Sirros v **Moore**

Jurisdiction: England & Wales

Court: Court of Appeal (Civil Division)

Reported In: [1975] QB 118, [1974] 3 WLR 459, [1974] 3 All ER 776 , [1975] 139 JP 29

Date: 1974

the principle that the taxed costs should not be more than an indemnity to the party against the expense to which he has been put in the litigation. (4) There may be special cases in which it appears reasonably plain that that principle will be infringed if the method of taxation appropriate to an independent solicitor's bill is entirely applied: but it would be impracticable and wrong in all cases of an employed solicitor to require a total exposition and breakdown of the activities and expenses of the department with a view to ensuring that the principle is not infringed, and it is doubtful, to say the least, whether by any method certainty on the point could be reached. To adapt a passage from the judgment of Stirling J. in *In re Doody* [1893] 1 Ch. 129, 137, to make the taxation depend on such a requirement would, as it seems to us, simply be to introduce a rule unworkable in practice and to push abstract principle to a point at which it ceases to give results consistent with justice.

Accordingly, we allow the appeal. It would appear that, had the taxing master not deleted item B, he would have allowed the figure of £75 for this discretionary item, and it would therefore seem unnecessary to remit the matter for reconsideration on the basis of this decision. But we will hear submissions upon what is the technically correct form of order.

Appeal allowed.
Order that taxing master's certificate be amended.
Leave to appeal refused.

Solicitors: *Treasury Solicitor; Field, Fisher & Martineau.*

L. G. S.

[COURT OF APPEAL]

SIRROS *v.* MOORE AND OTHERS

[1972 S. No. 1660]

1974 May 15, 16, 17; July 30

Lord Denning M.R., Buckley and Ormrod L.JJ.

Judge—Circuit judge—Judicial immunity—Mistake by judge as to ambit of appellate jurisdiction of Crown Court—Jurisdiction to detain in custody alien recommended for deportation conferred on appellate court by statute—Order to police to take alien into custody invalid through judge's mistake as to jurisdiction—Civil action for damages against judge—Action not maintainable where judge acting judicially in good faith—Extent of immunity of judges of all courts in modern conditions—Aliens Order 1953 (*S.I.* 1953 *No.* 1671), *arts.* 20 (2) (*a*), 21 (4)—*Courts Act* 1971 (*c.* 23), *ss.* 9, 10 (5), 57 (1) (*b*)

S, an alien on a visit to the United Kingdom, was fined and recommended for deportation by a magistrate for breach of the Aliens Order 1953, but the magistrate directed that S be not detained in custody pending the decision by the Home Secretary on the recommendation for deportation. S appealed in person to the Crown Court under the Courts Act 1971. At

the hearing the prosecution submitted that the court had no jurisdiction to hear an appeal against a recommendation for deportation made by a court of summary jurisdiction. The judge adjourned the hearing to enable S to obtain legal representation. On the resumed hearing, S, still in person and at liberty, made it clear that his appeal was only against the recommendation for deportation; but the judge accepted the prosecution submission that he had no jurisdiction to hear that part of the appeal. He then said: "The appeal is dismissed." S got up and left the court. When the judge saw him going out he called out "Stop him." Police officers, complying with that direction, followed S and told him that he was to be taken into custody. He ran from the court building, but the police caught up with him, brought him back, and put him in the cells. In the afternoon he was brought back before the judge, when counsel (instructed on his behalf at short notice) applied for bail, which the judge refused.

The next day S was given leave to apply for habeas corpus and granted bail after being in custody for a day and a half. A few days later the Divisional Court of the Queen's Bench made the order for habeas corpus on the ground that the judge had been functus officio before he began to consider whether S should be detained or not.

S began an action against the judge and the police claiming damages for assault and false imprisonment. Master Jacob refused an application by the defendants to strike out the writ and statement of claim and to dismiss the action on the ground that they disclosed no reasonable cause of action but Michael Davies J. allowed their appeal.

On appeal by S:—

Held, dismissing the appeal, (1) that the judge had clear jurisdiction under the Courts Act 1971 and the Aliens Order 1953 to hear and determine the appeal against the recommendation for deportation and on that appeal to direct that the alien be detained in custody pending the Home Secretary's decision, but that because he was mistaken as to his jurisdiction and had not adopted the appropriate procedure the order on which the plaintiff was taken into custody was invalid and he had been rightly released on habeas corpus.

(2) That the judge was entitled to immunity from liability in a civil action for damages, because the acts complained of (*per* Lord Denning M.R. and Ormrod L.J.) were done by him acting in his capacity as a judge, in good faith, albeit mistakenly; (*per* Buckley L.J.) were acts which the judge had power to do in the exercise of the appellate jurisdiction of a judge of the Crown Court, although he adopted an erroneous procedure.

Per Lord Denning M.R. and Ormrod L.J. As a matter of principle every judge of the courts in this land, from the highest to the lowest, should, when he is acting judicially in the bona fide exercise of his office, be protected against personal actions for damages, even where he may be mistaken in fact or ignorant in law. There is no ground today for drawing a distinction between judges of different status or between judges and magistrates (post, pp. 470F—471B, 483C–E).

Per Buckley L.J. (1) A judge of the High Court is absolutely immune from personal civil liability in respect of any judicial act which he does in his capacity as a judge of that court (post, p. 474B–C). (2) A judge may not be immune if he does an act outside his jurisdiction, though in a conscientious belief that it was within his jurisdiction if that belief is due to a careless ignorance or disregard of relevant facts or to a mistake of law as to the extent of his jurisdiction (post, p. 475A–B). (3) The Crown Court is a hybrid. In relation to matters

other than trials on indictment it is an inferior court subject to control by the High Court in the exercise of its jurisdiction; in such cases the immunity of the Crown Court judge exists if he has acted within his jurisdiction (post, p. 477A–D).

(3) That the police officers were also not liable in a civil action for damages in respect of acts done on the instruction of the judge.

Order of Michael Davies J. affirmed.

The following cases are referred to in the judgments:

Anderson v. *Gorrie* [1895] 1 Q.B. 668, C.A.
Bushell's Case (1671) Vaughan 135.
Calder v. *Halket* (1840) 3 Moo.P.C. 28, P.C.
Floyd v. *Barker* (1607) 12 Co.Rep. 23.
Fray v. *Blackburn* (1863) 3 B. & S. 576.
Garnett v. *Ferrand* (1827) 6 B. & C. 611.
Gwinne v. *Poole* (1692) 2 Lut.App. 1560.
Hamond v. *Howell* (1674) 1 Mod. 119, 184; (1677) 2 Mod. 218.
Houlden v. *Smith* (1850) 14 Q.B. 841.
Le Caux v. *Eden* (1781) 2 Doug.K.B. 594.
London Corporation v. *Cox* (1867) L.R. 2 H.L. 239, H.L.(E.).
Marshalsea Case (1613) 10 Co.Rep. 68b.
Miller v. *Seare* (1777) 2 Wm.Bl. 1141.
Palmer v. *Crone* [1927] 1 K.B. 804.
Peacock v. *Bell* (1667) 1 Saund. 69.
Rex v. *Leicestershire Justices* (1813) 1 M. & S. 442.
Rondel v. *Worsley* [1969] 1 A.C. 191; [1967] 3 W.L.R. 1666; [1967] 3 All E.R. 993, H.L.(E.).
Royal Aquarium and Summer and Winter Garden Society Ltd. v. *Parkinson* [1892] 1 Q.B. 431, C.A.
Scott v. *Stansfield* (1868) L.R. 3 Exch. 220.
Taaffe v. *Downes* (*Note*) (1813) 3 Moo.P.C. 36.
W. v. *W.* (1963) [1964] P. 67; [1963] 3 W.L.R. 540; [1963] 2 All E.R. 841, Cairns J. and C.A.
Willis v. *Maclachlan* (1876) 1 Ex.D. 376, C.A.

The following additional cases were cited in argument:

Abbott v. *Sullivan* [1952] 1 K.B. 189; [1952] 1 All E.R. 226, C.A.
Burdett v. *Abbot* (1817) 5 Dow 165, H.L.(E.).
Groome v. *Forrester* (1816) 5 M. & S. 314.
Haggard v. *Pélicier Frères* [1892] A.C. 61, P.C.
Leary v. *Patrick* (1850) 15 Q.B. 267.
Reg. v. *Smith* (*Martin*) [1974] 2 W.L.R. 495; [1974] 1 All E.R. 651, C.A.
Reg. v. *Uxbridge Justices, Ex parte Clarke* (*Note*) [1968] 2 All E.R. 992, D.C.
Reg. v. *Warwick Quarter Sessions, Ex parte Patterson* (1971) 115 S.J. 484, D.C.
Wilkinson v. *Barking Corporation* [1948] 1 K.B. 721; [1948] 1 All E.R. 564, C.A.

INTERLOCUTORY APPEAL from Michael Davies J.

The plaintiff, Michael Sirros, a Turkish citizen and an alien visiting the United Kingdom, issued a writ on March 27, 1972, claiming against Police Sergeant Michael Ernest Moore, the Commissioner of Police of the Metropolis, and Judge Oswell Seawright MacLeay, one of Her Majesty's circuit judges, damages for alleged assault and false imprisonment on March 7, 1972. As against the judge he claimed that on the morning of March 7 at the Inner London Crown Court, St. James's Square,

London S.W.1, the judge had without jurisdiction purported to order and authorise the assault and imprisonment of the plaintiff by the police sergeant and that in the afternoon of the same day the judge had at the Crown Court without jurisdiction purported to order the imprisonment of the plaintiff by the prison officers, which order the officers had complied with. By his statement of claim served on June 6, 1972, the plaintiff gave particulars of the circumstances of his appeal to the Crown Court from his conviction by the magistrate at Clerkenwell Magistrates' Court on December 13, 1971, of an offence under the Aliens Order 1953, when the magistrate imposed a fine of £50 and recommended that a deportation order be made in his case but that he be not detained in custody. He claimed, inter alia, that at the close of the hearing of his appeal the judge had ordered that the appeal be dismissed and that he had thereupon departed from the court but that about five minutes afterwards he was informed by the prison officers that he was to be taken into custody; that he had run from the court building pursued by the defendant police sergeant and other police officers, had been wrongfully seized and arrested by the police sergeant in Jermyn Street and brought back to the court building where he was imprisoned; and that the judge had ordered and authorised the wrongful arrest and imprisonment without having jurisdiction or any other lawful authority to do so. Further particulars were given of his release on bail on March 8 on the order of the Divisional Court of the Queen's Bench on his application for habeas corpus and of the grant of the writ on March 17 when the Divisional Court had held that his imprisonment was unlawful.

The defendant police sergeant and the commissioner delivered a defence on July 14, 1972, denying the allegations in the statement of claim and stating that on the trial of the action they would rely on the fact that the sergeant acted pursuant to an order made by the judge while sitting as a judge and would contend that whether or not the judge had jurisdiction or other lawful authority to make the order, the seizure and arrest of the plaintiff pursuant to that order did not make the police liable at the suit of the plaintiff for damages for assault or false imprisonment. By his reply to that defence the plaintiff claimed that the police defendants could not rely on the judge's order since the sergeant knew by his presence the circumstances of the appeal and knew or ought to have known that the judge's order was made without jurisdiction but that he took no steps to question the legality of a verbal instruction to detain the plaintiff given when the plaintiff was absent from the court.

The three defendants applied to have the indorsement on the writ and the statement of claim struck out and the action dismissed under R.S.C., Ord. 18, r. 19, and/or the inherent jurisdiction of the court on the ground that they disclosed no reasonable cause of action and were frivolous, vexatious and an abuse of the process of the court. In an affidavit the judge stated, inter alia, that he had on the hearing of the adjourned appeal stated that he accepted the argument for the prosecution and had felt he had no jurisdiction to quash the recommendation for deportation; that he had accordingly dismissed the appeal against the fine of £50 which the plaintiff had in any event abandoned, and had decided that he could not hear the appeal against the deportation order. The judge continued:

> "However, it was my view that [the plaintiff] had come within the jurisdiction of the Crown Court, by reason of his appeal against the £50 fine and that, as the deportation recommendation remained in effect, it was for this court to decide whether or not it should give a

direction pursuant to article 21 (4) of the Aliens Order that the plaintiff should not be detained pending consideration of his case by the Secretary of State. I was of the view that, unless I gave such a direction, the plaintiff would automatically have to be detained in custody. I had announced my decision that the appeal against the fine was dismissed and that I could not hear an appeal against the recommendation for deportation, but as soon as I had done so, before I could even enter this up in my notebook, I saw the plaintiff begin to leave the court. I saw the back of his head disappearing through the court door and I said "Stop him," or words to that effect. I believe some officers went to stop him and word was brought back to me that he had made a run for it. . . . I . . . adjourned the court to go and have lunch. . . . I should make it absolutely clear that the [plaintiff] left the court so swiftly that I never had an opportunity to deal with or discuss the question of whether he was to be kept in custody or not. . . . I did not make an order directing that he [the plaintiff] be detained in custody. I thought that, because he had come within the jurisdiction of the court, he would, by virtue of article 21 (4) of the Aliens Order 1953, automatically remain in custody unless I made a direction to the contrary. He was accordingly remanded in custody as appears from the court forms. . . ."

Master Jacob heard the applications on May 1, 1973, but refused to make the order to strike out and dismiss the action, but Michael Davies J. on November 30, 1973, allowed appeals by the three defendants.

The plaintiff appealed on the grounds (1) that the judge's decision was wrong in law and that the master's decision was correct and ought to be upheld; (2) that as pleaded in the statement of claim the judge had ordered the imprisonment of the plaintiff when acting without jurisdiction so that in the premises the judge was not entitled to claim judicial immunity and a reasonable cause of action was disclosed; (3) that as pleaded in the statement of claim the police officer acting illegally and/or in compliance with the judge's direction made without jurisdiction had imprisoned the plaintiff and accordingly a reasonable cause of action against the officer and the commissioner was disclosed; and (4) that it had not been contended on behalf of the defendants that the action was frivolous or vexatious.

None of the counsel appearing in the civil proceedings appeared in the Crown Court proceedings.

Lord Gifford for the plaintiff.
Alan Rawley for the defendant police sergeant and the commissioner.
Gordon Slynn for the judge.

Cur. adv. vult.

July 30. The following judgments were read.

LORD DENNING M.R. Michael Sirros is an alien. He is a citizen of Turkey. He sought to enter this country. He was given leave to land on condition that he only stayed a limited time. He broke this condition. He stayed too long. He was brought before the magistrate at Clerkenwell on December 13, 1971, for breach of the Aliens Order 1953. The magistrate fined him £50 and made a recommendation that he be deported. The magistrate did not himself make a deportation order. That was not for

him. It was for the Home Secretary. It would take a little time for the Home Secretary to consider it. Meanwhile Sirros would automatically be detained unless the magistrate made a direction to the contrary: see article 21 (4) of the Aliens Order 1953. The magistrate at Clerkenwell did give such a direction. He directed that Sirros be not detained pending the decision of the Home Secretary.

On December 22, 1971, Sirros gave notice of appeal against the sentence and against the recommendation for deportation. His grounds were that the sentence and recommendation were unreasonable.

On February 8, 1972, his appeal came on for hearing before the Crown Court. It was sitting at no. 4, St. James's Square. It consisted of Judge MacLeay, a circuit judge, and two magistrates. Counsel appeared for the prosecution. Sirros appeared in person. He was, of course, not in the dock as he was not in custody. He was seated at a table. He refused legal assistance. Counsel for the prosecution opened the case. He stated the facts. He called a detective inspector to give the man's history. Sirros himself gave evidence and called a witness. Counsel for the prosecution then submitted that the court had no jurisdiction to review the recommendation for deportation. The judge thought this was a difficult point. He thought that Sirros should be legally represented and ought to be given a legal aid certificate. He adjourned the appeal for this to be done.

On March 7, 1972, the adjourned hearing took place. Sirros still appeared in person. He steadfastly refused to be legally represented. But he had a solicitor's clerk with him. He made it plain that he was not complaining of the £50 fine. He was only appealing against the recommendation for deportation.

Counsel for the prosecution again submitted that the judge had no jurisdiction to deal with it. He referred to a note in *Stone's Justices' Manual.*

The judge accepted the submission. He said that he could not hear an appeal against the recommendation for deportation: and that if Sirros was dissatisfied, he should apply by case stated to the Divisional Court of the Queen's Bench. The judge then announced his decision: "The appeal is dismissed." Thereupon Sirros and the solicitor's clerk got up from their seats and made their way out of the court. The case was to all appearances over. After a little while, the judge looked up. He saw Sirros leaving the court: or rather he saw the back of his head disappearing. A minute or two later the judge called out "Stop him." Police officers hurried out after him. But he had gone. He went out of the court building in St. James's Square. He got as far as Jermyn Street: but then Sergeant Moore and other police officers caught him and brought him back. He was put in the cells.

The judge meanwhile had gone to lunch. Counsel for the prosecution arranged for Sirros to be brought back to the court during the afternoon. The solicitor's clerk found counsel who happened to be in the building. He instructed him on behalf of Sirros.

On the judge's return, this counsel submitted that Sirros should not be detained, and he asked for bail. He called witnesses as to his character. It took about an hour. The judge refused to grant bail. So Sirros was taken away in custody.

The proceedings were noted down by the clerk of the court in these words: "He appealed against sentence and order. The appeal was dismissed. The court concurred in recommendation for deportation (custody)." The formal order was drawn up in these words:

A "At the Crown Court . . . on Tuesday, March 2, 1972, the defendant Michael Sirros having been convicted of crime, is remanded in custody under an order made for recommendation for deportation (Pentonville)."

On the very next day, March 8, 1972, Sirros's counsel applied to the Divisional Court for leave to move for a writ of habeas corpus. That B court granted leave and said that Sirros was to be allowed out on bail. This was done. He was released after one and a half days in custody.

On March 17, 1972, the Divisional Court ordered that a writ of habeas corpus was to be issued. So he went free. Ashworth J. said:

C "On one matter I have no doubt whatever, and that is that the detention of this applicant was wholly unauthorised. The appeal was over before ever the judge began to consider, as it seems to me, the question whether the applicant should be detained or not; the order was made in his absence and there is no justification whatever for it."

Ten days later, on March 27, 1972, Sirros issued a writ against the judge and the police officers claiming damages for assault and false imprisonment. He specified two things against the judge: (1) the order to D "stop him" in the morning; (2) the order in the afternoon when the judge refused to grant bail, thus continuing the detention. He claimed against the police officers as acting on the judge's orders.

The defendants applied to strike out the action on the ground that it disclosed no reasonable cause of action. Master Jacob refused to strike it out. But on appeal Michael Davies J. struck out the action. Sirros appeals to this court. Meanwhile the Home Secretary has made a deportation E order against him. So Sirros has gone. But the North Kensington Neighbourhood Law Centre have taken up his case. On his behalf they seek to pursue his claim for damages.

The appeal against the recommendation for deportation

The judge held that he had no jurisdiction to hear an appeal against the F recommendation for deportation. I can understand him doing this because at that time there was a note [to the Aliens Order 1953, article 20 (2) (*a*)] in *Stone's Justices' Manual* [1972 ed., vol. 2, p. 4113] to this effect:

G "Such a recommendation is a 'sentence' against which a person convicted *on indictment* may with leave appeal to the criminal division of the Court of Appeal (Criminal Appeal Act 1968, sections 1 and 9). As that Act applies only to persons convicted on indictment, *there will be no such appeal from a recommendation made by a court of summary jurisdiction* (*Rex* v. *Campbell, Ex parte Ahmed Hamid Monssa* [1921] 2 K.B. 473)."

That note was wrong. It has since been deleted. The statutes have always given an appeal to quarter sessions against a "sentence"; see the H Magistrates' Courts Act 1952. I should have thought that a recommendation for deportation is part of a "sentence" and is open to appeal. The case cited in *Stone* was no authority to the contrary. It only says that a recommendation is not a "penalty." But any difficulty is now removed by section 57 (1) (*b*) of the Courts Act 1971 and section 6 (5) of the Immigration Act 1971. It says that "sentence" includes "a recommendation for deportation made when dealing with an offender." That section 57 was overlooked by everyone concerned in the criminal proceedings. It

was not found until the civil action came before Master Jacob. In view of the Act of 1971, it is conceded now that an appeal lies to the Crown Court from a recommendation for deportation made by a magistrate.

The jurisdiction of the court

On an appeal, the Crown Court has the very wide powers given by section 9 of the Courts Act 1971. It can do anything that the magistrates could have done at first instance. The Crown Court can vary the decision of the magistrates; it can increase the sentence; and make whatever order it thinks fit. It is in no way tied down by the form of the appeal. Even if the appeal is only against part of the decision of the magistrates, the Crown Court can go into the rest of it. The hearing before the Crown Court is in very truth a rehearing, just as quarter sessions used to be. The prosecution have to open the case and prove it. At the end the Crown Court can make its own order unfettered by anything the magistrate has done.

The Crown Court, therefore, in this case had jurisdiction on the appeal (i) to affirm or delete the recommendation for deportation: and (ii) (in case it affirmed the recommendation) to direct, or not direct, that the alien be not detained in custody.

We have, therefore, this strange result: the judge held, by mistake, that he had no jurisdiction to hear the appeal: but he did, in truth, have jurisdiction: and if he had exercised it, he could have affirmed the recommendation for deportation. He could have reversed the direction that the man be not detained and in lieu he could have ordered him to be detained in custody pending the Home Secretary's decision. But the judge did not do so. He simply dismissed the appeal.

The ruling of the Divisional Court

The Divisional Court did not decide whether there could be an appeal against a recommendation for deportation. They released Mr. Sirros on the ground that "the appeal was over" and that "the order was made in his absence." In short, that the judge had finished his duties and was functus officio.

I think the Divisional Court was right to release Mr. Sirros: but not on that ground. The judge was not functus officio. He still had seisin of the case in this sense, that he had power to alter his order within 28 days: see section 11 of the Courts Act 1971. The true ground for releasing Mr. Sirros was that there was no valid order for detaining him. When the judge said: "The appeal is dismissed," it meant that the order of the magistrate stood. It remained intact and in full force. Under it there was a recommendation for deportation *but with a direction that the man was not to be detained.* There was, therefore, no order in force for his detention. He was a free man. The judge had no right to call upon the police to detain him. He made a mistake in so doing.

At some time later the clerk drew up the formal record which said that: "Michael Sirros having been convicted of crime is remanded in custody under an order made for recommendation for deportation (Pentonville)." That record was erroneous. The judge had never "made" a recommendation for deportation. On the contrary, he had held that he had no jurisdiction to deal with it. The judge had never "remanded" him in custody. He had not said a word to that effect. In any case he had no jurisdiction to remand him in custody except as incidental to a recommendation for

deportation: and he had made no such recommendation. The record is never conclusive in matters of a criminal nature: see *Rex* v. *Leicestershire Justices* (1813) 1 M. & S. 442, 446 by Bayley J. So the truth can be shown. The truth was that the judge had simply dismissed the appeal. That left the magistrate's order intact, including the direction that he was not to be detained. In these circumstances, the Divisional Court were quite right to issue a writ of habeas corpus for the release of Mr. Sirros.

The liability of the judge

1. *Acts within jurisdiction*

Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for habeas corpus, or a writ of error or certiorari, or take some such step to reverse his ruling. Of course, if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden C.J. in *Garnett* v. *Ferrand* (1827) 6 B. & C. 611, 625:

> "This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be."

Those words apply not only to judges of the superior courts, but to judges of all ranks, high or low. Lord Tenterden C.J. spoke them in relation to a coroner. They were reinforced in well-chosen language in relation to a county court judge by Kelly C.B. in *Scott* v. *Stansfield* (1868) L.R. 3 Exch. 220, 223; and to a colonial judge by Lord Esher M.R. in *Anderson* v. *Gorrie* [1895] 1 Q.B. 668, 671.

2. *Acts without jurisdiction*

So much for acts done by a judge within his jurisdiction. I must now turn to acts done outside his jurisdiction. And here a distinction must be drawn between the inferior courts and the superior courts of record.

(i) *Inferior courts*

So far as inferior courts are concerned, it was established for centuries that a judge of an inferior court was only immune from liability when he was exercising—albeit wrongly—a jurisdiction which belonged to him. It did not exist when he went outside his jurisdiction. Then he was liable to an action for damages, even though he made an innocent mistake of law in so doing.

The root decision is the *Marshalsea Case* (1613) 10 Co.Rep. 68b. The Court of the Marshalsea had jurisdiction in cases which concerned the King's household. But in 1613 it sought to extend its jurisdiction beyond the bounds. It asserted that it could deal with claims for money even though the parties were not members of the King's household. The facts were these: Roger was owed £80 by Thomas. Neither was a member of the King's household. Roger brought proceedings against Thomas in the Court of the Marshalsea. The Marshal (who was the judge of the court) gave judgment for Roger for £80. Richard went bail for Thomas. But Thomas did not pay. Richard had to answer for his default. He was arrested and detained in prison for three months. Richard then brought an action in the Common Pleas for false imprisonment. It was held that the Court of the Marshalsea had no jurisdiction to entertain the case at all. In consequence the judge was held liable to pay damages. So was the plaintiff Roger who brought the proceedings: and also the officer who did the imprisoning. A strong decision, you may think, by the superior court to keep the lower court in order. Lord Coke stated the principle in words which have been handed down for centuries, 10 Co.Rep. 68b, 76a:

> "a difference was taken when a court has jurisdiction of the cause, and proceeds inverso ordine or erroneously, there the party who sues, or the officer or minister of the court who executes the precept or process of the court, no action lies against them. But when the court has not jurisdiction of the cause, there the whole proceeding is coram non judice, and actions will lie against them without any regard of the precept or process, . . ."

That principle has been repeated a thousand times, but it was only applied, so far as I can discover, to the inferior courts. The judges of the superior courts were very strict against the courts below them. They were particularly hard on justices of the peace. The reports abound with cases where they were held liable in damages. To borrow Lambard's words — the superior courts did "now and then correct the dulnesse of these justices, with some strokes of the rodde, or spur": see *Lambard's Eirenarcha* (1614) Cap. 4, 370. Not only were the justices of the peace held liable for acts done outside their jurisdiction. They were also liable for acts done *within* their jurisdiction if done maliciously and without reasonable and probable cause. Section 1 of the Justices' Protection Act 1848 was passed on this footing. The superior courts were also very hard on the county court judges. Far back 124 years ago they made one liable in damages for a mistake of law made quite innocently and in good faith: see *Houlden* v. *Smith* (1850) 14 Q.B. 841. And just 100 years ago they held that a revising barrister was liable in damages for turning a man out of his court—a man who richly deserved to be turned out: see *Willis* v. *Maclachlan* (1876) 1 Ex.D. 376.

(ii) *The superior courts*

But the superior courts were never so strict against one of themselves. There is no case in our books where a judge of a superior court has ever been held liable in damages. Even though a judge of a superior court has gone outside his jurisdiction, nevertheless he is not liable, so long as he is acting judicially.

The root decision arises out of a case famous in our history. It is the trial of the Quakers—William Penn and William Meade. They were tried at the Court of Oyer and Terminer at the Old Bailey before the Lord

A Mayor and the Recorder. The epic story is told in *Howell's State Trials*, vol. 6, p. 951 but the law report is in *Bushell's Case* (1671) Vaughan 135. The Recorder of London directed the jury that in point of law the Quakers were guilty. The jury disobeyed his direction and found the Quakers not guilty. The recorder fined them 40 marks apiece. When they did not pay, he committed them to prison. They brought a writ of habeas corpus. It was held that no judge had any right to fine or B imprison a jury for disobeying his direction in point of law, for every case depended on the facts and of the facts the jury were the sole judges. So the jurymen were set free. There the story usually ends. But it is the sequel which is of crucial importance to us in this case. One of the jurymen named Hamond brought an action against the Lord Mayor and the Recorder for false imprisonment. The case is reported as *Hamond* v. C *Howell* (1674) 1 Mod. 119, 184, and the second volume (1677) 2 Mod. 218, 219 where the full arguments and judgment are given. Counsel for the juryman cited the *Marshalsea Case*, 10 Co.Rep. 68b. He said that a justice of the peace and a constable were liable when they exceeded their jurisdiction. "So," he argued, "if a judge of nisi prius doth any thing not warranted by his commission it is void." But the Court of Common Pleas rejected that argument outright:

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> "There hath not been one case put which carries any resemblance with this; those of justices of the peace and mayors of corporations are weak instances; neither hath any authority been urged of an action brought against a judge of record for doing anything *quatenus a judge*. . . . though [the defendants] were mistaken, yet they *acted judicially*, and for that reason no action will lie against the defendant." E (2 Mod. 218, 220–221.)

In that case the recorder had no jurisdiction to fine or imprison the jurors. He made a mistake of law as to his jurisdiction. If it had been an inferior court, he would certainly have been held liable. Yet it being a superior court of record, he was not liable. This distinction was recognised in *Miller* v. *Seare* (1777) 2 Wm.Bl. 1141, 1145 by De Grey C.J., a most F accomplished lawyer:

> "In all the cases where protection is given to the judge giving an erroneous judgment, he must be *acting as judge. The protection, in regard to the superior courts, is absolute and universal; with respect to the inferior, it is only while they act within their jurisdiction.*"

G This principle was applied in an action in 1813 against the Lord Chief Justice of Ireland—*Taaffe* v. *Downes* (*Note*) (1813) 3 Moo.P.C. 36; and in 1863 in an action against Blackburn J.—*Fray* v. *Blackburn* (1863) 3 B. & S. 576, where Crompton J. said, at p. 578:

> "It is a principle of our law that no action will lie against a judge of one of the superior courts for *a judicial act*, though it be alleged to have been done maliciously and corruptly." H

What is the test upon which the judges of the superior courts are thus immune from liability for damages even though they are acting without jurisdiction? Several expressions are to be found. A judge of a superior court is not liable for anything done by him while he is "acting as a judge," or "doing a judicial act" or "acting judicially" or "in the execution of his office" or "quatenus a judge." What do all these mean? They are much wider than the expression "when he is acting within his jurisdiction."

I think each of the expressions means that a judge of a superior court is protected when he is acting in the bona fide exercise of his office and under the belief that he has jurisdiction, though he may be mistaken in that belief and may not in truth have any jurisdiction. No matter that his mistake is not one of fact but of law (as in the *Bushell's Case*) (1671) Vaughan 135, nevertheless he is protected if he in good faith believes that he has jurisdiction to do what he does.

Some attempt has been made to reconcile the immunity of the judges of the superior courts with that of the inferior courts. It has been said that a judge of a superior court is the arbiter of his own jurisdiction. It is so extensive that he can never be said to have gone outside it. At most he has only exercised—albeit wrongly—a jurisdiction which belongs to him. So he is not to be made liable in damages. I can see no justification for this theory. The Pharisee could say: "God, I thank thee, that I am not as other men are." But a judge of a superior court cannot say it, or at any rate, should not. A judge of the superior court can go outside his jurisdiction just as any other judge can. His jurisdiction is limited by the law, and not by his own whim. Suppose he is trying a case. The jury find the man "Not Guilty." And the judge says: "I do not agree with the verdict. I think you are guilty. I sentence you to six months' imprisonment. Officer, take him away." And the officer takes him away. Such a judge would be going outside his jurisdiction. He would be liable—not merely because he was acting outside his jurisdiction—but because he would be knowingly acting quite unlawfully. He would not be acting judicially. He would, I should think, be liable in damages. So would the officer for obeying an order which he must have known was unlawful.

(iii) *The modern courts*

In the old days, as I have said, there was a sharp distinction between the inferior courts and the superior courts. Whatever may have been the reason for this distinction, it is no longer valid. There has been no case on the subject for the last one hundred years at least. And during this time our judicial system has changed out of all knowledge. So great is this change that it is now appropriate for us to reconsider the principles which should be applied to judicial acts. In this new age I would take my stand on this: as a matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land—from the highest to the lowest—should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment," it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?" So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction—in fact or in law—but so long as he honestly believes it to be within his jurisdiction, he should not be liable. Once he honestly entertains this belief, nothing else will make him liable. He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind. Actions based on such allegations have been struck

A out and will continue to be struck out. Nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it.

This principle should cover the justices of the peace also. They should no longer be subject to "strokes of the rodde, or spur." Aided by their clerks, they do their work with the highest degree of responsibility and competence—to the satisfaction of the entire community. They should B have the same protection as the other judges.

(iv) *The Crown Court*

Today we are concerned with judges of a new kind. The judges of the Crown Court. It is, by definition, a superior court of record: see section 4 (1) of the Act of 1971. The judges of it should, in principle, C have the same immunity as all other judges, high or low. The Crown Court is manned by judges of every rank. Judges of the High Court, circuit judges, recorders, justices of the peace, all sit there. No distinction can or should be drawn between them. Each one shares responsibility for the decisions given by the court. If the High Court judge is not liable to an action, it should be the same with the circuit judge, the recorder or the D justice of the peace. No distinction can be taken on the seriousness of the case. Any one of them may sit on one day on a case of trifling importance, on the next on a case of the utmost gravity. No distinction can be taken as to the nature of the case. It may be a matter triable only on indictment, or it may be a man up for sentence, or an appeal from magistrates. If they are not liable in trials on indictment, they should not be liable on other matters. But, whatever it is, the immunity of the E judges—and each of them—should rest on the same principle. Not liable for acts done by them in a judicial capacity. Only liable for acting in bad faith, knowing they have no jurisdiction to do it.

Conclusion

The judge had no jurisdiction to detain Sirros in custody. The F Divisional Court were right to release him on habeas corpus. Though the judge was mistaken, yet he acted judicially and for that reason no action will lie against him. Likewise, no action will lie against the police officers. They are protected in respect of anything they did at his direction, not knowing it was wrong: see *London Corporation* v. *Cox* (1867) L.R. 2 H.L. 239, 269.

I would therefore dismiss the appeal.

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BUCKLEY L.J. The English law of judicial immunity against civil liability for acts done by judges in their judicial capacity is rooted far back in our legal history. Its development and form owes much to the history of our judicial system, which has also influenced the language in which the doctrine has from time to time been clothed. It emerges from H the period when there was an active struggle for jurisdiction between the King's courts, the ecclesiastical and seignorial courts, and other courts of limited jurisdiction. In consequence of the more extensive jurisdiction claimed by the King's courts, and particularly the Court of King's Bench, the judges of those courts may appear to have become invested with a more comprehensive immunity than the judges of the inferior courts, who were subject to control by the prerogative writs of prohibition and certiorari. The questions which confront us in this case are, I think, how

the principles evolved in the past apply to the modern pattern of judicial organisation and in particular where the Crown Court fits into that pattern for the relevant purpose.

A judge is immune from personal liability in respect of any act done in his judicial capacity and within his jurisdiction (*Marshalsea Case*, 10 Co. Rep. 68b, 76a), even if he acts maliciously or in bad faith: *Fray* v. *Blackburn*, 3 B. & S. 576, 578; and *Anderson* v. *Gorrie* [1895] 1 Q.B. 668, *per* Lord Esher M.R., at p. 670. It has been held that a judge, if he acts in excess of his jurisdiction, may be personally liable, notwithstanding that he acted in good faith and in a mistaken belief that he had jurisdiction: *Houlden* v. *Smith*, 14 Q.B. 841 and *Willis* v. *Maclachlan*, 1 Ex.D. 376. If, however, a judge is invested (as is a judge of the High Court) with a jurisdiction of such a kind that he is not amenable to the control of any other court in its exercise (otherwise than by an appellate court on appeal) it is said that he is immune from liability in respect of anything he may do in the purported exercise of that jurisdiction, however irregular or mistaken his assumption of jurisdiction may be. On the other hand, in numerous cases of judges of limited jurisdiction (in which any judicial act in excess of jurisdiction would be subject to control by prohibition or certiorari) judges have been held to be personally liable in respect of acts in excess of jurisdiction, notwithstanding that the judge may have acted in good faith and in the belief that the act was within his jurisdiction (for example, *Houlden* v. *Smith*, 14 Q.B. 841) unless that belief was based upon ignorance of some relevant fact: *Calder* v. *Halket* (1840) 3 Moo. P.C. 28, 77. This immunity is in each case based on public policy. The apparent distinction between a superior court and an inferior court in this respect has been explained by distinguished textbook writers (see below) upon the basis, that, where the assumption of jurisdiction by the court is not subject to the control of another court, the decision whether a particular cause or matter is within that jurisdiction is itself an exercise of the jurisdiction of the court. The court itself is the arbiter on questions relating to what falls within its own jurisdiction. Consequently, it is said, in assuming jurisdiction in relation to any particular cause or matter, the court is exercising that jurisdiction which is vested in it. In so doing the court may act erroneously ("inverso ordine") but, when purporting to act judicially, cannot act without jurisdiction ("coram non judice"). I have been unsuccessful in finding any judicial authority explicitly supporting this explanation apart from the statement of Willes J. in the advice of the judges to the House of Lords in *London Corporation* v. *Cox* (1866) L.R. 2 H.L. 239, 262, where he said:

> "Another distinction is, that whereas the judgment of a superior court unreversed is conclusive as to all relevant matters thereby decided, the judgment of an inferior court, involving a question of jurisdiction, is not final."

Before 1875 the jurisdictions of the superior courts of record were not coterminous. There were, for instance, pleas which the Court of King's Bench could entertain with which the Court of Common Pleas had no jurisdiction to deal: see the *Marshalsea Case*, 10 Co.Rep. 68b, 76a. Consequently, the possibility, at least theoretically, existed that a judge of one such court might assume jurisdiction in a matter in respect of which he demonstrably had no jurisdiction. In such a case the view was held in the 17th century that if anyone sought to make a judge of the superior court personally liable for an act in excess of his jurisdiction, the burden

A of proving excess of jurisdiction rested on the plaintiff; whereas, if a similar claim was made against a judge of an inferior court, the burden of proof was held to rest upon the judge to prove that he had had jurisdiction: *Peacock* v. *Bell* (1667) 1 Saund. 69, 74. The theory that a judge of a superior court of record might be shown to have acted without jurisdiction was still current in the middle of the 19th century. In the year 1840, Parke B., delivering the advice of the Privy Council in *Calder* v. *Halket*, 3
B Moo.P.C. 28, 74, 75 in a passage expressly referring to superior courts of record, stated that, "English judges, when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege," by which expression he meant immunity from suit. Even so, there were those who held that the immunity from civil liability of a judge of any superior court of record was absolute: see, for example,
C *Miller* v. *Seare* (1777) 2 Wm.Bl. 1141, where De Grey C.J. said, at p. 1145:

> "It is agreed, that the judges in the King's superior courts of justice are not liable to answer personally for their errors in judgment. And this, not so much for the sake of the judges, as of the suitors themselves. . . . The protection, in regard to the superior courts, is absolute and universal; with respect to the inferior, it is only while
D they act within their jurisdiction."

See also *Taaffe* v. *Downes* (*Note*), 3 Moo.P.C. 36.

Both *Salmond on Torts*, 16th ed. (1973), pp. 416, 417 and *Winfield and Jolowicz on Tort*, 9th ed. (1971), pp. 608, 609, treat this question as not being completely free from doubt, but favour the view that the immunity from suit is absolute: see also *Clerk and Lindsell on Torts*, 13th ed. (1969),
E p. 1097.

The history of the subject will be found to be discussed in *Holdsworth, A History of English Law*, 3rd ed. (1924), vol. 6, pp. 236, 240. The author sums the position up in this way, at p. 239:

> "Theoretically the judge of a superior court might be liable if he acted coram non judice; but there is no legal tribunal to enforce that
F liability."

In my opinion, there is in truth no difference between the principle applicable in the case of a judge of a superior court and that applicable in the case of an inferior court. Any difference that may arise in the operation of the rule between the one case and the other is due to the difference in jurisdiction: see *per* Lord Esher M.R. in *Anderson* v. *Gorrie*
G [1895] 1 Q.B. 668, 671. In determining whether a judge is liable for some act which he purports to have done in his judicial capacity, the sole question may, I think, be said to be whether it was an act coram non judice. If he were not then performing a judicial function, the act was not coram judice and the judge has no protection. If he was purporting to perform a judicial function but the matter was such that he had not jurisdiction to adjudicate upon it, again the act was not coram judice
H because he had no authority to act as a judge for that purpose, and again he is without protection. If, however, he did the act in question in the purported performance of his judicial function and it was within his jurisdiction, then the act was coram judice and the judge is protected notwithstanding any error in his reason for doing the act or his method of doing it.

When the superior courts of record were unified by the Supreme Court of Judicature Acts 1873 and 1875 the jurisdiction of the Supreme Court

then created was also unified. Every judge of the High Court, to whatever division of the High Court he may be assigned, is invested with the same measure of jurisdiction. The High Court is not subject to the control of any other court in the exercise of that jurisdiction. The Court of Appeal may correct errors in its exercise but cannot prohibit the High Court from assuming jurisdiction in any matter over which it determines that it possesses jurisdiction. If on appeal an appellate court discharges an order or judgment of the High Court as having been made without jurisdiction, it is correcting an erroneous exercise of the High Court's inherent jurisdiction in assuming jurisdiction in that matter. The High Court constitutes the sole arbiter (though subject to correction on appeal) as to what matters fall within its own jurisdiction. In my judgment, it should now be taken as settled both on authority and on principle that a judge of the High Court is absolutely immune from personal civil liability in respect of any judicial act which he does in his capacity as a judge of that court. He enjoys no such immunity, however, in respect of any act not done in his capacity as a judge.

This does not mean that if a High Court judge, or indeed a judge of the Court of Appeal, purports to do something demonstrably outside his jurisdiction, he will be entitled to immunity. He must have acted reasonably and in good faith in the belief that the act was within his powers. For example, a single judge of the Court of Appeal may at any time during vacation make an interim order to prevent prejudice to the claims of any parties pending an appeal: Supreme Court of Judicature (Consolidation) Act 1925, section 69. If he were to make an order in vacation which in good faith (although erroneously) he considered would prevent prejudice to some claim of a party to a pending appeal, the judge would, in my opinion, be entitled to immunity, but not if he were to make an order which was not directed to preventing such prejudice.

If a judge, acting judicially, does something which is within his jurisdiction, the law will not permit his motives to be impugned in an action brought by anyone who has sustained damage by reason of the act. In *Anderson* v. *Gorrie* [1895] 1 Q.B. 668, 670 Lord Esher M.R. said:

> "The ground alleged from the earliest times as that on which this rule" that no action will lie for a judicial act "rests is that if such an action would lie the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice":

He went on to say, at p. 671:

> "To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office."

It is clear that Lord Esher M.R. was here referring to acts done within the judge's jurisdiction, for he goes on to say:

> "If a judge goes beyond his jurisdiction a different set of considerations arise. The only difference between judges of the superior courts and other judges consists in the extent of their respective jurisdiction."

So the following questions may arise (1) was the act non-judicial? (2) If the act was, or purported to be, a judicial act, was it within the

judge's jurisdiction? (3) If the act purported to be a judicial act in the exercise of a jurisdiction which the judge possessed and about the extent of which he was under no misapprehension, did the judge act as he did upon an erroneous judgment that the circumstances were such as to bring the case within the ambit of that jurisdiction? (4) If the act was not in truth within the judge's jurisdiction, did he act in a conscientious belief that it was within his jurisdiction, and, if so, (a) was this belief due to a justifiable ignorance of some relevant fact or (b) due to a careless ignorance or disregard of some such facts, or (c) due to a mistake of law relating to the extent of his jurisdiction? He will, in my opinion, be immune in cases (2), (3) and (4) (a), but not otherwise.

If the act was non-judicial there is no doubt that no immunity arises from the fact that the doer holds the office of a judge, whether of a superior or of an inferior court.

If the act was, or purported to be, a judicial act and was within the judicial powers of the judge, he is immune from civil liability. Public policy requires that the judge's conduct shall not be impugned: *Anderson* v. *Gorrie* [1895] 1 Q.B. 668, 670. It is perhaps arguable that a judge, though acting within his powers, might be shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act at all. In such a case the remedy of his removal from office would be available. I doubt whether it would be in the public interest that his conduct should be open to debate in a private action.

It is in connection with the third and fourth questions that a difference between judges of superior courts and judges of inferior courts may be thought to emerge. There is no case in the books of a judge of a superior court being successfully sued for an act in excess of his jurisdiction, although there are statements of principle, to some of which reference has been made, which indicate that in theory this might occur. There are, on the other hand, many reported cases in which judges of inferior courts have been sued. This phenomenon is, I think, due to the fact that, where a judge of a superior court has been held to have acted beyond his powers, this has been regarded for the purposes of the rule of judicial immunity as an error of judgment on his part rather than an abuse of jurisdiction. *Hamond* v. *Howell*, 1 Mod. 119, 184; 2 Mod. 218 is such a case. The judgment in that case proceeded on the express basis that the court of which the recorder had been a member (which was a Commission of Oyer and Terminer and so a superior court of record) had power to punish a misdemeanour in the jury and that the court conscientiously but erroneously believed that what the jury had done amounted to a misdemeanour. This was held to constitute an error of judgment for which no action would lie on the basis that, although the court was mistaken, yet it had acted judicially. The mistake in that case was clearly a mistake of law.

In *Houlden* v. *Smith*, 14 Q.B. 841, the defendant was the judge of the county court at Spilsby in Lancashire. The plaintiff, Houlden, was resident and carried on business in Cambridgeshire. A judgment had been regularly obtained in the Spilsby county court against the plaintiff. Thereafter the defendant directed a summons to be issued for the plaintiff to appear at the Spilsby court for examination as to his means. This summons was without the jurisdiction of the Spilsby county court, for by statute such a summons had to be issued by the court within the limits of which the party summoned should then dwell or carry on his business. The plaintiff did not answer to the summons and the defendant as judge

of the Spilsby court, in good faith, believing that he had power to do so, committed the defendant for contempt of court. The plaintiff sued in trespass for false imprisonment. The judgment of the Queen's Bench proceeded upon the basis that the defendant had known all the relevant facts and he had been mistaken in law. Patteson J. said, at p. 852:

> "although it is clear that a judge of a court of record is not answerable at common law in an action for an erroneous judgment, ... yet we have found no authority for saying that he is not answerable in an action for an act done by his command or authority when he has no jurisdiction."

The defendant was held liable.

The third and last case which I will mention in this connection is *Willis* v. *Maclachlan*, 1 Ex.D. 376. The defendant in that case was a revising barrister who had ordered the plaintiff out of his court when acting as a revising barrister. Under the County Voters Registration Act 1865, section 16, the defendant had statutory authority to order any person to be removed from this court who should interrupt the business of the court or refuse to obey his lawful orders in respect of the same. The defendant had reason to think that the plaintiff had behaved dishonestly in respect of a hearing in his court in the previous year and on that ground he directed that he should be removed from the court. Bramwell B. said, at p. 382, that he had no doubt that the defendant thought he had power to deal with the plaintiff as he did and that in so doing he was making a proper use of that power, but that he could have no right to punish the plaintiff for his former conduct by turning him out of court. Grove J. said, at pp. 384–385, that the defendant's act had been an exercise of a jurisdiction which he did not possess, not an erroneous mode of action or an excessive exercise of a jurisdiction which he did possess. In the county court the plaintiff had been non-suited. The Exchequer Division, allowing the plaintiff's appeal, directed a new trial. Again the mistake was one of law.

The distinction between *Hamond* v. *Howell*, 1 Mod. 119, 184; 2 Mod. 218 and the two later cases appears to me to be that no question arose in that case as to the nature and extent of the jurisdiction of the court: the question was whether the acts of the jurymen had amounted to misdemeanours. *In Houlden* v. *Smith*, on the other hand, the plaintiff had not been guilty of any contempt of court unless the summons to attend for examination as to his means was validity issued. The fundamental question in that case consequently was whether the defendant had any power to issue that summons. In *Willis* v. *Maclachlan* no question arose as to the character or legal effect of anything done by the plaintiff at the meeting from which he was ejected; the only question was whether under the section of the County Voters Registration Act 1865, which was the only power relied upon by the defendant, the defendant could properly eject the plaintiff on the ground of his conduct in the previous year. In each of the two later cases the question was fundamentally one relating to the extent of the defendant's judicial powers, whereas in *Hamond* v. *Howell* the fundamental question was the nature and legal quality of the plaintiff's act. A comparison of these cases does not lead me to the conclusion that any different principles are applied in the case of a superior court from those applicable to an inferior court. I therefore approach the present case from the position that the test is whether the act com-

A plained of by the plaintiff was an act done coram judice, that is, a judicial act.

By section 4 (1) of the Courts Act 1971, the Crown Court is designated a superior court of record. But section 10 (5) provides that in relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High B Court possesses in relation to the jurisdiction of an inferior court. The Crown Court is consequently a hybrid. In relation to trials on indictment it is in truth a superior court of record, but in relation to other matters it is an inferior court subject to control by the High Court in the exercise of its jurisdiction. The present case falls in the latter category. Consequently, in my opinion, in the present case the immunity of the judge from civil C liability exists if he acted within his jurisdiction as a judge of the Crown Court, exercising its appellate jurisdiction. I have been tempted by the view that, as the Crown Court is designated a superior court of record, the immunity of its judges should be equated with the degree of immunity of judges of the High Court in the exercise of the jurisdiction of the High Court, and to hold that a judge of the Crown Court acting as such is, if he does some act in the honest belief that in the circumstances D of the case that act is within his judicial powers, immune from civil liability; but I do not find it necessary to go so far for the decision of this case, and moreover I have been unable to satisfy myself that that view would accord with the thinking which underlies the established law. So I must consider whether the act of which the plaintiff seeks to complain was one which it was within the judge's power to do.

E If it was within the powers of the judge to determine whether Mr. Sirros should or should not be detained in custody consequent on hearing the appeal, the fact that he may have followed an irregular course in doing so would not render the judge personally liable to a claim such as Mr. Sirros seeks to prosecute in this action. If the judge had jurisdiction to procure Mr. Sirros's detention, any irregularity of procedure may afford good grounds for appeal but cannot deprive the judge's act of its judicial F character, so as to render it coram non judice.

It is suggested that when the judge gave his direction to "stop him" he was already functus officio, as the hearing of the appeal had then been concluded, with the consequence that the direction was not a judicial act at all. I feel unable to accept this argument. The judge, in my opinion, clearly thought and intended that the order which he had made would G result without more in the detention of Mr. Sirros in custody. The direction to "stop him" was not a new and distinct decision. It was an implementation of the consequence which the judge believed and intended to follow from the order which he had made. This would, in my opinion, hold good, whether the judge gave the direction at the moment when he saw Mr. Sirros disappearing through the door of the court or some minutes later. I would, however, accept the judge's evidence that the H former was the truth.

If the judge was mistaken, as I think he was, in thinking that it would follow from his order without more that Mr. Sirros should be detained in custody, but he could have produced that result by an order in some other form, his error was one of form or procedure, not of jurisdiction. It is true that the judge, whose attention was not drawn to section 57 of the Courts Act 1971, believed that he had no jurisdiction to entertain an

appeal from the magistrate's recommendation of deportation, but this error could not affect the extent of his true jurisdiction. A

Upon hearing the appeal the judge could have discharged or varied any part of the magistrates' order (Courts Act 1971, section 9 (2) (*a*)) whether part of the order was appealed against or not (section 9 (5)) or he could have made such other order as he thought just (section 9 (2) (*c*)). He could, I think, clearly have deleted from the magistrate's order that part of it consisting of the direction that, notwithstanding the recommendation of deportation, Mr. Sirros should not be detained in custody; or (which would have come to the same thing) he could have certified that the magistrate had convicted Mr. Sirros and have made his own recommendation of deportation but no direction that Mr. Sirros should not be detained (Aliens Order 1953, article 20 (2) (*a*)). In either case Mr. Sirros would have become liable to be detained in custody under the Aliens Order 1953, article 21 (4). The judge thought, mistakenly, that if he dismissed the appeal but gave no direction of his own that Mr. Sirros should not be detained, that article would operate so as to result in Mr. Sirros being liable to be detained. That this was a mistake is, I think, clear from article 21 (4), but to my mind it is plain that the judge must have considered, however fleetingly, whether Mr. Sirros should be detained or whether matters should be so arranged as to allow him to remain free, and must be assumed to have decided in favour of the former and rejected the latter course. B C D

For these reasons I am of opinion that, when the judge directed the detention of Mr. Sirros, he was acting within his jurisdiction, although he adopted an erroneous course of procedure. It follows from this, in my opinion, that the judge is immune from any personal liability to Mr. Sirros in respect of that act. E

The police officers acted under the instructions of the judge. If the judge had power to direct the detention of Mr. Sirros, as I think for reasons already stated that he had, the police officers were justified in acting under his authority.

I would accordingly dismiss this appeal. F

ORMROD L.J. This case arises out of a most unfortunate muddle which occurred at the Crown Court, sitting at St. Jame's Square, on February 8, 1972, in an appeal by Mr. Sirros against a recommendation for deportation which had been made by the magistrate at Clerkenwell. As a consequence of this muddle Mr. Sirros was improperly detained in custody for about 24 hours. The court, consisting of the judge and two lay magistrates, together with counsel for the prosecution, were under the erroneous impression that no appeal lay to the Crown Court against such a recommendation and accordingly dismissed the appeal. Mr. Sirros, who had twice rejected the judge's offer of legal aid, was in no position to correct the error, which arose from a misleading footnote to article 20 (2) (*a*) of the Aliens Order 1953 in *Stone's Justices' Manual*. The judge, assuming that the provisions of article 21 (4) applied, ordered the police to stop Mr. Sirros as he was leaving the court. Actually he succeeded in leaving the building and was later arrested by one of the police officer defendants. Article 21 (4) must be unique, for it provides for the automatic detention of an alien against whom a recommendation has been made; no order or warrant of the court is required. This article, however, gives the court a discretion to direct that the alien be not detained. In this case the magistrate had so directed, but the judge either failed to appreciate G H

A that such a direction had been made or did not realise that the effect of dismissing the appeal was to leave the direction in force. Accordingly, Mr. Sirros was improperly detained. The mistake, however, was put right the following day by order of the Divisional Court in habeas corpus proceedings. The irony of the situation is that the Crown Court, in fact, had jurisdiction to hear the appeal and had all the necessary powers, had it thought fit, to effect Mr. Sirros's detention, either by amending the B magistrate's order by deleting his direction that Mr. Sirros should not be detained, or by making a new recommendation for deportation without giving such a direction. This is clear from the provisions of section 9 of the Courts Act 1971, which provides, inter alia, for a full rehearing of the case by the Crown Court, which can exercise any power which the court below could have exercised.

C The primary question in this appeal is whether in these circumstances the plaintiff, Mr. Sirros, can sue the judge personally for damages for trespass or false imprisonment. In my judgment, the answer is undoubtedly in the negative.

It is an established rule of public policy:

> "neither party, witness, counsel, jury, nor judge, can be put to D answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed": *per* Lopes L.J. in *Royal Aquarium and Summer and* E *Winter Garden Society Ltd.* v. *Parkinson* [1892] 1 Q.B. 431, 451.

In an earlier case, *Scott* v. *Stansfield*, L.R. 3 Exch. 220, 223, Kelly C.B. said:

> ". . . a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general F proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice."

This rule was reiterated, in relation to actions for negligence against advocates, in *Rondel* v. *Worsley* [1969] 1 A.C. 191, where the immunity was grounded firmly and unequivocally on public policy, for reasons which are set out at length in the speeches delivered by their Lordships in that G case.

There has been no case for over a century in which an attempt has been made to sue an English judge for trespass or false imprisonment, and I can see no reason in principle why a different rule should apply to these torts. In fact, in *Anderson* v. *Gorrie* [1895] 1 Q.B. 668, an action against three judges of the Supreme Court of Trinidad and Tobago for wrongfully committing the plaintiff for contempt and holding him to H excessive bail, in which the jury found that one of the judges had acted oppressively and maliciously, Lord Esher M.R. said, at p. 671:

> "To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office."

He went on to qualify this statement of principle by observing: "If a judge goes beyond his jurisdiction a different set of considerations arise." **A**

This qualification has a long history and much depends upon the sense in which the term "jurisdiction" is used. It has led to a distinction between judges of superior courts and judges of inferior courts which cannot easily be justified, at least, in the circumstances which prevail at the present time. There is no record of a judge of a superior court being held personally liable for an act done in the exercise of his judicial office. **B** As was said in an old case— *Le Caux* v. *Eden* (1781) 2 Doug.K.B. 594, 602:

> A negative usage is a strong argument. "An universal silence in Westminster Hall . . . is a strong argument to prove that no such action can be sustained."

C

There are a few reported cases of attempts to bring such actions against judges of a superior court in England, for example *Hamond* v. *Howell*, 1 Mod. 119, 184, and 2 Mod. 218 and *Floyd* v. *Barker* (1607) 12 Co.Rep. 23. The first involved the Recorder of London who had unlawfully imprisoned the jurors at the trial of Penn and Meade for ignoring his direction to convict; the second, a judge of assize, who was sued for conspiracy. In both cases it was held that no action could be brought **D** against a judge of record "for doing anything quatenus a judge" (*Hamond* v. *Howell*, 2 Mod. 218, 220), or "for that which he did openly in court as judge" (*Floyd* v. *Barker*, 12 Co.Rep. 23, 24).

In the Irish case of *Taaffe* v. *Downes*, 3 Moo.P.C. reported in a note beginning at p. 36, decided in 1812, it was held that no action lay against the Lord Chief Justice of the King's Bench in Ireland in respect of a warrant for the arrest and detention of the plaintiff. The Lord Chief Justice had **E** declined to plead any form of justification and took his stand on his position as a judge. The judgments proceeded upon what today would be called public policy. Fox J. said, at pp. 51–52:

> "The principle at law, of exemption from being sued for matters done by judges in their judicial capacity, is of great importance. It is necessary to the free and impartial administration of justice, that **F** the persons administering it should be uninfluenced by fear and unbiassed by hope. Judges have not been invested with this privilege for their own protection merely;—it is calculated for the benefit of the people, by ensuring to them a calm, steady, and impartial administration of justice; it is a principle coeval with the law of the land, and the dispensation of justice in this country; and is founded **G** on the very frame of the constitution; it is to be met with in the earliest books of law; and has been continued down to the present time, without one authority or dictum to the contrary, that I have been enabled to find. My brother Mayne, who preceded me, has given a clear and lucid detail of the authorities, as they have arisen from time to time. Most of them were mentioned in the course of the argument at the bar. After the manner in which they have been **H** stated by him, it becomes superfluous now for me to travel minutely through them again; but I think myself called upon, in assertion of this principle, so vitally necessary to the administration of justice, to maintain it in such a manner, as may be requisite to give it full effect and operation; still, however, not trenching in any manner on the rights of the subject, which this principle is intended to protect; not to injure or infringe. It appears to be most necessary that a judge

A administering justice shall not be liable to answer for acts done judicially by him, by the way of action or prosecution;—they are only answerable for their judicial conduct in the High Court of Parliament; and without the existence of this principle, it is utterly impossible that there could be such a dispensation of justice, as would have the effect of protecting the lives or property of the subject. A judge must—a judge ought to be uninfluenced by any personal consideration B whatsoever operating upon his mind, when he is hearing a discussion concerning the rights of contending parties; otherwise, instead of hearing them abstractedly, a considerable portion of his attention must be devolved to himself. There is something so monstrous in the contrary doctrine, that it would poison the very source of justice, and introduce a system of servility, utterly inconsistent with the con- C stitutional independence of the judges,—an independence which it has been the work of ages to establish, and would be utterly inconsistent with the preservation of the rights and liberties of the subject."

Judges of courts of inferior jurisdiction and justices of the peace have, always, it appears, been differently treated. Powell B. in *Gwinne* v. *Poole* (1692) 2 Lut.App. 1560, 1566 said that a judge of a court of record D in a borough was not responsible, as a trespasser, unless he was cognizant that the cause of action arose out of the jurisdiction, or, at least that he might have been cognizant, but for his own fault. This passage was cited with approval by Parke B., in his well-known judgment in *Calder* v. *Halket*, 3 Moo.P.C. 28, 77. It is relevant to note that Powell B. defined the sense in which he used the word jurisdiction by saying that some inferior jurisdictions were limited by subject matter, others in respect of persons, E and others in respect of place. Parke B. himself said, at p. 75:

"English judges, when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege"; and later in his judgment, at p. 78, he added: "It is clear, therefore, that a judge is not liable in trespass for want of jurisdiction, unless he knew, or ought to have known, of the defect; and it lies on the F plaintiff, in every such case, to prove that fact."

The decision in *Calder* v. *Halket* turned on the construction of the Statute 21 Geo. III c. 70., an Act passed for the protection of provincial magistrates in India. Section 24 enacted:

"That no action for wrong or injury shall lie in the Supreme Court against any person whatsoever exercising a judicial office in the county G courts, for any judgment, decree, or order, of the said court."

Three possible constructions of this section were suggested: complete immunity, immunity for acts done by a judge in the bona fide exercise of his office and in the belief that he had jurisdiction and immunity limited to acts done within the jurisdiction. Parke B., relying on the analogy of the law relating to English judges, adopted the third or narrowest construc- H tion, notwithstanding the apparently clear words of the statute.

Eleven years later, *Houlden* v. *Smith*, 14 Q.B. 841, the only reported case of a judgment against an English judge, was tried, curiously enough, by Parke B. himself, at Cambridge Assizes. The jury found for the plaintiff and the judge reserved it for the opinion of the Queen's Bench who, after hearing further argument, gave judgment for the plaintiff. The defendant was the county court judge for the Spilsby area. He caused a summons to be served on the plaintiff, who lived at Cambridge, outside

the jurisdiction of the Spilsby court. Eventually, the plaintiff having ignored the summons and a subsequent judgment summons, the judge made an order committing him to prison in Cambridge. Since he lived outside the county court's geographical jurisdiction, the judge had no jurisdiction over him. In the course of his judgment, in the Queen's Bench, Patteson J. said, at p. 851:

> ". . . although it is clear that the judge of a court of record is not answerable at common law in an action for an erroneous judgment, or for the act of any officer of the court wrongfully done, not in pursuance of, though under colour of, a judgment of the court, yet we have found no authority for saying that he is not answerable in an action for an act done by his command and authority when he has no jurisdiction."

In 1850, a county court judge was still something of a novelty. The first County Courts Act was passed in 1846.

The dichotomy in the common law is plain. A judge of a superior court was not answerable for anything said or done by him when acting in a judicial capacity, even if he acted "maliciously and corruptly": *Fray* v. *Blackburn*, 3 B. & S. 576, 578 *per* Crompton J. A judge of an inferior court was personally liable if he acted outside his jurisdiction. There was only one exception to this rule. If he genuinely, although mistakenly, believed on the facts that he had jurisdiction he was protected. Mistake of law, however, was no defence and it was held in *Houlden* v. *Smith* that the judge's mistake was a mistake of law and not of fact.

It appears to me to be impossible to find a consistent principle to explain or account for these rules, except in terms of public policy. The cases concerning judges of superior courts are replete with statements of policy; the cases involving inferior courts seem to be silent on policy and pre-occupied with questions of jurisdiction. Holdsworth (*A History of English Law*, 3rd ed. (1924), vol. 6, p. 238), however, suggested that exposure to the risk of personal liability for acting in excess of jurisdiction was preserved by the courts as a means of safeguarding the liberty of the subject, especially where justices of the peace were concerned. In many situations the law provided no other form of remedy, and the courts used this one so vigorously that Parliament had to intervene on several occasions to temper the wind to the shorn lamb. The Justices' Protection Act 1848 was only the last of a series of similar enactments. *Blackstone's* comment (*Commentaries*, 17th ed. (1830), vol. 1, pp. 353–354 is interesting. Having said that justices have had "heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand, the office," he observed that "if a well-meaning justice makes any undesigned slip in his practice, great lenity and indulgence are shown to him in the courts of law; . . ." Whether the defendant justices in many of these cases were conscious of much "lenity or indulgence" may be doubted.

The cases contain a variety of attempts to rationalise this dichotomy, but none carry conviction to a modern mind. So the fundamental question in this appeal is whether these rules, which were developed to meet situations quite different from those of today, are applicable in their old form to the present case; or whether they should be adapted to conform with the changes which have taken place in the 100 years since they were last considered in relation to judges. If they are to be modified, the question is how; if they are to be applied, great care must be taken not to distort them in the process.

A In my judgment, these rules in their old form are not appropriate to the conditions of today. There is no ground today for drawing a distinction between judges of different status or between judges and magistrates. The Courts Act 1971 provides, in effect, the reductio ad absurdum. By section 4 (1) the Crown Court is declared to be a superior court of record. But by subsequent provisions, the court consists of High Court judges, circuit (formerly county court) judges and, sometimes, lay B magistrates. So far as trials on indictment are concerned, it is a superior court, though staffed largely by judges who are judges of inferior courts when not sitting in crime. At the same time, when hearing appeals from magistrates' courts, it has one of the stigmata of an inferior court; the prerogative writs will go to it (section 10 (5)). Moreover, in cases arising under the Matrimonial Causes Acts, High Court judges sit as county court C judges, and county court judges sit as deputy High Court judges as occasion demands.

I, therefore, agree with Lord Denning M.R. that it is impossible to maintain double standards in so important a matter as a personal liability of judges, and that, accordingly, the old rules should be modified, by giving judges of inferior courts (including magistrates) enhanced protection. In my judgment the second formulation suggested, only to be D rejected, by Parke B. in *Calder* v. *Halket*, 3 Moo.P.C. 28, 74 should now be adopted, namely, a judge should be protected ". . . where he gives judgment, or makes an order, in the bona fide exercise of his office, and under the belief of his having jurisdiction, though he may not have any." With a fully developed appellate structure, supplemented by habeas corpus and the other prerogative writs, and made accessible to all, or nearly all, E by the legal aid scheme, there is no longer any necessity to preserve, in its old form, the remedy by way of personal actions against judges.

If, however, the old rules are still applicable in an unmodified form, two questions will have to be decided: what were the essential criteria of an inferior court: and what was meant by acting in excess of, or outside the jurisdiction?

The definition of an inferior court suggested long ago by Powell B. in F *Gwinne* v. *Poole* is, I think, still applicable. It means a court of limited jurisdiction, limited either by person, place or subject matter. The other test suggested, namely, that it is a court which is subject to supervision by prerogative writ, will not always give the same answer. In the present case, I cannot find any limitation by person, place or subject matter on the jurisdiction of the Crown Court, so it may not be the hybrid or chimera G I thought it was at one stage of the argument.

The use of the word "jurisdiction" in this context requires careful examination, because as Diplock L.J. pointed out in *W.* v. *W.* (1963) [1964] P. 67, 79, a distinction must be drawn between questions which are strictly questions of jurisdiction and questions which relate to the powers which the court can exercise in the course of exercising its jurisdiction. In my judgment, in the present context the word is used in its strict sense. In H other words, a judge of an inferior court acts outside his jurisdiction when he exceeds the limits imposed on his court; but not when, having jurisdiction over the subject matter, he assumes a power which has not been given to him. Whether this is in accordance with the well-known antithesis in the *Marshalsea Case*, 10 Co.Rep. 68b. between acts which are "inverso ordine" and acts which are "coram non judice," I do not know, because I find it virtually impossible to appreciate now the precise meaning which these phrases conveyed to Coke and his contemporaries. I hope and

think it is. It is certainly consistent with the cases up to and including *Houlden* v. *Smith*.

The result, therefore, is that, if the rule is applied in a modified form, the plaintiff in this case must fail. The acts complained of were done by the judge, acting in his capacity as a judge, in good faith, though mistakenly. In my judgment, he must fail also if the rule is applied in an unmodified form. I think Parke B. and his predecessors would have classified the Crown Court as a superior court, namely, not as a court of limited jurisdiction, with the consequence that no action lies against the judge. Alternatively, if it is to be classified as an inferior court, the plaintiff was subject to its jurisdiction and, for reasons which have already been given, the court had power (jurisdiction) to cause the plaintiff to be lawfully detained in custody. The functus officio point is irrelevant in this context. On the other hand, the actual order upon which the plaintiff was committed to prison was invalid because the appropriate steps had not been taken. Accordingly there was no answer to the application for habeas corpus which was rightly granted by the Divisional Court: see *Palmer* v. *Crone* [1927] 1 K.B. 804.

For these reasons I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *P. D. Kandler; Solicitor, Metropolitan Police; Treasury Solicitor.*

M. M. H.

[CHANCERY DIVISION]

RIGHTSIDE PROPERTIES LTD. *v.* GRAY

[1972 R. No. 4306]

1974 April 23, 24, 25; May 10 — Walton J.

Vendor and Purchaser—Completion—Delay in completion—Notice served for completion within 21 days from date of notice—Service by post arriving either by Saturday's or Monday's postal delivery at offices of purchasers' solicitors—Whether at least 21 days' notice—Statutory Form of Conditions of Sale 1925, condition 9

Vendor and Purchaser—Contract—Sale of land—Repudiation by vendor—Purchasers seeking damages—Whether purchasers to show themselves ready, willing and able to complete

By letter dated April 30, 1972, the plaintiffs exercised an option to purchase a freehold property from the defendant and, by condition 1 of the Statutory Form of Conditions of Sale 1925, the date for completion was Monday, June 19. The plaintiffs failed to complete on that date. On Friday, June 23, the defendant's solicitors wrote to the plaintiffs' solicitors and enclosed a notice, purportedly in accordance with condition 9

[Reported by MRS. F. ALLEN MCLEAN, Barrister-at-Law]