) 96
30. S.A.L.R 1925 T.P.D 491
31. 1933 O.P.D 139
32. 1941 A.D 75
33. 1960 4 S.A. 7.2 (A.D)
34. [1955] A.C 197
35. 11 - D.L.R 673
36. [1949] A.C. 182
37 16.0
38. 30 D.L.R 678
39. ~~16.0~~ 1971 Qd. R 358.
40. ~~1963 1 All E.R. 848~~
41. 1963 1 ALL E.R 848

CHAPTER THREE:

1 Chapter 80 laws of Kenya
2. [1955] A.C 197
3. ~~16.0~~ Ibid.
4. Ndungu Kamau V R (1958) E.A. 71 and Mohammed Farah V R (1963) E.A. 27
5. R. V Makindi (1961) E.A. 327
6. (1949) A.C 327
7. 11 D.L.R 673
8. 16.0
9. 16.0
10. 1961 E.A 327
11. 16.0
12. (~~1963~~ 1963 1 All E.R. 848
13. 16.0
14. R V Sang 1979 2 All E.R. 46

15. 16.d
16. 16.d
17. 16.d
18. (1959) E.A. 355
19 Uganda High Court Appeal (Criminal) 3049(1951)
20. (1967) E.A 102
21. 16.d
22. Act No. 5 of 1969
23. 16.d
24. 16.d
25. 16.d
26. 16.d
27. 16.d
28. 16.d

CHAPTER FOUR

1. [1955] A.C. 197
2. [1954] Scotts L.T 154
3. 365 U.S 534 (1961)
4. 297 U.S 278 (1936)
5. S.A.L.R 1925 T.P.D 491
6. Supra
7. Supra
8. 16.d
9. 16.d
10. 16.d
11. Lord Goddard by Brater F
12. Lood Goddard by Brastor F
13. 367 U.S 643 (1960)
14. 277 U.S 438
15. [1955] A.C. 197