

Taxation Report

30th July 1992

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Mrs E Cockburn, Solicitor

Solemn Time & Line

Outlays (whether reasonably incurred)

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tempt to conceal them or to run away,
e established from that evidence. The
e charge labels that it was the appellant
boy and as we have already explained,
orroboration of the boy's evidence that
to him. That being so we are satisfied
he appellant of the charge and we shall
tive and will quash the conviction.

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Note of Objections to Auditor's Report (Sheriff Court)

30th July 1992

HER MAJESTY'S ADVOCATE

Prosecutor

against

DANIEL GRAY

Accused

Legal aid—Outlays—Expenditure of over £9,500 incurred in obtaining photographs without estimates having been obtained—Whether reasonably incurred—Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (S.I. No. 1491), reg. 8(1)(c)

Regulation 8(1)(c) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 provides that a solicitor acting under a legal aid certificate will be allowed any out-of-pocket expenses actually and reasonably incurred by him.

The accused's solicitors were granted a legal aid certificate for his defence in a sheriff and jury trial due to begin on 7th January 1991. On 28th November 1990 counsel instructed the solicitors to obtain a number of photographs which it was accepted were necessary for the defence. The solicitors did not take any steps to obtain estimates for the cost of the photographs, but instructed a firm of photographers who had done work for them in the past. The photographers charged a total of £9,791.90, which included a charge of £5.75 per print. Objection was taken by the Scottish Legal Aid Board to this sum on the basis that the solicitors had not acted reasonably, had failed to obtain estimates, and should have been able to obtain prints at a cost of between £1.75 and £3 each. The auditor accepted that estimates should be obtained whenever practicable, but concurred in the solicitors' argument that it was best to proceed immediately with known photographers. He allowed the sum claimed and the Board took a note of objections to his report.

Held, that the question was what a prudent man of business would have done in the circumstances, that the auditor had failed to address that issue, and that a prudent man of business would have taken some steps in advance to find out what the photographers he knew, and other photographers, were likely to charge; and that accordingly the auditor had failed to apply an objective test and his determination could not stand; and note sustained and matter remitted to the auditor to tax the print charge of new in the light of the sheriff's observations.

Cases referred to in the sheriff's judgment:

Hood v Gordon (1896) 23 R. 675

Park v Colvilles Ltd, 1960 S.C. 143; 1960 S.L.T. 200.

On 9th June 1992 the auditor of Paisley Sheriff Court issued a determination in respect of outlays incurred by solicitors acting for the accused in a sheriff and jury trial at that court. The determination was in the following terms:

'Having examined the foregoing account of expenses insofar as same relates to outlays covering the provision of photographic services, and having taxed same under the provisions of regulation 11 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, I find same to be duly vouched in the sum of nine thousand seven hundred and ninety-one pounds and ninety pence (£9,791.90) sterling. I hereby tax the said outlays in that amount.'

In his note the auditor stated, inter alia:

'This case fell to me for taxation in terms of the above-mentioned Regulations. Taxation took place on 5th June 1992 when I heard submissions

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from Mrs E. Cockburn, Solicitor, Bridge of Weir, on her own behalf and from Mr N. Jones on behalf of the Scottish Legal Aid Board. . . .

In the exercise of her discretion Mrs Cockburn placed instructions with her chosen photographer, Simpson of Greenock, on 13th, 17th, 20th and 28th December 1990. Simpson subsequently rendered the accounts now in dispute.

The Board, as I have stated, do not dispute that all the photography was necessary or that time was short. Nevertheless the Board argued that Simpson's charges were unreasonably high and that estimates should have been obtained from other firms. It was said that the Board's previous highest pay-out was at the rate of £2.75 + V.A.T. for each of 825 prints in 1990 and I was advised that the Board had obtained some current estimates which led them to believe that £1.75 + V.A.T. per print was a fair price, but they had later upped their offer to Mrs Cockburn to £3 + V.A.T. per print. I enquired whether the Board's estimates included any premium for completion of such a big task at short notice, particularly at the Christmas period. They did not, and it was conceded that premiums could be a factor.

Mrs Cockburn's case was based on the shortage of time. It was necessary to get the job done quickly and well. Obtaining estimates would have delayed matters. She had used Simpson before and knew of their efficiency. Using any other firm without time to take or check references would have been stepping into the unknown and had there been any form of let-down, it may have been too late to take remedial action. Mrs Cockburn further submitted that there was no duty on her to obtain other estimates if she thought, in the exercise of her discretion, that the service offered was reasonably charged. Mrs Cockburn confirmed that Simpson's charges included time spent by two of their senior employees travelling to and spending time at the various loci and that the charges were enhanced by overtime and holiday rates.

Mrs Cockburn next submitted that the Criminal Injuries Compensation Board allow £5.00 + V.A.T. per colour shot and, in light of that, that the Board's figures were unduly weak. Finally a letter was exhibited from the British Institute of Professional Photography to the effect that Simpson's charge was "not unreasonable".

I do not dismiss the Board's argument on the view that they were told of the impending photography and assented to it. That does not make the charge fair and reasonable. I accept the principle that estimates should be obtained whenever practicable, but I concur with Mrs Cockburn's view that estimates do not establish a quality of work and that in the particular circumstances of this case it was best to proceed immediately with the devil she knew. I consider too that the absence of other estimates does not automatically render Simpson's charges unfair or unreasonable.

It is my view that the Board have not in their researches fully taken into account the particular circumstances of this case and have not demonstrated that a saving could have been made without possible prejudice to the defence of the case; that Mrs Cockburn acted responsibly all through, from the initial efforts to obtain the Board's instructions to the subsequent exercise of her discretion and that she has shown that the outlays were fairly and reasonably incurred in the circumstances.

The Scottish Legal Aid Board took a note of objections in which they stated that the auditor had erred for, inter alia, the following reasons:

4. The auditor has erred in concluding that the solicitor exercised her discretion reasonably. It is apparent that the solicitor, faced with what she herself obviously considered to be potentially substantial expenditure, admittedly failed to make any attempt to obtain competing estimates or to otherwise establish the appropriate rate for the work. It is not apparent what "particular circumstances" precluded the solicitor from taking normal and relatively simple steps to obtain estimates from other local reputable

photographers, of whom there must be some instructing these photographers or, alternatively, a photographer whom she preferred to instruct. The solicitor made any attempt to agree the total price of each print nor the substantially low price attach to the preparation of multiple prints.

5. The auditor was not entitled to conclude to consider that there was "no duty on her thought, in the exercise of her discretion, reasonably charged". The solicitor, when acting is obliged to satisfy herself that the outlays reasonably incurred, to control expenditure in every respect of a case, with due regard to efficiency, failed to do so in this case.

6. The auditor misled himself to the extent of his decision by comparing the cost per print of a letter exhibited from the British Institute of Professional Photography (B.I.P.P.) with the cost of a letter exhibited from the Criminal Injuries Compensation Board. The C.I.C.B. require four separate 8" by 10" copies of a letter for the victim. These are scanned and the cost for the work carried out would, accordingly, be four times the cost of a single copy, excluding V.A.T. In this case the number of copies compared to the large number of copies which would be required for the court, Crown and jury. No distinction between the cost of an original print or the cost of a copy. Nor has the solicitor disclosed any attempt to obtain photographs in agreeing a fee with the photographer. The letter from the B.I.P.P. is simply a fact that a charge is "not unreasonable" does not mean that the money or the cheapest, consistent with the economy obtained by a person who should have been considered by the Scottish Legal Aid Board.

It is considered by the Scottish Legal Aid Board that incurring substantial expense, must make it reasonable to satisfy himself that the costs to be incurred are reasonable. The solicitor in this case has failed to discharge the duty incumbent on her in that she had the client been a private fee-paying client, she would have been required to explain her failure to make some attempt to satisfy herself that the costs would have been required to explain her failure to client. The standard is no less in legal proceedings specifically laid down in the legislation.

The note of objections was heard by Sheriff Stoddart. For the objectors: Haggarty, Solicitor, S. For the solicitors: Cockburn, Solicitor, S.

On 30th July 1992 the sheriff issued the following note: The sheriff, having resumed consideration of the auditor's report, sustains the note; reduces the outlays of £9,791.90 incurred by the auditor; and orders Simpson Photographers of Greenock: a) to pay the auditor's fee in respect of the diet.

The sheriff appended the following note: SHERIFF STODDART. This note of objections is in relation to the auditor of court of certain outlays incurred.

of Daniel Gray, an accused person
 jury at Paisley Sheriff Court. The
 defence under section 23(1)(a) of the
 was concluded, his solicitor lodged
 an account of the fees and outlays
 of the Criminal Legal Aid
 Regulations'). Only one part of that
 the outlays incurred to Simpson
 a number of photographs on the

,791.90. Since the amount allowable
 outlay could not be agreed, the matter
 Paisley Sheriff Court, all in terms of
 5th June 1992 the auditor duly taxed
 on 9th June 1992 accordingly.
 ons to report and the matter came
 The Board were represented by Mr
 her on behalf as the solicitor for the

first to regulation 8(1)(c) of the Fees
 shall be allowed, as outlays on his legal

and reasonably incurred. . . .'

90 had 'actually' been incurred, but
 incurred.

and to this submission and the views
 ended me of the basis upon which legal
 on disputed that the proper basis of
 party paying', the third party in legal
 basis, all expenses were allowed which
 without special instruction from
 would be taxed: see *Hood v Gordon*,
elles Ltd, per Lord Patrick at p.153.
 and under criminal legal aid could only
 expense he incurred was 'reasonable',
 otographer was not an expert witness
 of the Board was necessary under
 id (S and) Regulations 1987, the
 er was not something with which the
 employment being wholly within the
 ame to the matter of payment, the
 e outlay was 'reasonably' incurred.
 acts which gave rise to the dispute. It
 ue to begin on 7th January 1991 (not
 productions for the trial required to be
 was sworn and in order to ensure
 ced with meeting a deadline by which
 efence required to be ready. It was
 90 counsel for the accused instructed
 raphs; it was conceded that these
 e since their purpose was to preserve
 ict a number of buildings in various
 hed. It was accepted too that these

buildings related directly to the charges upon which the accused was indicted and
 that in the light of the imminent loss of evidence, time was of the essence. But
 there the Board and the solicitor parted company.

It appeared that on receipt of counsel's instructions, on 6th December 1990
 the solicitor for the accused contacted the Board, more as a precautionary
 measure than anything else. The Board advised by telephone that prior authority
 to instruct a photographer was not required and confirmed this in writing on 18th
 December 1990. Before the latter date, however, the solicitor had decided to
 commission Simpson of Greenock to take the photographs. She was familiar with
 their work, having used them before in connection with other cases. Before
 instructing them she took no steps to obtain an estimate from them (or any other
 photographer) of what the job would cost. In fact almost 600 photographs were
 taken, following instructions placed on 13th, 17th, 20th and 28th December
 1990. Some of the prints were made the subject of multiple copies; most of the
 prints were in colour, for which the individual charge was £5.75 per print. In
 addition, the photographers made a separate charge for time and materials.

In taxing the outlay at the full sum incurred the auditor concluded:

'It is my view that the Board have not in their researches fully taken into
 account the particular circumstances of this case and have not demonstrated
 that a saving could have been made without possible prejudice to the defence
 of the case; that Mrs Cockburn acted responsibly all through, from the initial
 efforts to obtain the Board's instruction to the subsequent exercise of her
 discretion and that she has shown that the outlays were fairly and reasonably
 incurred in the circumstances.'

Mr Haggarty submitted that this conclusion was seriously flawed. Laying
 aside the fact that the auditor at one point in his report seemed to think that the
 Board had 'assented' to the impending photography and then had later in his
 report departed from that view of the Board's actings, the auditor had misled
 himself into thinking that the solicitor had exercised a discretion in deciding to
 incur the outlay of £9,791.90. In reality, the only discretion which required to be
 exercised was the discretion to employ a photographer at all. Once it had been
 decided to do so, then a solicitor had no discretion when it came to the amount of
 the outlay to be incurred. The solicitor was obliged to act as a 'prudent man of
 business', rather than exercise a discretion. In a legal aid case, public money was
 involved. The least that a prudent man of business would have done would have
 been to obtain estimates on which a negotiated figure for the cost of the
 photographs could be agreed. The solicitor had an obligation to make sure that
 the charge for each photograph was at a proper rate; here, all the copies of the
 prints had been charged at the rate pertaining to the original. A prudent man of
 business would have sought to agree in advance an appropriate rate for each
 element of the job rather than accept without question what Simpson of Greenock
 actually charged. The auditor had lost sight of this; he had taken a neutral event
 and built it into an exercise of discretion.

Further, said Mr Haggarty, the auditor had ex post facto transposed the onus
 of showing that the charge was 'reasonable'. It was for the solicitor to show that at
 the time the outlay was incurred, the question of the expense was properly
 addressed; it was not for the Board to demonstrate that a saving could have been
 made. In any event the question of 'saving' was not a matter raised directly in
 regulation 8(1)(c) of the Fees Regulations: the solicitor had to show only that the
 outlay was 'reasonably' incurred, not that it was 'reasonable with due regard
 being paid to economy' or some other like test.

Finally, Mr Haggarty submitted that the auditor had applied a subjective test
 in judging the actings of the solicitor. This was wrong: he should have asked

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A whether a prudent man of business would have incurred the outlay in question, which was an objective test. Looked at from this viewpoint, the question was whether the auditor was entitled to come to the conclusion that the outlay was reasonably charged. In spite of the tight time scale involved, there was nothing to indicate that an estimate had been obtained; there was nothing said to the auditor to support the view that the charge was reasonable. The solicitor did not know (at the time the outlay was incurred) what *was* reasonable. The Board's officers would have taken less than an hour to telephone a number of photographers to obtain comparative quotations for the print cost of the photographs, for it was only this element of the photographer's account which was in dispute; the Board took no issue with the reasonableness of the time and labour charges. The solicitor should have tried to find out in advance what the normal cost of the prints would have been. All that was being photographed was a number of buildings, so a high-quality print was unnecessary. The Board's view was that the cost per print should have been in the range £1.75 to £3.00, which was what the client of a prudent man of business might have been expected to pay. For all these reasons, Mr Haggarty invited me to sustain the note of objections.

C On her own behalf Mrs Cockburn submitted briefly that the auditor had been entitled to reach his decision. There was no requirement on a solicitor to obtain advance estimates for outlays and it was wrong to suggest that because estimates had not been obtained, the charges were unreasonable. The auditor had correctly addressed himself to the work involved, having regard to the limited amount of time available, the imminence of the Christmas holiday prior to the start of the trial and the need to present the photographs in booklet form suitable for use in court. The auditor had correctly had regard to information before him from the British Institute of Professional Photography to the effect that Simpson's charges were not unreasonable. I should sustain the auditor's report and repel the note of objections.

D In a brief word of reply, Mr Haggarty stressed that the extra labour charge had been accepted by the Board; indeed it had already been paid. It was the print charge which was in issue. In the abstract, the absence of estimates might not suggest that the outlay was unreasonable, but this was a situation with which the Board were familiar: their officers knew the usual charges for photography and the Board had sought to persuade the auditor that the outlay incurred was excessive.

F I have not found this an easy matter to determine, for I have considerable sympathy both for the solicitor for the accused and for the auditor. As for the former, she was no doubt overwhelmed with the preparation for a major jury trial which was expected to last many weeks and this no doubt led to her decision to instruct (for the best of motives) the photographer she knew. Nor did the auditor have an easy task in taxing these outlays, for he does not seem to have been presented with very much information on which to make a judgment. But sympathy cannot determine this matter. I have come to the view that the proper course is to sustain the note of objections. The question resolves itself into this: looked at objectively, what would a solicitor acting as a prudent man of business have done at the end of November 1990 on receipt of counsel's advice to obtain a large number of photographs for the use of the defence in a trial due to begin before sheriff and jury on 7th January 1991? I think such a solicitor would have realised that time was of the essence and that the photographs required to be of adequate quality for use by all those involved in the court proceedings. I think also that such a solicitor, knowing that the case was legally aided, would have realised that the amount of photography involved would give rise to a considerable outlay which ultimately the Board would require to pay. Having come to this realisation, such a solicitor would have required to check the Fees

Regulations to see what (if anything) was 'reasonable' outlays would be paid, to pause the cost about to be incurred. It is at this point an error. In his report he observes that he accepted wherever practicable but that they do not accept that the absence of estimates did charges unfair or unreasonable. But the a issue of what a solicitor acting as a prudent the circumstances. He concurs in Mrs C 'proceed immediately with the devil she kn prudent man of business would have done s an individual would certainly have regard photographers who were reliable and had p he would also have taken at least some steps other photographers) were likely to charge; advice was dated 28th November 1990. Not instructed until 13th December 1990. Not auditor about what was done by the solicitor enquiries as to cost and I must take it that a communication with the Board, but they to found out for herself: that prior authority: not required and that any photographer's a element of charge) to be justified. The audij gap into account and to have concluded on the solicitor simply to proceed to instruct M enquiry was necessary by a prudent solicitor even allowing for the constraints about to b with Mr Haggarty, therefore, that the audi to the determination of this issue and that.

But I am not satisfied that the auditor I. Although the auditor refers to the solicitor the initial efforts to obtain the Board's ins: her discretion', I am not at all convinced th discretion to *incur the outlay*. At the time S had no idea what the photographs wo. photographer was the exercise of the discr cost, there was no discretion to be exercis auditor's report as clearly holding that th auditor has inverted the onus of establishi worst, he confuses the question by refer demonstrate that a saving could have bee solicitor had shown that the outlays have. Looked at as a whole, I think the report re was for the solicitor to justify the charge.

There remains the question of how th of. Mr Haggarty agreed that in the event should be remitted to the auditor to tax of n clearly the appropriate course, for I am n which the detailed taxation of these outlays would expect the auditor to tax the print of the foregoing observations. It will be for t have been a reasonable charge for the prin time the work was done, and to provide th can obtain to vouch their respective prop

... have incurred the outlay in question, from this viewpoint, the question was ... to the conclusion that the outlay was ... time scale involved, there was nothing to ... ed; there was nothing said to the auditor ... asonable. The solicitor did not know (at ... t was reasonable. The Board's officers ... telephone a number of photographers to ... rint cost of the photographs, for it was ... account which was in dispute; the Board ... ne time and labour charges. The solicitor ... what the normal cost of the prints would ... phed was a number of buildings, so a ... Board's view was that the cost per print ... £3.00, which was what the client of a ... n expected to pay. For all these reasons, ... ot of objections.

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... to determine, for I have considerable ... ce ... and for the auditor. As for the ... with the preparation for a major jury trial ... and this no doubt led to her decision to ... ogra ... she knew. Nor did the auditor ... ys, for she does not seem to have been ... on ... ch to make a judgment. But ... I hav ... ome to the view that the proper ... s. The question resolves itself into this: ... tor acting as a prudent man of business ... n receipt of counsel's advice to obtain a ... e of the defence in a trial due to begin ... 91? I think such a solicitor would have ... that the photographs required to be of ... olved in the court proceedings. I think ... he case was legally aided, would have ... phy involved would give rise to a ... e Board would require to pay. Having ... would have required to check the Fees

Regulations to see what (if anything) was prescribed and, on finding that only 'reasonable' outlays would be paid, to pause and consider the reasonableness of the cost about to be incurred. It is at this point that I think the auditor fell into error. In his report he observes that he accepts that estimates should be obtained wherever practicable but that they do not establish a quality of work; and he accepts that the absence of estimates did not automatically render Simpson's charges unfair or unreasonable. But the auditor failed properly to address the issue of what a solicitor acting as a prudent man of business would have done in the circumstances. He concurs in Mrs Cockburn's view that it was best to 'proceed immediately with the devil she knew', without asking himself whether a prudent man of business would have done so in these circumstances. I think such an individual would certainly have regard to the fact that he knew of a firm of photographers who were reliable and had provided a good service in the past; but he would also have taken at least some steps in advance to find out what they (and other photographers) were likely to charge. It is very significant that counsel's advice was dated 28th November 1990 but Messrs Simpson were not first instructed until 13th December 1990. Nothing appears to have been said to the auditor about what was done by the solicitor in the interim period in the way of enquiries as to cost and I must take it that nothing was done. The solicitor was in communication with the Board, but they told her nothing that she could not have found out for herself: that prior authority for instruction of a photographer was not required and that any photographer's account would require (like every other element of charge) to be justified. The auditor appears not to have taken this time gap into account and to have concluded on a subjective basis that it was better for the solicitor simply to proceed to instruct Messrs Simpson. But I think some other enquiry was necessary by a prudent solicitor, for which there was adequate time even allowing for the constraints about to be caused by the holiday period. I agree with Mr Haggarty, therefore, that the auditor has failed to apply an objective test to the determination of this issue and that accordingly his decision cannot stand.

But I am not satisfied that the auditor has erred otherwise in his conclusions. Although the auditor refers to the solicitor acting 'responsibly all through, from the initial efforts to obtain the Board's instructions to the subsequent exercise of her discretion', I am not at all convinced that this is a reference to the exercise of a discretion to incur the outlay. At the time Simpson's were instructed, the solicitor had no idea what the photographs would cost; the decision to instruct a photographer was the exercise of the discretion. Since nothing was known about cost, there was no discretion to be exercised on this point and I do not read the auditor's report as clearly holding that there was. Nor am I convinced that the auditor has inverted the onus of establishing the reasonableness of the charge. At worst, he confuses the question by reference to the Board's alleged failure to demonstrate that a saving could have been made, but his conclusion is that the solicitor had shown that the outlays have been fairly and reasonably incurred. Looked at as a whole, I think the report reveals that the auditor understood that it was for the solicitor to justify the charge.

There remains the question of how the note of objections should be disposed of. Mr Haggarty agreed that in the event that the note was sustained, the matter should be remitted to the auditor to tax of new in the light of my judgment. This is clearly the appropriate course, for I am not party to the necessary material upon which the detailed taxation of these outlays must proceed. At the fresh taxation, I would expect the auditor to tax the print charge for the photographs in the light of the foregoing observations. It will be for the parties to submit to him what would have been a reasonable charge for the prints and copies in December 1990 at the time the work was done, and to provide the auditor with such information as they can obtain to vouch their respective propositions.

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The solicitor's fees for the original taxation, the hearing before me and the fresh taxation will require to be paid from the legal aid fund, although I do not think it is necessary for me to prescribe this specifically in my interlocutor; but I think the auditor's fee for the taxation on 5th June 1992 should be disallowed in view of the fact that I have decided to remit the matter to him.

High Court Trial

HER MAJESTY'S ADVOCATE

against

CARLO GIUSEPPE EMILIO RIGA

**Sentence—Recommendation for deportation—Accused Community national—Whether re-
 gration Act 1971 (c.77), s.3(6)—Treaty of 1
 64/221, art.3**

Section 3(6) of the Immigration Act 1971 provides that a person who is convicted of an offence punishable by imprisonment for a term recommended by the court for deportation.

Article 48 of the Treaty Establishing the European Community, Rome, provides for freedom of movement for persons who, in terms of art.48(3), entails the right to enter, remain or employ themselves having been employed there. Article 3 of E.C. measures taken by a member state on grounds of public policy, security or public health exclusively on the personal conduct of the individual concerned, shall not in themselves constitute grounds for deportation.

The accused, who was an Italian national, was convicted of theft, one of which involved £5,000, and to which he was sentenced under the Drugs Act 1971, including charges of possession with intent to supply to others. He was sentenced to imprisonment and the Crown moved the court for his deportation. He had no previous convictions from 1988 to 1991. He had been a drug addict but was taking steps to resolve his addiction.

Held, that a recommendation could be made for the deportation of a Community national only where his continued presence in the United Kingdom posed a sufficiently serious threat affecting one of the fundamental interests of society, that no such threat was manifest, nor did he have a propensity to commit acts which set a pattern of behaviour likely to be repeated to the detriment of the public interest.

R. v Bouchereau [1978] Q.B. 732; [1978] 2 All E.R. 1013; and *Caldewei v Jessop*, 1991 S.C.C.R. 323.

Cases referred to in the opinion of the court:

Caldewei v Jessop, 1991 S.C.C.R. 323

R. v Bouchereau [1978] Q.B. 732; [1978] 2 All E.R. 1013

R. v Caird (1970) 54 Cr. App. R. 499

R. v Nazari [1980] 1 W.L.R. 1366; [1980] 1 All E.R. 1013

Willms v Smith, 1981 S.C.C.R. 257; 1982 S.C.C.R. 101

On 3rd August 1992 Carlo Giuseppe Emilio Riga was charged in the High Court at Edinburgh before Lord Cameron with the following charges.

(1) [O]n 16th December 1991 you stole from Alexander Wright Brown at 6 Quarrydyke a sum of money;

(2) on 11th or 12th April 1992 in the presence of Alexander Wright Brown at 6 Quarrydyke, Melrose, you stole from him a sum of money.