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CITATION

These reports are cited thus:

[1981] 3 All ER

REFERENCES

These reports contain references to the following major works of legal reference described in the manner indicated below.

Halsbury's Laws of England

The reference 35 Halsbury's Laws (3rd Edn) 366, para 524, refers to paragraph 524 on page 366 of volume 35 of the third edition, and the reference 26 Halsbury's Laws (4th Edn) para 577 refers to paragraph 577 on page 296 of volume 26 of the fourth edition of Halsbury's Laws of England.

Halsbury's Statutes of England

The reference 5 Halsbury's Statutes (3rd Edn) 302 refers to page 302 of volume 5 of the third edition of Halsbury's Statutes of England.

The Digest

References are to the replacement volumes (including reissue volumes) of The Digest (formerly the English and Empire Digest), and to the continuation volumes of the replacement volumes.

The reference 44 Digest (Repl) 144, *1240*, refers to case number 1240 on page 144 of Digest Replacement Volume 44.

The reference 28(1) Digest (Reissue) 167, 507, refers to case number 507 on page 167 of Digest Replacement Volume 28(1) Reissue.

The reference Digest (Cont Vol D) 571, *678b*, refers to case number 678b on page 571 of Digest Continuation Volume D.

Halsbury's Statutory Instruments

The reference 12 Halsbury's Statutory Instruments (Third Reissue) 125 refers to page 125 of the third reissue of volume 12 of Halsbury's Statutory Instruments; references to subsequent reissues are similar.

CORRIGENDA

[1981] 2 All ER

pp 386, 393. **A v Liverpool City Council.** The case referred to on p 386 line *b* 1 and p 393 line *d* 3 should be *Re D (a minor) (justices' decision: review)* [1977] 3 All ER 481, [1977] Fam 158.

p 1066. **I Congreso del Partido.** Counsel for the respondents should read *'Brian Davenport QC, Robert Jennings QC* and *Timothy Saloman'*.

[1981] 3 All ER

p 45. **Royal Borough of Windsor and Maidenhead v Brandrose Investments Ltd.** Solicitors for the defendants: *Gamlens* were agents for *Lovegrove & Durant*, Windsor.

p 244. **Exxon Corpn v Exxon Insurance Consultants International Ltd.** Line *f* 3: the reference should be to Lewis Carroll's Nonsense poem.

p 291. **JEB Fasteners Ltd v Marks, Bloom & Co (a firm).** Counsel for the defendants should read *'Quintin J Iwi* and *Andrew Jordan'*.

p 548. **Edwards (Insp. of Taxes) v Clinch.** Line *c* 4: the words from 'For example, the assessment' to the end of the paragraph should be omitted.

p 680. **Harrison v British Railways Board.** Counsel for the second defendant was *Peter Leighton*.

Cases reported in volume 3

R v Littell

COURT OF APPEAL, CRIMINAL DIVISION
WATKINS LJ, CANTLEY AND HOLLINGS JJ
22nd, 26th JANUARY, 6th MARCH 1981

Road traffic – Breath test – Inflation of bag in requisite manner – Provision of specimen of breath in sufficient quantity to enable test to be carried out – Provision of specimen in more than one breath – Specimen so provided not of quality required to give reliable indication of proportion of alcohol in blood – Whether failure to provide specimen of breath – Road Traffic Act 1972, s 12(1)(3).

A police constable stopped the appellant when he noticed that the appellant had been driving his car in a markedly erratic manner. The appellant smelled of drink, was unsteady and appeared to be under the influence of alcohol. He was arrested pursuant to s 5(5) of the Road Traffic Act 1972 as being unfit to drive through drink or drugs and taken to a police station, where, pursuant to s 8(7) of the 1972 Act, he was given an opportunity to provide a specimen of breath for a breath test. The appellant agreed to provide a specimen, the breath test device was assembled and the appellant was told, in accordance with the manufacturer's instructions issued with the device, to inflate the bag in one breath in not less than 10 or more than 20 seconds. It was emphasised that the bag had to be inflated in one breath. The appellant took ten short puffs of breath and fully inflated the bag. The result did not indicate an alcohol proportion above the prescribed limit. The inspector at the police station took the view that a proper test had not been carried out. The appellant was given three more opportunities to provide a specimen, on each of which the appellant took at least five short puffs and in none of which was the bag fully inflated. The inspector decided that the appellant had failed to provide a specimen of breath for the purposes of the 1972 Act and accordingly required him under s 9 thereof to provide a specimen of blood or urine for a laboratory test. The appellant provided a specimen of blood which subsequent analysis showed to contain nearly twice the permitted proportion of alcohol. Following a ruling by the judge that the appellant had failed to provide a proper specimen of breath for a breath test by failing to inflate the bag in one breath and that the evidence of the analysis of the specimen of blood was therefore admissible, the appellant pleaded guilty to a charge of driving a motor vehicle when he had a blood-alcohol concentration above the prescribed limit, contrary to s 6(1) of the 1972 Act, and was convicted accordingly. He appealed against conviction on the ground that the judge's ruling was wrong.

Held – Since s 12(1)[a] of the 1972 Act provided that a 'breath test' meant a test for the purpose of obtaining an indication of the proportion of alcohol in a person's blood carried out by means of an approved device on a specimen of breath provided by that person and

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a Section 12, so far as material, provides:

'(1) In sections 6 to 11 of this Act, except so far as the context otherwise requires—"breath test" means a test for the purpose of obtaining an indication of the proportion of alcohol in a person's blood carried out by means of a device of a type approved for the purpose of such a test by the Secretary of State, on a specimen of breath provided by that person . . .

'(3) References in sections 8, 9 and 11 of this Act to providing a specimen of breath for a breath test are references to providing a specimen thereof in sufficient quantity to enable that test to be carried out . . .'

since by s 12(3) of that Act a 'specimen of breath for a breath test' referred to a specimen in sufficient quantity to enable that test to be carried out, it followed that to hold that a specimen of breath, which had been provided in such a way as to defeat the purpose of the breath test by making it impossible to obtain by means of the approved device a reliable indication whether the proportion of alcohol in the tested person's blood exceeded the prescribed limit, constituted a 'specimen of breath for a breath test' would be to ignore the declared purpose which was part of the definition of a 'breath test' within s 12(1). Accordingly, even though s 12(3) referred to the quantity of the specimen and not to its quality, it followed that, if a person provided the quantity asked for but, by ignoring the instructions he had been given for its provision, provided it in such a way that it was of a quality which did not and could not indicate the proportion of alcohol in his blood and was no reliable indication of whether that proportion exceeded the prescribed limit, the test contemplated by the 1972 Act had not been carried out. Since it was clear from the subsequent laboratory test on the specimen of blood provided by the appellant that the specimen of breath he had provided was useless for the purpose of indicating the proportion of alcohol in his blood, it followed that he had failed to provide a specimen of breath and the police inspector had accordingly been entitled to require the appellant to provide a specimen of blood for a laboratory test, evidence of the result of which was admissible. The appeal would therefore be dismissed (see p 4 *j* to p 5 *b* and p 7 *a* to *c*, post).

Dicta of Lord Pearson and of Lord Diplock in *Director of Public Prosecutions v Carey* [1969] 3 All ER at 1674, 1678 and of Lord Diplock and of Lord Kilbrandon in *Walker v Lovell* [1975] 3 All ER at 113–114, 131 applied.

Dicta of Viscount Dilhorne in *Director of Public Prosecutions v Carey* [1969] 3 All ER at 1670–1671 and in *Walker v Lovell* [1975] 3 All ER at 120, 122 not followed.

Notes

For the power to require a breath test and the effect of failure to take a test, see Supplement to 33 Halsbury's Laws (3rd Edn) para 1061A.3-6.

For the Road Traffic Act 1972, ss 5, 6, 8, 9, 12, see 42 Halsbury's Statutes (3rd Edn) 1646, 1648, 1651, 1655, 1660.

Cases referred to in judgment

Attorney General's Reference (No 1 of 1978) (1978) 67 Crim App R 387, [1978] RTR 377, CA.

Brennan v Farrell 1969 JC 45, Digest (Cont Vol D) 889, **1035qppp*.

Director of Public Prosecutions v Carey [1969] 3 All ER 1662, [1970] AC 1072, [1969] 3 WLR 1169, 134 JP 59, [1970] RTR 14, HL, Digest (Cont Vol C) 936, *322aa*.

R v Chapman [1969] 2 All ER 321, [1969] 2 QB 436, [1969] 2 WLR 1004, 133 JP 405, 53 Cr App R 336, CA, Digest (Cont Vol C) 933, *322m*.

R v Holah [1973] 1 All ER 106, [1973] 1 WLR 127, 137 JP 106, 57 Cr App R 186, [1973] RTR 74, CA, Digest (Cont Vol D) 879, *322oc*.

Walker v Lovell [1975] 3 All ER 107, [1975] 1 WLR 1141, 139 JP 708, [1974] RTR 377, HL, Digest (Cont Vol D) 883, *322llq*.

Cases also cited

R v Thorpe [1974] RTR 465, CA.

Rendell v Hooper [1970] 2 All ER 72, [1970] 1 WLR 747, DC.

Shepherd v Kavulock [1978] RTR 85, DC.

Appeal

On 25th July 1979 at the Crown Court at Chelmsford before his Honour Judge Hill-Smith the appellant, Ronald Arthur Littell, pleaded guilty to a charge of driving a motor vehicle when he had a blood-alcohol concentration above the prescribed limit contrary to s 6(1) of the Road Traffic Act 1972. He was sentenced to be fined £50, ordered to pay £75 towards the prosecution costs and £100 towards his legal aid costs. The appellant was also disqualified for holding a driving licence for 12 months. He appealed against his

conviction on the ground that the trial judge had wrongly ruled that he had failed to provide a specimen of breath for a breath test. The facts are set out in the judgment of the court.

The appellant appeared in person.
Justin Philips for the Crown.

Cur adv vult

6th March. **CANTLEY J** read the following judgment of the court: This appeal directly raises for decision yet another entirely technical point in the lamentable jurisprudence of the breathalyser law.

Section 5(1) of the Road Traffic Act 1972 provides that a person who when driving a motor vehicle on a road or other public place is unfit to drive through drink or drugs shall be guilty of an offence. Section 5(5) provides that a constable may arrest without warrant a person committing an offence under this section.

Section 8(7) provides that a person arrested under s 5(5) shall while at a police station be given an opportunity to provide a specimen of breath for a breath test there.

Section 9(1) provides that a person who has been arrested under s 5(5) may while at a police station be required by a constable to provide a specimen for a laboratory test (which may be a specimen of blood or urine) if he has previously been given an opportunity to provide a specimen of breath for a breath test at that station under s 8(7) and either (a) it appears to a constable in consequence of the breath test that the device by means of which the test is carried out indicates that the proportion of alcohol in his blood exceeds the prescribed limit, or (b) when given the opportunity to provide that specimen he fails to do so.

Section 12(1) states that a breath test means a test for the purpose of obtaining an indication of the proportion of alcohol in a person's blood, carried out by means of a device of a type approved for the purpose of such a test by the Secretary of State, on a specimen of breath provided by that person. Section 12(3) provides that references in ss 8 and 9 of the 1972 Act to providing a specimen of breath for a breath test are 'references to providing a specimen thereof in sufficient quantity to enable that test to be carried out'.

On the evening of 20th January 1978 a police constable off duty and in plain clothes was driving his motor car along Barking Road, London E6 when he noticed a motor car ahead of him being driven in a markedly erratic manner. He drew alongside, caused the driver to stop and showed him his warrant card. The driver was the appellant. He smelled of drink, was unsteady and appeared to be under the influence of alcohol. The constable arrested him pursuant to the provision of s 5(5) of the 1972 Act as being unfit to drive through drink or drugs and the appellant was taken to Barking Police Station. At the police station the appellant as is required by s 8(7) was given an opportunity to provide a specimen of breath for a breath test and agreed to do so. The official Alcotest equipment was duly assembled and the appellant was told, in accordance with the manufacturer's instructions issued with the equipment, to inflate the bag in one breath in not less than 10 or more than 20 seconds. It was emphasised that the bag had to be inflated in one breath. The appellant then took ten short puffs of breath and fully inflated the bag. The result was negative; it did not indicate alcohol above the prescribed limit. The inspector did not regard this as a proper test. He gave the appellant further opportunities. On the second attempt the appellant took eight short puffs. The bag was not fully inflated. At the third attempt the appellant took seven short puffs and at the fourth attempt five short puffs. In none of these was the bag fully inflated. The inspector decided that the appellant had failed to provide a specimen of breath for the purposes of the 1972 Act and accordingly required him under s 9 to provide a specimen of blood or urine for a laboratory test. The appellant provided a specimen of blood which subsequent analysis showed contained not less than 152 mg of alcohol in 100 ml of blood. The legal limit is 80.

The appellant elected trial by jury and eventually appeared at the Crown Court at Chelmsford. He pleaded not guilty to an indictment containing two counts under the 1972 Act. The first alleged that he drove a motor vehicle when he had a blood-alcohol concentration above the prescribed limit contrary to s 6(1).

During the trial counsel for the appellant asked the judge to exclude the evidence of the result of the analysis of the blood sample on the ground that it had been unlawfully or unfairly obtained. His submission was that the appellant had not failed to provide a specimen of breath nor had the specimens he had provided indicated that the proportion of alcohol in his blood exceeded the prescribed limit and accordingly there was no power under the 1972 Act to require him to provide the specimen of blood, which it was said was unfairly obtained because the appellant had been warned under s 9(7) that his failure to provide a specimen of blood or urine would make him liable to prosecution.

The judge ruled that on the undisputed evidence the appellant had failed to provide a proper specimen of breath for a breath test by failing to inflate the bag in one breath and the evidence of the analysis of the blood test was therefore admissible. The ruling effectively deprived the appellant of his only defence to the charge under s 6(1). He therefore withdrew his plea of not guilty to that charge and admitted it and was sentenced accordingly. He now appeals against his conviction on the ground that the judge's ruling was wrong.

In *R v Chapman* [1969] 2 All ER 321, [1969] 2 QB 436 it was held that if the bag was not fully inflated in one breath that in itself constituted a failure to provide a specimen of breath for a breath test as required by the 1972 Act, with the result that the consequences of such failure prescribed by the Act would follow. A more practical view of the purpose of this legislation has since prevailed and it can now be taken as finally settled, despite some powerful dissent to the contrary on the way, that if a specimen of breath is provided which indicates a proportion of alcohol above the prescribed limit there has been no failure to provide a specimen of breath in sufficient quantity to enable the test to be carried out even though the bag has not been fully inflated and has been inflated with more than one breath. Failure to comply with the instructions for providing a specimen of breath does not of itself invalidate the test if the test result is positive: see *Director of Public Prosecutions v Carey* [1969] 3 All ER 1662, [1970] AC 1072, *R v Holah* [1973] 1 All ER 106, [1973] 1 WLR 127; *Walker v Lovell* [1975] 3 All ER 107, [1975] 1 WLR 1141 and *Attorney General's Reference (No 1 of 1978)* (1978) 67 Cr App R 387.

In this appeal we have to consider a situation where the test results were negative. At his first attempt this appellant fully inflated the bag but he did not do so in one breath as instructed. At his subsequent attempts he did not fully inflate the bag. None of his attempts produced a positive result but it was contended that, as he did fully inflate the bag the first time, he did not fail to provide a specimen of breath as required by the 1972 Act, although it is clear from the subsequent laboratory test that the specimen he provided was useless for the purpose of indicating the proportion of alcohol in his blood. It is said that he filled the bag by blowing into it and the fact that he took more than one breath to do so is a mere breach of the manufacturer's instructions and of no legal consequence. The test proved negative. It is claimed that he did not fail the test; he passed it.

So far as we have discovered there is no reported authority directly dealing with this particular point, although one would expect of this fruitful branch of litigation, where it seems that no arguable defence, however technical, is ever overlooked or abandoned, that it must have arisen before.

In our view some guidance as to the true meaning of a 'breath test' in the 1972 Act is provided in s 12(1). A 'breath test' is stated in that subsection to mean a test for the purpose of obtaining an indication of the proportion of alcohol in a person's blood. The test for this purpose must be carried out by means of an approved device on 'a specimen of breath' provided by that person. By s 12(3) that person has to provide a specimen of breath in sufficient quantity to enable the test to be carried out.

Has the stated purpose of all this procedure to be wholly ignored? We do not think so.

Section 12(3) refers to quantity and not quality; but, if the person provides the quantity he is asked for (one bag full) but, by ignoring the instructions he has been given, provides it in such a way that it is of a quality which does not and could not indicate the proportion of alcohol in his blood and is no reliable indication of whether the proportion of alcohol in his blood exceeds the prescribed limit, has the test contemplated by the 1972 Act been carried out? Some would think not, but judicial opinion has not all been one way.

There are powerful dicta on either side in the speeches in the House of Lords in *Director of Public Prosecutions v Carey* and *Walker v Lovell*. In *Director of Public Prosecutions v Carey* [1969] 3 All ER 1662 at 1670–1671, [1970] AC 1072 at 1086–1087 Viscount Dilhorne referred to *R v Chapman* and to a decision to the contrary effect in the High Court of Justiciary in Scotland (*Brennan v Farrell* 1969 JC 45) and continued:

> 'The question which of these two decisions is right does not arise for decision in this case, but it is to be observed that the only obligation imposed by the Act is to provide a sufficient quantity of breath to enable the test to be made ... not a sufficient quantity in a single breath. I do not myself find it easy to see how a breach of the manufacturer's instructions to inflate in a single breath can be regarded as a failure or refusal to take a test when the Act making it by s. 2(3) an offence without reasonable excuse to provide a quantity of breath for the test does not stipulate that it must be in a single breath.'

He referred to the question again in *Walker v Lovell* [1975] 3 All ER 107 at 120, 122, [1975] 1 WLR 1141 at 1156, 1158 where he said:

> 'In my opinion these statutory provisions make it clear that a sufficient quantity of breath to enable a test to be carried out means in relation to the alcotest a sufficient quantity to inflate the bag ... Parliament could have enacted that a failure by the motorist to comply with the maker's instructions rendered him liable to arrest and prosecution. It did not do so. All that it provided was that failure to provide a specimen of breath in sufficient quantity to enable a test to be carried out rendered him liable to arrest and if without reasonable excuse, to prosecution. It may well be that in not stipulating that a specimen must be provided in a single breath, Parliament left a lacuna in the Act. If so, it is not one which in my view it would be proper for this House in its judicial capacity to attempt to fill.'

A different approach to the problem was made by Lord Pearson, Lord Diplock and Lord Kilbrandon. In *Director of Public Prosecutions v Carey* [1969] 3 All ER 1662 at 1674, [1970] AC 1072 at 1090 Lord Pearson said:

> 'My opinion is that there is not in this Act any absolute requirement, express or implied, that a test in order to be a "breath test" within the meaning of the Act must be carried out in perfect compliance with the maker's instructions. There is an express requirement that the test must be carried out for the purpose of obtaining an indication of the proportion of alcohol in the blood, and it follows that the police officer must be trying to use the device correctly in order to obtain a true indication. I think also that there probably is an implied requirement (not adding much for practical purposes to the express requirement) that the test must be carried out with such accuracy as is reasonably attainable in the circumstances.'

In the same case Lord Diplock said ([1969] 3 All ER 1662 at 1678, [1970] AC 1072 at 1096):

> 'The constable conducting the test must do his honest best to see that this instruction is complied with, but it should be treated in a common-sense way. In the circumstances in which the first breath test at any rate is carried out little purpose would generally be served by telling the suspect that he must take between 10 and 20 seconds to fill the bag, nor can the constable be expected to time him with a stop watch. The sensible thing to do, and it appears to be the common practice,

is to tell the suspect to fill the bag with a single deep breath. It is, in my view, sufficient if in the constable's bona fide judgment the way in which the bag is in fact inflated by the suspect does not depart so widely from the instructions that it is likely to show a significantly greater proportion of alcohol in the suspect's blood than is actually there. There was no evidence in the present case as to what would be the effect on the indication given by the device of a departure from this instruction either by taking more than one breath or by taking less than ten seconds or more than 20 seconds to fill the bag. Any departure, however, which to the constable's knowledge would result in the device giving a lower reading of the blood-alcohol content than the true reading can be ignored by him if the result of the test is positive, since the test would still provide a sufficient indication that the proportion of alcohol exceeds the prescribed limit. If, on the other hand, the constable is not possessed of this knowledge and the departure is one which he thinks may be sufficient to make the reading given by the device lower than the true reading, he may require the suspect to repeat the test in accordance with the instructions and if the suspect fails to do so the constable may arrest him under s. 2(5). If the suspect's failure is without reasonable excuse, e.g., physical disability not due to alcohol, he also commits an offence under s. 2(3).'

Lord Diplock in that passage was referring to sections in the Road Safety Act 1967 which contained provisions corresponding with those in the 1972 Act.

In *Walker v Lovell* [1975] 3 All ER 107 at 113–114, [1975] 1 WLR 1141 at 1147–1148 Lord Diplock referred to the approved form of breathalyser, Alcotest® 80, and continued:

'It makes use of the phenomenon that alcohol present in a person's bloodstream passes into the air in his lungs where, almost but not quite immediately, it reaches a state of equilibrium at which the proportion of vapourised alcohol in that air reflects with a reasonable degree of accuracy the proportion of alcohol in his blood. So a "specimen of breath" to be provided for a breath test as defined in s 12(1) must mean air that has been drawn into and exhaled from the lungs of the person undergoing the test . . . The reason why the constable should communicate this instruction to the person on whom the breath test is to be carried out, is because the constable does not know in advance whether the proportion of alcohol in that person's blood does not exceed or slightly exceeds or greatly exceeds the prescribed limit. If the excess is only slight, failure to provide enough breath to inflate the bag may defeat the purpose of a "breath test" by making it impossible to obtain by means of the Alcotest R80 an indication that the proportion of alcohol in his blood exceeds the prescribed limit, though such is indeed the fact. The same consequence may follow from using more than a single breath to inflate the bag; for to take a fresh breath may result in the specimen of breath provided containing a larger proportion of air that has not been drawn into and exhaled from the lungs than would be the case if it were provided in a single breath. Mere failure by a person on whom a breath test has been carried out to have followed the instructions of the constable is not an offence under the Act; nor does it, in my view, constitute a failure to provide a specimen of breath for a breath test within the meaning of s 8(5), unless the result of his departing from those instructions has been to defeat the purpose of the breath test by making it impossible to obtain by means of the Alcotest R80 a reliable indication whether or not the proportion of alcohol in *his* blood exceeds the prescribed limit.'

Lord Kilbrandon in the same case said ([1975] 3 All ER 107 at 131, [1975] 1 WLR 1141 at 1167):

'If too little air is put into the bag, and the crystals do not change colour, the test has not been properly conducted, because the conclusion to be drawn from the non-change may be either that the proportion in the body is less than that forbidden, or that the amount of air exhaled has been inadequate to cause the change of colour to occur, although the forbidden proportion be present. The same is true, mutatis

mutandis, if the bag has been inflated in short puffs. In such circumstances a constable would be entitled to arrest the motorist for failing to take the test.'

We respectfully agree with the opinions of Lord Pearson, Lord Diplock and Lord Kilbrandon, which we believe correctly interpret what is meant by a 'breath test' in s 12(1) of the 1972 Act. To hold that the negative specimen of breath, provided in the way in which it was provided by the appellant in the present case, constituted 'a specimen of breath for a breath test' would, in our view, be to ignore the declared purpose which is part of the definition of a 'breath test' in s 12(1).

The inspector was right when he decided that the appellant had failed to provide a specimen of breath for the breath test. Accordingly he was entitled to require the specimen of blood for a laboratory test, and the evidence of the result of that test was admissible.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *R E T Birch* (for the Crown).

Sepala Munasinghe Esq Barrister.

Procedure Direction

HOUSE OF LORDS

House of Lords – Costs – Security for costs – Increase in amount of security.

House of Lords – Costs – Taxation – Bills of costs lodged for taxation to be drawn in accordance with revised scales.

(1) *Security for costs*

The House of Lords has ordered the doubling of all forms of security lodged by appellants in appeals to the House of Lords presented on or after 1st October 1981 as follows: (a) by payment into the House of Lords' Security Fund Account of the sum of four thousand pounds, such sum to be subject to the order of the House in regard to the costs of the appeal; or (b) by payment of the sum of two thousand pounds into the House of Lords' Security Fund Account, and by entering into a recognisance, in person or by substitute, to the amount of two thousand pounds; or (c) by procuring two sufficient sureties, to the satisfaction of the Clerk of the Parliaments, to enter into a joint and several bond to the amount of two thousand pounds, and by entering a recognisance, in person or by substitute, to the amount of two thousand pounds.

These increases were approved by the House of Lords' Offices Committee (Fourth Report, 21st July 1981) and subsequently by the House of Lords on 30th July 1981.

(2) *Forms of bills of costs*

The House of Lords has also ordered a revision of the Forms of Bill of Costs applicable to Judicial Taxations in the House of Lords.

From 1st October 1981 and until 31st March 1982 bills drawn on the revised and the 1977 scales will be accepted for taxation but thereafter all bills of costs lodged for taxation in the House of Lords should be drawn in accordance with the revised scales.

This revision was approved by the Appeal Committee and agreed to by the House of Lords on 23rd July 1981.

30th July 1981

PETER HENDERSON
Clerk of the Parliaments.

Marshall v Cottingham

CHANCERY DIVISION
SIR ROBERT MEGARRY V-C
11th, 12th DECEMBER 1980, 30th JANUARY 1981

Mortgage – Receiver – Appointment under debenture – Remuneration – Debenture not specifying rate of commission – Debenture extending statutory powers of receiver by giving power of sale and providing that receiver's remuneration 'and the costs of realisation' to be paid out of proceeds of sale – Whether receiver entitled to retain commission at rate of 5% out of gross proceeds of sale without application to court – Whether agents' fees and expenses, costs of conveyance and caretaker's wages pending sale deductible from commission as part of 'costs, charges, and expenses' incurred by receiver – Law of Property Act 1925, s 109(6).

A company which owned premises issued a debenture to a bank to secure money due from it to the bank. Clause 8 of the debenture, which was expressed to take effect by way of variation and extension of the provisions of ss 99 to 109 of the Law of Property Act 1925, gave the bank power, after demanding payment of money secured by the debenture, to appoint a receiver of the 'premises hereby charged', gave the receiver a power of sale and provided that all money received by him should be applied 'first in payment of his . . . remuneration and the costs of realisation'. The debenture did not specify the receiver's rate of commission. Subsequent to the issuing of the debenture the company executed a legal charge on the premises in favour of the plaintiff to secure money he had paid to the company. The bank, having demanded payment of money secured by the debenture, appointed a receiver of the premises under the debenture and later the receiver sold the premises for £125,000. In proceedings brought by the plaintiff seeking payment by the receiver of the balance of the net proceeds of the sale in his hands, the receiver applied by summons for determination of the questions (i) whether on the true construction of s 109(6)[a] of the 1925 Act he was entitled, in the absence of a specified rate of commission in the debenture, to retain a commission of 5% on the gross amount of the money received by him, for his remuneration and in satisfaction of all costs, charges and expenses incurred by him as receiver, without applying to the court, and (ii) whether the agents' fees and expenses on the sale, the conveyancing costs of the sale and the wages paid to a caretaker of the premises pending the sale were to be treated as part of the 'costs, charges, and expenses incurred by him as receiver', within s 109(6), and were therefore payable out of his commission.

Held – (1) On the true construction of s 109(6) of the 1925 Act a receiver appointed under an instrument which did not specify his rate of commission was entitled without applying to the court to retain commission at the rate of 5% on the gross amount of the money he received, as his remuneration and in satisfaction of all costs, charges and expenses incurred by him as receiver, and s 109(6) only required an application to the court where the receiver wished to obtain a rate of commission higher than 5% (see p 12 *e f*, post).

(2) Since the receiver had not been appointed solely under the 1925 Act but under a debenture which extended the provisions of that Act by appointing him a receiver of the premises charged, and not merely a receiver of the income, and by giving him a power of sale, and since the debenture expressly provided that money received by the receiver was, after payment of his remuneration, to be applied in payment of 'the costs of realisation' and that phrase included the agents' fees and expenses on the sale of the premises, the conveyancing costs and the caretaker's wages pending the sale, those items

a Section 109(6) is set out at p 10 *g*, post