(1) Bernard Pianka
(2) Terry Hylton – – – – – – – *Appellants*

v.

The Queen – – – – – – – – *Respondent*

and

The Director of Public Prosecutions – – – – *Appellant*

v.

(1) Bernard Pianka
(2) Terry Hylton – – – – – – – *Respondents*

(Consolidated Appeals)

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY 1977

Present at the Hearing:

LORD WILBERFORCE
LORD MORRIS OF BORTH-Y-GEST
LORD SIMON OF GLAISDALE
LORD FRASER OF TULLYBELTON
LORD RUSSELL OF KILLOWEN

[*Majority Judgment delivered by* LORD WILBERFORCE]

These are two appeals from the Court of Appeal of Jamaica relating to a single set of facts. The first appeal (No. 47 of 1975) relates to the conviction of the appellants, Bernard Pianka and Terry H. Hylton, by a Resident Magistrate on charges of possession and conveyance of ganja. The second relates to an order made by the Resident Magistrate (but set aside by the Court of Appeal) for forfeiture of the motor boat "Star Baby" in which the ganja was found. In relation to each appeal a number of questions of law were certified as arising for consideration. Their Lordships will refer to these at later stages in this judgment.

The bare facts are that on 8 August 1974 the "Star Baby", a small motor boat of United States registration, was seen anchored in Port Antonio harbour with the appellants on board. Soon after midnight on 9/10 August she was intercepted by a coast guard boat 3·8 miles from Rio Neuvo Bay, within the territorial waters of Jamaica which have a

width of 12 miles. The appellants, who are United States citizens, were on board. The boat was travelling north-east and had no navigation lights; she was carrying sixty bags weighing 3,277 lb., later, on examination, found to contain ganja. The appellant Hylton said, "We got caught". The appellants were charged with offences against the Dangerous Drugs Law—namely with having ganja in their possession (section 7 (*c*)) and using a conveyance, *viz.* a ship, for carrying ganja (section 22 (1) (*e*) as introduced by Act No. 10 of 1964 and amended by Act No. 16 of 1974). The Resident Magistrate for the Parish of St. Mary convicted the appellants on both charges.

On the first appeal: The main issue is whether the Resident Magistrate had jurisdiction to try the offences alleged. If she had, there would arise a second question, whether the appellants had a good defence by virtue of certain provisions in the Convention on the Territorial Sea and Contiguous Zone of 1958.

The questions certified by the Court of Appeal were

> "(1) Whether or not in virtue of section 4 (1) of the Territorial Sea Act, 1971, the Courts of Jamaica and specifically the Resident Magistrate's Courts have jurisdiction to try summary offences committed by a foreigner on a foreign ship
>
> (*a*) within the territorial sea;
>
> (*b*) passing through the territorial sea.
>
> (2) Whether or not in the instant case the exercise of any power or authority in pursuance of that jurisdiction was such as to constitute a breach of Article 19 of the 1958 Convention."

As will appear, the first of these questions is not wholly appropriate, but it raises the essential point as to the jurisdiction of the Resident Magistrate to try offences said to be committed by foreigners on a foreign ship in the territorial sea.

The argument against the existence of jurisdiction can be summarised as follows. Following the decision of the Court for Crown Cases Reserved in *R. v. Keyn* (1876–77) 2 Ex.D.63 that, under the law then existing in England, there was no jurisdiction to try offences committed by a foreigner on board a foreign ship in territorial waters, there was passed the (Imperial) Territorial Waters Jurisdiction Act 1878. This was made applicable to dependent territories, including Jamaica. The Act provided that offences committed on the open sea within the boundaries of territorial waters were within the jurisdiction of the Admiral and were punishable accordingly. However the offences there referred to were limited to such offences as would, if committed within the body of a county in England, be punishable on indictment.

This being the case, no jurisdiction to try any summary offences committed by foreigners on foreign ships within territorial waters was conferred by the Act on Courts whether in the United Kingdom or in Jamaica.

The Act of 1878 was replaced in Jamaica by the Territorial Sea Act of 1971 which extended the width of the territorial sea from three to twelve miles and which contained a similar provision regarding offences to that found in the Act of 1878, substituting as a reference point the law of Jamaica for that of England.

Section 4 (1) is as follows:

"An act—

(*a*) committed by a person, whether he is or is not a citizen of Jamaica, on or in the territorial sea; and

(*b*) being of such a description as would, if committed on land within a parish in Jamaica, be punishable on indictment according to the law of Jamaica for the time being in force,

is an offence punishable on indictment in like manner, notwithstanding that it may have been committed on board or by means of a vessel the nationality of which is not Jamaican; and the person who is reasonably suspected of having committed such offence may, subject to the provisions of subsection (5), be arrested, and may be tried and otherwise dealt with in reference to any charge against him in connection with that offence, accordingly."

The relevant offences under the Dangerous Drugs Law are not, under the law of Jamaica, punishable on indictment, but are "special statutory offences" triable by Resident Magistrates.

The enactment relied upon as founding jurisdiction is the Resident Magistrates Law. In 1887 this Law contained a provision:

"S. 246. For the purposes of the Criminal Law, the Jurisdiction of every Resident Magistrate's Court shall extend to the Parish for which the Court is appointed, and one mile beyond the boundary line of the said Parish."

In 1891, by Law No. 16, section 7, there was added to section 246 a provision which, in the 1904 consolidation, read as follows:

"Provided always that the boundaries of every parish shall be deemed to extend to such part of the sea as lies within three miles of the coast line of such parish . . ."

This proviso was combined with the original section in section 266 of the consolidating Resident Magistrates Law, 1904. The proviso was amended by the Territorial Sea Act of 1971 (section 8 and Second Schedule) to read as follows:

"Provided that the boundaries of every parish shall be deemed to extend to such part, if any, of the sea as is constituted by law internal waters of which the shore or any part thereof is at the coast of that parish, and to the part of the sea within such distance beyond the inner limit of the territorial waters adjacent to that parish (including the portion of it taken to comprise the internal waters aforesaid, if any) as comprises the breadth of the territorial sea, without prejudice to the conferment of any concurrent jurisdiction by virtue of any other parish's boundaries being deemed to extend in manner aforesaid, but nothing in the foregoing provisions of this section shall be taken to confer jurisdiction extending beyond the outer limits of the territorial sea, whether as extending one mile beyond any such boundary as aforesaid or otherwise; and the decision of the Magistrate as to any distance for the purpose of deciding any question as to jurisdiction under this section shall be final."

On these provisions the essential question is whether the amendment of 1891, and the provisions in the current section 267 of the Judicature (Resident Magistrates) Act, were merely concerned with establishing the venue for trial of such offences as, apart from their enactment, would be cognisable by Resident Magistrates, or whether they extended the jurisdiction of Resident Magistrates so that they could try any offences against the laws of Jamaica committed within their extended parishes as delimited by the section including the proviso.

In order to answer this question it is necessary to consider the position as it was before the passing of the Territorial Waters Jurisdiction Act 1878, and the effect of that Act.

Their Lordships do not consider that, for the present purposes, extensive discussion of *R. v. Keyn* is necessary. The offence, in that case, the indictable offence of manslaughter, was committed within territorial waters opposite the English coast of the County of Kent by a foreigner on a foreign ship: and the question was as to the jurisdiction of the Central Criminal Court to try him. The Central Criminal Court possessed the jurisdiction formerly belonging to the Admiral, so that the only question for the Court was as to the extent of the Admiral's jurisdiction. It was as to this that the Court was divided in opinion, the majority holding that the Admiral had no jurisdiction over the offence, the minority holding that he had. There were a number of differing reasons given in support of each of these opinions which have proved difficult to analyse clearly. But three points, essential to the present case, are clear. First, that if the offence had been committed within the body of the county, the Court of Oyer and Terminer would have had jurisdiction over it (per Cockburn C.J p. 168) and conversely that, if the offence were not so committed, the Courts of Common Law would have no jurisdiction over it

> " because the commissions of the judges applied in terms only to counties, and the juries were summoned only to try cases within counties " (per Brett J.A. p. 145, Cockburn C.J. p. 167.)

Secondly that the boundary of the county extended to low water mark (including ports and harbours and waters *inter fauces terrae*), but not beyond (per Brett J.A. *ibid*, Cockburn C.J. p. 162). Thirdly, that by 1876 international law conceded to coastal States extensive powers over territorial waters. The learned judges differed as to the nature of such powers, some (the minority) holding that the territorial belt is part of the " territory " of England (there is no need here to discuss semantic difficulties as to the meaning of " territory " and " realm "), others differing on this point. But there was general concurrence that in any event the Parliament of the United Kingdom had legislative power as regards the territorial belt: it was because such power had not been exercised so as to bring offences committed in it within the jurisdiction of English Criminal Courts that, in spite of any rights the State might have under international law, the majority denied the jurisdiction claimed.

Since the question of legislative power is critical, their Lordships will refer to some cardinal passages.

The clearest is from the (majority) judgment of Lush J.:

> " I wish, however, to guard myself from being supposed to adopt any words or expressions which may seem to imply a doubt as to the competency of Parliament to legislate as it may think fit for these waters. I think that usage and the common consent of nations, which constitute international law, have appropriated these waters to the adjacent State to deal with them as the State may deem expedient for its own interests. They are, therefore, in the language of diplomacy and of international law, termed by a convenient metaphor the territorial waters of Great Britain, and the same or equivalent phrases are used in some of our statutes denoting that this belt of sea is under the exclusive dominion of the State. But the dominion is the dominion of Parliament, not the dominion of the common law. That extends no further than the limits of the realm. In the reign of Richard II the realm consisted of the land within the body of the counties. All beyond low-water mark was part of the high seas. At

that period the three-mile radius had not been thought of. International law, which, upon this subject at least, has grown up since that period, cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by Act of Parliament. As no such Act has been passed, it follows that what was out of the realm then is out of the realm now, and what was part of the high seas then is part of the high seas now; and upon the high seas the Admiralty jurisdiction was confined to British ships. Therefore, although, as between nation and nation, these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm, and any exercise of criminal jurisdiction over a foreign ship in these waters must in my judgment be authorised by an Act of Parliament." (pp. 238–9.)

In the judgment of Cockburn C.J. there are several passages to the same effect—see pp. 193, 198, 207–8. In the latter pages the learned Chief Justice says:

"It is obviously one thing to say that the legislature of a nation may, from the common assent of other nations, have acquired the full right to legislate over a part of that which was before high sea, and as such common to all the world; another and a very different thing to say that the law of the local state becomes thereby at once, without anything more, applicable to foreigners within such part, or that, independently of legislation, the Courts of the local state can proprio vigore so apply it. The one position does not follow from the other; and it is essential to keep the two things, the power of Parliament to legislate, and the authority of our Courts, without such legislation, to apply the criminal law where it could not have been applied before, altogether distinct, which, it is evident, is not always done. It is unnecessary to the defence, and equally so to the decision of the case, to determine whether Parliament has the right to treat the three-mile zone as part of the realm consistently with international law. That is a matter on which it is for Parliament itself to decide. It is enough for us that it has, so far as to be binding upon us, the power to do so. The question is whether, acting judicially, we can treat the power of Parliament to legislate as making up for the absence of actual legislation. I am clearly of opinion that we cannot, and that it is only in the instances in which foreigners on the seas have been made specifically liable to our law by statutory enactment that that law can be applied to them."

The only doubts as to the power of Parliament, consistently with the principles of international law, to apply the law of England, in particular the criminal law, to the territorial belt were those expressed by Sir R. Phillimore and Kelly C.B., and as regards the former, these mainly related to the right of innocent passage (cf. Sir R. Phillimore p. 82)—a matter which their Lordships will deal with later in this judgment.

It was upon the basis of these positions, taken by the judges in *R. v. Keyn*, that the Territorial Waters Jurisdiction Act 1878 was passed. As indicative of the opinion of the Executive on the position in international law, reference can be made to what was said by the Attorney General of the time in the House of Commons. There were, he said, two propositions established:

1. that a certain belt or zone of water round the coast was territorial water and formed part of Her Majesty's dominions;

2. that that belt or zone of water, being part of territory of Her Majesty, Parliament had a right by legislation to give the Courts of the country jurisdiction over it. (Hansard 18 April 1877 col. 1398–9.)

This was, in effect, combining the majority acceptance of the need for Parliamentary legislation, and of the legitimacy of such legislation, with the minority position as to the territorial waters being part of Her Majesty's dominions.

The Act, as passed, was in conformity with this statement. It is unnecessary to cite it at length. In its recital it proceeds upon the dual basis of existing jurisdiction which " extends and has always extended " over the territorial belt and the expediency that all [sic] offences committed therein should be dealt with according to law. It then proceeds to bring indictable offences, and only indictable offences, though committed by foreigners on board or by means of a foreign ship, within the jurisdiction of the Admiral. The question is now therefore, in the first instance, what further power, as regards other than indictable offences, committed within the territorial belt by foreigners on foreign ships, existed, and how could such power be exercised.

As regards power, there can be no doubt in principle. If there was Parliamentary power to legislate as regards indictable offences, there must be power to legislate as regards other offences. In fact the power to legislate as regards territorial waters is perfectly general and unlimited. A few examples can be quoted to show that whatever doubts may have existed in 1876, as to the legislative competence of Parliament, these have long since disappeared.

In *Carr v. Fracis Times & Co.* [1902] A.C. 176 a question arose as to the legitimacy of a seizure, conformably with a proclamation of the Sultan, and within the territorial waters of Muscat. Lord Macnaghten said:

> " It [the seizure] was committed in the territorial waters of Muscat, which are, in my opinion, for this purpose, as much a part of the Sultan's dominions as the land over which he exercises absolute and unquestioned sway " (pp. 182–3)

and it may be noted that the Earl of Halsbury L.C. refers to *R. v. Keyn*, and to the judgment of Cockburn C.J., in terms entirely consistent with the observations that their Lordships have already made.

In Canada, the Supreme Court has stated as a well recognised principle that territorial waters within three miles of the shore are as clearly a part of the State as land.

> " All exceptions . . . to the full and complete power of a nation within its own territory must be traced to the consent of the nation itself ". *S.S. " May " v. The King* (1931) (3) D.L.R. 15, 20–1.

In the Supreme Court of Newfoundland it has been said in 1875:

> " I hold that the territorial jurisdiction of the sovereign extends to three miles outside of a line drawn from headland to headland . . . that the local government being the Queen's government . . . her authority and jurisdiction is, in this respect, the same with the Imperial government; that this authority and jurisdiction existed in the local government prior to the grant of representative institutions to the colony; that such grant, while it enlarged the powers, neither added to nor lessened the territorial jurisdiction of the local government; and that subject to the royal instructions and the Queen's power of dissent, the Acts of the local legislature have effect and operation to the full extent of that territorial jurisdiction." (*Anglo-American Telegraph Co. v. Direct United States Cable Co.*—6 Nfld. L.R. 28, 33 per Sir H. W. Hoyles C.J.; decision affirmed (1877) 2 App. Cas. 394.

In the United States, the Supreme Court has said in a context involving the application of penal law that in the territory " subject to its laws there are included land, ports, harbours, bays and the three mile belt." It added that foreign merchant ships entering territorial waters submit themselves to the jurisdiction of the coastal State: the jurisdiction attaches in virtue of presence, just as with other objects within these limits. The Sovereign may forgo the exercise of jurisdiction but that is a matter of its discretion. *Cunard SS. v. Mellon* 262 U.S. 100, 122, 124.

Quotations need not be multiplied: the legal position is undoubted and has received endorsement in the 1958 Convention on the Territorial Sea and Contiguous Zone.

Then how may the undoubted jurisdiction of the coastal State be asserted? No doubt legislation might take many forms. There might be enacted provisions similar to those in the (Imperial) Territorial Waters Jurisdiction Act 1878, or in the (Jamaican) Territorial Sea Act of 1971, explicitly conferring power upon specified courts to try other offences than indictable offences, committed by foreigners in foreign ships. The question is whether this can be done, and has in this case been done, by extending the boundaries of parishes.

In *Manchester v. Massachusetts* (1890) 139 U.S. 240 (*i.e.* just before the amending Jamaica Act of 1891) the Supreme Court of the United States considered just this question. A question having previously arisen in Massachusetts whether an act of kidnapping taking place within three miles of the coast was triable by the County of Barnstable, the State of Massachusetts enacted legislation " that the boundaries of counties bordering on the sea extend to the boundary of the State " (see (1926) 11 A.L.R. 629). This enactment was upheld by the Supreme Court. That Court held that the customary English law as to the boundaries of counties (*viz.* that they terminated at low water mark) did not necessarily apply elsewhere; a State could fix its own county boundaries;

> " Within what are generally recognised as the territorial limits of States by the law of nations, a State can define its boundaries on the sea and the boundaries of its counties " (pp. 263–4).

The implication is clear that in doing so, *viz.* in extending the boundaries to the limit of the territorial sea, the State made its criminal law extend over the territorial sea. The similarity to the present case is obvious.

The legislation in the present case has now to be examined. It consists, originally, of the addition made in 1891 to section 246 of the Resident Magistrates Law of 1887. The relevant provisions have been quoted.

The initial words of section 246 are to be noted. They refer to " the criminal law ". The criminal law of Jamaica, as of every other country, dependent or independent, extends, in the absence of limiting provision, to the whole of the territory of the country concerned, and to all persons within that territory, unless specially exempted. What the section sets out to do is to define the jurisdiction of the Courts to deal with offences against that law.

That jurisdiction may extend only to a part of the territory—and indeed the aggregate jurisdictions of all Courts may extend to less than the whole of the territory: if this becomes apparent to the legislature, it may be expected to eliminate the discrepancy. An illustration of this type of problem is *R. v. Kent Justices* [1967] 1 All E.R. 560 where a possible gap was filled by judicial decision.

The addition of the proviso appears to have this effect. It being clear in 1891—if it was not clear before—(cf. *R. and Another v. Rolet and Others* (1866) 1 L.R.P.C. 198, itself a case of a foreign ship) that the territory of the colony extended to include a three mile belt of territorial waters, the purpose of the proviso can in their Lordships' view only have been to enable Courts to deal with offences of any nature committed in that territory—provided always that the relevant provision of criminal law had sufficient territorial extension. There seems no reason for giving to this proviso any lesser effect.

Various arguments were submitted against this conclusion. It was said that the extension of jurisdiction could not have been intended to apply to foreigners on foreign ships. If this argument rests upon some supposed immunity of foreign merchant ships, it is clear that none such exists or ever has existed in the law of England or of Jamaica. If in any particular case the jurisdiction of any Court has been held not to extend to them, that is by virtue of their locality, in the same way as jurisdiction may not exist over persons or corporations, and not by virtue of their character.

If it is an argument on construction that, *in dubio*, a provision should be interpreted as not applying to foreign ships, there is, in their Lordships' opinion, no authority to support such a proposition any more than there is such a rule applying to foreigners. It is true that Sir R. Phillimore said in *R. v. Keyn*, of a section in the Merchant Shipping Act (18 & 19 Vict. c. 91, s. 21), that as a foreign ship is not mentioned in the section, it was therefore applicable only to British ships, because

> " it is an established principle as to the construction of a statute that it should be construed, if the words will permit, so as to be in accordance with the principles of international law." (*l.c.* p. 85).

Their Lordships agree with the principle of construction, but are of opinion that there is no principle of international law, other than the right of innocent passage, which impinges on this situation. On the contrary, in their Lordships' judgment it is clearly accepted, as the authorities already referred to demonstrate, that, subject as stated, the legislative power of the coastal State over its territorial waters is as absolute as its authority over its land territory, and that foreign merchant ships, as foreign individuals, entering that territory, of land or sea, submit themselves to its laws unless exempted therefrom. In any event their Lordships do not consider that the wording of the section admits any restriction of its scope by the principle invoked.

Secondly it was said that, if the Crown's contentions were correct, the Courts of Jamaica would have had since 1891 wider powers as regards offences than Courts in England. Their Lordships do not necessarily accept that this is so since the classification of offences may well be different in the two countries. But in any event, if the principle is, as their Lordships believe, that each country may determine for itself the reach of its laws, there is nothing unacceptable in such difference as may exist. Their Lordships would add that the amendment of 1891 was not objected to by Her Majesty at the time: was not invalid under the Colonial Laws Validity Act 1865: and in any event the substance of it became unquestionable upon independence and upon the enactment of the Territorial Sea Act of 1971.

Thirdly, and more substantially, it was said that the form and drafting of the Territorial Sea Act of 1971 showed that the intentions of the 1891 amendment, and of its legislative successors, cannot have been as argued

by the Crown. That Act in section 4 (1) repeats, with adaptations, the Territorial Waters Jurisdiction Act 1878 and provides for the punishment of indictable offences only. If, it is argued, the position was that all offences, indictable or otherwise, should be triable by the Courts of Jamaica, what was the object of preserving this special and limited provision? Instead, what was done was to amend the Resident Magistrates Law, section 267, by redefining the boundaries of parishes—a needless complication if all offences were triable.

Their Lordships are not unimpressed with this difficulty. But they consider that the Crown meets it in two ways. First, if the position which existed since 1891 was that Resident Magistrates had power to try (*inter alia*) special statutory offences occurring in their parishes, including the attached portion of territorial waters (a matter to be determined on the construction of section 7 of the 1891 Law), the fact that a particular method of legislation was adopted in 1971 cannot alter that position, unless an intention appears to do so from that legislation. But on the contrary the Act of 1971 (section 4 (4) (*b*)) preserves existing criminal jurisdiction—subject only to modification of the width of the belt from three to twelve miles (section 3 (2), (3) and (5)). Secondly, the reason why this method of legislation was adopted appears to lie in the court structure of Jamaica. This is governed by two separate enactments—the Judicature (Supreme Court) Law Cap. 180, and the Resident Magistrates Law. Section 30 of the former Law, before 1971, dealt with the jurisdiction of the Supreme Court, through circuits to be held in the parishes. It contained its own jurisdiction section and its own definition of the boundaries of parishes, including in them so much of the sea as lay within three miles of the shore of the parish. The Resident Magistrates Law, as has been explained, dealt with the jurisdiction of Resident Magistrates in parishes, defined in a similar, but not identical, manner. When the Act of 1971 was passed—to give effect, *inter alia*, to the extension of the territorial belt to a width of twelve miles, and to make the 1958 Convention applicable—the method chosen was to preserve the two enactments in parallel, and to amend the "boundary" proviso separately in relation to each jurisdiction (see Second Schedule). This was done in similar, but not identical, language. That continuity with existing legislation, rather than a reconstruction of it, was an objective is confirmed by section 4 (4) (*b*) of the Act. Their Lordships therefore do not find in the Act of 1971 any indication limiting the jurisdiction of Resident Magistrates over offences in territorial waters.

Finally it is necessary to consider the criminal enactment immediately in issue—the Dangerous Drugs Act. Is there any reason for giving to this law a limited application, it being presupposed that *prima facie* legislation applies territorially, and to all persons whether foreigners or not in the territory? Their Lordships consider that there is no such reason. As regards "possession" the law is in general terms. "Every person" presumably means every person—including foreigners. Possession must mean possession anywhere; it cannot exclude possession by a foreigner one yard below low water mark. Why should it exclude possession if the foreigner is on board a boat? The position is even clearer as regards using a conveyance. By the amendment of 1974 "conveyance" is defined to include (if it did not previously include) "any ship". To suppose that this is limited to ships in internal waters and does not include ships in territorial waters is to impute a high degree of irrationality to the legislature. There is no more reason to limit it to Jamaican ships than there is to limit the rest of the section to Jamaican vehicles or aircraft, or to Jamaican citizens. Neither the language, nor any principle of international law, calls for any such limitation.

Their Lordships therefore consider that the Resident Magistrate had jurisdiction to try these alleged offences.

There remains a possible defence based upon the Convention on the Territorial Sea and Contiguous Zone of 1958, to which Jamaica is a party. By section 4 (5) of the Act of 1971 it appears that jurisdiction may not be exercised in such a way as to constitute a breach of Article 19 of the Convention. This Article appears in Section III of Part I of the Convention which deals with the right of innocent passage, a right which has long been recognised as limiting the jurisdiction of the coastal State over foreign merchant ships, and which was codified by the Convention of 1958. The relevant portions of Article 19 are as follows:

" *Article 19*

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed on board the ship during its passage, save only in the following cases:

(*a*) If the consequences of the crime extend to the coastal State; or

(*b*) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or

(*c*) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or

(*d*) If it is necessary for the suppression of illicit traffic in narcotic drugs.

2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters."

Though paragraph 1 is drafted in a hortatory rather than in a prohibitory form, their Lordships consider that through the reference to it in section 4 (5) of the Act of 1971 it becomes necessary under the law of Jamaica for the coastal State to comply with its provisions. Whether or not the provisions of paragraphs (*a*) and (*b*) of Article 19 (1) apply to this case depends to a large extent upon the detailed facts as to the nature of the " passage " and the nature of the crime. These were carefully examined by the Court of Appeal in their judgment, and the conclusion was reached that each of these paragraphs applied to the case. Their Lordships are of opinion that these provisions should receive a liberal construction and they agree with the Court of Appeal's appreciation of the facts. They are also of opinion that paragraph (*d*) applies by virtue of the 1961 Convention on Narcotics to which Jamaica became a party in 1964. Cannabis (to which ganja is equated by the Dangerous Drugs Act, section 2) is one of the drugs to which (by Schedule IV) the Convention applies. The defence under section 4 (5) of the Act of 1971 therefore fails.

The questions submitted on this appeal are:

(1) Whether or not in virtue of section 4 (1) of the Territorial Sea Act, 1971, the Courts of Jamaica and specifically the Resident Magistrate's Courts have jurisdiction to try summary offences committed by a foreigner on a foreign ship

(*a*) within the territorial sea;

(*b*) passing through the territorial sea.

(2) Whether or not in the instant case the exercise of any power or authority in pursuance of that jurisdiction was such as to constitute a breach of Article 19 of the 1958 Convention.

Their Lordships answer these as follows:

(1) That the Courts of Jamaica and specifically the Resident Magistrates' Courts have jurisdiction to try summary and special statutory offences committed by a foreigner on a foreign ship within the territorial sea.

(2) That in the instant case the exercise of any power or authority in pursuance of that jurisdiction was not such as to constitute a breach of Article 19 of the 1958 Convention;

and they will humbly advise Her Majesty to dismiss the first appeal accordingly.

The second appeal (No. 48 of 1975) is by the Director of Public Prosecutions and relates to a decision of the Court of Appeal reversing the order of the Resident Magistrate forfeiting the motor yacht "Star Baby". The provision under which the forfeiture was ordered is section 23A (now section 24) of the Dangerous Drugs Act (introduced by section 4 of the Dangerous Drugs (Amendment) Act 1974). The relevant portion is as follows:

"(2) On the conviction of any person for an offence against this Law, the Court shall, upon the application of the prosecution, order the forfeiture of any conveyance used in the commission of the offence, and seized pursuant to this section, if the Court is satisfied that:

(*a*) such person owns the conveyance, or the owner thereof permitted it to be so used; or

(*b*) the circumstances are otherwise such that it is just so to order;

(3) If, upon the application of any person prejudiced by an order made by the Court under subsection (2), the Court is satisfied that it is just to revoke such order, the Court may, upon such terms and conditions (if any) as it deems meet, revoke that order."

The course taken by the Resident Magistrate, of which complaint was made, was as follows. On the conviction of both defendants on 17 October 1974 and after sentence, the prosecution applied for forfeiture of the boat. The Resident Magistrate on the application of the defendants adjourned this application to 5 December 1974. On the adjourned hearing on that date there was an appearance on behalf of the owner of the boat, one Moseley, who gave evidence that he was its owner. He said that about two weeks after he had acquired it, he hired it to Pianka and Hylton whom he had known since November 1973. There was put in evidence (as Exhibit 5) a six months' charter agreement commencing 15 April 1974. After Pianka and Hylton took possession of the boat they wished to put radar on it; Moseley agreed and gave them one and a half months' extension on the charter. He denied knowledge that the boat was to be used for the purpose for which it was used or that it was to be used in Jamaica. After hearing this evidence, the Resident Magistrate ordered forfeiture of the boat without stating reasons. On appeal to the Court of Appeal, three affidavits were filed, one by the attorney-at-law who had represented Moseley, two by other attorneys present in court at the hearing of the forfeiture proceedings, to the effect that the Resident Magistrate stated that she was ordering forefeiture because the charter (Exhibit 5) proved that the owner, Moseley, had given permission to both accused to use the said yacht for the purpose for which they in fact used it.

The Court of Appeal quashed the order for forfeiture on the ground that the evidence leading to forfeiture must be adduced in the course of the antecedent trial and not in a subsequent hearing. New evidence, they held, cannot be admitted.

Their Lordships cannot, with respect, agree with this. The section requires the order for forfeiture to be made on conviction " if the Court is satisfied that [the convicted person] owns the conveyance, or the owner thereof permitted it to be so used." In a case (such as the present) where the convicted persons did not own the boat, it might be impossible for the Court to be satisfied that the owner had permitted the use, unless evidence to that effect were called. In order to enable itself to be so satisfied, the Court must enable evidence to be called: such evidence might and normally would not be called during the trial at which the owner might not be present. The question of the permission or otherwise would not be material to any issue at the trial and would only become material " on conviction ". It is true that subsection (3) of section 23A permits an application by the owner to the Court to revoke the order, but this does not meet the point that in order to make the order at all the magistrate must be satisfied as to the owner's permission. Relief under subsection (3) is discretionary only. In the present case, the adjournment was requested by the defendants themselves and was, in their Lordships' opinion, properly granted by the Resident Magistrate under her normal powers. Neither they, nor the owner, ought later to be able to complain that she had exceeded her powers.

In their Lordships' opinion, therefore, the decision of the Court of Appeal cannot stand. It does not however follow that the order for forfeiture should remain effective. The respondents are still entitled to take the point that there was no evidence on which the Resident Magistrate could make the order. The three affidavits have not been considered by the Court of Appeal, either as regards their status or as regards their content: if the fact is and can be proved, that the only material which the magistrate took into account was the charter (Exhibit 5), that might be thought to be insufficient. If, on the other hand, she took into account other evidence, of a circumstantial nature, particularly the oral evidence of the owner, the question would have to be considered whether there was anything in that evidence upon which she was entitled to be satisfied of the owner's permission as required by section 23A. These matters have not been examined by the Court of Appeal and it is not for their Lordships to examine them. This appeal must therefore be remitted to the Court of Appeal in order to determine this appeal upon the basis that the procedure followed by the Resident Magistrate was correct and in accordance with the statute. Their Lordships will humbly advise Her Majesty accordingly.

[*Dissenting Judgment by* LORD SIMON OF GLAISDALE *and* LORD RUSSELL OF KILLOWEN.]

We venture to express our dissent on the first appeal (by the accused against their conviction): first, because that appeal involves the liberty of the individual (however unmeritorious he might appear to be), being concerned with the criminal jurisdiction of a court which has imposed a sentence of imprisonment; and, secondly, because the appeal raises one of the most difficult problems of statutory construction—namely, where it seems certain that a legislature did not mean to lay down a statutory prescription, but may nevertheless have done so inadvertently by the words which it has used. The question is whether the Jamaican legislature, in amending in 1891 the Resident Magistrates Law of 1887, conferred on Resident Magistrates' Courts in Jamaica jurisdiction over

summary offences against Jamaican law committed by a foreigner in a foreign ship in passage through that part of the high seas as lay within Jamaican territorial waters. The construction of the (Jamaican) Territorial Sea Act 1971 (which further amended the Resident Magistrates Law) is consequent on the answer to this anterior question.

In *R. v. Keyn* (1876–77) 2 Ex.D. 63 it was held that at common law no municipal court had jurisdiction over *any* offence against English law committed by a foreigner in a foreign ship in passage on the high seas, notwithstanding that, at the relevant time, the ship was on a part of the high seas within three miles of low water mark of the English coast. It matters not, in our view, whether the decision is regarded as declaratory of a rule of English common law or of a rule of international law as interpreted by English common law; though we are, for the reasons given by the majority of their Lordships, inclined to categorise it as the former. At any rate, it was recognised, in the passages from the judgments which are cited or referred to by the majority of their Lordships, that it was within the competence of the legislature to modify the common law rule as regards offences committed within British territorial waters, and that in so acting the legislature would not be trespassing on any rule of international law.

The law as declared in *R. v. Keyn* became a rule of law wherever the English common law was the law of the land, including Jamaica. In consequence there was no court in Jamaica with jurisdiction over *any* offence committed by a foreigner in a foreign ship in passage on the high seas within Jamaican territorial waters.

The common law declared in *R. v. Keyn* was modified by the Territorial Waters Jurisdiction Act 1878. Section 2 reads:

> "An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral [whose jurisdiction in England had been transferred to the Central Criminal Court], although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried and punished accordingly."

Section 7 contains definitions. The two which are relevant are as follows:

> "'The territorial waters of Her Majesty's dominions', in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions:
>
> 'Offence' as used in this Act means an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force:".

There are five things to be noticed about these provisions: (1) the rule of common law as laid down in *R. v. Keyn* was qualified; (2) the rule was not, as it could have been, completely abrogated—the qualification only extended to *indictable* offences; (3) the qualification of the rule of law, and its limitation, extended to British dominions overseas

(of which Jamaica was then one); (4) the common law rule was modified in those clear and explicit terms which a court of construction will look for when the qualification of a rule of law is in question; (5) such clear and explicit terms constituted a plain precedent which could have been, but was not on any showing, followed in the 1891 amendment of the Resident Magistrates Law, but was followed in the (Jamaican) Territorial Sea Act 1971.

The effect in Jamaica of the Territorial Waters Jurisdiction Act 1878 was to extend the jurisdiction of those courts which had cognisance of indictable offences to embrace such indictable offences (and only such *indictable* offences) when committed by a foreigner in a foreign ship in passage on that part of the high seas which lay within Jamaican territorial waters. No Jamaican court, any more than any English court, could try summary offences committed by foreigners in foreign ships in passage on the high seas within territorial waters. When the Jamaican courts with jurisdiction to try indictable offences were brought together in one Supreme Court by the (Jamaican) Judicature (Supreme Court) Law 1880 their extended territorial jurisdiction over territorial waters was made explicit in section 30:

> "The jurisdiction of the Circuit Court appointed to be held in any parish shall extend over the whole of such parish, and over so much of any adjoining parish as lies within one mile of the boundary of such first-mentioned parish, and over so much of the sea as lies within three miles of the shore of such parish . . ."

Although the Supreme Court had a limited summary jurisdiction over its own officers (section 20), it has not been argued that section 30 declared (or, more correctly, confirmed) anything other than jurisdiction to try indictable offences committed by foreigners in foreign ships in passage on the high seas within Jamaican territorial waters. This was because *R. v. Keyn* was part of the law of Jamaica except insofar as it had been qualified by the Territorial Waters Jurisdiction Act 1878 (*i.e.*, only as regards indictable offences).

For the proper construction of the subsequent Jamaican legislation it must first be determined why the British Parliament in 1878 did not entirely abrogate the rule in *R. v. Keyn*, but modified it only as regards *indictable* offences. Of this there can be no doubt. However desirable it might be that a British court should have jurisdiction over foreigners committing *serious* offences against British law in foreign ships in passage on that part of the high seas which constitutes British territorial waters, it was obviously considered undesirable that British courts should assume jurisdiction to try in such circumstances every petty act which infringed any part of the vast code of summary offences under British law. Hence, too, presumably the requirement (section 3) that prosecutions under the 1878 Act should be sanctioned by the Secretary of State (or, in overseas dominions, the Governor).

This limitation to indictable offences must have been a solemn act of legislative policy; and we venture again to emphasise that this limitation on the modification of the common law as declared in *R. v. Keyn* extended also to Jamaica.

In 1887 a law was enacted in Jamaica conferring (*inter alia*) criminal jurisdiction on Resident Magistrates' Courts. Section 246 (now part of section 267) read:

> "For the purposes of the Criminal Law, the Jurisdiction of every Resident Magistrate's Court shall extend to the Parish for which the court is appointed, and one mile beyond the boundary line of the said Parish."

It will be noted that the language of this section corresponds with that of section 30 of the Judicature (Supreme Court) Law, with the significant difference that the Resident Magistrates had no jurisdiction over Jamaican territorial waters. "Jurisdiction" is an ambiguous term. It can mean either the area within which acts must be committed for the court to take cognisance of them or the type of act (or the class of person committing the act) of which (or of whom) the court can take cognisance. In section 246 "jurisdiction" must have the former sense; because, first, section 247 (now section 268) specifies what offences may be tried in the Resident Magistrates' Courts; and, secondly, by an amendment made in 1891 (and now incorporated in section 267) distances "for the purpose of deciding any question as to jurisdiction" under those sections were to be finally decided by the Resident Magistrate—which makes sense only if "jurisdiction" refers to territorial area.

Before we set out the 1891 amendment to the Resident Magistrates Law we would draw attention to the fact that the Resident Magistrates had (and have) a three-fold jurisdiction: first, over summary offences (compare section 285 in the current Judicature (Resident Magistrates) Act; secondly, over special statutory summary offences (see section 271 of the current Act); and, thirdly, over certain indictable offences (see sections 275 *et seq.* of the current Act). It is their jurisdiction over indictable offences which is essential to a proper understanding of the 1891 amendment. But the Resident Magistrates' Courts, unlike the Circuit Courts, had admittedly no jurisdiction in 1887 to try indictable offences committed by foreigners in foreign ships in passage on the high seas within Jamaican territorial waters. This was because the jurisdiction of the Resident Magistrates' Courts was wholly statutory, and was by section 246 of the 1887 Law limited to the boundary line of the parish and one mile beyond, but did not extend seawards beyond low-water mark.

By section 7 of Law No. 16 of 1891 a provision was added to section 246 which in the consolidating Law of 1904 read:

> "Provided always that the boundaries of every parish shall be deemed to extend to such part of the sea as lies within three miles of the coast line of such parish; . . .".

This provision was perfectly compatible with the limitation to indictable offences contained in the Territorial Waters Jurisdiction Act 1878; since, as we have ventured to point out, the Resident Magistrates' Courts had jurisdiction over indictable offences. The proviso had therefore abundant scope on any view: it extended to Resident Magistrates' Courts the power which since 1880 had been solely in Jamaica vested in the Supreme Court—namely, to try indictable offences committed by foreigners in foreign ships in passage on the high seas within Jamaican territorial waters. The question is whether it was meant to go further. Was it, notwithstanding the solemn policy decision of the British legislature in 1878, meant to give a court in Jamaica power to try the most trivial infringement of the local code of summary jurisdiction committed by a foreigner in a foreign ship in passage on the high seas within Jamaican territorial waters? No reason was advanced why this peculiar power should be needed or considered desirable in Jamaica, notwithstanding the limitation in the 1878 Act. We find it quite incredible that the Jamaican legislature meant any such thing. As the Duke of Wellington replied to the man who addressed him "Mr. Smith, I believe", "If you believe that, you will believe anything."

That is not, however, the end of the matter. It sometimes happens that a Parliament brings about a legislative effect without meaning to. It is true that the legislative process will then have gone awry. But statutory construction is concerned with the meaning of what the

legislature has said, not with what the legislature meant to say; though if both legislative and interpretative functions operate properly the two should coincide. See *Black-Clawson Ltd. v. Papierwerke A.G.* [1975] A.C. 591, 645, 650. Is this one of those unfortunate instances where Parliament has achieved a legislative effect without meaning to? We think not. There are available two canons of construction (rules based on judicial experience of how a legislature sets about its job), reinforced by other circumstances, which obviate here a miscarriage of the legislative process.

The first of such canons of construction is what *Maxwell on Interpretation of Statutes* (12th ed. 1969, p. 159) calls a "Presumption against Creating New, and Enlarging Existing Jurisdictions:

> "It is also presumed that a statute does not create new jurisdictions or enlarge existing ones, and express language is required if an Act is to be interpreted as having this effect."

James Dunbar and Co. v. Scottish County Investment Co. Ltd. [1920] S.C. 210 was concerned with whether a jurisdiction previously the exclusive province of the Court of Session (actions of proving the tenor—*i.e.*, establishing by judicial declaration the legal effect of a document which has been lost) had been extended to Sheriffs' Courts by general statutory words extending their jurisdiction to embrace actions of declarator. It was held that the general words did not carry this particular jurisdiction. In *The Vera Cruz* (1884) 10 App. Cas. 59 the Earl of Selborne L.C. said at p. 68:

> ". . . if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."

The second canon of construction to which we would refer appears in *Maxwell* (p. 116) under the heading "Presumption against Changes in the Common Law". It is stated:

> "Few principles of statutory interpretation are applied as frequently as the presumption against alterations in the common law. It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question."

(citing authorities). As Devlin J. said in *National Assistance Board v. Wilkinson* [1952] 2 Q.B. 648,661:

> "It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion."

Some of the citations which we have made in support of these two canons of construction might suggest a potency that they do not have in all circumstances. But where a court of construction is satisfied, as we venture to be, that the words of the 1891 amendment cannot have been meant to bear the width of meaning to which they are susceptible, those canons are quite sufficient to sway the issue—to reconcile the meaning of what the legislature has said with what the legislature meant to say—to obviate a miscarriage of the constitutional process—and to demand that a construction be put upon the statutory words which accords with what the legislature must have meant and which the words are fully capable of meaning.

Moreover, these two canons of construction are reinforced in the instant case by the clear and explicit terms used by both the British and the Jamaican legislatures when advisedly and obviously modifying the rule in *R. v. Keyn.* We have already cited the Territorial Waters Jurisdiction Act 1878. The Jamaican legislature was equally explicit in the Territorial Sea Act 1871. Section 3 (2) stipulated that the territorial sea should be twelve miles in breadth. Section 4 (1) states:

" An act:

(*a*) committed by a person, whether he is or is not a citizen of Jamaica, on or in the territorial sea; and

(*b*) being of such a description as would, if committed on land within a parish in Jamaica, be punishable *on indictment* according to the law of Jamaica for the time being in force,

is an offence punishable *on indictment* in like manner, notwithstanding that it may have been committed on board or by means of a vessel the nationality of which is not Jamaican; . . ." (emphasis added).

We presume to think that the cases from foreign jurisdictions which are cited in the judgment of the majority of their Lordships have no bearing on the problem of statutory construction on which, in our view, the appeal turns. Nor, in our opinion, has the cited passage from the speech of the Attorney-General, which was on a private member's Bill, in terms significantly different from those in the 1878 Act, which was proposed (and withdrawn) in the session previous to that in which the 1878 Act was passed. In view of this we do not need to comment on the availability to a court of construction of this type of material—particularly as no argument was addressed on it to the Board.

It was argued on behalf of the respondent to the first appeal that, the Territorial Waters Jurisdiction Act 1878 having being repealed for Jamaica by section 4 (3) of the Territorial Sea Act 1971, the summary jurisdiction of the Resident Magistrate's Court claimed to have been conferred by the 1891 provision was preserved by section 4 (4) (*b*) of the 1971 Act. Sub-section (4) reads:

" Nothing in this section shall—

. . . . .

(*b*) abrogate or abridge any criminal jurisdiction conferred on any court by virtue of any provisions contained as aforesaid;

. . . . ."

" . . . . contained as aforesaid " picks up the words at the end of paragraph (*a*) of section 4 (4):

" contained immediately before the commencement of this Act in any law having effect thereafter as part of the law of Jamaica;".

The Resident Magistrates Law as amended in 1891 fell within these words, it was argued for the respondent; so that the alleged criminal jurisdiction of Resident Magistrates' Courts over summary offences committed by foreigners in foreign ships in passage on the high seas within Jamaican territorial waters, was preserved by section 4 (4) (*b*). But this produces a most extraordinary result. Immediately before the commencement of the 1971 Act the Resident Magistrate's Court, on the respondent's argument, had a jurisdiction over both indictable and summary offences extending three miles from the shore; and it is this that would be preserved by section 4 (4) (*b*). But the jurisdiction over indictable offences is extended to twelve miles from the shore. A twelve mile jurisdiction over indictable offences: a three mile jurisdiction of Resident Magistrates' Courts over summary offences: no seaward

jurisdiction, apparently, of common law Courts of Petty Session over summary offences! So extraordinary an anomaly is, we venture to think, a further strong indication that the respondent's interpretation is not correct.

The learned Director of Public Prosecutions sought to explain away this anomaly by arguing that section 4 (4) (*b*) preserves the " nature " of the jurisdiction, not its " extent ". But we have already pointed out that " jurisdiction " in section 246 (now section 267) can only be used in a territorial sense—*i.e.*, it must refer to the " extent " of the jurisdiction.

The majority of their Lordships, we think, do not adopt this approach. They ignore section 4 (4) and proceed direct from the 1891 amendment (which they construe as conferring a summary jurisdiction in the Resident Magistrate's Court over territorial waters of three miles in extent) to the amendment in the Second Schedule to the 1971 Act (extending the three miles to twelve miles). But we respectfully suggest that this too would be a most extraordinary way of achieving the objective. Instead of such a circuitous procedure all that was required was to leave out of section 4 (1) of the 1971 Act the words " on indictment " in the two places in which they occur. If the majority of their Lordships are correct, these words are merely misleading.

The learned Director of Public Prosecutions relied on the fact that the offences with which the appellants were charged were special statutory summary offences. But there is no way in which the 1891 proviso can be limited to special statutory summary offences. Once it is held that the jurisdiction of the Resident Magistrate under the proviso extends beyond indictable offences, it must be a general jurisdiction extending to the most trivial summary offence.

On the construction that we prefer—namely, that the 1891 amendment, consonantly with the limitation in the 1878 Act, extended to the new Resident Magistrates' Courts the jurisdiction to try *indictable* offences committed by foreigners in foreign ships on passage on the high seas within Jamaican territorial waters—the Territorial Sea Act 1971 is a perfectly rational piece of drafting. Section 3 (2) extends the territorial sea to twelve miles. Section 4, in explicit terms, confers jurisdiction on the criminal courts in Jamaica to try indictable offences committed by a foreigner in a foreign ship in passage on the high seas within Jamaican territorial waters (now twelve miles); and the Second Schedule amends both the Judicature (Resident Magistrates) Law and the Judicature (Supreme Court) Law to extend the jurisdiction of those courts to the new limit of twelve miles.

For the foregoing reasons we would allow the first appeal. This conclusion involves that the learned Resident Magistrate had, in our view, no jurisdiction to try the case. It would necessarily follow that the second appeal—that of the Director of Public Prosecutions—would fail. Only one of us (Lord Simon of Glaisdale) sat to hear the second appeal. On the basis that the opinion of the majority in the first appeal is the opinion of the Board, Lord Simon of Glaisdale would agree with the majority in allowing the second appeal.

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In the Privy Council

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(1) BERNARD PIANKA
(2) TERRY HYLTON

v.

THE QUEEN

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

v.

(1) BERNARD PIANKA
(2) TERRY HYLTON
(Consolidated Appeals)

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