In the Privy Council.

No. 39 of 1955.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN

MAHARAJ KRISHAN BHANDARI ... ... *Appellant*

AND

THE ADVOCATES COMMITTEE ... ... *Respondent.*

RECORD OF PROCEEDINGS

INDEX OF REFERENCE.

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RECORD OF PROCEEDINGS

In the Advocate's Committee.

No. 1. Notice of Application to Appellant to Answer allegations. 24th December, 1954.

No. 1.

Notice of Application to Appellant to answer allegations.

To the Secretary of the Advocate's Committee, Constituted under the Advocate's Ordinance.

ADVOCATE'S COMMITTEE CAUSE NO. 3 OF 1954.

In the Matter of MAHARAJ KRISHAN BHANDARI an Advocate

and

In the Matter of the Advocate's Ordinance, 1949.

I, the undersigned, HERBERT FRED HAMEL, Acting Registrar of the
10 Supreme Court, Nairobi, make application that the above-named MAHARAJ KRISHAN BHANDARI, an Advocate, may be required to answer the allegations contained in the Affidavit which accompanies this application ; and that such Order may be made as the circumstances may require.

In witness whereof hereunto set my hand this 24th day of December, 1954.

(Sgd.) H. F. HAMEL,
Supreme Court, Nairobi,
Acting Registrar.

In the Advocate's Committee.

No. 2.

Affidavit of Herbert Fred Hamel containing allegations and annexures.

No. 2. Affidavit of Herbert Fred Hamel containing allegations and annexures. 24th December, 1954.

To the Secretary of the Advocate's Committee, Constituted under the Advocate's Ordinance.

I, HERBERT FRED HAMEL, of P.O. Box 41, Nairobi, in the Colony of Kenya, make oath and say as follows :

(1) I am the Acting Registrar of Her Majesty's Supreme Court of Kenya and as such I am in charge of the records of that Court.

(2) On the 17th day of December, 1954, I received from Mr. Justice C. A. Hooper a memorandum relating to the conduct of the above-named, MAHARAJ KRISHAN BHANDARI, copy of which memorandum is annexed to this Affidavit and is marked " A." Subsequently on the 20th day of December, 1954, Mr. Justice C. A. Hooper addressed a further memorandum to me, copy of which is also annexed to this Affidavit marked " B."

(3) The matter before Mr. Justice Hooper was Miscellaneous Criminal Case No. 22 of 1954 entitled : " IN THE MATTER OF AN APPLICATION FOR A WRIT OF CERTIORARI AND MANDAMUS AND IN THE MATTER OF THE IMMIGRATION (CONTROL) ORDINANCE, 1948, AND RULES MADE THEREUNDER : JAGABHAI KALABHAI PATEL AND MRS. SHANTABEN W/O JAGABHAI KALABHAI PATEL—APPLICANTS."

(4) In his memorandum the learned Judge refers to the Affidavit of Shantaben w/o Jagabhai K. Patel filed in support of the application and I annex hereto a true copy of the Affidavit marked " C," by the said Shantaben w/o Jagabhai K. Patel.

(5) There is also annexed to this Affidavit a copy of the Temporary Employment Pass, marked " D," issued to the said Shantaben w/o Jagabhai K. Patel on the 7th May, 1951. The original Affidavit " C " and the original of the said Temporary Employment Pass " D " form portion of the record in the aforesaid Miscellaneous Criminal Case and remain in my custody.

(6) I further annex extracts (marked " E ") from the judgment of Mr. Acting Justice Cram in Civil Case No. 675 of 1954 which is the Civil Case referred to by Mr. Justice C. A. Hooper in his memorandum of the 17th December, 1954.

Sworn at Nairobi, this 24th day of December, 1954. } H. F. HAMEL.

Before me,

(Sgd.) R. H. LOWNIE.

Annexure ("A")—Memorandum of Hooper, J.

In the Advocate's Committee.

No. 2. Annexure "A" to Affidavit of Herbert Fred Hamel. 24th December, 1954.

SUPREME COURT OF KENYA
LAW COURTS,
P.O. BOX 41, NAIROBI.
17th December, 1954.

CONFIDENTIAL.

The Acting Registrar.

On the 10th of this month I had before me an application by Mr. BHANDARI in connection with a Notice of Motion on behalf of JAGABHAI KALABHAI PATEL and Mrs SHANTABEN W/O Jagabhai Kalabhai Patel, the Applicants. Before Mr. BHANDARI appeared before me I read the papers attached to the Notice of Motion and discovered that an affidavit sworn by Mrs. SHANTABEN W/O Jagabhai KALABHAI PATEL, the Applicant, was false in a material particular since it stated that the Employment Pass attached to the application was still valid and current. When Mr. BHANDARI appeared I drew his attention to this fact and he stated that it was a mistake and that he would file a Supplementary Affidavit correcting the mistake. This Supplementary Affidavit was filed on the 14th December. From Mr. BHANDARI'S demeanour and the manner in which he endeavoured to explain away the false statement contained in the Affidavit there was created in my mind an impression that he was not being frank and perfectly straightforward I was left with the impression that this statement had been intentionally made by Mr BHANDARI (who admitted this morning that he drafted the affidavit) in order to mislead me into believing that the state of facts was different from what it really was

I asked Mr BHANDARI how it was that the Applicant was still in the Colony since the Governor had issued a Deportation Order and Mr. BHANDARI undertook, if I would adjourn the consideration of the Motion, to produce correspondence in his possession on this point. On the 15th December when Mr. BHANDARI appeared a second time he explained that he had been unable to find any correspondence on the matter, but that if I sent for the file in Civil Case 675/54 I would find the whole of the papers relating to the attitude adopted by the Governor in respect to the Deportation Order.

I therefore adjourned the application until Friday, 17th instant. I sent for the file and to my surprise discovered that the principal question down for consideration on the Motion Paper had already been decided by Mr. Justice CRAM on the 18th November, 1954. In this case the Plaintiff asked for a declaration that she was not a prohibited immigrant within the meaning of Section 5 of the Immigration (Control) Ordinance, 1948, and that her presence in the Colony was lawful so that she was not subject to

In the Advocate's Committee.

No. 2. Annexure " A " to Affidavit of Herbert Fred Hamel. 24th December, 1954— *continued.*

a Deportation Order at the instance of the Governor in virtue of his powers under Section 9 of that Ordinance. I find that on reading Mr. Justice Cram's Judgment that he held that the procedure which had been adopted in bringing up the Governor's Order was incorrect and after discussing the authorities on which he based his opinion he stated (on page 17) that he proposed to do what both parties apparently desired the Court to do and that was to consider the whole proceedings in the case on their merits. In other words that he proposed to try the case out, although in his opinion the wrong procedure had been taken to bring it before the court. The result of the examination of this matter by Mr. Justice CRAM can be seen in the final paragraph of his judgment which reads as follows :—

> " In the result I declare that the Plaintiff is unlawfully within " the Colony and that she is a prohibited immigrant and that she " is subject to the deportation order made against her which was " properly made against her. She is present in the Colony without " any valid pass. Her Temporary Employment pass is void and " is expired. She was never the subject of a dependant's Pass. " The Principal Immigration Officer acted within his competence " in rescinding his approval of the issue of a dependant's pass in " respect of the Plaintiff and she acquired no continuing right " and no *status* from his earlier decision."

Amongst other things it is clear that Mr. Justice CRAM has dealt with the question of the Temporary Employment Pass given to her and he finds as follows :

> " Her Temporary Employment Pass is void and is Expired."

This is the same conclusion to which I came when the Motion papers were placed before me although I was then unaware that Mr. Justice CRAM had adjudicated upon the matter.

It seems from reading Mr. Justice CRAM'S judgment that he has had the whole matter of the Plaintiff's objection to the Deportation Order made by the Governor before him in all its details (including the Temporary Employment Pass) and he has adjudicated upon each and every issue. He has found against the Plaintiff. Not content with this judgment, Mr. BHANDARI gave Notice of Appeal on the 29th November. It is therefore with astonishment that I discovered that on the 4th December this patently false affidavit had been sworn by Mr. BHANDARI on behalf of the Plaintiff.

I have spoken to Mr. BHANDARI on this matter this morning, perhaps a little sharply, and I asked him to explain how it came about that knowing perfectly well that the Pass was no longer valid and Mr. Justice CRAM had declared it to be invalid he could appear before me with an affidavit stating that it was still valid. Mr. BHANDARI told me that it was a genuine mistake and that he did not intend to mislead me in the matter, I have already stated that I feel that Mr. BHANDARI knew perfectly well what the true position was—he must have done—at the very least as soon as Mr. Justice CRAM'S judgment was pronounced ; he was present throughout the argument of the whole case when that point came up for discussion and

I feel I am unable to accept his statement that the false statement in the affidavit was nothing more than a mistake due to inadvertence.

In these circumstances you may deem it desirable to place this matter before His Lordship the Chief Justice who may perhaps wish to adopt an attitude in the matter. I am, myself, at the present moment labouring under a sense of indignation because I feel that Mr. BHANDARI has tried to deceive me in this matter. I may be wrong, perhaps a third party who is a stranger to the matter may be in a position to either confirm or to modify the impression which has been formed in my mind.

(Sgd.) C. A. HOOPER,
Puisne Judge.

This is the exhibit marked " A " referred to in the annexed Affidavit of HERBERT FRED HAMEL, sworn before me at Nairobi this 24th day of December, 1954.

R. H. LOWNIE,
Deputy Registrar, Supreme Court.

Annexure ("B")—Further Memorandum of Hooper, J.

CONFIDENTIAL.

Registrar,

Since writing my minute of the 17th December I feel I ought perhaps to supplement and clarify certain points.

(2) When Mr. Bhandari first appeared before me, he mentioned incidentally a long judgment by CRAM J. saying that he, CRAM J. had told him (Mr. BHANDARI) or had ruled—I am not quite sure which—that the correct procedural method to adopt in this matter was by way of *certiorari* or *mandamus*, and this explained why his notice of motion of the 4th December had been filed. The impression I then formed in my mind was that it was either by reason of Mr. Justice CRAM'S advice, or as a result of the terms of this judgment that Mr. BHANDARI had filed his notice of motion. The impression left in my mind was also that Mr. BHANDARI had failed before CRAM J. on the procedural aspect of the matter and that as a result he was appearing before me, adopting the correct procedure. I told Mr. BHANDARI I had no time to read the judgment then ; and indeed, I was quite prepared at that time to accept his word in respect to this aspect of the matter ; but I was seriously worried about the statement in paragraph 2 of the affidavit of the 29th November, 1954, saying that the

In the Advocate's Committee.

No. 2. Annexure "B" to Affidavit of Herbert Fred Hamel. 24th December, 1945—*continued.*

Temporary Employment Pass was still valid when quite obviously a cursory examination of the Pass showed that it was not.

(3) One point, however, is clear in my mind beyond the slightest possible doubt and that is that Mr. BHANDARI never at any time, directly or indirectly, or indeed in any way whatsoever, told me that CRAM J. had proceeded with the consent of the parties, to give judgment in the matter; had ruled against him on all points; and that he intended to appeal against the judgment; and had in fact already filed his notice of appeal.

(4) I did not discover these latter facts until, as the result of my asking Mr. Bhandari if he had any correspondence in his possession to prove that the execution of the Governor's Deportation Order had been suspended, he told me that I would find all the papers in the File of Civil Case No. 675/54. When I sent for this file I discovered for the first time that, while it did not contain these particular papers, it did contain CRAM J.'s judgment, and it was on reading this judgment that I discovered also for the first time, the true position of affairs: namely, that CRAM J. had tried out the whole case on its merits, had ruled against the Plaintiff on all points, and that Mr. BHANDARI had entered notice of appeal.

(5) When Mr. BHANDARI appeared before me on the 17th December (after I had read Mr. Justice Cram's judgment) I asked him how it was that he had not been frank and open with me and had failed to tell me what the true position was; and I asked him what he thought the true position would have been had I acceded to his motion and the writs had eventually issued. Did he not think a remarkable position would have arisen, especially if the Court of Appeal confirmed CRAM J.'s declaration? Mr. BHANDARI then said that he deemed this matter to be of the same nature as *habeas Corpus*, and that he could go from Court to Court until he succeeded. I said I did not agree.

(6) I then asked Mr. BHANDARI who had drafted the affidavit of the 29th November. He said he supposed one of his clerks had. I then asked him whether it was not true that he had drafted it himself. He then said: "Yes, I suppose I must have done so." I then told him I intended to strike out his motion and that I would record my reasons for so doing.

(7) But I do not wish it to be thought that I am here concerned with any legal points which may possibly be arguable: but I am concerned with three points:—

(1) The fact that Mr. BHANDARI did not disclose to me that the matter dealt with in his notice of motion had already been adjudicated upon by Mr. Justice CRAM and that notice of appeal had been given;

(2) The fact that Mr. BHANDARI sought to convey to my mind the impression that in appearing before me with his notice of motion he was acting either on the injunctions of Mr. Justice CRAM or in virtue of his judgment to that effect;

(3) The fact that Mr. BHANDARI supported his motion by an affidavit he himself drafted which was false in a material particular, namely, that the Temporary Employment Pass was still valid, and which, in view of the concluding paragraph but one of CRAM J.'s judgment, he must have known was not true.

In the Advocate's Committee.

No. 2. "B" to Annexure Affidavit of Herbert Fred Hamel. 24th December. 1954—*continued.*

C. A. HOOPER,
Puisne Judge.

20.12.54.

This is the exhibit marked "B" referred to in the annexed affidavit of HERBERT FRED HAMEL, sworn before me at Nairobi, this 24th day of December, 1954.

R. H. LOWNIE,
Deputy Registrar, Supreme Court.

Annexure ("C")—Affidavit of Shantaben W/o Jagabhair Kalabhai Patel.

No. 2. Annexure "C" to Affidavit of Herbert Fred Hamel. 24th December, 1954.

COPY.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI.
MISC. CRIMINAL APPLICATION NO. 22 OF 1954.

IN THE MATTER OF AN APPLICATION FOR A WRIT OF MANDAMUS AND AN APPLICATION FOR A WRIT OF CERTIORARI

and

IN THE MATTER OF THE IMMIGRATION (CONTROL) ORDINANCE, 1948, AND THE RULE MADE THEREUNDER

SHANTABEN W/O JAGABHAI KALABHAI PATEL ... ... *Applicant*

AFFIDAVIT.

I, SHANTABEN W/O JAGABHAI KALABHAI PATEL, a married woman, make oath and say as follows :—

1.—I am a British Subject and am working for gain as a Teacher in Nairobi in the Colony of Kenya.

2.—I entered Kenya Colony on 16th July, 1951 on a valid Temporary Employment Pass No. 3146 dated 7.5.51 granted to me by the Principal Immigration Officer of the Colony of Kenya to work with Messrs. Cutchhi

In the Advocate's Committee.

No. 2. Annexure "C" to Affidavit of Herbert Fred Hamel. 24th December, 1954—*continued.*

Gujarati School, Nairobi, aforesaid in accordance with the provisions of the Immigration (Control) Ordinance, 1948, and Rules made thereunder, which said Pass is still valid and current and has been valid and current at all material times. The said Pass has yet not been cancelled. I enclose the said Temporary Employment Pass and is marked " A."

3.—I was a widow when I entered the Colony and I married JAGABHAI KALABHAI PATEL, a British Subject and a Permanent Resident of Kenya Colony on the 18th day of June, 1953, at Nairobi aforesaid.

4.—On or about July, 1953, I left the employment of the said Cutchhi Gujarati School and I reported the matter to the Principal Immigration Officer through my employers and later by myself personally and through my advocates.

5.—On or about 24th July, 1953, my said husband Jagabhai Kalabhai Patel applied to the Principal Immigration Officer for Dependant Pass for myself.

6.—On or about 24th October, 1953, the Principal Immigration Officer approved the said application. I attach a letter received from the Principal Immigration Officer in this connection and is marked " B."

7.—On or about 5th November, 1953, the Senior Immigration Officer informed my advocates Messrs. De'Souza & Patel that the Principal Immigration Officer is not prepared to issue me with a Dependant Pass. I attach a letter received from the said Senior Immigration Officer and is marked " C."

8.—I have never been declared a Prohibited Immigrant by the Principal Immigration Officer or any other authority or authorised officer of the Government of the Colony of Kenya under any law in force in the Colony or at all.

9.—On or about 10th April, 1954, His Excellency the Acting Governor of the Colony made a Deportation Order against me and the said Order purported to have been made by virtue of the powers conferred on His Excellency by Section 9 (1) of the said Immigration (Control) Ordinance. I attach the said Deportation Order and is marked " D."

10.—I am informed by my advocates and I verily believe that the said Order is not valid as I am neither a Prohibited Immigrant nor my presence in the Colony is unlawful.

11.—The Principal Immigration Officer still refuses to issue me with a Dependant Pass although I satisfied him that I am a person entitled to

be issued with a Dependant Pass under Regulation 21 (1) of the Immigration Control Ordinance Regulation, 1948.

11.—I make this oath from my personal knowledge and believing the same to be true.

Sworn at Nairobi this 29th day of November, 1954.

Before me,

(Sgd.).....,
Commissioner for Oaths.

(Sgd.) SHANTABEN in English
Deponent.

This is the exhibit marked "C" referred to in the annexed Affidavit of HERBERT FRED HAMEL, sworn before me at Nairobi this 24th day of December, 1954.

R. H. LOWNIE,
Deputy Registrar, Supreme Court.

Annexure ("D")—Temporary Employment Pass.

BOND IN NAIROBI.
(Sgd.) P. COLIN WHITE,
Immigration Officer.

No. 3146.

COLONY AND PROTECTORATE OF KENYA.
The Immigration Control Regulations, 1948.

TEMPORARY EMPLOYMENT PASS.

MRS. SHANTABEN SOMESHWAR THAKER
of SARANGUR—INDIA.

Holder of this Pass, is permitted to enter the Colony on or before the 6.11.1951 and to remain therein for a period not exceeding THREE YEARS from the date of such entry for the purpose of taking up employment in the capacity of TEACHER . . . . . with CUTCHI GUJARATI GIRLS' SCHOOL,

In the Advocate's Committee.

No. 2. Annexure " D " to Affidavit of Herbert Fred Hamel. 24th December, 1954—*continued.*

NAIROBI . . . . . in accordance with the terms of service set out in the application for the Pass.

Date of issue . . . 7.5.1951.
Fee Sh.20 received.

(Sgd.) P. COLIN WHITE,
Immigration Officer,
for Principal Officer, Kenya.

N.B.—The holder of this Pass is required to confirm within seven days of his arrival in the Colony either in person or by registered letter to the Principal Immigration Officer, P.O. Box 741, Nairobi, that he has taken up the employment stated above, and further to report himself either personally or by registered post to the Principal Immigration Officer at intervals of six months during the validity of this Pass.

This is the exhibit marked " D " referred to in the annexed Affidavit of HERBERT FRED HAMEL, sworn before me at Nairobi, this 24th day of December, 1954.

R. H. LOWNIE,
Deputy Registrar, Supreme Court.

No. 2. Annexure " E " to Affidavit of Herbert Fred Hamel. 24th December, 1954.

Annexure (" E ")—Declaration of Cram, J. in Supreme Court Civil Case No. 675 of 1954.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI.
CIVIL CASE NO. 675 OF 1954.

SHANTABEN W/O JAGABHAI KALABHAI PATEL ... ... *Plaintiff*

versus

THE ATTORNEY GENERAL OF THE COLONY AND PROTECTORATE OF KENYA REPRESENTING THE PRINCIPAL IMMIGRATION OFFICER OF KENYA ... ... *Defendant.*

DECLARATION.

The Plaintiff, a Brahmin woman asks for a declaration that she is not a prohibited immigrant within the meaning of Section 5 of the Immigration (Control) Ordinance, 1948, and that her presence in the Colony is lawful so that she is not subject to a deportation order at the instance of the Acting Governor in virtue of his powers under Section 9 of the said Ordinance.

At the outset of the hearing, the Court inquired of the learned advocate for the Plaintiff for what reason the *fiat justitia* appeared upon the plaint and the response was that the plaint was brought under the provisions of the Petitions of Right Ordinance Cap. 11 and the Plaintiff was asking for a declaratory remedy by petition of right.

The Petitions of Right Ordinance, like its counterpart, the Petitions of Right Act 1860 in England is purely a procedural statute and does not affect the prerogative of the Crown except in the matter of practice and procedure. It is legislated that the Ordinance is not to be construed to give any person any remedy against the general Government of the Colony which a subject would not be entitled to as against the Crown in England on 3rd September, 1910. Should in fact this petition be considered as maintainable upon general grounds. So far as jurisdiction is concerned I reserve no doubts. The Court, upon the *fiat* on the petition has jurisdiction in terms of Section 5 of the Ordinance. It is for the Attorney General to advise the Governor and for such advice he is constitutionally answerable in Legislative Council. If such petitions do not lie then a general demurrer ought to be entered even if a fiat is granted.

Learned Counsel for the Defendant, supported the submission and submitted further that a question of status was involved and, to obtain a declaration of *status* the procedure by petition of right was competent and cited as an analogy the procedure for obtaining declarations of legitimacy.

In my respectful view, however, a petition of right will not lie for the remedy prayed. I refer to the definition of "relief" in Section 16 of the Petitions of Right Act 1860 :—

> "16. In the construction of this Act . . . the word 'relief' "shall comprehend every species of relief claimed or prayed for "in any such petition of right whether a restitution of any "incorporeal right or a return of land or chattels or a payment "of money or damages or otherwise."

Now this Act has been held not in any way to enlarge the remedy by petition of right. In this general statement every species of petition of right which is now regarded as admissible is included. The principle must be stated as widely as this or it will be impossible to bring under it such petitions as those for unliquidated damages for breach of contract. It is stated nearly as widely in 3 Bls. Comm. 256 where it is said that a petition of right "is of use where the King is in full possession of any hereditaments "or chattels and the petitioner suggests such a right as controverts the "title of the Crown."

Unlike the great prerogative writ of mandamus a petition of right is a writ unknown to the common law. Although its origin is hazy, for long, its field of competency has been defined. I am unable to accept the invitation that declarations as to *status* may be obtained by this procedure. For example, the analogy cited is contrary. Any person who is natural-born British subject or whose right to be deemed to be a natural-

In the Advocate's Committee.

No. 2. Annexure "E" to Affidavit of Herbert Fred Hamel. 24th December, 1954—*continued.*

born British subject depends wholly or in part on his legitimacy may if he is domiciled in England or Northern Ireland or claims any real or personal estate situate in England, apply by petition to the High Court for a decree declaring that the petitioner is the legitimate child of his parents, but this procedure is not competent by petition of right but is statutorily provided for by Section 188 of the Supreme Court of Judicature (Consolidation) Act, 1925, replacing Section 1 of the Legitimacy Declaration Act 1858. That is, there is statutory provision for the procedure. Nowhere, however, in the long history of petitions of right appears any such precedent. In *Tobin* v. *R.* (1864) 16 C.B. (NS) 310 the Court said :—

> "The substance seems always to have been the trial of the "right of the subject as against the right of the Crown to property "or an interest in property, which has been seized by the Crown; "and if the subject succeeded, the judgment only enabled him to "recover possession of that specified property or the value thereof "if it had been converted to the King's use."

In *Feather* v. *R.* (1865) 6 B. & S. 257 it was stated :—

> "The only cases in which the petition of right is open to the "subject are, where the land or goods or money of a subject have "found their way into the possession of the Crown and the purpose "of the petition is to obtain restitution, or if restitution cannot "be given, compensation in money, or where the claim arises "out of contract, as for goods supplied to the Crown, or to the "public service. It is in such cases only that instances or petitions "of right having been entertained are to be found in our books.
>
> "The proceedings by petition of right exist only for the "purpose of reconciling the dignity of the Crown and the rights "of the subject and to protect the latter against any injury "arising from the acts of the former; but it is not part of its "object to enlarge or alter these rights."

Monckton v. *A.G.* (1850) 2 Mac. & G. 402 per Lord Cottenham L.C. Petitions have lain for matters of corporeal and incorporeal hereditaments, chattels real and specific chattels, money claims in general and claims in contract. Where the claim is in mixed contract and tort or is such that it may be based on either, the Crown will probably grant the *fiat* in order that it may be decided whether the claim is in contract when the Crown will be liable, or in tort, when the Crown will not be liable. That is a petition of right will not lie in respect of a tort committed by a servant of the Crown. The matter is not one of procedure but of substance. It is based logically and directly on the maxim that the Queen can do no wrong and if the Crown cannot do wrong in the eyes of the law it cannot authorise the doing of wrong by another.

That is whether I inquire into practice as of old from the authority of Bro. Abr. tit. *Peticion et Monetrana de Droit* right up to the abolition of petitions of right by Section 23 and the First Schedule to the Crown Proceedings Act, 1947, I have been unable to discover any precedent for a petition of right of the sort now before the Court.

When I asked Mr. Bhandari, at a later stage in the suit, upon what he based his claim, and on the failure of the Principal Immigration Officer to follow up his approbation to issue a dependant's pass, he at once found an answer wanting in contract. If there was a failure in a statutory duty by a government official towards a subject and there were no other remedy then this defect would be met by an application for a rule *nisi* in *Mandamus*. I accept, as settled law, that, where there is a remedy then a *mandamus* application is incompetent but it is not enough, as Mr. Bhandari has propounded, that where he has none then he necessarily has a remedy by petition of right. With that proposition I respectfully but profoundly disagree.

The situation facing the Plaintiff (for if this is no petition of right, then she is no suppliant) is that she has been served with a deportation order, that is an executive act of Government. She maintains that the deportation order proceeds upon a wrong interpretation of the Immigration statute and rules. That is there is no contract ; no money (belonging to the Plaintiff) is alleged wrongfully withheld by Government ; no land and no movables are claimed ; no services alleged rendered ; no duties alleged overpaid ; no compensation claimed for wrongful interference by the Crown with the subject's property ; no pension or prize money alleged due.

At common law the Queen has power to deport aliens to their own country.

It is a function of Government to control immigration and the Legislature has made laws and the rule-making body rules to control uninhibited ingress into the Colony. The Executive is of course subject to the rule of law. It cannot exclude any person arbitrarily but only lawfully. The making of deportation orders on undesirable immigrants is a common and universal function of sovereign and colonial executive government. Nowadays ingress and egress across sovereign land and sea frontiers is nearly everywhere controlled. Every sovereign state, by international public law, claims a right to legislate who may enter and leave its territory. For example, in the United Kingdom under Article 12 (6) (b) of the Aliens Order 1920 the Secretary of State may make a deportation order if he deems it conducive to the public good to do so. The exercise of the Secretary of State's discretion in making a deportation order cannot in general be interfered with by the Court—*The King* v. *Secretary of State for Home Affairs ex parte Duke of Chateau Thierry* 1917 1 K.B. 922 C.A. In that case the Court refused to make absolute a rule for a writ of *certiorari* to bring up for the purpose of quashing it an order made by the Home Secretary under the order that an alien " shall be deported from the " United Kingdom " the order being in form a valid order The operative word used in Article 12 (1) is " may order the deportation." That is the Home Secretary is given a discretion, but his act is an executive one and cannot be questioned by the Courts.

Swinfen Eady L.J. said after considering the grounds put forward in favour of an alien : " But whether this be so or not, these considerations

In the Advocate's Committee.

No. 2. Annexure "E" to Affidavit of Herbert Fred Hamel. 24th December, 1954—*continued.*

" ought not to affect the judgment in this case. These are matters to be " brought before the Home Secretary when he is considering whether or " not to make a deportation order and they are matters which may " properly affect his discretion ; but his power to make a deportation order " is not dependent in any way upon the absence of these or any similar " circumstances. By Article 12 Clause 1 of the Aliens Restriction " (Consolidation Order) 1916 a Secretary of State may order the deportation " of any alien. The Respondent is an alien and a Secretary of State has " made an order for his deportation. . . . It is urged by the Respondent " that the Executive Government claims and intends to exercise over him " by virtue of the Act and Order, an authority not thereby conferred. . . . " A Secretary of State is not required to justify in a Court of Law his " reasons for making a deportation order in the case of an alien. In the " event of it being disputed that the subject of a deportation order is an " alien, the matter must be determined by a Court and unless it is proved " that the person is an alien the order must be quashed as made without " jurisdiction ; but I am not aware of any other ground upon which such " an order can be quashed. . . ."

Pickford L.J. said : " I think the order a perfectly good order. The " power given to a Secretary of State is quite unqualified. If the person " ordered to be deported is in fact an alien, the Secretary of State has an " absolute discretion to order him to be deported and I do not think that " discretion can be questioned in a Court of Law."

Turning now to the Immigration (Control) Ordinance Cap. 51 the section under which the deportation order was made by the Acting Governor and served upon the Plaintiff, i.e. Section 9, is seen as amended reads :—

" (1) The Governor may make an order directing that any prohibited " immigrant or any person whose presence within the Colony is, under the " provisions of this Ordinance, unlawful, shall be deported from and remain " out of the Colony either indefinitely or for a time to be specified in the " order."

That is the Governor is given a discretion to act as the Chief Ministerial Officer of the Executive Government of the Colony and to exercise analagous powers in the case of certain immigrants as those exercised by the Principal Secretary of State for Home Affairs in the case of aliens.

The Governor has a discretion. If it is brought to his notice that there is within the Colony a prohibited immigrant or a person who by the provisions of the Immigration (Control) Ordinance is unlawfully within the Colony he has a discretion to make a deportation order. But this act is an executive one and cannot be questioned by this Court. No doubt certain matters may be brought to the notice of the Governor and these may properly affect the exercise of his discretion but his power to make a deportation order is not dependent in any way upon the presence or absence of any of these matters. The Governor could not be required by this Court to justify his reasons for making a deportation order. Provided the Plaintiff is a prohibited immigrant or is unlawfully within the Colony, as provided in the Ordinance, then the Acting Governor had an unqualified

discretion to make the deportation order. He had an absolute discretion and that discretion could not be questioned by this Court. The deportee has put in issue that she is neither a prohibited immigrant nor unlawfully within the Colony under the Ordinance. These matters are properly to be determined by this Court. In my respectful view an appropriate procedure would have been to apply to this Court for a rule *nisi* on the Acting Governor to show cause why a writ of *certiorari* should not issue to quash the order. If that be so then it is idle for Mr. Bhandari to argue that the Plaintiff has no other remedy than a petition of right. But even if she had none as I have already outlined she could not extend the jurisdiction of this Court in the strictly limited field of petitions of right.

I refer to the case of *King* v. *Governor of Brixton Prison Ex parte Sarno*, 1916, 2 K.B. 472, in which not only had a deportation order been made but there had been a subsequent order restricting the liberty of the alien until deportation, and the deportee applied by rule *nisi* calling upon the Governor of the prison to show cause why a writ of *habeas corpus* should not issue. Lord Reading C.J. said :—" On behalf of the appellant " the further point was taken that assuming article 12 is not *ultra vires* " the powers given are being misused by the Executive. In a sense it " may be said that in the form in which this application comes before the " Court that point is not strictly before us but we do not think that we " are bound to apply the rules with strict regard to technicality. If we " were of opinion that the powers were being misused we should be able " to deal with the matter. In other words if it was clear that an act was " done by the Executive with the intention of misusing these powers this " Court would have jurisdiction to deal with the matter . . ."

Scrutton L.J. said in the case of the *King* v. *Superintendent of Chiswick Police Station Ex parte Sacketeder* (1918) 1 K.B. 578, an application by deportee under *habeus corpus* procedure :—" I approach the consideration " of this case with the anxious care which His Majesty's judges have " always given, and I hope will always give, to questions, where it is " alleged that the liberty of the subject, according to the law of England, " has been interfered with, and none the less when the person is not by " birth or naturalisation a subject of the King but a foreigner temporarily " living within the King's protection. This jurisdiction of His Majesty's " judges was of old the only refuge of the subject against the unlawful " acts of the Sovereign. It is now frequently the only refuge of the subject " against the unlawful acts of the Executive, the higher officials or more " frequently the subordinate officials. I hope it will always remain the " duty of His Majesty's judges to protect these people " . . . " The " only question, therefore, in this case, is whether this particular alien " has been treated in any illegal way. An order for deportation has been " made against him and it is in the form held valid by the Court of Appeal " in the *Duke of Chateau Thierry's* case. . . ."

The case of the *King* v. *Secretary of State for Home Affairs, Ex parte Same* (1920) 3 K.B. 72 was one in which a deportee applied for rules *nisi* for *habeus corpus* and *certiorari* directed respectively to the Inspector of

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Leman Street Police Station and the Home Secretary, the latter having made a deportation and detention order against the alien. Lord Reading C.J. said :—" Turning now to the statute article 12 and the " deportation order made under it, I have no doubt that it is not for us " to pronounce whether the making of the order is or is not conducive to " the public good. Parliament has expressly empowered the Secretary of " State as an executive officer to make these orders and has imposed no " conditions." Avory J. said :—" The applicant can succed only if he can " show that the order for his deportation was made without jurisdiction. " It is not disputed on its face it is perfectly good, and the only ground for " suggesting that it was made without jurisdiction is the use of the word " ' deems ' in art. 12 which it is contended implies that the Home " Secretary must, before making an order, hold an inquiry and hear the " person against whom he proposes to make the order . . . The matter " is one entirely for the Home Secretary as an executive officer and the " whole foundation for the argument for the applicant fails."

As I read that case if there is jurisdiction to make the order then it cannot be inquired into but whether or not there is jurisdiction to make the order is properly the subject for judicial inquiry.

Finally on this aspect I refer to the case of the *King* v. *Brixton Prison (Governor), Ex parte Bloom,* 90 L.T.R. K.B. 574 where the Earl of Reading C.J. said on the application of a deportee for a rule *nisi* for a writ of *habeus corpus* :—" It is said that on the facts there was a misuse of the " executive powers by the Secretary of State, but in my judgment there " is not the faintest ground for the suggestion. In *R.* v. *Brixton Prison* " *(Governor); Sarno, Ex parte* it was argued that the Home Secretary " ought not to have exercised his discretion by making the order for " deportation. That is really an appeal from the order. We have no " right to sit here on appeal from the Home Secretary who has used the " executive powers conferred upon him, provided he has used them in " a lawful way in accordance with the Act. It is sufficient to say that there " is no evidence whatever of any misuse of executive powers by the Home " Secretary. The result is that the rule must be discharged."

While this series of cases deal with aliens and in this instance it is admitted that the Plaintiff is a British subject—a matter which without the admission might well be open to argument—and in the series the Home Secretary is given an executive power to make a deportation order " for the public good " and in this Colony the Governor is given a discretion to make a deportation order provided the Plaintiff is a prohibited immigrant or unlawfully within the Colony, nevertheless there are clear principles which can be extracted and applied here. In the first place the reasons which induced the Acting Governor to exercise his discretion cannot be inquired into by this Court. If on the other hand there has been a misuse of executive powers or the order has been made without jurisdiction then this Court could inquire.

The Plaintiff however has not sought to have quashed the order of the Acting Governor in making the deportation order. What she is seeking

is a declaration that the order was made without jurisdiction in that she was neither a prohibited immigrant nor unlawfully within the Colony.

She has applied by procedure of petition of right and that procedure being incompetent her petition will have to be dismissed. Mr. Bhandari in what, with respect seemed to me to be a split argument, submitted that the petition of right should not be dismissed because it asked merely for a declaratory remedy. But petitions of right are obliged to ask for declaratory remedies for the simple reason that Courts cannot command the Crown by making substantive orders. He referred to in support of that argument Order 2 rule 7 of the Civil Procedure (Revised) Rules, 1948, viz. :—

" No suit shall be open to objection on the ground that a merely " declaratory judgment or order is sought thereby and the Court may make " binding declaration of right whether any consequential relief is or could " be claimed or not."

This rule is identical with Rule 5 of Order 25 R.S.C. except that in the English rule " declarations " are in the plural so not falling into the grammatical error in our rule. But it has nothing to do with petitions of right.

Interpreting that rule Bankes L.J. in (1915) 2 K.B. 572 stated that the Plaintiff must be entitled to relief in the fullest meaning of the word, but the relief claimed must be something which it would not be unlawful, or unconstitutional or inequitable in the Court to grant.

That pronouncement raises the issue as to whether the declaration sought against the Attorney General is constitutional. There was at one time an old practice in the Court of Chancery under which the Attorney General was made defendant in a bill that he might establish or relinquish the rights of the Crown.

I refer to the case of *Dyson* v. *Attorney General* (1911) 1 K.B. 410 C.A. where Cozens Hardy M.R. laid down : " It has been settled for centuries " that in the Court of Chancery the Attorney General might in some cases " be sued as a defendant representing the Crown and that in such a suit " relief could be given against the Crown. *Pawlett* v. *Attorney General,* Harders' Rep 465 is a very early authority on this point. *Laragoity* v. *Attorney General* 2 Proce 172 is a case where this matter was a good deal " discussed. In *Deare* v. *Attorney General* 1 Y. & C. Ex. 197 the Attorney " General demurred to such a bill. Lord Abinger said I apprehend that the " Crown always appears by the Attorney General in a Court of Justice, " especially in a Court of Equity where the interest of the Crown is " threatened. Therefore a practice has arisen of filing a bill against the " Attorney General, or of making him a party to a bill, where the interest " of the Crown is concerned, and the demurrer was overruled. But it is " said that these authorities have no application except in cases in which " the Crown rights are only incidentally concerned and that where the " rights of the Crown are the immediate and sole object of the suit the " application must be by petition of right. (See Mitford on Pleading " page 30). I do not think that the distinction thus suggested is supported

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" by authority, nor do I think that the distinction would avail the Attorney " General in the present case."

" But then it is urged that in the present action no relief is sought " except by declaration and that no such relief ought to be granted against " the Crown there being no precedent for any such action. The absence of " any precedent does not trouble me. The power to make declaratory " decrease was first granted to the Court of Chancery in 1852 by s. 50 of 15 " and 16 Vict. c. 86 under which it was held that a declaratory decree could " only be granted in cases in which there was some equitable relief which " might be granted if the Plaintiff chose to ask for it: see *Rooke* v. *Lord* " *Kensington* (1856) 2 K. & J. 753. The jurisdiction is, however, now " enlarged, by Order 25 rule 5. . . . I can see no reason why this section " should not apply to an action in which the Attorney General, as " representing the Crown, is a party. The Court is not bound to make a " mere declaratory judgment, and in the exercise of its discretion will " have regard to all the circumstances of the case. . . . In my opinion " the plaintiff may assert his rights in an action against the Attorney " General and is not bound to proceed by petition of right."

In such case no *fiat justitia* is a prerequisite to create jurisdiction it is to be noticed.

Farwell L.J. said: " In a case like the present the Attorney General " is properly made defendant. It has been settled law for centuries that " in a case where the estate of the Crown is directly affected the only course " of proceeding is by petition of right, because the Court cannot make " a direct order against the Crown to convey its estate without the permission " of the Crown, but when the interest of the Crown are only indirectly " affected the Courts of Equity whether the Court of Chancery or the " Exchequer on its equity side (see *Deare* v. *Attorney General*) could and " did make declarations and orders which did affect the rights of the Crown. " The two cases of *Pawlett* v. *Attorney General* and *Hodge* v. *Attorney General* " 3 Y. & C. Ex. 342 on the other are good illustrations of the distinction. " It has not, since the Commonwealth at any rate, been the practice of the " Crown to attempt to defeat the rights of its subjects by virtue of the " prerogative in 1667 Baron Atkyns in *Pawlett* v. *Attorney General* says: " ' The party ought in this case to be relieved against the King; because " ' the King is the fountain and head of justice and equity, and it shall not " ' be presumed that he will be defective in either; it would derogate " ' from the King's honour to imagine that what is equity against a common " ' person should not be equity against him.'

" The present is not a case for petition of right at all; the Crown is not " directly affected but the plaintiff seeks a declaration from the Court of " the true construction of an Act which imposes burdensome and expensive " inquiries upon him and for non-compliance with which he is threatened with " fines. The argument on behalf of the Attorney General admits for this " purpose the illegality of the inquiries, but claims for a Government " Department a superiority to the law which was denied by the Court to " the King himself in Stuart times.

"Then it was argued that there is no precedent for such an order as "is asked in this action. That may very well be, because before the "Judicature Act the Court of Chancery would not make declarations of "right where the plaintiff did not, or at any rate could not ask for "consequential relief. Order 25 rule 5 has altered this and declaration "of right can now be obtained in cases where the Court of Chancery would "have refused to make them.

"The next argument on the Attorney General's behalf as 'ab "'*inconvenienti*'; it was said that if an action of this sort would lie there "would be innumerable actions for declarations as to the meaning of "numerous Acts adding greatly to the labours of the law officers. But "the Court is not bound to make declaratory orders and would refuse "to do so unless in proper cases and would punish with costs persons who "might bring unnecessary actions; there is no substance in the "apprehension, but if inconvenience is a legitimate consideration at all, the "convenience in the public interest is all in favour of providing a speedy "and easy access to the Courts for any of His Majesty's subjects who have "any real cause of complaint against the exercise of statutory powers by "Government Departments and Government officials having regard to "their growing tendency to claim the right to act without regard to legal "principles and without appeal to any Court."

In the instant suit the rights of the Crown are not the immediate and sole object of the suit. To the contrary it might be said that the rights of the subject are the immediate and sole object of the suit. The Crown rights are only incidentally concerned. The Plaintiff is complaining against the exercise of statutory powers on the part of the Immigration Department. She is asking for certain facts to be taken into consideration and for certain passages in the Immigration (Control) Ordinance to be construed.

The Attorney General has not demurred generally in this suit no doubt influenced by the remarks of the Lord Chief Baron in *Deare* v. *Attorney General*:—"It has been the practice, which I hope will never be "discontinued, for the officers of the Crown to throw no difficulty in the "way of proceedings for the purposes of bringing matters before a Court of "Justice when any real point of difficulty that requires judicial decision "has occurred." The form of the plaint, the prayer and the defence fit into the frame of suit for a declaratory judgment as contemplated by Order 2 rule 7 and were it in that form it would be perfectly competent.

Sir George Farwell said in the *Eastern Trust Company* v. *McKenzie Mann & Co. Ltd.*, 1915 A.C. (P.C.) page 759:—"There is a well-established "practice in England in certain cases where no petition of right will lie, "under which the Crown can be sued by the Attorney General and "a declaratory order obtained, as has recently been explained by the "Court of Appeal in England in *Dyson* v. *Attorney General* and in *Burghes* "v. *Attorney General* (1912) 1 Ch. 173. It is the duty of the Crown and "of every branch of the Executive to abide by and to obey the law. If

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" there is any difficulty in ascertaining it the Courts are open to the Crown " to sue and it is the duty of the Executive in cases of doubt to ascertain " the law in order to obey it and not to disregard it. . . .

" I propose therefore to do what both parties apparently desire the " Court to do and that is to consider this proceedings on its merits. The " Crown mistakenly, or otherwise has waived all objections to procedure, " as if it were a declaratory suit which of course requires no *fiat justitia.*"

The first ground argued by the Plaintiff is that she entered the Colony under a Temporary Employment Pass which is still valid and which has not been revoked or cancelled.

It is admitted that the Plaintiff entered the Colony on a valid Temporary Employment Pass, Exhibit 4, which permitted her to enter the Colony and to remain for a period not exceeding three years for the purpose of taking up employment in the capacity of a teacher with the Cutchi Gujarati Girls' School in Nairobi. The Plaintiff admits she left the employment specified in the pass on 24th June, 1953, because she was not getting on well with her employers. In cross-examination the Plaintiff agreed that she knew well enough that she had to make a report to the Immigration Authorities should she leave her employment. She admitted that she did not personally make any such report but that she believed the school committee would intimate her on her behalf to the Immigration Authorities. She agreed that the school committee gave no undertaking in writing that they would so intimate and she further agreed that the letter from the school committee to the Immigration Authorities intimating that the Plaintiff had left their employment made no mention of any intimation on her behalf. Mr. Pearce, a Senior Immigration Officer, stated that he had had a meeting with the Plaintiff some time after 21st January, 1954, when she was inquiring why she was not the subject of a dependent's pass. At no time had she made a report of leaving her employment to him. During the discussion she merely gave him the reason why she had left her employment. It was mentioned when Mr. Pearce, explained to her why, in his opinion, she was unlawfully in the Colony. At no other time and in no letter was the Plaintiff able to show that she had reported such change of employment to the Immigration Authorities. In my view she never at any time made any report.

Looking at the regulations made under the Ordinance Regulation 22 is found to deal with Temporary Employment Passes. Sub-regulation 4 runs :—" If the person to whom such pass was issued . . . does not continue " therein he shall report the fact to the Principal Immigration Officer, and, " if he fails to report, his temporary employment pass shall become void."

Regulation 5 runs :—" The employer . . . of any person to whom " a Temporary Employment Pass has been issued shall forthwith report " to the Principal Immigration Officer if such person

" (b) is discharged from or leaves such employment."

Regulation 6 runs :—" Upon receiving any such report as aforesaid " the Principal Immigration Officer, may, in his absolute discretion cancel

" the Temporary Employment Pass, or, subject to such conditions as he " may impose, permit a holder of a Temporary Employment Pass to work " for an employer other than the employer specified in the pass and issue " a new or amended Pass for any period expiring not later than four years " from the date of Original Pass."

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These Regulations seem to be as clear as may be. It cannot be overlooked that one of the main purposes of the Immigration Laws is to regulate employment within the Colony and to see to it that persons already resident within the Colony are not prejudiced in their employment by immigrants. The Regulations lay statutory duties first upon the employee and secondly upon the employer.

The Regulations lay a statutory duty upon the employee to report if he does not continue in the employment specified in the pass. Mr. Havers conceded that the Regulation does not require an employee to report in person and that such report might be given orally or in writing or by an agent, relative or friend. I am satisfied however that a report must be made, by whatever means, by the employee. A further statutory duty to report is laid upon the employer when an employee leaves his employment.

If the employee fails to report the law is that his pass becomes void. No one has to declare or deem it void it becomes void *ipsa lege*. No time is laid down within which he is to report but, in such circumstances the rule of interpretation is that the regulation is to be interpreted as laying down that the report shall be made within a reasonable time. What is a reasonable time is a question of fact. Looking however to the nature of Immigration Law I should be inclined to rule that a person who is privileged to obtain employment within the Colony on a Temporary Employment Pass has a duty to report as soon as possible. That is so soon as he can send a letter or call upon an immigration official. Illness or *force majeure* apart it is duty which he must fulfil as quickly as he can. It would be idle to argue as has been argued here that a school teacher resident in Nairobi who leaves her employment on 24th June, 1953 reports within a reasonable time if she delays without good reason till after the 21st January, 1954. To admit this proposition would be to render this provision, which is patently one to keep the authorities informed, nugatory. In any event I am not satisfied that what comes out in a conversation about the issue of another pass can in any reasonable way be termed a report. The report made by the Cutchi Gujarati Girls' school committee is an exhibit and it is bald report in conformity with the statutory requirement that employers must report the leaving by an employee of their employment. It could not be aught else because Dr. Patel who was at the relevant time the President of the School Committee has admitted freely that while he stated to the Plaintiff that he would report to the Immigration Authorities he could not have undertaken to report secondarily on her behalf for the simple reason he was not then aware that there were two duties. Although Mr. Patel was not then aware of the two duties the Plaintiff was aware. Even if she had the impression, I am not prepared to find either that she had or

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had not such an impression for she is not a witness upon whose evidence reliance can be placed if the duty was not performed she cannot plead that the pass did not become void.

Turning now to another argument put forward by Mr. Bhandari. Once a report was made by the school committee he argued the Principal Immigration Officer could in his absolute discretion cancel the pass or impose conditions or issue a new amended pass. As he had not cancelled the pass *ergo* it was still valid. Now this is merely one of the several specious and meretricious arguments put forward on behalf of the Plaintiff in this suit. Quite plainly if a pass becomes void by failure in a statutory duty and that without any act of the Immigration Authorities and of the two requisite reports only one is received and that from the employers the Principal Immigration Officer has no discretion to cancel the pass. There is no pass to cancel for it is automatically by law void in the absence of a report, by the employee. To attempt to read the Regulations as invited by the Plaintiff's advocate would make nonsense of perfectly plain legislation. It would mean that Regulation 22 (4) was of no effect provided the employer made a report. That is of course the way the Plaintiff would like the law interpreted because it would be in her favour. I am unable to accept this invitation. The true meaning of Regulation 22 (6) is no more than this that provided the employee is the holder of a Temporary Employment Pass which is not void then the Principal Immigration Officer may in his discretion cancel that pass which is then voidable or he may permit the holder of it to work for another employer or issue a new pass, or amended pass.

Now the position of the Plaintiff as soon as her Temporary Employment Pass became void, was looking to the terms of this reference as defined by Section 15 of the Ordinance was that of a person unlawfully in the Colony. The argument put forward on her behalf that Section 15 (1) applied in her case is too spurious to merit the attention for that sub-section governs only subjects of states at war with Her Majesty as regulated by Section 11 of the Ordinance.

Section 15 (2) runs: "It shall be unlawful for any person to remain "in the Colony after the expiration or cancellation of any endorsement "or pass relating to or issued to him as the case may be unless he is otherwise "entitled or authorised to remain in the Colony under the provisions of "this Ordinance or any regulations made thereunder."

As I read this section a pass that has become void has expired. The Temporary Employment Pass issued to the Plaintiff expired by course of law on her failure to observe her statutory duty to report and thereafter, I should consider probably not more than a week after she left her employment, it was unlawful for her to remain in the Colony.

Turning now to Section 5 of the Ordinance it runs at sub-paragraph (1):—"The following persons, other than permanent residents "are prohibited immigrants and . . . their presence within the Colony is "unlawful except in accordance with such provisions as may be prescribed. "(h) Any person whose presence in the Colony is . . . unlawful under this "or any other Ordinance or law for the time being in force."

The Proviso to Section 5 (1) so far as her Temporary Employment Pass is concerned, cannot assist the Plaintiff because it requires possession of a valid pass and she has none.

Another argument submitted on behalf of the Plaintiff is that she should not be deemed to be a prohibited immigrant because she is in possession of a valid pass permitting her to enter the Colony and could not be so deemed during the period for which such pass is issued. But in my view the Plaintiff has no valid temporary employment pass. It expired automatically before its period elapsed and no act of any Immigration Officer was necessary to deem her a prohibited immigrant. No Immigration Officer has in fact " deemed " the Plaintiff a prohibited immigrant. She is one by process of law.

Mr. Havers has also dealt with the Plaintiff's submission under Section 5 (4) and 5 (3). That is a sub-section which deals exclusively with the case of a person who is not a prohibited immigrant by the provisions of the Ordinance but who had that status under previously existing legislation. Any such person within four years after the commencement of the Ordinance who is found to have been a prohibited immigrant is to be deemed one. An appeal lies from this decision to finding to a magistrate of the first class. This sub-section does not apply at all to the Plaintiff and all the elaborate argument built up around the words " finding " and the alleged necessity for " finding " and " deeming " the Plaintiff to be a prohibited immigrant is utterly fallacious.

A further tendentious argument was built up round the meaning of Regulation 35 which runs :—

" The decision as to whether a person is or is not a prohibited " immigrant shall rest with the Principal Immigration Officer." Now where regulations provide for a decision we must look to the substantive law to see in what cases a Principal Immigration Officer has power to arrive at such a decision. I have already dealt with the case of Section 5 (3). The argument addressed to that sub-section is utterly fallacious. That is one instance where the decision can be made. The Principal Immigration Officer may also make a decision about the status of an immigrant under Section 5 (1) (f) and the proviso is limited to the paragraph and does not extend to the sub-section. That is what the proviso itself enacts. The word " paragraph " is used. It is a word of precise meaning in legislation. Ordinances are divided into sections, and sub-sections and paragraphs. Therefore when this word is used in the proviso limiting the proviso to the paragraph then the proviso cannot extend to the sub-section. The proviso to Section 5 (1) deals with the case where there is in existence a valid pass or permit. It does not give any power of decision, rather it limits any existing power. No other power of decision is given by the Ordinance. Looking at the Regulations, Regulation 35, as amended, apart from its application to Section 5 (3) plainly deals with the case of an immigrant wishing to enter the Colony. If the Principal Immigration Officer decides he is prohibited then he is to be served with a notice.

Now in the instant case it seems to me that it is not the Principal

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Immigration Officer who has come to any decision. The Plaintiff by the law itself was unlawfully within the Colony and a prohibited immigrant and the decision to deport was taken by the Executive. It was the Acting Governor and not the Principal Immigration Officer who has the discretion to make the deportation order. No declaration was necessary by any official. The Order is an Executive Act of a high and dignified officer of Government lawfully made so far as the temporary employment pass is concerned.

The other term of reference is that the Plaintiff is not a prohibited immigrant and that her presence in the Colony is lawful because the Principal Immigration Officer having once approved the issue of a dependent's pass had no right or authority to rescind the same. On 23rd July, 1953, Mr. Patel applied for a dependent's pass under the provisions of Regulation 21 (1) and this form was sent to the Immigration Authorities. On 24th October, 1953, the Immigration Department replied to the applicant to the effect that a pass would be issued on payment of 40/-. The 40/- requested was duly sent to the Immigration Department. On 5th November, 1953, the Immigration Department replied to the effect that the decision contained in the earlier letter of the Department had been rescinded. The Plaintiff, and her advocates, not to speak of Mr. Patel, have repeatedly requested the Immigration Department to issue a pass but the Department has remained adamant.

I think it advisable to define that I am not asked to say that the Immigration Department had no or insufficient grounds to rescind their decision. This is not a rule *nisi* on the Principal Immigration Officer requiring him to show cause why a writ of mandamus should not issue ordering him to issue a pass. The argument is simply this, that once the Principal Immigration Officer had approved of the issue of a pass, but before that pass had been issued, had no right or authority to rescind his approval. I may say, however, that the evidence discloses more than ample grounds for a refusal to issue a pass.

Regulation 21 (1) runs :—

> " A Dependent's pass may be issued by the Principal " Immigration Officer upon application as in form 9 of the First " Schedule hereto by a resident of the Colony in respect of any " person as to whom the Principal Immigration Officer is satisfied " that :—
>
> " (a) such person is a dependant of such resident ; and
>
> " (b) such resident is able to provide and to continue to " provide adequate accommodation for such dependent ; " and
>
> " (c) such resident has in his own right and at his full and " free disposition an assured income sufficient adequately " to maintain and to continue to maintain such " dependant.
>
> " (2) A Dependant's Pass shall entitle the person in respect " of whom such Pass is issued to enter the Colony within the

" period stated in the Pass in such Pass and to remain therein for " such time only as :

" (a) the resident upon whose application such Pass had been " issued remains a resident of the Colony ; and

" (b) such person remains a dependant of such resident.

" (3) Every Dependant's Pass shall be as in form 10 in the " First Schedule hereto."

Now it is common ground that no pass such as is envisaged by the Regulation was ever in fact issued to the applicant. *Prima facie* it would seem only common sense that where an official is given a discretion to issue a pass on accepting an application and approves upon the belief that the facts as stated in the application are true and before issue of the pass becomes dissatisfied because he finds out that the facts as stated in the application are not true or because other material facts come to his apprehension, that he could rescind his approval and refuse to issue a pass. But common sense has not been a dominant characteristic of the Plaintiff or her advisers.

When I asked Mr. Bhandari upon what grounds whether contract or tort or quasi-contract the Plaintiff claimed right to have a pass issued he was at once in difficulties. His argument finally was reduced to this, I trust I have it correctly for, I confess, with this elusive and chameleon-like argument I found it not simple to ascertain its hub ; once the Principal Immigration Officer is satisfied then the applicant had a vested right to have a pass issued. The Principal Immigration Officer became *functus officio* and could no longer change his mind. He then must perforce issue the pass. There was a duty to be performed and it must be performed. That is Mr. Bhandari is harking back to the sort of instance in which a writ of mandamus might issue. In my view, the Regulation gives a discretion to the Principal Immigration Officer. He has to make up his mind on certain facts. He has to be satisfied. I do not think he can be arbitrary about the matter. He has to make a quasi-judicial decision whether to issue a pass or not. Once he is satisfied I consider the discretion ceases and he is charged by legislation to issue a pass. He could not for example announce he was satisfied and then refuse to issue a pass. Equally he would be in breach of the law if he issued a pass although he was dissatisfied. I put it to Mr. Bhandari the situation where an applicant submits an application containing allegations of fact false to his knowledge. *Bona fide* the Principal Immigration Officer accepts these facts as true, although they are primarily, within the knowledge of the applicant. In good faith, the official announces that he will issue a pass and, then before the pass is issued, he finds out the falsity of the very facts upon which he announced himself satisfied. He says he is now dissatisfied and revokes his decision to issue a pass. The applicant, however, with unashamed effrontery says he will hold the official to his earlier decision and that although he falsely misrepresented the facts he has acquired a right to the issue of a pass. Mr. Bhandari was forced to concede that this was the sort of principle upon which the Plaintiff was founding. In the instant case between receipt of

In the Advocate's Committee.

No. 2. Annexure "E" to Affidavit of Herbert Fred Hamel. 24th December, 1954— *continued.*

the application and decision to issue a pass and the issue of the pass certain other facts came to the notice of the Immigration Authorities and the Authorities became dissatisfied. Indeed they had ample grounds for grave dissatisfaction. The official rescinded his decision but still the Plaintiff says, as it were *tant pis pour les faits*, I have right to this pass. There is not contract or quasi-contract unless in the remotest metaphysical-jurisprudential sort between state and individual. Where therefore does the right emerge ? Is there a tortious withholding of this pass ? There is a duty to issue the pass. Provided the official is satisfied but once he is again dissatisfied the duty vanishes. I am not dealing with the case where a pass has been issued and then the facts upon which the issue depended are found to be different. I am dealing with a case where an officer first says he is satisfied and will issue a pass and then says he has become dissatisfied and will not issue it. There can only be a right in this case if there is a duty. There is a duty to issue the pass so soon as the officer is satisfied and the fees paid but the moment the officer becomes dissatisfied the duty ceases and to my mind so does the right. If the Plaintiff had believed for one moment that the Principal Immigration Officer had not acted judicially in being dissatisfied she would, if properly advised, have prayed for a writ of mandamus to issue. The reason why she did not is that the facts were wholly against hope of success. What she has tried amounts to a desperate attempt to establish that upon facts later eschewed by the Authority she acquired a right. In my view the words " Pass may be issued " contained in Regulation 21 (1) although discretionary confer a power on the Principal Immigration Officer. He is given a discretion, but it is a judicial discretion. He has to make up his mind upon an application for a dependant's pass submitted to him. He is not entitled to act arbitrarily but judicially. He cannot arbitrarily refuse to issue the pass. He is not given an absolute but a conditional discretion. He is not entitled to say without consideration, " I shall not issue a pass." His decision is conditional upon his being " satisfied " and that word implies a consideration of and a weighing of facts until there is enough to reach a frame of mind which enables him to come to a decision. If he is satisfied then the word " may " which confers a power upon him as an official of the Government of the Colony in relation to certain persons becomes an imperative and he must exercise the power and issue the pass. The word " may " is a potential but is coupled with a duty to use the power to issue the pass in a certain circumstance, that is satisfaction of mind. Once that state of satisfaction is achieved then there is a duty cast upon him to exercise the power conferred upon him as donee of the power for the benefit of those who have the right.

That is, this issue where a declaratory order is sought is not far removed from the issues before a Court when an application is made for a writ of mandamus to issue. On the one hand an official is said to have a power and a duty and a member of the public a benefit or right and it is alleged that the official has wrongfully refused to exercise the power and failed to perform the duty and that the member of the public has a right

No. 2. Annexure " E " to Affidavit of Herbert Fred Hamel. 24th December, 1954 - *continued.*

to have the power exercised or the duty performed and is aggrieved and applies for an order commanding the official concerned to exercise the power or perform the duty.

Accepting that if the official concerned was satisfied, as he once was then I consider he had a power which he had to exercise to grant the pass and a duty to perform and the applicant had a right was entitled to the benefit of the issue of a pass or the right to have one issued. This imperative ordinarily would continue right up to the time of the issue of the pass and were the pass withheld then the Plaintiff or the applicant could compel performance by writ of mandamus. In the instant case I consider that as long as the satisfaction of the Principal Immigration Officer continued then so long he had a duty to issue a pass and in a sense the applicant had a right to have a pass issued to him. I say, " in a sense " advisedly for it is at least difficult to see how a man who makes a false statement about dependents in an application can have acquired a right in that event if a pass were issued it could be declared a nullity. But conceding for the sake of argument that he had such a right then it continued so long as the satisfied frame of mind of the official persisted. Then something supervened and before the issue of the pass the satisfied frame of mind of the official disappeared and he was dissatisfied and never again achieved satisfaction. In my view the imperative on the official to exercise the power then flew off and he had no longer a duty to issue a pass. The contrary he had duty to the public and the Government of the Colony to refuse to issue a pass. At the same time any right or benefit appertaining to the Plaintiff or the Applicant also flew off. That is if in the circumstances there ever were one. I am unable to accede to the proposition that there was a vested right in the Applicant by reason of the approval to issue a pass in the first place. Whatever right there was conditional upon the continuing satisfaction of the official and when this ceased any right ceased. That is the discretion inherent in the official continues at least up to the issue of the pass. It would make neither logic nor common sense were the official held bound by an earlier frame of mind if he had changed it and was dissatisfied at the time when he was called upon to issue the pass. Right up to the time of issue the official is entitled to change his mind and he is not bound by his earlier state of mind.

Let me consider the final technical grounds put forward by this importunate woman. It is that as the Principal Immigration Officer alone could reach a decision and so reached one Mr. Pearce, a Senior Immigration Officer could not rescind the decision. This point is taken although in paragraph 8 of the plaint it is admitted that the Principal Immigration Officer rescinded his decision and this is admitted by paragraph 6 of the written defences. The truth of the matter is however that both decisions were conveyed to the Applicant by officials of the Immigration Department signing " for the Principal Immigration Officer." That is if the Plaintiff is going to found on the second letter—and go back on her pleadings—she is placed in the position of never having obtained

In the Advocate's Committee.

No. 2. Annexure "E" to Affidavit of Herbert Fred Hamel. 24th December, 1954—*continued.*

a decision of the Principal Immigration Officer at all, both letters having been signed by subordinates. Mr. Havers has cited *Carltone Ltd.* v. *Commissioners of Works,* 1943 2 A.E.R. 560 C.A. In that case the authority "competent" to arrive at a certain decision were the Commissioner of Works and the Decision was written on the headed letter paper of the Ministry of Works and signed by an assistant secretary who was an official in the Ministry. The question arose whether this official was "competent." Lord Green M.R. said :—"In the administration of "the Government of this country the functions which are given to ministers "(and constitutionally properly given to ministers because they are "constitutionally responsible) are functions so multifarious that no "minister could ever personally attend to them. . . . It cannot be "supposed that this regulation meant that in each case, the minister in "person, should direct his mind to the matter. The duties imposed upon "ministers and the powers given to ministers are normally exercised under "the authority of ministers by responsible officials of the department. "Public business could not be carried on if that were not the case. "Constitutionally, the decision of such an official is, of course, the decision "of the minister. The minister is responsible. It is he who must answer "before Parliament for anything that his officials have done under his "authority and, if for an important matter he selected an official of such "junior standing that he could not be expectedly competently to perform "the work the minister would have to answer to Parliament. The whole "system of departmental organisation and administration is based on the "view that ministers being responsible to Parliament will see that "important duties are committed to experienced officials. If they do not "do that, Parliament is the place where complaint must be made against "them."

Now in the instant case the subordinate officials of the Immigration Department did not act under their individual powers. They purported to act as conveying the decision of the head of their department the Principal Immigration Officer. He is the responsible official. He has to answer in a Court of law for their departmental acts and the minister responsible for the department would also have to answer for their acts before the Legislative Council. That being the constitutional position. This was a departmental matter and it was dealt with by subordinate officials. No one could possibly expect the Principal Immigration Officer with all his multifarious duties to attend to every matter himself and what he does is to entrust the matter to other officials in his department who make decisions in his name and for which he is responsible.

In the result I declare that the Plaintiff is unlawfully within the Colony and that she is a prohibited immigrant and that she is subject to the deportation order made against her which was properly made against her. She is present in the Colony without any valid pass. [Her Temporary Employment pass is void and is expired. She was never the subject of a dependant's pass. The Principal Immigration Officer acted within his competence in rescinding his approval of the issue of a dependant's pass in

respect of the Plaintiff and she acquired no continuing right and no status from his earlier decision.

The Defendant to have the costs of this proceeding.

18.11.54. (Sgd.) A. L. CRAM.

This is the exhibit marked " E " referred to in the annexed affidavit of HERBERT FRED HAMEL Sworn before me at Nairobi this 24th day of December, 1954.

R. H. LOWNIE,
Deputy Registrar Supreme Court.

In the Advocate's Committee.

No. 2. Annexure " E " to Affidavit of Herbert Fred Hamel. 24th December, 1954—*continued.*

No. 3.

Affidavit of Appellant in Answer and annexures.

No. 3. Affidavit of Appellant in Answer and annexures. 12th January, 1955.

To the Secretary of the Advocates' Committee ; Constituted under the Advocates' Ordinance.

AFFIDAVIT.

I, MAHARAJ KRISHAN BHANDARI, of Nairobi in the Colony of Kenya make oath and say as follows :—

1.—I was a partner of Messrs. Bhandari & Bhandari, Advocates of Nairobi and had the conduct of Supreme Court Civil Case No. 675 of 1954 on behalf of the Plaintiff Shantaben w/o J. K. Patel and also I had the conduct of Miscellaneous Criminal Application No. 22 of 1954 on behalf of the applicant Mrs. Shantaben w/o J. K. Patel and her husband, Mr. J. K. Patel.

2.—I was away on holiday in England from 5th May, 1954 to 23rd August, 1954 and during my absence from the Colony my firm on 7.6.54 filed a declaratory suit No. 675 of 1954 in the Supreme Court on behalf of the Plaintiff Mrs. Shantaben w/o J. K. Patel. I attach a copy of the Plaint marked " A."

3.—On my return from my holiday, I conducted the above mentioned suit, which suit was dismissed with costs by His Honour Mr. Acting Justice Cram on 18.11.54. The extracts of the judgment in this case are attached as an exhibit No. " E " of the Affidavit of Mr. Hammel, the Acting Registrar of the Supreme Court.

In the Advocate's Committee.

No. 3. Affidavit of Appellant in Answer and annexures. 12th January, 1955—*continued.*

4.—At the hearing of the said suit, it was never argued by the Defendant in the suit that the temporary employment pass of the Plaintiff, Mrs. Shantaben Patel, had expired by effluxion of time. They contended that the pass was null and void by virtue of Regulation 22 (4) of the Immigration (Control) Regulations, 1948 as a result of the failure of the said Plaintiff to report to the Principal Immigration Officer when the said Plaintiff had changed her employment from Cutchhi Gujarati School (for which school the pass was granted) to Vohra Nursery School. The Plaintiff, however, maintained that the Temporary Employment Pass was current and valid at the time when a Deportation Order was made as the said Pass was never Officially cancelled by the Principal Immigration Officer and it had not expired then by effluxion of time. The Court, however, ruled in favour of the Defendant, and further ruled that a pass which was void was to be treated as expired.

5.—After hearing the said judgment of Acting Justice Mr. Cram in the said suit and on my interpretation of law I honestly believe that the Plaintiff could besides appealing against the judgment of Acting Justice Mr. Cram to Court of Appeal for Eastern Africa and notwithstanding the judgment of Acting Justice Mr. Cram in Supreme Court Civil Case No. 675 of 1954 apply for a writ of mandamus directed to the Principal Immigration Officer to show cause why the said writ should not issue to him to grant the Plaintiff a dependant pass in terms of a letter issued by the Principal Immigration Officer to the Plaintiff's husband under Regulation 21 (1) of the Immigration (Control) Regulations, 1948, and for a writ of certiorari directed to His Excellency the Deputy Governor of the Colony of Kenya to show cause why a writ of certiorari should not issue removing into the Supreme Court and quashing the deportation order made by him on 10.4.54 on the said Mrs. Shantaben w/o J. K. Patel by virtue of his powers under Section 9 of the said Immigration (Control) Ordinance, 1948, or alternatively to show cause why a writ of mandamus should not issue to the said Acting Governor to cancel the Deportation Order issued by him against the said Mrs. Shantaben J. K. Patel. I had to my mind good grounds of law to support my said belief and application.

6.—I accordingly drafted the Notice of Motion and also the affidavit of Mrs. Shantaben w/o J. K. Patel and whilst drafting the affidavit I referred to the Plaint filed earlier in the said Supreme Court Civil Case No. 675 of 1954 for the facts of the affidavit.

7.—In para. 4 of the said Plaint the following words appear " which " said pass is still valid and current and has been valid and current at all " material times." I embodied these words in the affidavit of Mrs. Shantaben w/o J. K. Patel not realising that the temporary employment pass was valid only for three years and had expired on 16.7.54 after the filing of the Plaint. I say honestly that I was under the impression that the temporary employment pass was valid for four years as normally

temporary employment passes were issued by the Principal Immigration Officer for the maximum period of four years. At that time the temporary employment pass was an exhibit in Supreme Court Civil Case No. 675 of 1954 and therefore I could not check dates and since I did not consider it was material to the Applicant's case whether the said temporary employment pass was valid and current in the month of November, 1954, as long as it was valid and current on 10th April, 1954, the date of the Deportation Order of His Excellency the Acting Governor I did not particularly check the dates or the validity of the pass when the Application and the Affidavit were drafted. I however attached the original temporary employment pass as an exhibit to the affidavit after getting it released from the Court but it did not occur to me to scrutinize the document before it was exhibited.

8.—The said application and affidavit together with its exhibits were filed in the Court and the application came before His Honour Mr. Justice Hooper for an Order Nisi on 8.12.54.

9.—On about 8.12.54 when I entered the said Judge's Chambers both I and the Learned Judge were under some misapprehension whether the application should have been served on the Respondent the Attorney General the other party to the Application. Since no person appeared on behalf of the Crown the application was stood over to 10.12.54 to find out whether the application had been duly served on the opposite party. During the day, however, it was made clear that the application for an order nisi is an *ex-parte* application and the opposite party need not be served.

10.—On about 10.12.54 when I entered the Judge's Chambers, my attention was drawn by the Learned Judge to the fact that there was apparently a mis-statement in the affidavit as the temporary employment pass attached as an exhibit clearly showed that it had expired on 15.7.54 by effluxion of time whereas the affidavit of the applicant stated that the temporary employment pass was still valid and current. I was rather surprised and embarrassed at such an obvious mistake, and after satisfying myself that the temporary employment pass was in fact for three years and had not been extended for another year by looking for an endorsement at the back of the temporary employment pass, I apologised to the Learned Judge and said that it was a genuine mistake and that I was prepared to file another affidavit to correct the mistake. I, however, explained that it did not affect the position of my application as at the material time, viz., the 10th April, 1954, the said temporary employment pass was valid and current. The Learned Judge then adjourned the application to give me time to file an amended affidavit of the Applicant which I did on 14.12.54, and I enclose a copy of the said affidavit and is marked " B."

11.—On about 15.12.54 when I entered the Judge's Chambers, I was told by the Learned Judge that besides the mis-statement in the affidavit

In the Advocate's Committee.

No. 3. Affidavit of Appellant in Answer and annexures. 12th January, 1955—*continued.*

there was one another point on which he was not clear and wanted an explanation as to " how was it that the Applicant was still in the Colony " if her temporary employment pass had already expired and she had been " served with a Deportation Order as early as 10th April, 1954." I explained that the said Deportation Order had been suspended by His Excellency the Acting Governor to enable the Applicant, Mrs. Shantaben w/o J. K. Patel, to file proceedings in the Supreme Court and to establish her rights to stay in the Colony and that such letter of authority had probably been filed in the previous proceedings which the Applicant filed in the Supreme Court. I gave to the Learned Judge the reference number of Civil Case No. 675 of 1954 and said that he would find out all relevant papers in that file. The Learned Judge then adjourned the application in order to enable him to satisfy himself that the Deportation Order was in fact suspended as I stated to him. I also undertook to supply him with the relevant letter if I found it in my file.

12.—On about 17.12.54 when I entered the Learned Judge's Chambers, I was sternly asked why I did not disclose to the Learned Judge that there was already a judgment of a Supreme Court Judge holding that the said temporary employment pass was null and void and expired as the Judge said he had read the last two paragraphs of the said judgment, I explained or at least I tried to explain that I was never given an opportunity to bring these facts before him because until then I had not been heard on the Application as such. In fact it was always my intention to refer in so far as was necessary to the proceedings and judgment in Supreme Court Civil Case No. 675 of 1954 and to satisfy the Learned Judge that in spite of that case my client was entitled to the relief which she claimed by way of Writs of Certiorari and or Mandamus.

13.—I tried my best to assure the Learned Judge that I had no intention to mislead him in any way as I had already attached the temporary employment pass with the Applicant's affidavit and I say here honestly that I had never any intention to mislead the Court on any point. I honestly believe that the mis-statement in the affidavit was a genuine mistake which I readily accepted and offered to rectify the same and which was in fact rectified by a supplementary affidavit.

14.—I honestly say that at no stage of the proceedings did I intend to hide or not to disclose the fact that there had been previous proceedings in this matter and that there was a judgment on that point. The application was to be served on Hon. The Attorney General and the fact that there had been previous proceedings and their nature could not have been under any circumstances concealed, and I for my part had prepared my arguments that the question of *Res Judicata* did not in the circumstances arise. It may be that I would have been better advised to refer specifically in my client's affidavit to the previous proceedings but at the time I felt that this could be more conveniently done by way of admissions and submissions to the Court on the hearing of the application for *Mandamus* and *Certiorari*.

No. 3. Affidavit of Appellant in Answer and annexures. 12th January, 1955—*continued.*

15.—Dealing specifically with the points raised by Mr. Justice Hooper in paragraph 7 of his Memorandum (exhibit " B ") of 20th December, 1954, I beg to state—

(i) I admit that I did not in the Notice of Motion referred to, or in the affidavit of my client refer to the proceedings and judgment in Supreme Court Civil Case No. 675 of 1954. This I intended to do in the course of my arguments before the Learned Judge. In fact as a result of the Learned Judge's enquiry concerning the suspension of the Deportation Order, I had occasion to refer to the said case before the substance of my application came for argument. I would emphasize that the proceedings before Mr. Justice Cram were of a nature different from those in the Notice of Motion before Justice Mr. Hooper and I had given notice of appeal so that my client may not be debarred from pursuing either remedy should she fail to get the necessary relief by way of Writ of Certiorari or Mandamus.

(ii) I regret that I should have conveyed to the Learned Judge the impression that I was acting " either on the injunction of " Mr. Justice Cram or in virtue of his judgment." This impression was entirely unintentional. What I actually intended to convey to the Learned Judge was that it was my impression from the reading of the judgment of Mr. Acting Justice Cram that the latter was of the opinion that in the circumstances the appropriate remedy open (if indeed it was open at all) to my client was by way of Prerogative Writ and not by way of Declaratory Suit under the Petition of Rights Ordinance. It was never my intention to suggest that to the Learned Judge that Mr. Acting Justice Cram had expressed the opinion that an application for *Certiorari* or *Mandamus* would succeed, but merely it seemed to him that that remedy to be most appropriate to the facts.

(iii) I have already explained my position with regard to the affidavit supporting my client's application. I can only re-iterate that it was a regrettable error on my part to have permitted my client to swear that the Employment Pass was still valid and current, a fact which was contradicted on the face of the document which was exhibited, which I regretfully failed to observe.

I make this oath from my personal knowledge believing the same to be true.

Sworn at Nairobi this 12th day of January, 1955.
Before me :
(Sgd.) H. D. TRIVEDI,
A Commissioner of Oaths.

(Sgd.) M. K. BHANDARI.

In the Advocate's Committee.

No. 3. Annexure "A" to Affidavit of Appellant in Answer. 12th January, 1955.

Annexure ("A")—Plaint Civil Case No. 675 of 1954.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI.

Civil Case No. 675 of 1954.

SHANTABEN W/O JAGABHAI KALABHAI PATEL ... ... *Plaintiff*

versus

THE ATTORNEY GENERAL OF THE COLONY AND PROTECTORATE OF KENYA representing the Principal Immigration Officer of the Colony of Kenya ... ... *Defendant.*

PLAINT.

1.—The Plaintiff is a married woman and is a British subject, and her address for service for the purpose of this suit is care of Bhandari & Bhandari, Advocates, Ibea Building, Government Road, Nairobi.

2.—The Plaintiff is working for gain as a Teacher in Nairobi in the Colony of Kenya.

3.—The Defendant's address for service is as given above.

4.—The Plaintiff, who was then a widow, lawfully entered the Colony on 16th July, 1951, on a valid Temporary Employment Pass No. 3146 dated 7.5.51 granted to her by the Principal Immigration Officer to the Colony of Kenya in accordance with the provisions of the Immigration (Control) Ordinance 1948, and Rules made thereunder, which said pass is still valid and current, and has been valid and current at all material times.

5.—The Plaintiff married Jagabhai Kalabhai Patel, a British Subject and a permanent resident of this Colony in July, 1953, at Nairobi aforesaid.

6.—On or about 24th July, 1953, the said Jagabhai Kalabhai Patel, applied to the Principal Immigration Officer for a Dependant Pass for the Plaintiff.

7.—On or about 24th October, 1953, the Principal Immigration Officer approved the said application.

8.—On or about 5th November, 1953, the Principal Immigration Officer rescinded his earlier decision to grant the Dependant's Pass.

9.—The Plaintiff has never been declared a Prohibited Immigrant by the Principal Immigration Officer or any other authority or authorised officer of the Government of the Colony of Kenya under any law in force in the Colony or at all.

10.—On or about the 10th April, 1954, His Excellency the Acting Governor of the Colony of Kenya made a Deportation Order against the Plaintiff, the said Order purported to have been made by virtue of the power conferred on His Excellency by Section 9 (1) of the said Immigration (Control) Ordinance.

11.—The said Deportation Order was unlawfully made against the Plaintiff as under Section 9 aforesaid it can only be made against persons, who are either prohibited immigrants or whose presence within the Colony is unlawful under the provisions of the said Immigration (Control) Ordinance.

12.—The Plaintiff therefore, made representation to His Excellency against the making of the said Deportation Order, and His Excellency has agreed to suspend the operation of the said Deportation Order in order to allow her to institute proceedings in this Honourable Court to establish her right to stay in the Colony.

13.—The Plaintiff on the facts of the case is entitled to be declared—

(a) that she is not a Prohibited Immigrant under Section 5 of the said Immigration (Control) Ordinance, and was not so when the Deportation Order was made, and

(b) that she is lawfully in the Colony since July, 1951,

but the Principal Immigration Officer refuses to admit either of these facts.

14.—There are no means by which the Plaintiff can at this time obtain a legal determination of the matter at issue between the parties except by the decision of this Honourable Court and the relief by way of declaration.

REASONS WHEREFORE THE PLAINTIFF PRAYS for

(i) A Declaration that the Plaintiff is not a Prohibited immigrant within the meaning of Section 5 of the said Immigration (Control) Ordinance, 1948, and that her presence in the Colony is lawful having entered the Colony under a valid Temporary Employment Pass, which is still current and which has not in any way been revoked or cancelled and also having been once approved the issue of a Dependant's Pass, which approval the Immigration Officer had no right or authority to rescind and as such the Plaintiff is not subject to a Deportation Order by His Excellency the Acting Governor by virtue of his power under Section 9 of the said Immigration (Control) Ordinance, 1948;

In the Advocate's Committee.

(ii) Costs of this action be awarded to her ; and
(iii) for such further or other relief as to this Honourable Court may seem just.

Dated at Nairobi this 7th day of June, 1954.

(Sgd.) R. B. BHANDARI,
for BHANDARI & BHANDARI,
Advocates for the Plaintiff.

No. 3. Annexure "A" to Affidavit of Appellant in Answer. 12th January, 1955 — *continued.*

Filed by :
BHANDARI & BHANDARI,
Advocates,
Ibea Building,
P.O. Box 1591,
Nairobi. 10

To be served upon—
The Attorney General of the Colony of Kenya representing the Principal Immigration Officer of the Government of the Colony of Kenya, the Defendant,
c/o The Attorney General's Chambers,
Nairobi.

No. 3. Annexure "B" to Affidavit of Appellant in Answer. 12th January, 1955.

Annexure ("B")—Supplementary Affidavit of Shantaben W/O Jagabhai Kalabhai Patel. 20

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI.

Misc. Cr. Application No. 22 of 1954.

In the Matter of an Application for a Writ of Certiorari and an Application for a Writ of Mandumus

and

In the Matter of the Immigration (Control) Ordinance, 1948, and Rules made thereunder.

JAGABHAI KALABHAI PATEL, and MRS. SHANTABEN W/O JAGABHAI K. PATEL ... ... *Applicants.* 30

SUPPLEMENTARY AFFIDAVIT.

I, SHANTABEN W/O JAGABHAI KALABHAI PATEL make oath and say as follows :—

1.—I swore an affidavit on 29th November, 1954, in connection with my above mentioned application.

2.—In para. 2 of my said affidavit I stated that the temporary employment pass was still valid and current, and has been valid and current at all material times. In fact my temporary employment pass expired on 16th July, 1954; but it was valid and current at the time when a Deportation Order was made against me and I consider that is the material time as regards my above mentioned application.

3.—I regret the mistake in my original affidavit and I state that the other statements in my said affidavit are true to the best of my knowledge and belief.

4.—I made representation through my advocates to His Excellency the Governor against the making of the Deportation Order as stated in para. 9 of my said affidavit and to the best of my knowledge and belief His Excellency agreed to suspend the operation of the said Deportation Order to allow me to institute proceedings in this Honourable Court to establish my right to stay in the Colony.

Sworn at Nairobi this 14th day of December, 1954.
Before Me :
(Sgd.) K. D. TRAVADI,
Commissioner for Oaths.

(Sgd.) SHANTABEN in (Gujarati.)

No. 4.

Affidavit of His Honour Mr. Justice Hooper.

I, CHARLES ARTHUR HOOPER of P.O. Box 41 Nairobi, in the Colony of Kenya make oath and say as follows :—

(1) I am Puisne Judge of Her Majesty's Supreme Court of Kenya.

(2) On 17th day of December, 1954 and on the 20th day of December, 1954, I addressed memoranda to HERBERT FRED HAMEL, Acting Registrar of Her Majesty's Supreme Court of Kenya. The said Memoranda are those referred to in and true copies of which are annexed to the affidavit of the said HERBERT FRED HAMEL, and which are marked " A " and " B " respectively.

(3) The facts, circumstances and allegations contained in the said memoranda are true to the best of my knowledge and belief.

Sworn at Nairobi this 28th day of January, 1955
Before Me :
(Sgd.) R. H. LOWNIE
Deputy Registrar
Supreme Court.

(Sgd.) C. A. HOOPER.

In the Advocate's Committee.

No. 5.

Proceedings.

No. 5. Proceedings. 29th January, 1955.

RECORD OF PROCEEDINGS OF THE ADVOCATE'S COMMITTEE.

MEMBERS OF THE COMMITTEE :

Mr. JOHN WHYATT, Q.C. Attorney-General (Chairman).
Mr. GRIFFITH-JONES, Q.C. Solicitor-General.
Mr. MANGAT, Q.C.
Mr. SORABJEE.

In Attendance :

Mr. J. BICKERTON WILLIAMS (Secretary).

Mr. H. R. HAYLOCK and Mr. D. CRANE were appointed Shorthand-Writers pursuant to Rule 24 of the Advocate's Committee (Disciplinary Proceedings) Rules, 1952.

Mr. REID appeared for the Applicant.

Mr. O'BRIEN KELLY appeared for the Advocate to whom the application relates.

9.15 a.m. Saturday, 29th January, 1955.

Mr. REID appears for the Applicant.

Mr. O'BRIEN KELLY appears for the Respondent.

CHAIRMAN : There is one matter we ought to have on record, and that is the question of waiver of the periods which are allowed under the Rules to an advocate to file his answer. I understand Mr. O'Brien Kelly, that you are prepared to waive the periods which are allowed.

Mr. O'BRIEN KELLY : We agree that all the periods should be waived.

CHAIRMAN : There is one other matter before you open your case, Mr. Reid. The Secretary has just handed to me an affidavit made by Mr. Justice Hooper, which he received late yesterday evening and he has not had an opportunity of serving a copy of it on Mr. O'Brien Kelly.

Mr. O'BRIEN KELLY : We waive any question of time in respect of that. We have actually received a copy.

Argument ensues on the question whether Mr. Justice Hooper should be called to give evidence.

Mr. Reid points out that the Judge does not consider that it is compatible with his position to submit himself for cross-examination and refers to the following authorities :—

Halsbury, Vol. 13, at p. 724 ;
Odgers, p. 728 ;
Cox's Criminal Cases, Vol. 8, p. 103.

Mr. O'Brien Kelly referred to Section 121 of the Indian Evidence Act.

Mr. O'BRIEN KELLY : We dispute the conclusions which Mr. Justice Hooper arrived at from these facts and in particular challenge the

expressions of opinion or impressions which he arrived at. I cannot waive any rights which the Respondent may have, to ask, through me, any questions which it is felt ought to be asked of Mr. Justice Hooper as to those opinions and impressions, but we admit his version of the facts and will not require to question him on those.

CHAIRMAN : The Committee is very much obliged to you both for the helpful attitude that you have adopted in this matter, and the Committee is prepared to proceed with the hearing of this application on the basis which was explained to the Committee by Mr. Kelly and agreed by Mr. Reid, which, for the purposes of the record, I will recapitulate. It is this : that the Committee under Rule 10 will in their discretion proceed upon the affidavit evidence of Mr. Justice Hooper, excluding from that affidavit any expressions of opinion or inference, and confining the affidavit to questions of fact, so far as this case is concerned. On that understanding Mr. Kelly, on behalf of Respondent, has informed the Committee that he will not exercise the right which is given to a party to the proceeding under Rule 10 to require the attendance of the deponent.

Mr. REID opens for the Applicant :—

In substance the allegations against the Respondent Advocate are contained in the final paragraph of the second Memorandum of Mr. Justice Hooper. The Principal allegation from the point of view of the case will be that Mr. Bhandari did not disclose to Mr. Justice Hooper, either by affidavit or when he appeared before him on 10th December or on 15th December, that there had been previous proceedings in regard to the same issues and that in those proceedings it had been decided against Mr. Bhandari's clients on the merits in each and every issue which arose on his motion before Mr. Justice Hooper. It will not be alleged that Mr. Bhandari had any eventual intention of attempting to conceal this from the Court in any subsequent proceedings which would eventuate. What is alleged is that the first hurdle he had to cross was that of obtaining an order *nisi* in relation to the Mandamus proceedings which were before Mr. Justice Hooper, and that for the purpose of obtaining that Order *nisi* he had to show a *prima facie* case for it, and that he indeed showed a *prima facie* case for it on the basis of the affidavits which he had prepared that he knowingly concealed from Mr. Justice Hooper the fact of the previous proceedings, well knowing at the same time that if the previous proceedings had been disclosed Mr. Justice Hooper—or any Judge for that matter—he might well deem that no order *nisi* should issue. That is the principal allegation.

There is the second allegation, which appears to be marginal ; the question of the impression that Mr. Bhandari conveyed to the mind of Mr. Justice Hooper. I am not suggesting that this should be personal to Mr. Justice Hooper, nor can I in view of the agreement between my friend and myself, that Mr. Bhandari conveyed the impression that in appearing before the Court with the Notice of Motion he was acting either on the injunctions of Mr. Acting Justice Cram or in virtue of his Judgment to that effect.

In the Advocate's Committee.

No. 5. Proceedings. 29th January, 1955—*continued.*

The third allegation is that Mr. Bhandari supported his Notice of Motion before Mr. Justice Hooper by means of an affidavit which he well knew to be false in a material particular. Now within that allegation there are two alternatives the two alternatives being that certain statements with regard to the Temporary Employment Pass in that affidavit, to the effect that that Temporary Employment Pass was valid and current were included by Mr. Bhandari, although he well knew that the Temporary Employment Pass was void and had expired by effluxion of time. Or if he did not know that, he ought to have known.

The other sub-head of that same allegation is that in any event he well knew that by virtue of the Judgment of Mr. Justice Cram it had been decided by a Judge of the Supreme Court that the Temporary Employment Pass was void and expired by process of law.

Those are the principal allegations and I would ask the Committee to find three things in the alternative. Firstly, taking those allegations together, or separately, that Mr. Bhandari intended to deceive the Court and that he was thereby guilty of professional misconduct. Secondly, that he was guilty of gross negligence in failing to disclose what he ought to have disclosed, and in failing to check what he ought to have checked and that that gross negligence was of such a nature as to amount to professional misconduct. My third submission, in the alternative, will be that the duty of the Committee is as set out in the Advocates Ordinance of 1949, section 9, sub-section 3, sub-paragraph 3, where it states : (*Reads.*)

I am submitting in the third place, that in any event it should make a finding that there is a *prima facie* case for the application, and that accordingly it should lay a signed copy of such report as it would see fit to make before the Court for such action as the Court might think fit to take.

Applicant's Evidence.

No. 6. Herbert Fred Hamel. 29th January, 1955. Examination.

No. 6.

Evidence of Herbert Fred Hamel.

Examined by Mr. REID.

Q. Are you Herbert Fred Hamel ?—*A.* I am.

Q. And you are the Acting Registrar of Her Majesty's Supreme Court of Kenya ?—*A.* Yes.

Q. You are the Applicant in present proceedings ?—*A.* I am.

Q. You made an affidavit which has been admitted by the Committee which is considering this matter, in which you refer to certain memoranda and Court Records ?—*A.* That is correct.

Q. Have you in your possession the Memoranda addressed to you by Mr. Justice Hooper in connection with the matter before the Committee ?—*A.* I have in my possession a Memorandum which is marked " B."

Q. Have you the second ?—*A.* I have the original of the second Memorandum.

Q. Do you produce it ?—*A.* Yes (Marked " H 1.").

Q. You are in charge of the records of the Court ?—*A.* Yes.

Q. And you have those records in your custody ?—*A.* Yes.

Q. Do you have in your possession the Court record of Miscellaneous Criminal Case No. 22 of 1954 ?—*A.* Yes.

Q. Do you now produce it ?—*A.* Yes. (Marked " H 2.")

Q. Do you further have in your possession the Court records relating to Civil Case No. 675 of 1954 ?—*A.* Yes.

Q. Do you now produce them ?—*A.* I produce the original record in Civil Case No. 675 of 1954. (Marked " H 3.")

Q. Annexed to your affidavit there is a copy of an affidavit by Shantaben W/O Jagabhai Kalabhai Patel ?—*A.* Correct.

Q. And is that a true copy of the affidavit of Shantaben W/O Jababhai Kalabhai Patel, which is included in the record of the proceedings in Miscellaneous Criminal Case No. 22 of 1954 ?—*A.* That is so.

Q. There is also annexed to your affidavit and marked " D " a copy of a Temporary Employment Pass which is also a part of the Court record in the case—is that a true copy ?—*A.* That is a true copy of the original Temporary Employment Pass.

Q. Lastly, you refer in your affidavit to extracts marked " E " from the judgment of Mr. Justice Cram in Civil Case No. 675 of 1954. Are those true extracts to the best of your knowledge and belief? —*A.* They are true extracts.

NO CROSS-EXAMINATION.

No. 7.
Proceedings.

Case for the Applicant.

Mr. O'BRIEN KELLY opens for the Respondent :—

May it please the Members of the Committee. As I understand it, there are three points mentioned specifically by the learned Judge on which he bases his complaint. They are set out at page 2 of the Second Memorandum of the Judge. The first is the fact that Mr. Bhandari did not disclose to him that the matter dealt with in his Notice of Motion had already been adjudicated upon by Mr. Acting Justice Cram and that Notice of Appeal had been given. Well, our answer, in effect, will be this, that the matter had not really been adjudicated upon by Mr. Justice Cram : that the procedure adopted before the learned Judge was completely different procedure ; and that it asked for relief in respect of a Dependent's Pass, or rather the emphasis was on relief in respect of a Dependent's Pass and not as in the case before Mr. Justice Cram, of a Temporary Employment Pass ; and that any matters dealt with by Mr. Justice Cram in respect of the

In the Advocate's Committee.

No. 7. Proceedings. 29th January, 1955—*continued.*

Temporary Employment Pass were merely obiter and were not in fact a decision on this matter at all.

The second point is the fact that Mr. Bhandari sought to convey to Mr. Justice Hooper the impression, when appearing before him with his Notice of Motion, that he was acting either on the injunctions of Mr. Justice Cram or in virtue of his judgment to that effect. Now, our answer to that will be that there was no intention of creating such an impression on the mind of the learned Judge, but that if we did create such an impression, a clear and proper reading of the judgment of Mr. Justice Cram supports any suggestion that we made to that effect; in other words and I shall quote you passages at a later stage—the learned Judge keeps harping on the fact that the procedure before him is incorrect and that if the Plaintiff in that case had any remedy it was by way of Mandamus, and not by Declaratory suit.

The third point especially emphasised by the Judge is No. 3 on page 2: "The fact that Mr. Bhandari supported his motion by an affidavit he "himself drafted which was false in a material particular, namely, that "the Temporary Employment Pass was still valid, and which, in view of "the concluding paragraph but one of Cram J.'s judgment, he must have "known was not true." Our answer to that will be that we admit that we did make this false statement, that we made it through lack of information, that it was an error, that it was a *bona fide* mistake, that it was clear on the face of the affidavit that it was a mistake, but that we did not make this mistake with any wrong intention, much less an intention of deceiving the learned Judge.

I have with me an affidavit which has been made by the Respondent and sworn on 12th January. I do not know what the feelings of the Committee are, but subject to your directions, I propose to read this affidavit, which turns generally on the complaints and then call Mr. Bhandari for any questions which the Committee may see fit to put to him. The affidavit made by Mr. Bhandari was made under the impression that the Committee might consider it at any preliminary hearing and that possibly, having read the affidavit, it might decide that there was no *prima facie* case for the Respondent to answer.

Respondent's Evidence.

No. 8. Maharaj Krishan Bhandari. 29th January, 1955.

No. 8.

Evidence of Maharaj Krishan Bhandari.

(Mr. O'BRIEN KELLY reads affidavit.)

Mr. BHANDARI affirmed (in absence of appropriate Book).

Examination.

Examined by Mr. O'BRIEN KELLY.

Q. You are the Respondent in this matter?—*A.* Yes.

Q. And I think I am right in saying that you have instructed me to admit the truth of the facts stated in the Memoranda of Mr. Justice Hooper

of 17th and 20th December ?—*A.* Yes ; there is practically no dispute on the facts.

Q. We want to be clear that there are no facts in this Memoranda which you will be disputing ?—*A.* I am not disputing any.

Q. In view of the complaint which had been made, did you swear an affidavit on 12th January, 1955 ?—*A.* I did.

Q. And is that the affidavit which I have just read to the Committee ? —*A.* That is right.

Q. Did you attempt in any way to mislead the Judge in the conduct of this matter ?—*A.* No.

Q. It is suggested by Mr. Reid that, in making this false statement by your client, you may have led the Judge to granting an Order *Nisi* which he would not otherwise have granted ?—*A.* I had no intention of deceiving the Judge. The fact that I could have obtained an Order *Nisi* would not have meant anything to me ; but I wanted to get the Order absolute ultimately. It was my intention to bring to the notice of the Judge the proceedings in the previous case had I been given an opportunity to do so. As I have explained in my affidavit, the first time when I went into his chambers—which was very shortly adjourned—we were under the impression that service has to be effected on the opposite party, and I thought that since the Judge raised the point it might be served. I then got a telephone message from the clerk to say that it is an *ex parte* application. When I went the second time . . .

CHAIRMAN : We do not want all the details. Did you fail to disclose these matters of the previous proceedings before Mr. Justice Cram because you thought that if you did so you might fail to get the Order *Nisi* ?—*A.* I would not have gained anything by that. My client was already in the Colony and the Governor had suspended the Order until I could finish my proceedings in the Supreme Court. So there was no purpose in getting an Order *Nisi*. It was never my intention to mislead the Court in order to get an Order *Nisi*.

Mr. O'BRIEN KELLY : There seems to be a certain amount of confusion on your part and on the part of the learned Judge as to whether the application for an Order *Nisi* should be served on the Attorney-General ?—*A.* That was the reason why the application was adjourned on the first day.

Q. Were you under that impression ?—*A.* On the first day.

Q. Before you got your Order *Nisi*, you referred the learned Judge to the proceedings in Civil Case No. 675 of 1954 ?—*A.* Yes.

CHAIRMAN : When was that ?—*A.* On the second occasion on 15th December ; I gave the reference number of the case on the second occasion.

Mr. O'BRIEN KELLY : That was the first occasion that you mentioned these civil proceedings No. 675 ?—*A.* No, the first occasion was on 10th December.

Cross-examined by Mr. REID.

Q. Mr. Bhandari, I want you to direct your mind to Civil Case No. 675 of 1954, before Mr. Justice Cram. That was quite a long case ?—*A.* Yes.

In the Advocate's Committee.

Respondent's Evidence.

No. 8. Maharaj Krishan Bhandari. 29th January, 1955.

Cross-examination—*continued.*

Q. Would you agree if I stated that it went on on 22nd, 23rd, 25th and 28th October ?—*A.* Yes.

Q. And it required, presumably, careful preparation on your part ?—*A.* Yes.

Q. Would you have to direct your attention to it for some time ?—*A.* Yes.

Q. Now I want to refer you to exhibit " A " to your affidavit, at p. 3, particularly to the terms of the remedy which you sought in those civil proceedings. You asked for a Declaration that the Plaintiff is not a prohibited Immigrant within the meaning of Section 5 of the Immigration (Control) Ordinance 1948, and that her presence in the Colony is lawful having entered the Colony under a valid Temporary Employment Pass. You also asked the Court to find that once the Principal Immigration Officer had given a decision with regard to a Dependent's Pass he could not rescind it ? *A.* Yes.

Q. And that in view of all those circumstances your client was not subject to the Deportation Order by His Excellency the Governor ?—*A.* Yes.

Q. But that both you and counsel for the Crown agreed that the case should be tried by Mr. Justice Cram on its merits ?—*A.* The position was that the Judge took an objection himself ; he thought that the proceedings before him were not proper, and I was maintaining that I had a proper right to be heard before him, and Crown Counsel conceded that the proceedings were proper, and therefore the Judge heard us.

Q. You were anxious that the case should be heard on its merits ?—*A.* Of course.

Q. And Mr. Justice Cram decided against you on each and every point ?—*A.* He did.

Q. He decided that your client was a prohibited immigrant ?—*A.* Yes.

Q. At page 8 of the extract of Mr. Justice Cram's Judgment (Record, p. 23), he is referring to the position with regard to your client and her Temporary Employment Pass. It says : " It expired automatically . . . process of law." Is that *Obiter ?*—*A.* I had doubts whether it was a correct exposition of law.

Q. Is it *obiter* ?—*A.* He at first at page 2 dismissed my petition.

Q. You were anxious that the case should be dealt with—was it dealt with on its merits ?—*A.* Yes.

Q. Your action before Mr. Justice Cram was for a declaration of right ? —*A.* Yes, he dismissed it.

Q. Did he dismiss it on a procedural point or on its merits ?—*A.* On a procedural point. He thought that my petition of right was not proper and dismissed it, but he took into consideration our submissions and decided the matter on its merits also.

Q. In deciding the matters on their merits, was that quotation which I have quoted *obiter* or not ?—*A.* It is a question of law.

Q. And your interpretation of it was that it was *obiter* ?—*A.* He was dealing with the question on its merits.

Q. Why did you want the question decided on its merits ?—*A.* Because I thought that I was properly before the Court on my application.

Q. You were dissatisfied with the decision on the merits ?—*A.* Yes.

Q. I want you now to direct your attention to the second point in your Plaint, that your client, it was held by Mr. Justice Cram, was a prohibited immigrant by process of law ?—*A.* Yes.

Q. And the issue of the Temporary Employment Pass—was that decided against you ?—*A.* The Judge ruled that the Temporary Employment Pass had expired by process of law.

Q. I would refer you to the extract from Mr. Justice Cram's Judgment which states : " She is present in the Colony without any valid Pass. Her " Temporary Employment Pass is void and is expired." That is clear ?—*A.* Yes, the Judge wrote that sentence in view of his finding on page 7 of the Judgment, when he said : " As I read this section a pass that has " become void had expired."

Q. Is that *obiter* ?—*A.* I took objection that after he had dismissed my petition the whole thing is *obiter*, but it is not *obiter* ; if the matter has been decided on its merits, then it is a proper Judgment.

Q. You appealed against this judgment ?—*A.* Yes, I appealed against the whole judgment.

Q. You intended to appeal against the whole judgment ?—*A.* Yes.

Q. Against the parts which were *obiter* ?—*A.* Yes.

Q. I now want to direct your attention to the third point in your Plaint, which was that the Principal Immigration Officer once having indicated a decision to grant a Dependent's Pass, that decision could not be rescinded. Was that decided against you ?—*A:* Yes.

Q. I want to refer you to page 15 of Mr. Justice Cram's judgment. (Record, p. 27.) " In my view . . . to refuse to issue a pass." That related to his decision to rescind the previous indication that he would grant a Dependent's Pass and that related to the point in your Plaint ?—A. Yes.

Q. Is that *obiter* ?—*A.* No, not in that sense ; he went on decide the question on its merits.

SOLICITOR-GENERAL : Do you maintain that if the Court of Appeal, as it frequently does, dismisses an appeal and gives its reasons afterwards, its reasons are *obiter* ?—*A.* No. I do not believe that.

Mr. REID : When a Court dismissed your suit and in the process of judgment gave judgment on the issues in that suit, is his judgment *obiter* ? —*A.* The judgment does not become *obiter* by that fact alone.

SOLICITOR-GENERAL : Can you refer me to the passage in Mr. Justice Cram's judgment where he dismissed the petition ?—*A.* Yes, in the middle of page 2.

Mr. REID : Nevertheless, whatever your interpretation was as to what is *obiter*, you gave Notice of Appeal as to the whole circumstances relating to the Cram judgment ?—*A.* Yes.

Q. Were you going to argue the question of *obiter* ?—*A.* No. I had dual remedies ; I could go by declaratory Suit, and also in view of the judgment, by writs of mandamus and certiorari.

In the Advocate's Committee.

Respondent's Evidence.

No. 8. Maharaj Krishan Bhandari. 29th January, 1955.

Cross-examination—*continued*

Q. If you are right in assuming that most of the very long judgment of Mr. Justice Cram was *obiter*, then was that the reason why you did not raise it ?—*A.* It was not in my mind to raise an appeal. I could proceed by way of Prerogative writ before the Court, even though my Declaratory suit had been dismissed. Because I thought the question of *resjudicata* would not be raised in these proceedings.

Q. I want to refer you to the last point in what you claimed in your Plaint, which is that the Deportation Order was invalid. I want also to refer you to the last main paragraph of the Cram judgment (p. 28) " In " the result I declare that the Plaintiff is unlawfully within the Colony " and that she is a prohibited immigrant and that she is subject to the " deportation order made against her." Which was properly made against her ?—*A.* I felt that that was a true interpretation of law, but that his ruling was not correct, because section 9 of the Ordinance only gives power to the Governor to deport a person who is a prohibited immigrant, and I thought that in the circumstances my client was not a prohibited immigrant.

Q. And you sought an alternative remedy ?—*A.* Yes.

Q. Apart from appealing ?—*A.* Yes.

Q. Was an order *nisi* issued ?—*A.* No.

Q. It was refused ?—*A.* Yes.

Q. On what ground ?—*A.* The ground was this, that the Judge thought that I had misrepresented in my affidavit certain facts which he thought I had not brought to his notice in previous proceedings.

Q. I was directing your attention to the mandamus proceedings, and I think your views with regard to those proceedings are set out in paragraph 5 of your affidavit, where you state ; (Reads). Now, what had you to show in order to obtain a writ of mandamus in this case ?—*A.* I had to show to the Judge, firstly, that my client entered the Colony lawfully, that she had a Temporary Employment Pass which was not cancelled, and that she had in her possession a letter by the Principal Immigration Officer whereby he had agreed to issue her with a Dependent's Pass ; and that, notwithstanding that a certain Judgment has been given, I could ask for Prerogative writs.

Q. Do you agree that the issues in both the Civil Case Proceedings and in your mandamus proceedings were identical ?—*A.* The issues may be identical, but the approach to those issues by the Court were not identical. In a writ of mandamus or certiorari, the Court has to take into consideration the question whether the Principal Immigration Officer, in refusing to issue a Dependant's Pass, has failed to take certain matters into consideration which he ought to have taken into consideration, or has taken matters into consideration which he ought not to have taken into consideration ; whilst in a Declaratory Suit the onus is on a person who wants a declaration to prove to a Court that he is entitled to the relief he is seeking.

Q. Is it your view now, and was it your view at the relevant time, that the proceedings before Mr. Justice Cram and Mr. Justice Hooper were in substance different from one another ?—*A.* Yes.

Q. Is that why you did not refer to the previous proceedings ?—*A.* On the contrary, I was basing my arguments in the second proceedings on the the first proceedings, and I could not, in my respectful submission, proceed further unless I could bring to the notice of the Judge what has transpired, and I came to him for second relief.

Q. You did not disclose that in your affidavit ?—*A.* I thought I would disclose that when I appeared before the Judge.

Q. Was it because you thought the proceedings in the two cases were so substantially different that you did not see fit to mention them in either of the affidavits submitted by you to Mr. Justice Hooper ?—*A.* No ; I thought I would only give in my affidavit the bare facts of her right to stay in the Colony.

Q. All of which had already been adjudicated upon ?—*A.* That is a matter on which I wanted to say that that judgment did not bind a Judge in dealing with a Prerogative writ.

Q. According to paragraph 14 of your affidavit, you said you had the question of *res judicata* in your mind ?—*A.* If it was raised by the opposite party.

Q. I thought you said that you appeared in the first place on 8th December and the point in issue was then whether it was an *ex parte* application or not ?—*A.* On 8th December we adjourned the case for 10th, thinking that it had to be served on the opposite party.

Q. What did you think on 10th ?—*A.* We knew that it was an *ex parte* application. On 10th, when I entered, immediately the question of misstatement of fact was raised and we had an argument on that question and I was asked how it was the misstatement came about, and I explained that it was a mistake, and then he adjourned the proceedings to give me time to file an amended affidavit.

Q. You had time to refer to the fact that you had either been advised or had received a ruling from Mr. Justice Cram ?—*A.* On 10th, when we entered the Court, the Judge said that he did not understand the nature of the proceedings.

Q. You had time to refer to a ruling by Mr. Justice Cram ?—*A.* It must have been mentioned by the way.

Q. You had time to mention it " by the way " ?—*A.* In some conversation it might have arisen, and I might have mentioned it by the way.

Q. You had time to mention it " by the way " ?—*A.* Yes.

CHAIRMAN : I was under the impression that Mr. Reid was asking you whether in mentioning Mr. Justice Cram's Judgment you were doing so for the purpose of bringing to Mr. Justice Hooper's notice the fact that these issues had been considered and decided by Mr. Justice Cram, or whether it was for the purpose here stated of informing the Judge that Mr. Justice Cram had indicated that certiorari or mandamus was the correct procedure, and not by way of Declaratory Suit. You follow the difference ?—*A.* It was a very hurried meeting ; we were there for only 5 or 6 minutes, and I might have hurriedly mentioned that there were previous proceedings.

In the Advocate's Committee.

Respondent's Evidence.

No. 8. Maharaj Krishan Bhandari. 29th January, 1955.

Cross-examination—*continued.*

Mr. REID : You thought that this was a matter which could be dealt with when the case came up for argument ?—*A.* Yes, I said I would have referred to this when the application came for argument after the preliminaries had been arranged.

Q. You intended to draw Mr. Justice Hooper's attention to the previous proceedings ?—*A.* Yes, because my submission is that I could not possibly have proceeded with my arguments before Mr. Justice Hooper had I not referred to the previous judgment.

CHAIRMAN : Why do you say that if you had not disclosed these previous proceedings to Mr. Justice Hooper when applying *ex parte* for an Order *nisi*, the Judge could not have granted you an Order *nisi* ?—*A.* I say this because if I had been given the opportunity of opening my case, surely I would have told the Judge the history of the case : how this woman came, when was a Temporary Employment Pass granted to her, when was the Deportation Order issued and under what section it was issued. And then I would have told him that because she did not report to the Immigration Officer her change of employment, that that in itself does not constitute her pass as void, because then I would have given other reasons why I say that her Temporary Employment Pass was still valid at the time the Deportation Order was made.

Mr. REID : I would like to refer you to para. 14 of your affidavit. (Reads.) Now when would the Attorney General receive the Notice ?—*A.* After the Order *nisi* had been made.

Mr. SORABJEE : When did you raise the point of *res judicata* ? The question of *res judicata* can only be heard by the Judge if it is raised by the opposite party.

Mr. REID : That could only have been raised at the hearing of the application ?—*A.* Yes.

Q. It was never your intention to refer to the previous proceedings in the case before Mr. Justice Hooper ?—*A.* I would not try to hide anything before Mr. Justice Hooper.

Q. Did you intend to raise it of your own volition ?—*A.* I intended to refer to the previous proceedings because I wanted to give him the history of the case.

Q. Had you prepared your argument about *res judicata* ?—*A.* Yes. I was prepared to answer or satisfy the learned Judge that, in spite of that judgment, I was properly before the Court.

Q. Did you intend to argue the question of *res judicata* at all ?—*A.* No ; what I intended was to bring it to the notice of the Judge and tell him about the previous proceedings, and also tell him that that did not debar me from coming to this Court.

Q. I want to refer you to the Second Memorandum of Mr. Justice Hooper, addressed to the Registrar, where it is stated : (Reads para. 5). Did you say that ?—*A.* Yes.

Q. You thought it was like a habeas corpus application ?—*A.* I did say to the Judge that, as in the case of habeas corpus, I could come to the Court on a Prerogative Writ.

Q. Had you been involved in a habeas corpus application and you failed in your first application and tried a second time, do you think it proper not to disclose that you failed the first time ?—*A.* It would be improper if I did not disclose that I failed the first time.

Q. I want now to direct your attention to the affidavit which you drafted for your client in connection with your Notice of Motion. (Reads paragraphs 2, 8 and 10 of affidavit.) Now, on the face of an affidavit containing statements of that nature, would you suppose that anyone would ever consider that those points had been decided against the Applicant in a previous case ?—*A.* No, I agree that they would not consider, but I must tell you that the question was out of my mind for some other reason—because I did not agree with his findings and I had already given Notice of Appeal against his decision. So, whatever he said in his judgment, I did not give much attention to it.

Q. This affidavit is dated 29th November, 1954—did you not file your Notice of Appeal on the same day ?—*A.* It might have been.

Q. You say that you had not this question of the judgment in your mind when you drafted the affidavit—Am I correct ?—*A.* Yes.

Q. Was the judgment of Mr. Justice Cram delivered on the 18th November ?—*A.* Yes.

Q. And did you not bother to read it ?—*A.* I was present in Court when it was read.

Q. It was a long judgment ?—*A.* Yes.

Q. Took a lot of reading ?—*A.* Yes.

Q. Did you read it ?—*A.* I was present in Court when it was read.

Q. Did you get an extract of the judgment ?—*A.* No.

Q. You just carried it in your mind ?—*A.* Yes.

Q. It is a lot to carry in your mind ?—*A.* Yes.

Q. You filed a Notice of Appeal on 29th November ?—*A.* Yes.

Q. Without reading the judgment ?—*A.* I only gave Notice of Appeal.

Q. Did you ever get an extract of the judgment ?—*A.* Later on—yes.

Q. When ?—*A.* On or about 24th December.

Q. Supposing I draw your attention to the fact that in the matter of the appeal an affidavit was drafted for your client addressed to the Court of Appeal for Eastern Africa, and the date which appears on this affidavit in support of the application is 20th December ?—*A.* Yes ; it was only on the question of the financial position.

Q. Did you include in this affidavit certain statements with regard to the merits of the appeal ?—*A.* Yes.

Q. Now do you consider, Mr. Bhandari, that there is a high obligation upon you as an advocate when making an *ex parte* application ?—*A.* Yes ; I consider there is a high responsibility whenever you make any application.

Q. Now the first hurdle you had to cross in your mandamus and certiorari proceedings was the Order *nisi* ?—*A.* Yes.

Q. To get an Order *nisi* you had to show a *prima facie* case ?—*A.* Yes.

Q. On the basis of your client's affidavit there is a *prima facie* case ?—*A.* Yes.

In the Advocate's Committee.

Respondent's Evidence.

No. 8. Maharaj Krishan Bhandari. 29th January, 1955.

Cross-examination—*continued.*

Q. According to the affidavit which you drafted, the Temporary Employment Pass is still valid and current and has been valid and current at all material times ?—*A.* Yes.

Q. If that was true, then would not the logical conclusion be that your client was lawfully in the Colony ?—*A.* That would be true, but the fact that the Temporary Employment Pass was valid and current on 29th November was not material to my application for mandamus. The Temporary Employment Pass was valid and current when the Deportation Order was made. I was considering the the judgment of Mr. Justice Cram as not correct in law.

CHAIRMAN : But you knew that, according to Mr. Justice Cram's judgment, the Temporary Employment Pass was no longer valid ?—*A.* Yes, but I did not address my mind to that question at the time. My mind was obsessed with the question, considering that Mr. Justice Cram's judgment was not correct, what remedy I might have.

Mr. REID : Did you in fact anticipate any difficulty in obtaining your Order *nisi* ?—*A.* I had to satisfy the judge that there was a *prima facie* case.

Q. Did you anticipate any difficulty in this case ?—*A.* I had to explain to the Judge that there was a judgment of Mr. Justice Cram, but in spite of that, I wanted to explain to him that I had a right to come before him. I had a difficulty.

Q. There was another difficulty : Mr. Justice Hooper observed that the Temporary Employment Pass had expired by effluxion of time ?—*A.* Yes. Before that I had not directed my mind to the question of effluxion of time.

Q. If Mr. Justice Hooper had not observed this patent incompatibility between the affidavit and that which was exhibited to it, you would have got your Order *nisi* ?—*A.* Not on that point alone ; that was not material at that time. What was material was whether the Temporary Employment Pass was valid and current on 10th April.

CHAIRMAN : If Mr. Justice Hooper had not discovered this discrepancy between the exhibit and the contents of the affidavit, you would have got your Order *nisi* almost as a matter of course ?—*A.* No, because I still had to convince the Judge that the Temporary Employment Pass was valid and that it had not expired by operation of law.

SOLICITOR-GENERAL : If Mr. Justice Hooper, when you went to his chambers, said, " Mr. Bhandari, I have read your application and the " affidavit in support, you may have your Order *nisi*—what would you " have done " ?—*A.* I do not know. I might have said, " All right," and walked out.

CHAIRMAN : Would execution of the Deportation Order be suspended pending an appeal to the Court of Appeal for Eastern Africa ?—*A.* Yes, but it would do me no good to get Order *nisi*. Order absolute was my main concern.

Mr. REID : You were gaining a hearing on the application ?—*A.* The hearing in any case I was getting before Mr. Justice Hooper.

SOLICITOR-GENERAL: What is the purpose of an Order *nisi* if it has no value ?—*A.* The purpose is that I have disclosed to the Judge that there is a *prima facie* case.

SOLICITOR-GENERAL: Did you disclose a *prima facie* case by your affidavit in support ?—*A.* Yes.

Mr. REID: As to the validity of the Pass for three years you earlier stated that the judgment of Mr. Justice Cram, was delivered on 18th November ?—*A.* Yes.

Q. And that you carried it in your head ?—*A.* Quite a bit.

Q. You did not carry this bit in your head. (Reads judgment at bottom of page 2) ?—*A.* The question of time was never before the Court at all.

Q. You were not worried whether it expired by effluxion of time or not ?—*A.* No.

Q. Did you refer to your own case files when you were engaged in those dual proceedings ?—*A.* Yes.

Q. Did you have occasion to read the correspondence ?—*A.* I must have read it once.

Q. Do you recollect representations having been made to His Excellency the Governor to suspend the Deportation Order against your client ?—*A.* Yes.

Q. Your mind was not directed to that ?—*A.* I knew that the Governor had suspended the operation of that order.

Q. Did you refer to the correspondence on your return from London ?—*A.* Yes.

Q. I want to refer you to the original affidavit of your client—you drafted that ?—*A.* Yes.

Q. And did Mrs. Patel call and see you after you drafted it ?—*A.* Yes.

Q. Did you read to her the affidavit you had drafted ?—*A.* Yes.

Q. She never made any demur as to contents ?—*A.* No.

Q. She must have known that it was valid for only 3 years ?—*A.* I do not know.

Q. She was prepared to agree to anything that you put down to assist her case ?—*A.* I do not think so. She is a school teacher.

Q. You stated in para. 7 of your affidavit: " In para. 4 of the said " Plaint the following words appear ' which said pass is still valid and current " ' and has been valid and current at all material times.' I embodied these " words in the affidavit of Mrs. Patel not realising that the Temporary " Employment Pass was valid only for three years and had expired on " 16.7.54, after the filing of the Plaint " ?—*A.* Yes.

Q. Now you added certain words to the words contained in the plaint ?—*A.* Yes.

Q. Had you directed your mind particularly to the question of the Temporary Employment Pass ?—*A.* Yes. My submission was that the Pass must be cancelled by the Principal Immigration Officer before it could be termed void.

Q. Now you have stated in para. 7: " At that time . . . the affidavit were drafted " ?—*A.* That is right.

In the Advocate's Committee.

Respondent's Evidence.

No. 8. Maharaj Krishan Bhandari. 29th January, 1955.

Cross-examination—*continued.*

Q. You did not consider it material ?—*A.* That is right. I felt that the fact that she had a certain pass later on did not matter very much ; it is a question whether she had a valid pass when the Deportation Order was made.

Q. Did you consider at the time when you drafted the affidavit that the date on the Temporary Employment Pass, or its validity, was not material to your client's case ?—*A.* The date was material and the date was material as long as it related to 10th April, 1954.

Q. Did you not decide to check the dates on the Temporary Employment Pass ?—*A.* The Temporary Employment Pass was not with me ; it was with the Court at that time.

Q. Had you a copy on your file ?—*A.* No.

Q. Had you any doubts about what was stated in the affidavit when you drafted it ?—*A.* I had no doubts in my mind. I was under the impression that the Temporary Employment Pass was valid for 4 years.

Q. What Mr. Justice Cram had decided was that there was no need for cancellation ?—*A.* In my view, there was a need for cancellation.

Q. Had you Mr Justice Cram's judgment in mind when you added the words, " which said pass is still valid and current and has been valid and " current at all material times " ?—*A.* No.

CHAIRMAN : Why did you put them in ?—*A.* I had in mind that the Pass was not cancelled by the Principal Immigration Officer.

Q. Having said that the Pass is still valid, why did you have to go on ?—*A.* When it was issued it may have been that the Principal Immigration Officer might have cancelled that Pass and I might have challenged the validity of his cancellation of the Pass.

Q. You said, " The pass is still valid and current "—why did you have to say anything more ?—*A.* My impression is that I wanted to refer in the affidavit to the fact that the Pass was not officially cancelled by the Principal Immigration Officer.

Mr. REID : You knew that it had been held very recently by a Judge of the Supreme Court that there was no necessity for such a formality ?—*A.* I was not agreeing with the Judgment.

CHAIRMAN : Did you have that judgment in mind at the time when you drafted this ?—*A.* I cannot say but my impression is that, having in mind that Mr. Justice Cram's judgment was not correct, I dis-regarded the judgment.

SOLICITOR-GENERAL : How is it possible when you are dealing with the same client and the same Temporary Employment Pass completely to disregard the Cram judgment ten days after it was delivered ? Are you asking the Committee to believe that the Cram judgment had been completely abandoned from your mind ? Is it a fact that you had the Cram judgment in mind when you drafted this affidavit ?—*A.* I only knew there was a Cram judgment. I was not attaching any importance to it.

Q. Why not ?—*A.* I was drawing up the affidavit disregarding the point of law decided by Mr. Justice Cram.

Q. You were prepared to incorporate in an affidavit to be sworn by

your client on oath a view of the law contrary to a judgment of a Judge of the Supreme Court delivered ten days earlier ?—*A.* This question did not occur to me.

Q. Why ?—*A.* Because I was under the impression that my client was in the Colony on a valid pass which had not been cancelled.

Q. You were drawing an affidavit for your client to swear on oath which you knew was entirely conflicting and contrary to the Cram judgment ?—*A.* I knew there was a Cram judgment, but my mind was at that time so much against the judgment. I was indignant with the judgment. I thought the judgment was not very true not proper in law, and I was labouring under some sense of frustration at such a judgment being delivered. I should have given weight to the judgment of Mr. Justice Cram.

Mr. REID : I want you to refer to para. 10 of your own affidavit, where it states : " I apologised to the learned Judge . . . was valid and current." You said that ?—*A.* Yes.

Q. Well knowing that your client's pass had been declared void ?—*A.* I did tell him that it was a mistake and that I was prepared to rectify the mistake.

Q. I want you to direct your mind to page 7 of the extract of Mr. Justice Cram's judgment (Record, p. 22) where it states : " As I read " this Section . . . to remain in the Colony " ?—*A.* At that time I was under the impression that the Judge was wrong in stating that a pass that has become void had expired.

Q. I want to refer to your supplementary affidavit. Para. 2. (Reads.)

CHAIRMAN : Are you of the opinion that it was material for Mr. Justice Hooper to know of the Cram judgment on this particular matter when he was considering your affidavit on 15th December ?—*A.* It was material and I would have explained the position had I had the opportunity.

SOLICITOR-GENERAL : How were you going to explain it ?—*A.* I referred him to the case file.

Mr. REID : I want now to refer you to the other two statements in paragraphs 8 and 10 of the original affidavit. Para. 8 reads (Reads). Do you still consider that is a true statement ?—*A.* No, I do not consider it a true statement. At that time I did not take into consideration the judgment of Mr. Justice Cram.

Q. You re-affirmed all the contents of the previous affidavits ? —*A.* Yes.

Q. Para. 10 (Reads). That was re-affirmed, too ?—*A.* Yes.

Q. Do you not agree that the affidavits were, to say the least equivocal in the extreme ?—*A.* I would not agreee that much—only that there is a mistake.

Q. You think they are open, frank and honest ?—*A.* Yes.

Q. And disclose all the relevant facts ?—*A.* With respect, yes.

In the Advocate's Committee.

Respondent's Evidence.

No. 8. Maharaj Krishan Bhandari. 29th January, 1955.

Cross-examination—*continued.*

Q. Do you think your affidavits are fair, square and above board ?—*A.* I think they are. The Judge did not take any objection to them.

Q. I want to refer you to para. 6 of exhibit " B," which is the Second Memorandum to the Acting Registrar : " I then asked Mr. Bhandari . . . " reasons for so doing." Why did you suggest that one of your clerks had drafted it ?—*A.* What Mr. Justice Hooper said was, who drafted it ? and I said, I drafted it. I said I took full responsibility for it, even if drafted by my clerk.

Q. Why did you mention your clerk ?—*A.* When the question was first put to me I did not understand the question properly.

Q. It took you by surprise ?—*A.* I said it might have been drafted by my clerk.

Q. Did you suggest that it was drafted by your clerk so that the blame for any decision could be passed on to somebody else ?—*A.* I had no such intention.

The Committee adjourns at 12.45 p.m.

9.15 a.m. Monday, 31st January, 1955.

Re-examination

Mr. BHANDARI re-examined by Mr. O'BRIEN KELLY.

Q. With regard to this judgment of Mr. Justice Cram's did it occur to you to refer to this judgment in the affidavit of your client's supporting the application for an Order *nisi* ?—*A.* It did not occur to me at all that I should refer to the judgment in my affidavit.

Q. Did you regard this judgment as being contrary to the interests of your client in the remedy which she sought by Prerogative Writ at this state ?—*A.* At that stage I thought the judgment was not against me in my remedy for a Prerogative Writ, it was against me as regards my remedy as far as a Declaratory Suit was concerned.

Q. Did you think that the findings in that judgment prevented your client from seeking a remedy by way of a Prerogative Writ ?—*A.* No, I thought I had a right to go by a Prerogative Writ. In fact if one reads the judgment of Mr. Justice Cram no less than six or seven times he mentioned that I should have gone to the Court by way of a Prerogative Writ.

Q. The learned Solicitor General asked you a question on Saturday and I think I am fair in saying that the effect of that question was, would you have taken an Order *nisi* from the learned Judge if the question of this judgment had not arisen at all. That is to say, if the Judge were satisfied with the affidavit in support of the application would you have been satisfied to take an Order *nisi* ?—*A.* Yes I would because at that stage it did not occur to me at all that it was necessary for me to refer in the affidavit to the judgment but of course I would have referred to the judgment in my submissions and my experience is that we are invariably asked to submit or plead our case before a Judge before an Order *nisi* is granted.

Q. Have you ever been before a judge who has granted an Order *nisi* as a matter of course ?—*A.* Not in my experience.

Q. In approaching this matter did you at any time have separately in mind the question of the Order *nisi* and the Order Absolute ?—*A.* No, I always regarded this as one and the same applications although these are two steps for one and the same application because an Order *nisi* would not take me anywhere. I still had to argue the application in order to get it absolute.

Q. It was your intention in any event to bring to the notice of the learned Judge the judgment of Mr. Justice Cram at a later stage ?—*A.* Certainly, in fact I was looking for that opportunity and I took to my mind the first opportunity when I was in the Court to refer to the judgment ; in fact I had based my arguments on the assumption that the judgment of Mr. Justice Cram did not debar me from bringing an application by way of Prerogative Writ before the Court.

Q. Let us assume if it were vital that you should have referred to this judgment of Mr. Justice Cram and you had not done so and in fact you did not do so what in your experience would, you have had some ten years experience, have been the effect of that submission on your ultimate remedy. That is to say when you did bring the matter before Mr. Justice Hooper ?—*A.* If I was later on arguing my application for an Order Absolute surely the proper parties could have said about the judgment.

Q. When the judgment was eventually disclosed and when the Judge considered the significance of this judgment, as presumably he may have, what in your experience would have been his attitude towards the matter then. You not having disclosed it at an earlier stage ?—*A.* To my mind it would be something against me as to why didn't I disclose it.

Questioned by the SOLICITOR-GENERAL.

Q. Your application for an Order *nisi* was an *ex parte* application ? —*A.* It was.

Q. You have told us that the question arose as to whether or not it should be served but yet you filed it as *ex parte* application ?—*A.* I filed the application at that time but I did not direct my mind to whether it was *ex parte* or not.

Q. It was filed as an *ex parte* application was it not. There was no attempt when you went before Mr. Justice Hooper to serve anybody, you had no responsibility ?—*A.* No respsonibility.

Q. That is the form of an *ex parte* application is it not ?—*A.* Yes.

Q. And you made no attempt to serve it on anybody ?—*A.* No.

Q. Is it not true to say that you filed it and intended it to be an *ex parte* application ?—*A.* It was an *ex parte* application.

Q. Did you file it and intend it to be an *ex parte* application ?—*A* I did not direct my mind towards that.

Q. It was drawn in the form of an *ex parte* application. There was no responsibility and you made no attempt to serve it. Isn't there only one conclusion from that and that was that you filed it and intended it to be an *ex parte* application ?—*A.* Sometimes the Court serves on the proper party.

In the Advocate's Committee.

Respondent's Evidence.

No. 8. Maharaj Krishan Bhandari. 31st January, 1955.

Re-examination—*continued.*

Q. Your intention ?—*A.* I did not give this matter that thought. I thought the application is in this form and I filed it, I still had a vague idea that the proper party, the Court, might serve it on the A.G.

Q. That again is a question for the Court. Did you or did you not intend it on filing it as an *ex parte* application ?—*A.* I did not think it was an *ex parte* application although the form was an *ex parte* application, but my impression was that it was still to be served by the A.G. although he took no steps to serve it.

Q. Your intention was that it would be an *ex parte* application unless the Court ordered it to be served on any other party ?—*A.* Yes.

Q. In your affidavit or in the affidavit of your client in support of that application you said in paragraph 2 that the pass was still valid and current and had been valid and current at all times. It was drawn to your attention by the Judge that that was not so and you filed a corrective affidavit and in that corrective affidavit (Exhibit " B ") you said " In fact " my temporary employment pass expired on 16th July, 1954 ; but it was " valid and current at the time when a Deportation Order was made against " me and I consider that is the material time as regards my above- " mentioned application." Am I right in my understanding that you filed that affidavit after Mr. Justice Hooper had challenged you with the Cram judgment ?—*A.* I had seen the Employment Pass attached to my original application and it was clearly written three years.

Q. At that stage when you filed this corrective affidavit had the Cram judgment been referred to at all ?—*A.* I had mentioned it.

ATTORNEY-GENERAL : I have a note of this I think during Mr. O'Brien Kelly's examination-in-chief the 10th December was the first time Civil Case No. 675 was mentioned, is that correct.

Mr. O'BRIEN KELLY : Yes.

SOLICITOR-GENERAL (*continued*).

Q. That was on the first occasion and it was mentioned by the time you filed this corrective affidavit which is dated the 14th ?—*A.* We did not discuss that. I only said there was a long judgment but Mr. Justice Hooper was not prepared to listen to that. " I have seen the Temporary " Employment Pass and it was for three years. You must correct it " before you come to me."

Q. That meant you were required to correct a statement that the Pass was still valid and current and has been at all material times. You were filing this corrective affidavit to correct certain statements that the pass was still valid and current and had been at all times ?—*A.* Yes, that is the only thing.

Q. And you corrected it by saying it was valid and current at the time the Deportation Order was made ?—*A.* Yes.

Q. That was your client's statement on oath ?—*A.* Yes.

Q. Even that so-called correction is in flagrant disregard of the judicial view of the pass taken by Mr. Justice Cram ?—*A.* I have already said that the judicial view of Mr. Cram I was under the impression did not bind me or that did not affect this issue because I was going by a

different route and I thought that judgment was not good in law. In fact if you will allow me to explain . . .

ATTORNEY-GENERAL : I do not think you need go into detail Mr. Kelly will no doubt put proper submissions and I think you have given sufficient explanation when you were cross-examined on this point by Mr. Reid, but I do not wish to stop you.

Mr. O'BRIEN KELLY : There is nothing further.

SOLICITOR-GENERAL (*continued*).

Q. Do you agree Mr. Bhandari that the same issue, the validity of the pass, was common to the Declaratory Suit and application for the Prerogative Writ ?—*A.* The isssues may be the same but the approach . . .

Q. Was the issue of the validity of the pass as at the 10th April, 1954, common to both proceedings ?—*A.* The issue was common I agree but may I be allowed to say this that the application was quite different whereas it is possible I may fail or get a declaration that I was properly in the Colony but I may succeed in the Prerogative Writ directing the P.I.O. that he must issue a Dependant Pass, they are two different passes.

Q. Your prerogative proceedings were with a view to cancelling the issue of a Dependant Pass and the Declatory Suit was in relation to your status ?—*A.* That is so.

Mr. O'BRIEN KELLY : That is certainly partially so, half the remedy sought was sought in respect of a mandamus to the P.I.O. to issue a Dependant Pass, that pass was never in existence and is held to be so by the Judge and an amendment to the application for a mandamus was asked for to direct the P.I.O. to issue this pass. It does not apply to the certiorari.

SOLICITOR-GENERAL.

Q. Although the issues may not have been identical in the two proceedings there was this one common issue, the validity or otherwise of the Temporary Employment Pass, on the 10th April, 1954, the date of the Deportation Order, that was a common issue? —*A.* That is true.

Q. As a matter of professional responsibility Mr. Bhandari do you consider that having regard to Mr. Justice Cram's judgment on that issue, you were entitled to procure your client to swear on oath that the pass was valid and current on the 10th April, 1954. What you did in fact do was to put it on oath into the mouth of your client. Do you consider that was right ?—*A.* I did consider it was right.

Q. Do you now consider it was right ?—*A.* I think so.

Q. You described it in your client's corrective affidavit as a statement of fact. You did not even qualify it by saying " I believe " or " I am advised." You framed it in the affidavit as a statement of fact that it was valid and current at the time the Deportation Order was made. Do you consider that you were correct and justified in making that statement in your client's affidavit or not ?—*A.* I did because I thought the validity was a question of law and I considered I was justified. It had not been cancelled and therefore my client had a perfect right to stay in the Colony.

In the Advocate's Committee.

Respondent's Evidence.

No. 8. Maharaj Krishan Bhandari. 31st January, 1955.

Re-examination—*continued.*

Questioned by Mr. MANGAT.

Q. When you filed this application—Notice of Motion—did you tender one copy, the original, and no duplication ?—*A.* I did not personally file it, my clerk filed it.

Q. Would you accept it that there was no extra copy ?—*A.* We certainly made more copies.

Q. For filing ?—*A.* I don't know.

Q. Can you tell me whether you filed an extra copy for the purpose of serving if the Court thought fit ?—*A.* I cannot answer that question. If there was only one copy then only one copy was given.

ATTORNEY-GENERAL.

Q. We may take it that only one copy was filed ?—*Q.* Yes.

Mr. MANGAT (*continued*).

Q. On what date was it filed ?—*A.* 7th December.

Q. It was put down in Chambers for Order *nisi* on the 8th ?—*A.* Yes.

Q. Can you imagine anyone being served within those 24 hours and being able to represent the other party if you ever intended that the Court may serve another party ?—*A.* I agree it is very little time.

Q. It was impossible. Nobody would accept service at such a short notice. So it would be fair to draw a conclusion that you did not intend it to be served on anybody at that time ?—*A.* I signed it on the 4th December.

Q. We fix the date when we file the application. When you filed the application you took a date for the 8th December ?—*A.* Yes, it was given to me.

Q. If there was any intention of serving anybody surely you would take a date a week hence or four days hence ?—*A.* What happens in this case is that the papers are left at the Court and the Court clerk does nothing, he sees the Registrar and he then says whether he should accept those papers and then gives us a date and we put the date then.

Q. You think that is the general practice ?—*A.* That probably happened in this case because I remember I drafted an application. It was taken to the Registrar and he did not accept it because certain words were not used to show cause and he rejected it and I had to draft it again.

Q. You did not pay any service fees at all ?—*A.* No.

Questioned by Mr. SORABJEE.

Q. When you went before Mr. Hooper and presumably you got an Order *nisi* and the case went on for hearing an Order Absolute was dismissed you had a right of appeal ?—*A.* No, the procedure is that there is no appeal except on the criminal side.

Q. If an order was not made absolute you had no right of appeal ? —*A.* No.

Q. But you could apply to the Court of Appeal for leave to appeal ?— *A.* No, because there is no right of appeal.

Q. You could have gone to another Court and filed another writ ?—*A.* I could have gone on a writ of habeas corpus to another Court.

SOLICITOR-GENERAL.

Q. I think you explained to Mr. Justice Hooper that you could as in the case of habeas corpus go from Court to Court, in other words you could canvass your application round all the Judges ?—*A.* I gave an argument that as in the case of habeas corpus I got the impression that only habeas corpus could go from Court to Court, but with other writs I don't think you could.

ATTORNEY-GENERAL.

This is a point which is referred to by Mr. Justice Hooper in the minute which through your Counsel you have said you would accept. May I remind you of what it says. " Mr. Bhandari then said that he deemed " this matter to be the same nature as habeas corpus, and that he could go " from court to court until he succeeded. I said I did not agree." That is merely a recording of what was said by you to Mr. Justice Hooper, in other words that is a statement of fact and I think you must take it that is accurate as to what was said by you.

Mr. O'BRIEN KELLY : We did admit the facts and I think that ought to be covered by the statement of Mr. Justice Hooper. However I will leave it at that.

Mr. O'BRIEN KELLY : I wonder if I might ask one or two short questions.

ATTORNEY-GENERAL : Yes, I think we may have got it but I would like to be clear about it and record it again. It is the question of the references to Mr. Justice Cram's judgment on the various occasions when you appeared before Mr. Justice Hooper. I would like to get it clear. How often was it referred to and what was said when it was referred to. You first appeared before Mr. Hooper on the 8th December ?—*A.* Yes.

Q. There was no reference to the Cram judgment then ?—*A.* No.

Q. The 10th December was your second appearance. Was it referred to then ?—*A.* Yes, but I only mentioned a long judgment by Mr. Cram on this point. That was all I said.

Q. The next occasion was the 15th December. Was there any reference then ?—*A.* I gave him the reference number of the case file namely 675.

Q. Was anything else said ?—*A.* I asked him if you ask for that file you will find everything there.

Q. When was the next occasion that you appeared before him ?—*A.* The 17th. He was very angry and was not prepared to listen to my reference to the Cram judgment and dismissed my application.

Q. That is the chronological series of the events ?—*A.* Yes.

Q. On three occasions out of four there was a reference to Mr. Justice Cram's judgment ?—*Q.* Yes.

Q. How much was said about it is another matter ?—*A.* The first occasion when it was mentioned even the files were not opened.

In the Advocate's Committee.

Respondent's Evidence.

No. 8. Maharaj Krishan Bhandari. 31st January, 1955.

Re-examination—*continued.*

Questioned by Mr. O'BRIEN KELLY.

Q. In making your affidavit of the 12th January I think you dealt with this question of service in paragraph 9 of that affidavit (reads). That was your answer to this point on the 12th January. Is it in fact still your answer ?—*A.* Yes.

Q. There is one more question and that is the question of time. Mr. Mangat asked you about this. When an application of this sort is filed is it for the advocate to find out what day the matter will be fixed before the Court ?—*A.* No, the Court fixes that and they give us a date.

Q. It might be a day or a week ahead ?—*A.* Yes.

Mr. MANGAT. 10

Q. Did you accept a day ahead ?—*A.* My impression is that it was not only a day, it was two or three days before.

Q. What I mean to say is that the Registrar cannot force a date on you ?—*A.* We can refuse but in this case I was anxious to have it as soon as possible.

Mr. O'BRIEN KELLY.

Q. Did you yourself concern yourself personally with the date at all in this matter ?—*A.* No, it was done by my assistant.

Case for the Respondent.

No. 9. Report of the Advocates' Committee. 3rd February 1955.

No. 9. 20

Report of the Advocates Committee.

Mr. Herbert Fred Hamel, Acting Registrar of Her Majesty's Supreme Court of Kenya at Nairobi, made an application, dated the 24th day of December, 1954 to the Advocates' Committee asking them to require Mr. Maharaj Krishan Bhandari, an Advocate (hereinafter referred to as the Respondent) to answer allegations against him in his professional capacity. The application was supported by his affidavit, also dated the 24th day of December, 1954, incorporating in it, as exhibits, the following documents :—

1. A Memorandum, dated 17th December, 1954. 30
2. A copy of a Memorandum, dated 20th December, 1954, both the above Memoranda were addressed to him by His Honour Mr. Justice Hooper.
3. A copy of the Affidavit, dated 29th November, 1954, of one Shantaben w/o Jagabhai Kalabhai Patel, filed in Miscellaneous Criminal Application No. 22 of 1954 of the Supreme Court.
4. A copy of the Temporary Employment Pass dated 7th May, 1951, issued in favour of the said Shantaben.

5. An extract from the judgment delivered by His Honour Mr. Justice Cram on 18th November, 1954, in Civil Case No. 675 of 1954, Shantaben w/o Jagabhai Kalabhai Patel *versus* The Attorney General.

The above documents appear as Appendix 1 to this report.

The Committee met on 21st January, 1955, and found that the Application disclosed a *prima facie* case against the Respondent. As the Respondent wished to forego the statutory period of 21 days requisite under Rule 6 of the Advocates' Committee (Disciplinary Proceedings) Rules, 1952 (hereinafter called the Rules) and wanted the Committee to dispense with the formal requirements of the Rules in other particulars, the Committee deemed it just and expedient to do so ; and in exercise of its powers under Rule 26 dispensed with all requirements of the Rules respecting the period between the service of the application and the hearing thereof and respecting notices, affidavits, documents, service and time and fixed the 29th day of January, 1955, as the date on which the application be heard and directed that the service of the Application and the Affidavit and the annexures thereto be effected on the Respondent before then.

On 29th January, 1955, the Applicant was represented by Mr. Reid and the Respondent by Mr. O'Brien Kelly. The Respondent was present in person throughout the hearing on this date and on 31st January, 1955, when the hearing was continued.

At the commencement of the hearing it was confirmed by the Advocates for both the parties that they wished, and had agreed, to forego their rights in respect of notices, documents, affidavits of documents, service and time as required under the Rules and wished the Committee to proceed to hearing.

Mr. Reid, for the Applicant, informed the Committee that His Honour Mr. Justice Hooper, who in normal course, would be an essential witness for the Applicant, considered it was not compatible with his position as a Judge to submit himself for cross-examination and had, therefore, decided not to attend before the Committee; but that he had sworn an affidavit confirming the facts circumstances, and allegations contained in the aforementioned Memoranda of 17th and 20th December, 1954, addressed to the Acting Registrar. He handed in an Affidavit of Mr. Justice Hooper dated 28th January, 1955. The said Affidavit is appended hereto and marked as Appendix 2.

Mr. O'Brien Kelly informed the Committee that he would not, under Rule 10, require the attendance of His Honour Mr. Justice Hooper for the purpose of giving oral evidence as to the facts set out in his Memoranda and did not wish to exercise his right under the proviso to Rule 10 in respect of those facts ; he would accept the Affidavit of His Honour Mr. Justice Hooper as evidence of those facts, which he did not contest. He did not, however, accept the impressions and opinions set out by Mr. Justice Hooper in the Memoranda and submitted that they should be disregarded by the Committee.

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The Committee decided to treat the Affidavit of His Honour Mr. Justice Hooper and the said Memoranda as evidence in the case and directed themselves to exclude from their consideration all the impressions and opinions of Mr. Justice Hooper, as described by him in his two Memoranda.

Before leaving this matter it might be desirable to refer to the position which would arise if the Respondent were not willing to forego his right to cross-examination. Where, as happened in the present case, the matter complained of arises in Chambers and the only persons present are the Judge and the Advocate, the substantive complainant would necessarily be the Judge.

If in these circumstances, the Advocate insists on his rights under Rule 10 but the Judge declines to give oral evidence, it would seem to follow that the Committee would by the express provisions of Rule 10, be precluded from admitting an Affidavit by the Judge in lieu of oral evidence. The result would then be that the complaint would fail for lack of evidence.

Mr. Hamel, the Applicant gave evidence and produced the original records of the aforesaid Civil Case No. 675 of 1954 and Miscellaneous Criminal Application No. 22 of 1954. These records are attached hereto and marked as Appendix 3 to this report. The case for the Applicant was then closed.

Mr. O'Brien Kelly outlines the Respondent's case and tendered as evidence the Affidavit of the Respondent, dated 12th day of January, 1955, incorporating in it as Exhibits, the following documents :—

1. A copy of the Plaint in the aforesaid Civil Case No. 675 of 1954, and
2. A copy of the Affidavit, dated the 14th day of December, 1954, made by the said Shantaben, filed in the aforementioned Miscellaneous Criminal Application No. 22 of 1954 as a Supplementary Affidavit to her first Affidavit in the same Application, and dated 29th November, 1954.

The said Affidavit with its exhibits appears as Appendix 4 to this report.

The Respondent also gave oral evidence. A complete transcription of the shorthand notes of the proceedings is attached hereto and marked as Appendix 5.

The facts leading up to the Application before the Committee, as disclosed in the several Appendices and by the evidence enumerated above, may be summarised as follows :—

1. One, Mrs. Shantaben, then knc wn as Mrs. Shantaben, Someshwar Thakar, now known as and appearing in the two aforementioned proceedings in the Supreme Court of Kenya Civil Case No. 675 of 1954 and Miscellaneous Criminal Application No. 22 of 1954 as Mrs. Shantaben W/O Jagabhai Kalabhai Patel, was granted a Temporary Employment Pass by the Principal Immigration Officer in Kenya, dated 7th May, 1951 authorising her to enter Kenya and remain therein for a period not exceeding three years from the date of such entry and subject to the other conditions contained therein.

2. The said Mrs. Shantaben, by virtue of the said Pass, entered Kenya on 16th July 1951.
3. On 18th June 1953, the said Shantaben married one Jagabhai Kalabhai Patel who, on or about 24th July, 1953 applied to the Principal Immigration Officer for a Dependant's Pass for her.
4. The said Shantaben left her authorised employment on the 24th June, 1953, but failed to notify the Principal Immigration Officer of the fact as required by the Immigration (Control) Regulations.
5. On 24th October, 1953, the Principal Immigration Officer informed the then Advocates of the said Jagabhai Kalabhai Patel that a Dependant's Pass would be issued in favour of the said Mrs. Shantaben, on payment of the requisite fees.
6. On 5th November, 1953, the Principal Immigration Officer rescinded his decision to issue a Dependant's Pass in favour of the said Mrs. Shantaben.
7. On 10th April, 1954, a Deportation Order was made against the said Mrs. Shantaben, under the hand of Sir Frederick Crawford Acting Governor of Kenya, under Section 9 of the Immigration (Control) Ordinance reciting that she was a prohibited Immigrant and that her presence in the Colony was unlawful and ordering her to be deported from Colony of Kenya by not later than the 15th day of May, 1954. The said Deportation Order is attached to the original Affidavit of the said Mrs. Shantaben, dated 20th November, 1954, filed in the aforesaid Miscellaneous Criminal Application No. 22 of 1954 and is marked "D" (Appendix 3).
8. On 21st May, 1954, in response to a request made on her behalf by her Advocates Messrs. Bhandari & Bhandari, a firm in which the Respondent was then a Partner, the said Deportation Order was suspended till such time as the outcome of any proceedings which might be taken by the said Mrs. Shantaben in the Supreme Court was known.

   A certified true Copy of the letter granting the suspension of the Deportation Order is contained in record of the aforesaid Miscellaneous Criminal Application No. 22 of 1954.
9. On or about the 7th June, 1954, proceedings known as Civil Case No. 675 of 1954, Shantaben w/o Jagabhai Kalabhai Patel *versus* The Attorney General, were initiated by the said Messrs. Bhandari & Bhandari, Advocates by filing a Plaint which prayed for a declaration :—
   (A) That the Plaintiff was not a Prohibited Immigrant ;
   (B) That once having entered the Colony on a valid Temporary Employment Pass, which was then current, and had not been in any way revoked, her presence in the Colony was lawful, and
   (C) That the Principal Immigration Officer having once approved the issue of a Dependant's Pass, which approval, the Plaint

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contended, he had no right or authority to rescind, the Plaintiff was not subject to a Deportation Order by His Excellency The Acting Governor.

The said Civil Case No. 675 of 1954 was heard by Mr. Justice Cram on the 22nd, 23, 25, and 28 October, 1954, and Judgment was pronounced in Court in the presence and the hearing of the Respondent on 18th November 1954. The Judgment is contained in the record of the case (Appendix 3). The following points were decided :—

1. That the appropriate procedure for the Plaintiff would have been to apply to the Court for a Rule *nisi* calling on the Acting Governor to show cause why a Writ of certiorari should not issue to quash the Deportation Order and that the Plaintiff having applied by procedure of Petition of Right, the procedure was incompetent and her Petition would have to be dismissed ;
2. That both the parties, by consent, desired the Learned Judge to determine the several points raised in the Plaint and the Learned Judge agreed and then recorded :—

> I propose therefore to do what both parties apparently desire me to do and that is to consider this proceeding on its merits. The Crown mistakenly or otherwise has waived all objections to procedure, as if it were a declaratory suit which of course requires no *fiat justitia*

and decided :—

(a) That the Plaintiff was unlawfully within the Colony ;
(b) That she was a prohibited Immigrant ;
(c) That she was subject to the Deportation Order made against her ;
(d) That the said Deportation Order was made properly against her ;
(e) That her Temporary Employment Pass was void and had expired by reason of her failure to notify the Principal Immigration Officer that she had relinquished her employment in June, 1953 ;
(f) That she was present in the Colony without any valid pass ;
(g) That the Plaintiff was never the subject of a Dependant's Pass, and
(h) That the Principal Immigration Officer acted within his competence in rescinding his approval of the issue of the Dependant's Pass in respect of the Plaintiff and that she acquired no continuing right and no status from his earlier decision to issue the Dependant's Pass.

The case was dismissed with costs to the Defendant.

On the 29th November, 1954, the Respondent, filed in Court Notice of his intention to Appeal against the whole of the above Judgment.

On the same day, i.e. 29th November 1954, the Respondent drafted, completed, and arranged for his client to swear two Affidavits as follows :—

1. By the said Shantaben, which Affidavit has already been referred as being part of Appendix 1.
2. An Affidavit by the aforementioned Jagabhai Kalabhai Patel.

The Affidavit of the said Mrs. Shantaben contained among others, the following paragraphs :—

Paragraph 2 : " I entered Kenya Colony on 16th July 1951, " on a valid Temporary Employment Pass No. 3146 dated 7.5.51 " granted to me by the Principal Immigration Officer of the " Colony of Kenya to work with Messrs. Cutchi Gujarati School, " Nairobi, aforesaid in accordance with the Provisions of the " Immigration (Control) Ordinance, 1948, and Rules made " thereunder, which said Pass is still valid and current and has " been valid and current at all material times. The said Pass has " yet not been cancelled I enclose the said Temporary Employ- " ment Pass and is marked 'A' "

Paragraph 8 : " I have never been declared a Prohibited " Immigrant by the Principal Immigration Officer or any other " authority or authorised Officer of the Government of the Colony " of Kenya under any Law in force in the Colony or at all."

Paragraph 10 : " I am informed by my Advocate and I verily " believe that the said Order is not Valid as I am neither " a Prohibited Immigrant nor my presence in the Colony is " unlawful."

This Affidavit had annexed to it as Exhibits, the originals of the said Temporary Employment Pass, of the letters from the Principal Immigration Officer dated 24th October, 1953, and 5th November, 1953, respectively and of the Deportation Order.

And the said Affidavit of the said Jagabhai Kalabhai Patel, among others, contained the following paragraph :—

Paragraph 3 : " I have been read over and explained the " Affidavit sworn by my said wife, Shantaben at Nairobi on " 29th November, 1954, and the facts stated therein are within my " knowledge and belief true and correct."

On 7th December, 1954, the Respondent filed in the Supreme Court at Nairobi, a Notice of Motion, dated 4th December 1954, instituting proceedings known as Miscellaneous Criminal Application No. 22 of 1954 for the issue of :—

An Order *nisi* directed to His Excellency the Acting Governor of the Colony of Kenya to show cause why a writ of certiorari should not issue to quash the Deportation Order dated 10th April, 1954, or to show cause why a writ of mandamus should not issue, " to the said Acting Governor " to cancel the said Deportation Order.

And further for an Order *nisi* directed to the Principal Immigration Officer of Kenya to show cause why a writ of mandamus should not issue to him to grant a Dependant's Pass to Mrs. Shantaben.

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The Respondent filed simultaneously the said Affidavits of Mrs. Shantaben and Mr. J. K. Patel in support of the said Notice of Motion.

The Notice of Motion was, in form, an *ex parte* application. It was to be taken in Chambers on 8th December 1954.

On the 8th December, 1954, when the Respondent presented himself before Mr. Justice Hooper, according to the evidence of the Respondent, the question arose as to whether the notice should be served on the Attorney-General as the opposite party, and the Notice of Motion was stood over till 10th December 1954. No order in this respect appears on the Court Record. Later in the day, however, it was ascertained that the Notice of Motion, so far as the issue of an Order *nisi* was concerned, was *ex parte*.

On 10th December, 1954, the Court Record shows :—

1. That the Learned Judge drew the attention of the Respondent to the fact that the Affidavit of Mrs. Shantaben was inaccurate as the statement in paragraph 2 was not borne out by the Temporary Employment Pass which had expired on 15th July 1954, by effluxion of time.
2. That the Respondent stated that the reason why the Deportation Order of 10th April 1954 had not been complied with was that it had been suspended.
3. That the Respondent undertook to produce the correspondence proving the stay of execution of the Deportation Order.
4. That the Application was adjourned to 15th December 1954.

On 14th December, 1954, the Respondent drafted, completed and arranged for the said Mrs. Shantaben to swear an Affidavit which was headed " Supplementary Affidavit."

The said Supplementary Affidavit contains, among others the following paragraphs :—

Paragraph No. 2 : " In para. 2 of my said affidavit, I stated " that the Temporary Employment Pass was still valid and current " and has been valid and current at all material times. In fact " my temporary employment pass expired on 16th July, 1954 ; " but it was valid and current at the time when a Deportation " Order was made against me and I consider that is the material " time as regards my above mentioned application."

Paragraph No. 3 : " I regret the mistake in my original " affidavit and I state that the other statements in my said " affidavit are true to the best of my knowledge and belief."

Paragraph No. 4: " I made representation through my " Advocates to His Excellency the Governor against the making " of the Deportation Order as stated in para. 9 of my said " affidavit and to the best of my . . . . . knowledge and belief His " Excellency agreed to suspend the operation of the said " Deportation Order to allow me to institute proceedings in this " Honourable Court to establish my right to stay in the Colony "

The Application again, on 15th December, 1954, came before Mr. Justice Hooper in Chambers and the Court record shows :—

1. That the Respondent filed the Supplementary Affidavit.
2. That the Respondent failed to produce the full correspondence promised on the previous date with regard to the suspension of the execution of the Deportation Order but that he referred to Civil Case No. 675 of 1954, which file, he said, contained all the papers.
3. That the Application was adjourned to 17th December, 1954.

On 17th December, 1954, the Court record shows that the application was dismissed with costs for reasons given.

The events which occured in Chambers between Mr. Justice Hooper and the Respondent on 10th, 15th, and 17th December, 1954, are more fully set out in the two aforementioned Memoranda addressed by the Judge to the Acting Registrar and the truth of the facts contained therein has been admitted by the Respondent and accepted by the Committee.

As set out in the commencement of this Report, Mr. Hamel the Acting Registrar made the application on 24th December, 1954.

Mr. Reid submitted to the Committee that the allegations against the Respondent could be summarised as follows :—

1. That the Respondent in his capacity as the Advocate of Mrs. Shantaben in Miscellaneous Criminal Application No. 22 of 1954 drafted, procured her to swear, and filed in Court the affidavit of 29th November, 1954, the contents of which were false to the knowledge of the Respondent and filed same in Court with the intention of deceiving and misleading the Court ; and deliberately and wilfully attempted to deceive and mislead the Court by such false statements in order to obtain the Orders *nisi* prayed for in the said proceedings and thus had been guilty of disgraceful and dishonourable conduct inconsistent with his duty as an Advocate.
2. Alternatively, that the Respondent failed to disclose to the Court matters which were most material to the above case and thus was guilty of gross negligence amounting to professional misconduct.

From the evidence of the Respondent, and the submissions made on his behalf by his Counsel, it seems that the Respondent has put up the following pleas in answer to the allegations :

1. That when the Respondent allowed the Deponent to state that the Temporary Employment Pass " is still valid and current and " has been valid and current at all material times. The said Pass " has not yet been cancelled," he thought that the material time was the date of the Deportation Order, i.e. 10th April, 1954.
2. That the truth or otherwise of the said statement was a matter of law.
3. That the Respondent did not have in mind the judgment of Cram J., when he drafted the affidavit of Mrs. Shantaben and

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therefore it did not occur to him that he should mention it in the affidavit.

4. That it was not necessary to mention the judgment of Cram J., in the affidavit.
5. That the Respondent did not think it would influence his client's case one way or the other.
6. That after Mr. Justice Cram dismissed the Plaint in Civil Case No. 675/54 on the point of procedure, he was not competent to give any decisions on the merits of the case and he had no jurisdiction to do so.
7. That the judgment of Mr. Justice Cram in Civil Case No. 675 of 1954, was in the opinion of the Respondent so bad in law that the Respondent did not give attention to it.
8. That it was an error of judgment on the part of the Respondent not to mention Civil Case No. 675 of 1954 in the affidavit.
9. That the Respondent did not understand the said judgment.
10. That the Respondent did not intend to mislead or deceive the Court by the inaccuracies in the affidavit and by not disclosing the nature and the result of the Civil Case No. 675 of 1954 and that the introduction of the former into, and the omission of the latter from, the affidavits of Mrs. Shantaben were genuine mistakes.

The Committee have given consideration to each of the above defences. They think it appropriate to deal with them seriatim :—

1.—Assuming that the material time was 10th April, 1954, as contended by the Respondent, nevertheless he knew that Cram J. had decided that long before that date, namely, in June, 1953, the Temporary Employment Pass had become void, and the Respondent was fully aware of this decision when he prepared the affidavit for his client to swear on the 29th November, 1954. Furthermore when he prepared the second and Supplementary affidavit sworn on 14th December, 1954, he still made no reference to this decision. It is also pointed out that in paragraph 8 of the affidavit it was stated that Mrs. Shantaben had not been declared a Prohibited Immigrant by . . . any authority under any law in force in the Colony or at all. This statement is sworn to despite the fact that the Deportation Order recites that she was a Prohibited Immigrant within the meaning of the Immigration (Control) Ordinance and that her stay in the Colony was unlawful.

Again in paragraph 10 of the Affidavit the said Mrs. Shantaben testifies that she had been informed by the Respondent that the said order was not valid as she was neither a prohibited immigrant nor was her presence in the Colony unlawful.

2.—The Respondent contends that the question whether the Temporary Employment Pass was still " valid and current " was a matter of law and therefore the judgment of Cram J. on that point was not strictly a matter for inclusion in an Affidavit.

The Committee is of the opinion that even if it be correct to say that the issue whether the Temporary Employment Pass was valid or not was a question of law, nevertheless, when a finding had been made by Mr. Justice Cram on this point, it was no longer open to the Respondent to make an unqualified statement that the Pass was " valid and current " and omit all reference to the decision of Cram J. which was to precisely the opposite effect.

3.—The Respondent says that he did not have in mind the judgment of Cram J. when he drafted the Affidavit. The Committee is quite unable to accept this explanation. Civil Case No. 675/54 had been through an abnormally lengthy hearing and the judgment had been delivered only eleven days previously in the presence and hearing of the Respondent. Moreover, the Respondent gave a Notice of Appeal against the whole of the judgment on the same day as that on which the Affidavit was sworn in support of a Notice of Motion seeking Orders *nisi* on substantially the same matters as had been disposed of in the judgment.

4.—The Committee are of the opinion that it was necessary to mention at least the substance of the judgment of Cram J. in the Affidavit, as otherwise the Affidavit would inevitably create a misleading impression on the Court. The Respondent's contention that the procedure being different, the issue was not *res judicata* by reason of Cram J.'s judgment and that the decision of Cram J. would not be binding in the Order *nisi* proceedings, does not, in the opinion of the Committee, affect the matter. The duty of the Respondent was plain and simple and that was to disclose the previous proceedings. Not only, however, did he conceal them but he even allowed his client to swear to statement which was in direct conflict with Cram J.'s decision.

5.—The Committee is clearly of the opinion that the disclosure of Mr. Justice Cram's judgment to Mr. Justice Hooper would have influenced his views and indeed, that is borne out by the fact that, when subsequently Mr. Justice Hooper was apprised of Mr. Justice Cram's judgment, he dismissed the Notice of Motion on the grounds that the matters had already been dealt with by Mr. Justice Cram.

The Committee is unable to accept the Respondent's statement that he believed the disclosure of Mr. Justice Cram's judgment would not influence his client's case one way or the other before Mr. Justice Hooper.

6.—The question is not whether Cram J. did or did not, have jurisdiction to decide the several points of law and facts which he did. These points were put before Cram J. for decision by consent. There was Notice of Appeal against the whole of his judgment. This was no excuse for concealing the judgment of Cram J. from Mr. Justice Hooper or for stating facts in the Affidavit which were false and deceptive.

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7.—The proposition that the Respondent did not mention to Mr. Justice Hooper the judgment of Cram J., as he thought it to be bad in law, is contrary to well-recognised rules of professional conduct; if taken to its logical conclusion, this proposition would mean that an Advocate might suppress all authorities which to him seemed wrongly decided and thus mislead the Court by making submissions which took no account of such authorities.

The Committee could not countenance such conduct in any member of the profession whose primary duty is to assist the Court honestly and conscientiously in its task of arriving at a just decision.

8.—Mr. O'Brien Kelly has pleaded an error of judgment on the part of the Respondent. The Committee is of the opinion, however, for reasons which will be apparent from what has been said in the preceding paragraphs, that the Respondent's misconduct went far beyond what could be described as a mere error of judgment.

9.—That the Respondent did not understand the judgment delivered by Cram J. is in substance a plea of ignorance and incompetence. The Committee consider that it is a sufficient answer to this plea that the Respondent, on the very day on which this Affidavit was sworn, gave notice of appeal to the Eastern African Court of Appeal against the whole of Mr. Justice Cram's judgment.

10.—This defence is that there was no intent on the part of the Respondent to deceive or mislead the Court. The Respondent in his Affidavit, has stated that he gave assurance to this effect to Mr. Justice Hooper and he asks the Committee to accept this assurance.

The Committee appreciate that this is the most important issue in the case. Intention is not always capable of positive proof. As a general rule every man is taken to intend the natural and probable consequences of his acts, though the inference may be rebutted.

The following commentary appears in the Indian Evidence Act by Monir, 3rd Edition, at page 120 :—

> " Mellish, L.J. remarked in *Sugden* vs. *St. Leonards* that " wherever it is material to prove the state of a person's mind " of what was passing in it and what were his intentions, there " you may prove what he said because it is often the only means " by which you can find out what his intentions were."

The Learned author goes on to say :—

> " The best circumstantial proof of the intention of a person " in doing an act is the nature of the act, his conduct, and the " circumstances surrounding the act. The subsequent conduct of " the accused and the surrounding circumstances may be " looked at to ascertain his intention in doing the act. A man is " presumed to intend the natural consequences of his act, and if

" a person does an act with some intention other than that which " the character and circumstances of the act suggest, the burden " of proving that intention is upon him. Secrecy or silence " where the circumstances cast a duty on the party to speak may " be circumstantial evidence of a fraudulent intention."

The arguments for and against the existence of an intention on the part of the Respondent to deceive and mislead the Judge have been very ably and clearly put by Mr. O'Brien Kelly and Mr. Reid respectively in their opening and concluding addresses to the Committee. The full text of them is contained in the transcript of the shorthand notes of the proceedings before the Committee.

It was urged upon the Committee that the following circumstances show that there was no intention on the part of the Respondent to deceive or mislead the Court :—

1. The Respondent gave an assurance to Mr. Justice Hooper, which assurance he has repeated in his Affidavit and before the Committee, that he did not intend to deceive or mislead the Court.
2. On his appearance in Chambers on 10th December, 1954 the Respondent actually mentioned to the Judge that " there was " a long Judgment by Mr. Justice Cram."
3. On his appearance in Chambers on 15th December the Respondent gave the number of Civil Case which had been decided by Mr. Justice Cram, to the Judge and informed him that the papers relating to the suspension of the Deportation Order could be found in that case file.
4. The Respondent would have been obliged to disclose the existence of Civil Case No. 675/54 in the course of arguments when applying for an Order Absolute.
5. The Respondent did not stand to gain anything by obtaining an Order *nisi*.

The above aspects of the case were put before the Committee as an elaboration of the several defences advanced by Mr. O'Brien Kelly. In considering the above, the Committee has had regard to the following matters :—

1. The assurance given by the Respondent at a stage when the vigilance and the industry of the Judge himself had discovered material inaccuracies in the Affidavit, has little value, and even less when repeated in his Affidavit and before the Committee. It could hardly be expected that the Respondent would say otherwise in the circumstances.
2. The Court record of Miscellaneous Criminal Application No. 22 of 1954 does not give any indication that the Respondent mentioned the actual judgment in Civil Case No. 675 of 1954. In paragraph 2 of the second Memorandum of Mr. Justice Hooper to the Acting Registrar, however,

reference is made to the judgment in the following words :—

' When Mr. Bhandari first appeared before me, he mentioned

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" incidentally a long judgment by Cram J., saying that he " (Cram J.) had told him (Mr. Bhandari) or had ruled, I am not " quite sure which, that the correct procedural method to adopt " in this case was by way of certiorari or mandamus. . . . I told " Mr. Bhandari I had no time to read the judgment then, and " indeed, I was quite prepared at that time to accept his word in " respect of this aspect of the matter . . ."

The Respondent's version of this incident is set out on page No. 11 of Appendix 5 (first day), 9th line from the bottom of the page (Record p. 47):—

" On 10th when we entered the Court, the judge said he did " not understand the nature of proceedings,

" *Q.* You had time to refer to a Ruling by Mr. Justice " Cram ?—*A.* It must have been mentioned by the way.

" *Q.* You had time to mention it ' by the way ' ?—*A.* In " some conversation, it might have arisen, and I might have " mentioned it by the way."

It will be noted that this mention of the previous proceedings was so casual as not even to deserve a place on the record in any event, the purpose of it was not to apprise the Judge of the nature or the result of the previous proceedings but merely to provide some justification for proceedings by way of prerogative writ.

Furthermore, when the Judge indicated that he was not proposing to read the judgment, in the opinion of the Committee, a duty was then cast on the Respondent to inform him of the substance of the judgment but instead of doing so, the Respondent remained silent. This in the opinion of the Committee affords further circumstantial evidence that he never intended to disclose the substance of this judgment.

3.—Thirdly, it is said that the action of the Respondent in giving the actual number of Civil Case No. 675 of 1954 to the Judge on the 15th December, 1954, shows that he had no intention to deceive the Court.

In the opinion of the Committee, however, when this disclosure of the case number is viewed in the light of the circumstances which led to its being made, it confirms the Committee in their opinion that the Respondent endeavoured throughout to mislead the Court.

At the previous hearing on the 10th December, 1954, the Respondent had undertaken to produce the correspondence which he said was in his possession to prove that the execution of the Deportation Order had been stayed. However, on the 14th December, 1954, he arranged for his client to swear the supplementary affidavit which contained a paragraph to the following effect :—

" I made representation through my Advocates to His " Excellency the Governor against the making of the Deportation " Order as stated in paragraph 9 of my said affidavit and to the " best of my knowledge and belief His Excellency agreed to " suspend the operation of the said Deportation Order to allow me " to institute proceedings in this Honourable Court to establish " my rights to stay in the Colony."

It is somewhat surprising that this paragraph should have been introduced at all in the supplementary Affidavit the sole purpose of which was to correct the patent inaccuracy regarding the expiry of the Temporary Employment Pass. The Committee can only assume that he hoped by inserting this paragraph to satisfy the Judge on this point without producing the actual correspondence which, according to his statement on the following day, he believed to be in case File No. 675, but when he appeared before the Judge on the following day the Judge insisted, in spite of paragraph 4, on the production of the actual correspondence, and it was then and then only that the Respondent gave the number of the case file.

The Committee observe also that the latter part of paragraph 4 of the Supplementary Affidavit quoted above is so phrased as to convey the impression that the proceedings therein referred to were the proceedings before Mr. Justice Hooper and not, as was the fact, the proceedings which had taken place before Mr. Justice Cram.

4.—Fourthly, as regards the Respondent's contention that he intended, and indeed would have been obliged, to disclose the judgment of Cram J. at some later stage in the proceedings, the Committee consider that assuming this to be so, it would not excuse his repeated failures to disclose it in the proceedings for an Order *nisi*.

5.—Fifthly : with regard to the Respondent's contention that he did not stand to gain anything by getting an Order *nisi* in other words that there was no motive—the Committee is of the opinion that there was the obvious motive that by instituting these proceedings for an Order *nisi*, he was providing his client with an alternative chance of defeating the Deportation Order and possibly further deferring its execution.

Accordingly, the Committee find that it is fully established, on the evidence, that the Respondent intended to deceive and mislead the Court and that therefore a *prima facie* case of disgraceful and dishonourable conduct inconsistent with his duty as an Advocate has been made out.

With regard to the alternative submission made on behalf of the Applicant that the Respondent's failure to make disclosures to the Court constituted gross negligence amounting to professional misconduct, if the Committee had not reached the conclusion that the evidence in this case justified a finding of a *prima facie* case and that disgraceful and dishonourable conduct had been established, they would have had no hesitation in reaching the conclusion that the evidence clearly showed that the Respondent had been guilty of gross negligence amounting to professional misconduct.

Dated at Nairobi this 3rd day of February, 1955.

JOHN WHYATT, Q.C.
Attorney-General (*Chairman*).

E. N. GRIFFITH-JONES, Q.C.
Solicitor General (*Member*).

N. S. MANGAT, Q.C. (*Member*).

J. SORABJEE (*Member*).

In the Supreme Court of Kenya.

No. 10. Notes of The Chief Justice. 7th March, 1955.

No. 10.

Notes of The Chief Justice.

IN THE SUPREME COURT OF KENYA.

Advocates' Committee Cause No. 3 of 1954.

IN THE MATTER of MAHARAJ KRISHAN BHANDARI; an Advocate

and

IN THE MATTER of the ADVOCATES' ORDINANCE, 1949.

7.3.55.

REID for the Advocates' Committee.

O'DONOVAN and KAPILA for the Advocate.

REID:

Report has been set down under Section 12.

Made by the Committee under Section 9.

p. 2 Hamel's affidavit.

p. 67 Principle allegation against the Advocate.

Alternatively that the advocate negligently failed to disclose to the Court matters material to the application for an order *nisi* and was therefore guilty of gross negligence.

The Committee found (1) That the principle allegation had been established.

(2) If they had not found that, that they would have found the alternative allegation proved.

Committee was fully entitled to arrive at its conclusion.

Ask you to uphold findings.

Facts: (admitted by respondent before Committee).

Respondent acted for Mrs. Shantaben in S.C. 675/54 before Cram, J. Subsequently acted for the same client in Misc. Crim. 22/54. Motion to Hooper J for mandamus and certiorari. The Civil Case i.e. the petition of right, was dismissed by Cram, J. but both advocates by consent desired Cram, J. to determine many issues raised on their merits. This Cram, J. proceeded to do.

pp. 8 and 9 Committees' Report; points decided.

The issues in the Civil case and in the prerogative writ application were identical.

p. 75 shorthand notes (Record p. 46): "Do you agree . . . proceedings were identical." Issues identical, approach not identical.

p. 75 (Previous question) (Record p. 46). Q. I was directing etc., issues identical.

Respondent drafted affidavits.

pp. 31–33 (Record pp. 7–8). Shantaben's affidavit dated 29/11 paragraphs 2, 8 and 10.

p. 16 (Record p. 69). "The question is not . . .

Notice of appeal filed on the same day as Shantaben's affidavit filed.

p. 31 (Record p. 8). Affidavit : " which said pass is valid and current."

Cram, J. had decided that it was void and had expired by reason of failure to notify P.I.O. of change of employment.

" The said pass has yet not been cancelled."

This is additional to what was stated in the Civil Claim.

The advocate must have directed his mind to this. This is not merely copied from the Civil Claim.

p. 32 (Record p. 8). " I have never been declared a prohibited " immigrant etc., under any law in force in the Colony, or at all." This was just what Cram, J. had decided.

Paragraph 10, reinforces this.

Submit Committee justified in finding that the affidavit was false and deceptive.

p. 79 (Record p. 49). Q. " Now do you consider " ; and subsequent questions and answers

p. 80 (Record p. 50). Chairman " If Mr. Justice Hooper " . . . to " walked out."

p. 64 (Record p. 37). Supplementary affidavit paragraph 3 re-affirms deceptive statement.

p. 20 (Record p. 72). Report " at the previous hearing . . ."

Supplementary affidavit also false and deceptive.

Advocate appeared on the 8/12 when the question of whether application should be *ex parte* or not was considered.

Advocate appeared on the 10/12 when Hooper, J. saw the discrepancy in the date.

Advocate appeared on the 15/12.

Advocate appeared on the 17/12 by which time Hooper, J. had read the proceedings in the Civil Case.

Cross-examined p. 29. Hooper's Memorandum paragraph 3.

p. 18 (Record p. 71). " It was urged upon the Committee . . ."

Dealt with on p. 19.

Essence of the case against advocate is at p. 16 (Record p. 69). " The duty of the respondent . . ."

It may be argued that Cram J's judgment was not a judgment at all, that it was a nullity and therefore there could be no duty to refer to it.

I submit :

(1) Although the civil suit was dismissed on a procedural point, it was nevertheless within the judge's jurisdiction to rule on the merits when requested by the parties and their advocates so to do.

Alternatively :

(2) Whether the decision of Cram, J. were *obiter dicta* and not binding on any Court, there was, nevertheless, a duty on the advocate to disclose the fact of the previous ruling on the merits.

As to (1) the Judge ruled with the consent of the advocates.

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The respondent thought that he was properly before Cram, J. and at the relevant time considered that the Judge had jurisdiction to deal with the case on its merit. He lodged notice of appeal against the whole of Cram J's judgment. Must have considered Judge had jurisdiction to decide the question on its merits. That was the day he got Mrs. S. to sign the principal affidavit.

p. 17 *Civil Case Record.*

Both parties were anxious to have the matter disposed of on its merits.

" The form of the plaint . . .

O. 2 *R.* 7. Court may make binding declaration of right.

See O. 25 r. 5 White book.

Hanson v. *Radcliffe Urban Council* (1922) 2 Ch. p. 507 Sterndale M.R. " Power of Court to make declaration only limited by discretion of court."

Cram, J. exercised his discretion: it was convenient: proper parties were present: form of suit identical and Cram treated it as such.

(To COURT: Notice of appeal filed. Application to appeal in forma pauperis dismissed. Nothing else has been done.)

Against me is *Tindall* v. *Wright* 27 Cox C.C. 216.

p. 217 HEWART L.C.J.

" *Obiter dictum* not binding upon any other Court."

There are exceptions and Mrs. Shantaben's point was not academic. It was convenient that the case should be dealt with on its merits.

Alternatively

Whether or not Cram J. had jurisdiction, a clear duty lay on the Advocate to disclose the fact of the proceedings to Hooper, J.

p. 16. Paragraph 6 (Record p. 69).

p. 84 (Record p. 53). Chairman " Are you of the opinion . . ."

A. " It was material. . . ."

S.G. " How were you going. . . ."

A. " I referred him to the case file."

p. 20 (Record p. 47). " You had time to refer etc.

" I might have mentioned it by the way."

He admitted that it was material.

The Advocate did not disclose the fact of the previous determination on the merits given *by consent* of the *parties.*

Cram, J. had determined the identical matters in issue.

This was an ex parte application.

p. 87. Questioned by S.G. (Record p. 55).

p. 88 (Record pp. 55–56). By 8th December, Advocate knew that the proceedings were *ex parte.*

p. 56. Paragraph 9 (Record p. 31).

" During the day however . . . made clear that the application is *ex parte* application."

Particularly high duty rests on advocate in an *ex parte* application.

R. v. *Kensington I. T. Commissioners* (1917) 1 K.B. 486.

p. 505. Cozens Hardy, J.

" That is merely established

On an *ex parte* application *uberrima fides* is required.

p. 506. " If you make a statement which is false. . . .

" Must be perfectly frank and open with the court."

p. 509. " The rule *nisi* is an essential preliminary.

" Under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge. . . ."

p. 514. SCRUTTON, L.J.

" full and fair disclosure of all material facts."

The *fact* was not revealed that Cram, J. had decided the same issues. In *ex parte* application—utmost good faith must be observed. Far from displaying *uberrima fides*, Advocate intended to deceive and mislead.

Ask you to uphold Committee's findings.

p. 22. Last paragraph of report (Record p. 73). Alternative finding.

11.40. O'DONOVAN.

Reid's main argument based on failure to disclose fact of Cram J's judgment.

First eliminate minor matter.

In the first affidavit of Shantaben, there is a statement that the entry permit is still valid and current.

A glance would show that the permit had expired by effluxion of time as distinct from process of law. That was a purely formal mistake, as Reid submitted. Respondent's explanation adequate and uncontradicted.

(i) Respondent did not draft plaint. When he drafted affidavit, he did so by reference to the plaint and did not have original pass.

Passes are usually granted for 4 years and he assumed that it had not expired by effluxion of time.

The mistake was irrelevant to the question on a mandamus and certiorari; whether pass was valid at date of application. The material date was the date of the Order.

The original was attached to the affidavit. A purely formal mistake—not dishonourable.

Covered by *ex parte*. *Renner* (1897) A.C. 218.

p. 97. It was a mistake—not part and parcel of a plan to mislead. Reid places no reliance on that here.

GRAVAMEN: his concealment of Cram J's judgment. Two aspects of the judgment:

(1) An authority as a proposition of law.
(2) As determining or affecting the rights of the parties upon the issues decided.

Reid says that Cram J's decision was not only relevant but constituted *res judicata* and therefore Hooper, J. was correct in dismissing the application because it was barred by Cram J's judgment. Therefore the Respondent must have known that if it was disclosed, his application would be dismissed.

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Three circumstances :

1. Judgment of Cram, J. might constitute *res judicata* ;
2. it might be relevant to the decision of the issues on the 2nd application ; or
3. it might be irrelevant to the 2nd application in which case Mrs. Shantaben would have been entitled to have her application independently considered without the views of Cram.

Respondent followed a procedure based on the submission that Cram J's decision should not have affected the application for a prerogative writ. He was entitled to think so. Even if he did not think so, there would still be no *actus reus*.

Circumstance 1 *above*. *Res judicata* : always taken by opposite party.

Position in Kenya unique. Second proceedings were a criminal proceeding. Authorities to that effect doubted but still binding. At this time not even doubted.

What is res judicata in Civil proceeding ?

Indian Evidence Act.

S. 7.

S. 2 " Suit."

S. 7 constitutes no bar to exercise by the Court of its jurisdiction on the *criminal* side.

The proceedings are not identical :

(1) They are not between the same parties ;

(2) the relief asked for is different.

The validity of the temporary employment pass was in issue in both proceedings.

The Respondent was entitled to take the view that it was competent to him to pursue concurrent remedies : (1) an appeal ; and (2) a prerogative writ. Inherent that client didn't agree with Cram. Inherent he thought it not *res judicata*.

(2) *Was Cram J's judgment relevant to the second proceedings ?*

R. v. *Kensington I.T. Commissioners* (1917) 1 K.B.

505. If you conceal something *relevant* or *material* you are liable. But was Cram J's judgment *relevant* or *material ?* That is governed by the Indian Evidence Act. No judgment except a judgment *in rem* is relevant except where it is *res judicata*. *Duchess of Kingston's case* quoted in *Barrs* v. *Jackson* 62 E.R. 1028. p. 1032 " Lord Camden. . . ."

p. 1033 (598).

Decision overruled, but not on that point. That is position in England. But in Kenya see Secs. 40–45.

Indian Evidence Act.

S. 40.

S. 41. " *A final* judgment (Cram J's was not) in exercise *of Probate* etc. jurisdiction is relevant when title etc. is relevent. That deals with entire field of judgments *in rem* in law. Has no application. None of these jurisdictions exercised. Commentary—Section is exhaustive.

S. 42. doesn't apply—public matters.

S. 43. Judgments other than those mentioned are irrelevant unless the existence of such judgment is a fact in issue. e.g. illustration (g). Cram J's judgment was irrelevant to the proceedings before Hooper J. Section 43 so states. Therefore it is not a fact to be disclosed in an affidavit in which application for an order *nisi* was made.

Respondent was entitled to think that he was right.

Hooper, J. was under a judicial duty to hear and determine the application upon its merits without regard to Cram J's judgment. I do not say that this was like a habeas corpus. But on one point it is comparable to habeas corpus. Judge should exclude from his mind the previous application.

Cox v. *Hakes* (1890) 15 A.C. 506, 374.

LORD HALSBURY :

" not to be influenced by previous decision."

This would apply equally.

If Cram J's judgment was not relevant, Hooper should not have been influenced, then he had no right to be informed. He was informed and would then be asked to disregard it.

Adjourned to 2.30.

Resumed 2.35. (7.3.55.)

Whether Cram J's judgment was *obiter* or final it could not be produced. Reid said that both advocates desired Cram, J. to determine the points and that there was jurisdiction to rule when both parties requested the Judge to do so. But there never was such consent. Cram, J. of his own motion raised the point of jurisdiction.

There cannot be a waiver of lack of jurisdiction.

Cram J's order :

" Order. Issue of jurisdiction reserved for further argument." There were no further argument. There was no question of waiver. Havers agreed that petition of right was competent, but it was not. There is nothing to show that the parties wanted Cram J's views on the merits if he was going to dismiss suit on procedure. There is nothing to show that the parties decided that they would be bound by what Cram, J. decided on the merits.

P. 17. " *what both parties apparently desire the court to do.*"

(But see next sentence).

You can go behind this.

Cram, J. dismissed this on a point of procedure.

Burrow's " *Words and Phrases.*"

" Obiter dicta " not binding.

It was not necessary for Cram, J. to have gone beyond p. 12.

Sections 40, 41, 42 apply only to judgments which finally determine issues and *obiter* expressions of opinion would be excluded by S. 43. The suit was dismissed because it was brought by way of petition of right. It *is*

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suggested that new pleadings should have been filed. There was no agreement that Cram, J. be asked to express his views. Notice of appeal is not a recognition of Cram, J's judgment.

Cram did not assume jurisdiction to decide the merits. He merely expressed a view on the merits because the parties appeared to desire it.

O. 2 r. 7 does not enlarge a jurisdiction.

What Cram, J. said after p. 12 binds no one.

Considered as a proposition of law, Cram J's judgment is a material authority only on the proposition that the correct proclamation was by way of application for a prerogative writ.

Notice of motion was not thought to be *ex parte* when it was filed.

(" to be served upon the P.I.O. and H.E. the Governor "). Assume that the Advocate deliberately intended not to produce Cram, J's judgment on the application for an order *nisi*, it would be a very short-lived advantage because it would inevitably appear when the matter came on for argument. Result: Costs against his client and liability of Advocate.

Bound to be discovered.

P. Rep. para II : " that both parties by consent desired the Judge " is not correct.

(a) (b) etc.—(h) were entirely outside the scope of the proceedings before Cram, J.

p. 9. Paragraph 8 (Record p. 8). " *I have never been declared . . .* " is a strictly accurate statement. Cram, J's judgment was not a binding declaration.

p. 10. X. inaccurate.

p. 11. As regards the 10th December the Committee rely on the Court record only.

p. 29. But see paragraph 2.

p. 13 (Record p. 67). " From the evidence of the Respondent.

1. That when the respondent. . . . This is not a fair way of putting his case which was that (1) there was an explicable oversight, (2) it was material.

2. Is unhappily expressed.

Respondent was trying to say that his client was entitled to take a view that she did not agree with Cram, J. and was entitled to argue contra.

3. Is put in a way which was manifestly ridiculous. It has never been contended by the respondent that he forgot about Cram, J's judgment. He says that it did not occur to him to mention it because it was not a matter which should influence the 2nd application.

4. Cram J s judgment should never have been considered except as a matter of narrative or as an authority for the correctness of the 2nd procedure.

5. " would " should be " should."

9. I don't support.

10. There was only one inaccuracy.

The whole point is: was Cram, J's judgment relevant to the proceeding before Hooper, J. I challenge Reid to say how it was relevent in the proceedings before Hooper, J. The original decision on the merits was *obiter*.

p. 15 top. Of course the Deportation Order contains a recital, but this is not a declaration. The recital in the deportation order was what was attacked. The deportation order was annexed to the application. There could be no intention here to deceive.

p. 15. *Paragraph* 2. Judgment of Cram had nothing to do with it. Why could he not make an unqualified statement ?

Paragraph 4.

Hooper, J. was wrong in being influenced by Cram, J's judgment. The matter was not put before Cram, J. by consent.

The previous judgment was mentioned on the very first occasion. On 3 out of 4 occasions when the respondent appeared, Cram, J's judgment was mentioned.

Cram, J's judgment stands until reversed and upon that the second point of it must be *obiter.*

But did Bhandari think so ?

Adjourned to 10.30 *a.m. to-morrow.*

8.3.55.

10.30 *a.m. Resumed.*

O'DONOVAN *continues :*

Record made is conclusive as to what happened before him. " apparently " follows on his observations that the Crown had not objected to the procedure. If there had been jurisdiction conferred by waiver, he could not have dismissed the case on a point of procedure. Even if the parties had by consent invited Cram, J. to express his views this would not make those views anything but *obiter.* It makes no difference whether there was a final judgment or not because a judgment in a civil proceeding would not be relevant in a criminal proceeding.

Ghose v. *Emp.* (1881) 6 Calcutta 247.

There had been a civil judgment followed by a prosecution The civil judgment was put in in the criminal case. It was held to be an opinion only. Civil decision could never be relevant on the criminal side unless relevant under sections 41, 42 or 43 I.E. Act.

p. 16. *Committee's report.*

Paragraph 7 " a just decision " would only be arrived at if irrelevant matters are excluded. This treats Cram's judgment as authority for a proposition of law. It is only authority on a point of procedure, but in any event is a matter of law and not

Respondent should have been believed when he said that he honestly thought that he was entitled to act as he did—no deliberate attempt to mislead.

p. 19 *paragraph* 2.

If there were a scheme to suppress Cram, J's judgment why was it mentioned at the first hearing ? On the 8th December matter was not referred to. (Discussion whether *ex parte* was *inter partes.*)

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No. 10. Notes of The Chief Justice. 8th March, 1955— *continued.*

On the 10/12 Hooper, J. raised point about the date of the pass. Bhandari says that there is a judgment of Cram. And H. says that he has no time to read it. On the third occasion says that the correspondence is in the file of which he gives the number and

p. 26 paragraph 2.

An occasion never arose in the course of these interviews when it was appropriate to tell the Judge that the point had already been decided. Committee have found that he *never* intended to reveal the judgment, but that was not what has been argued here.

p. 21 (Record p. 73). " When he appeared the Judge *insisted* and it " was then only that respondent gave the number of the case. . . .

There is no evidence that he " insisted." Before the supplementary affidavit had been drafted a reference had been made to the other case and the Judge was invited to send for the file.

Paragraph 4 " repeated failure " not justified.

Paragraph 5 The order *nisi* would not " defeat " the deportation order. Grotesque that there was a deliberate intention to mislead the court by getting an order *nisi*. Only a few days would elapse between issue and discharge. Plaintiff could have appealed. There is nothing in the proposition that he was grossly negligent. What the respondent did he did deliberately. He decided that the proceedings were not *res judicata* and that they need not be brought to Hooper, J's notice.

p. 78.

Hulla On Civil Procedure Code 12th edition Vol. 1 p. 94.

It is essential that the plea of *res judicata* be properly raised. It does not affect jurisdiction of the court. Bhandari thought " I have a very " simple answer to the *res judicata* point." The question is not whether Bhandari was right. The question is whether the Respondent could without acting dishonourably take the view that he did. Before you could decide that you would have to hold that my submissions as to the legal aspect are such nonsense that no advocate could reasonably hold them.

Duty of advocate as to affidavits :

Concede Reid's authorities good—i.e. it would be wrong of any advocate either knowingly or through negligence to allow client to depose to an affidavit which set out any matter which was untrue or suppressed any matter which was relevant. Duty is no higher than that even in *ex parte* proceedings. If I am right, then Reid is wrong saying " Even if Cram, J's judgment was *obiter* and not binding there was duty on the advocate to " disclose it." What is alleged against the respondent is a criminal offence—Subornation of perjury—and should be proved beyond reasonable doubt.

Distinction between English and Kenya law on judgments *in rem* :

Smith's Leading Cases. A judgment on status by a court of exclusive jurisdiction—i.e. Probate, Matrimonial or Insolvency matters. As also in Section 41 I.E. Act. It is useless to rely on English decisions, unless they can be brought under section 41 which is exhaustive. See section 43.

Submit :

Hooper, J's original complaint has been answered and so have Reid's

allegation. Misunderstanding between Hooper, J. and respondent and Judge was confused in thought and received a wrong impression.

The question whether Cram, J's judgment was material was not considered or not considered sufficiently by the Advocates' Committee, and had their attention been directed to this problem they would not have been left with a false impression.

Ask that application be dismissed.

11.45. REID *in reply.*

Yesterday the argument of O'Donovan was that if Cram, J's judgment was not relevant then it was quite irrelevant and the respondent was entitled not to refer to it.

Further argued that the respondent was entitled to conduct the proceedings without referring to the fact that he had previously canvassed them.

It was argued that Mrs. S. was entitled to refrain from referring to the Cram, J. judgment.

Point is: not what was argued yesterday or to-day, but what view respondent took of his duty to the court at the relevant times, which are :—

(1) when he drafted the affidavits ;
(2) when he appeared before Hooper ;
(3) when he prepared the affidavits for the Advocates' Committee ;
(4) when he appeared before the Committee.

But will first dispose of procedural points.

(1) *Res judicata :*
(2) relevance.

(1) Argued Cram judgment was not *res judicata* on grounds

(1) Proceedings before Hooper, J. criminal :
Proceedings before Cram, J. civil.
(2) Proceedings not between (same parties).
(3) Issues were different apart from the temporary employment pass.
(4) *Obiter.*

Points not taken before Hooper, as judgment not disclosed.

(1) *Res judicata.* O'Donovan says it was for the opposite party to raise it. The opposite party was not there, and would not be on an *ex parte* application unless the Cram judgment was disclosed.

(2) Proceedings were criminal.

I say that the proceedings were civil in substance whether they were assigned to the criminal side or not.

(3) The Crown was not informed. If they had been, the Crown would have claimed *res judicata* and would have succeeded.

(4) *Hals. Vol.* 13 *paragraph* 469.

Res judicata is a matter of procedure not of evidence.

That matter had been

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Immaterial in what court the proceedings took place.

Res judicata is only part of Estoppel.

p. 409.

p. 411.

The doctrine of *res judicata* is not a technical doctrine.

Notwithstanding Lal Khan's case the distinction between civil and criminal procedure would not have been taken into account. Civil case 176/54 Supreme Court of Kenya 10/7/54. Respondent's brother engaged. This was not raised before the Advocates' Committee because Respondent agreed that he had a duty to disclose and intended to disclose. It is raised now because he now relies on procedure.

In this case the Misc. Cr. ap. had come first and the civil suit followed. Memo of appeal filed against the judgment of Connell, J. which was signed by the Respondent Advocate. He must have known about it when he drafted Mrs. S's affidavits when he appeared before Hooper, J. and the Advocates' Committee. This, no doubt, is why he had prepared his argument on *res judicata* (p. 58).

Material on his attitude of mind

O'Donovan said there could be no *res judicata* because the actions involved different parties No substance

Plaint (p. 68) (Record p. 34) was against A.G. representing the P.I.O. who was the substantial party.

Writ (p. 10) was directed to the P.I.O.

A.G. only a party as a matter of form—declaration was asked for from the P.I.O. At the least he was " privy " and that is enough.

Alleged that the issues were different. Wrong. See page 63 prayer. Set this against summary of Cram, J's judgment at p. 8.

As to Respondent Advocate's intentions see page 75 (Record p. 46). " Issues may be identical."

It was argued that Cram, J's judgment was irrelevant by virtue of sections 40–43 and it was said that, if so, there was no duty to disclose it.

If there was a question of *res judicata*, then the earlier judgment was relevant under section 40 and respondent must have known this and, in fact regarded it as relevant.

Alternatively : It was relevant under section 41.

Sarkar 9th edition pp. 404, 5.

" A judgment *in rem* is a judgment on status by a Tribunal having " competent authority."

Woodroffe 9th edition p. 416.

A decision *in rem* declares the status of the person.

O'Donovan. It has to be in one of the jurisdictions mentioned.

Reid. If there is a lacuna in the Indian law, English law will apply. The Cram judgment was concerned with status. See page 3. " Declaration as to status." Judgment of Cram, J. was relevant within sections 40 and 41. *Obiter Whether Cram, J's judgment was obiter.*

If Cram, J. was wrong on his procedural point, his judgment on the merits would not be *obiter.*

p. 5. last paragraph (Record p. 13). " The situation facing the plaintiff . . . '

Shows he regarded that as a suit in substance or in law.

The question was not only whether judgment was *obiter* but what view the respondent took.

The appeal against Cram, J's judgment would have been on the merits.

p. 79 (Record p. 49). " Did you include certain statements with regard to the merits of the appeal.

Affidavit dated 20/12/ :

" I am advised that there are good merits in my appeal. . . ."

The respondent advocate, did not regard Cram, J's judgment as *obiter*.

Said that the respondent did not consent to Cram, J's judgment on the merits.

p. 56. " apparent." Respondent advocate not only did not object but appealed on the merits.

See pp. 72, X 73 X-X as to Respondent's attitude.

It was suggested that the proceedings should have been regarded as a habeas corpus application as a corollary to the argument that the Cram judgment was irrelevant and Mrs. S. was entitled to an independent adjudication. But he was not entitled to conceal.

? p. 78, 79. (Record pp. 48, 49.)

Ex parte Partington 153 E.R. 284 p. 286.

" This case has already been before the Court of Q.B. on the return " of a habeas corpus."

Applicant entitled to independent consideration, but that does not say that previous proceedings should be concealed.

Adjourned to 2.15.

Resumed 2.15.

REID (*continues*).

Whatever view is taken of the law as to the relationship between the two judgments, the important point is what view the Respondent advocate took as to his duty at the relevant time.

Sections 40–43 of the I.E.A. were not in mind and neither were most of the other arguments advanced on his behalf. He well recognised his duty to disclose the Cram judgment. See (1) his affidavit.

p. 57 paragraph 12.

p. 58 paragraph 14.

paragraph 15 (Record p. 33). " This I intended to do."

p. 75 (Record p. 46). " It is your view . . . " ?

p. 84 (Record p. 53). " It was material. . . . "

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Submit there could be no doubt that at the relevant time the Advocate believed that it was his duty to bring the Cram proceedings before Hooper, J. but he did not do so.

Questions of relevance and procedure were never put to the Advocates' Committee, because Bhandari never suggested that there was no duty on him to disclose the proceedings as is now argued on his behalf. On the contrary he repeatedly affirmed the duty to disclose.

If he thought it his duty to disclose those proceedings but did not do so wilfully and intentionally he is guilty of professional misconduct; alternatively if he thought he had a duty to disclose but failed to do so he is guilty of professional misconduct.

Refer to Criminal Appeal 200/54 *Mohamid Abdul Hamid Bhatt* v. *Reg.* Case of official corruption. Def. That as the police officer had no power to withdraw there was no offence.

> " It is enough that the appellant thought the officer could do the act."

Consider the intention and state of mind of the Respondent advocate.

Findings of the Committee.

Proceedings before the Committee were based on the admission by the respondent that there was a duty to disclose. Criticisms based on procedural submissions are irrelevant.

Motive most important issue.

p. 17.

Paragraph 10 *of the report.*

O'Donovan suggested this motive was absurd as bound to be found out.

But see *R.* v. *Kensington I.T. Commissioners* (1917) I.K. B. 509. Ask you to uphold findings. You may think that the Advocate was more a fool than a knave.

O'Donovan on the new law (with leave). Judgment of Connell, J. Bhandari told me of this. Was in England at the time but drafted the appeal.

I brushed this aside as being beside the point. I accept responsibility for not having looked at Connell J's judgment and not having quoted it.

But I still think its off the point, because Connell considered the effect of a provision in the Civil Procedure Code on a Civil suit whereas the contrary position arose before Hooper, J.—those were criminal proceedings.

The arguments in the Connell appeal would have been raised by the Advocate before Hooper. He would have argued that there was no *res judicata.*

Lall Khan says the matter is governed by the Criminal Proc. Code, also the judgment was not a final one. There is no difference between what Bhandari tried to maintain and my argument,—he never had a chance to put it forward.

You can't supplement the I.E. Act by reference to the Law of England.

Change on front in reply—to follow dubious analogy in a bribery case and to take the position not as it was but as Bhandari misconceived it.

Cram's judgment was material only on the point of procedure. There must be " *actus reus* as well as *mens rea.*" .

In re Lubeck (1906) 33 Cal. 151.

C.A.V.

K. O. C.
8.3.55.

Indian Contract Act Sections 211, 212, 214.
British & Beningtons Ltd. v. *Cachar Tea Co.* 1923 A.C. 48, 71.
Boustead on Agency.
Bowlby v. *Bell* 136 E.R. 114.
Johnson v. *Kearly* (1908) 2 K.B. 514, 520.
Ellis v. *Pond* (1898) 1 Q.B. 426.
Duncan v. *Hill* (1873) 8 Ex. 242, 247.
Benjamin v. *Bennett* (1903) 19 T.L.R. 564.
Proudfoot v. *Montefoire* 1867 36 L.J. 225.
Colonial Bank of Australasia v. *Marshall* (1906) A.C. 559.
Aston v. *Kelsey* (1913) 3 K.B. 314 C.A.
Blaker v. *Hawes & Brown* (1913) 109 L.T. 320.
Mersey Steel & Iron Co. v. *Naylor* 9 A.C. 434.

No. 11.

Notes of Mr. Justice Bourke.

7.3.55.

REID.
O'DONOVAN and KAPILA.

REID : Section 12 Advocates' Ordinance. Reports—Section 9.

P. 67 principal allegation (Record p. 39). Failed to disclose matters most material—at least gross negligence amounting to professional misconduct. Committee found principal allegation fully established and would anyway have upheld alternative submission of gross negligence. Committee fully entitled to arrive at those conclusions and Court should uphold findings.

Facts admitted :

(1) S.C. C.C. 675/54 before Cram, Ag. J.

(2) Misc. Appeal 22/54—Hooper, J.—Same client.

(1) Dismissed—but by consent Judge agreed decide issues on merits—

P. 7 Reports—8 R. Identical questions for decision. P. 75 R admission of Advocate's affidavits—Report pp. 9–11 R.

(1) 29th November Shanteben P. 31 R. P. 16 Ans. 6.

Paragraph 2 affidavit—P. 9 Cram, J. held Pass void by process law *Re.* pass not yet cancelled added Advocate must have directed mind to pass. Sentence before appears in civil plaint.

In the Supreme Court of Kenya.

No. 11. Notes of Mr. Justice Bourke. 7th March, 1955—*continued.*

Paragraph 8 P. 9 Cram, J. decided to contrary. Paragraph 10 P. 9

On face of paragraphs Committee justified in finding affidavit false and deceptive. P. 79–80 R. Answers of Advocate to charge and S. 9. Supplementary affidavit p. 64—14th December. Same category; false or deceptive. P. 20 Report.

8.12.54. Advocate appeared before Hooper, J. re whether *ex parte* or not.

10.12—Judge noticed discrepancy—date on pass and date in affidavit.

15.12 and 17.12. Paragraph 3 Hooper's 2nd memorandum p. 29 R. p. 18—Essence case against Advocate P. 16 that view whatever about legality etc. of Cram, J's view. Might be argued Cram, J's judgment a nullity and not a decision on merits and therefore no duty to refer to it.

(1) Although Civil Suit dismissed on procedural point, it was nevertheless in jurisdiction to go into merits when requested by pleas so to do.

(2) Whether or not decision of Court on merits were mere *obiter dicta*, not binding on any Court subsequently dealing with same issues nevertheless clear duty on Respondent's Advocate to disclose the fact of the previous ruling on merits.

To (1) emphasise proceeded to rule with consent of Advocates.

R. p. 73–4. Advocate thought properly before Cram. R. Advocate considered Judge had full jurisdiction to deal with matter on merits. 29th November—thought had full jurisdiction to decide on merits when Mrs. Shantaben swore principal affidavit. P. 17 Cram, J's full judgment. Last sentence paragraph 1—Order 2 rule 7—re declaratory relief—R.S.C. England Order 25 rule 5 *Hanson* v. *Radcliffe Ct. Council* 1922 2 Ch. at 507. Discretion very wide. Committee exercised discretion in case—Parties before Court—identical with lawful declaratory suits. (Only Notice Appeal filed—and appearance to app. *informa pauperis*).

Tindell v. *Wright* 27 (37 ?) Cox Cr. Cases 217 (against contention). Here it was a real point of substance—not academic—would be raised anyway in another way.

(2) Even if no jurisdiction. Clear duty lay to disclose proceedings in entirety to Hooper, J. Report—no excuse—paragraph 6 (P. 16) Sup. R. P. 84 Advocate admits material to Hooper to know of Cram's judgment. P. 19 R—Report—contrast with evidence that would have mentioned Cram's judgment at given opportunity. Did not disclose previous determination on merits—should not be concerned whether *obiter* or not. By consent Cram, J. purported to adjudicate matter on merits. Identical issues. *Ex parte* application. P. 87–8. Advocate knew *ex parte*. Anyway clear by 8th December—1st appearance before Hooper (Paragraph 9 Advocate's affidavit)—knew *ex parte* application. High duty in *ex parte* applications—many cases. *R.* v. *Kensington Income Tax Commissioners* 1917 1 K.B. 486, at 505 near bottom—*uberrime fides* necessary. P. 506 Top—concealment in affidavit. Application must be perfectly frank and open with Court. P. 509 top page—P. 514 top—the fact was not revealed. Legality is arguable—whether Cram right or wrong. Utmost good faith

must be observed. Here found intended deceive and mislead. Court findings justified.

O'DONOVAN : Main argument failure to disclose the facts. 1st affidavit which Advocate allowed client to depose to—plaint—permit pass valid and current. Obvious mistake—permit had expired by effluxion of time as distinct from process of law. Purely formal mistake. Advocate given adequate and uncontradicted explanation. Advocate did not draft plaint—in England. Drafted it by reference to plaint. Assumed still valid in sense not expired. Anyway mistake immaterial. No importance whether pass valid on ? date. Date Deportation Order made is material date. Pass attached to affidavit. Mere mistake—formal mistake. *Ex p. Renne* 1897 A.C. 218. Mistake re date mortgage. P. 97 R.—Mistake not part of plan to mislead Court. Reid places no reliance on that point. Serious aspect—no reference judgment Cram and allowed client make assertions contrary to judgment.

Judgment : (1) authority on law.
(2) affecting rights of parties.

Other side says Cram's judgment not only relevant but constitutes *res judicata* and therefore Hooper correct in dismissing application as Cram, J. had already decided on merits. Other side say if judgment known of, would follow a dismissal.

The J. (a) might or might not relate to 2nd application to constitute *res judicata.*
(b) might be relevant to issues on 2nd application
(c) might be utterly irrelevant to merits on 2nd application.

If latter intended have 2nd application decided without any reference to judgment of Cram. Respondent thought that Judgment could have no effect on 2nd application. Entitled without moral turpitude to think so i.e. right in law. Conversely no actus reum.

(a) *Res judicata*—1st proceedings civil. 2nd application Criminal application following judgment (now doubted) 18 C.A.E.A. 180. At time 2nd application not even doubted.
Section 389 Cr. P.C. Civil P. Code Section 7 C.P. Ord. suit—S.2. Section 7 no bar to jurisdiction on Criminal side. Not between same parties. Relief sought different. In both validity. Pass in issue. Respondent perfectly entitled to take view competent to bring these 2nd criminal proceedings. Concurrent remedies. Inherent said did not agree with Cram J's view (inherent in appeal) . . .

(b) Is it (J) relevant to 2nd application. Concede *Kensington* case (*supra*) good law—P. 505 relevant. 509 disclosure all material facts. 514 material facts. Excusable to misstate law. Does J. affect rights parties on issue in criminal application.

Good by Indian Evidence Act. No J. except a J. *in rem* is relevant

In the Supreme Court of Kenya.

No. 11. Notes of Mr. Justice Bourke. 7th March, 1955— *continued.*

except where *res judicata*. In England. Difficult to say if J. *in rem* or *in personam*.

Duchess of Kingston's case. 62 E.R., 1028.

"Lord Cambden . . ." 1032, 1033. Position in England stated there in and principle left untouched on app.

Kenya : S. 40–43 Indian Evidence Act. S. 41 important. " Final "—covers ' J's *in rem* ' in England. Woodruffe's J. No application as limits J. on status to probate etc. and J. here not such. Cram's J. does not qualify as relevant under these sections and therefore was irrelevant to proceedings before Hooper, J.

If irrelevant therefore not a fact to be disclosed in an affidavit on application for order *nisi*. Even if not right Respondent entitled to think he was right. Unless *res judicata* or relevant Hooper, J. under duty to hear application for order *nisi* without any reference to Cram's J. *Right* to have heard on merits. Hooper, J. should (as in habeas corpus) exclude from mind what was decided in earlier J.

Cox v. Hakes. 1890 15 A.C. 506. 514, applies with equal force here. If a right to bring 2nd criminal proceedings on failure of 1st. civil suit. Hooper, J. had no right in strict legal sense to be informed at all of Cram's J.

Adjourned to 2.30 *p.m.*

P.J.B.

7th March. Resumed.

Argument to relevancy applies whether what Cram J. decided was relevant or not. A duty to disclose it *or* disregard it. Position com. weakened when one looks at judgment itself. Never was consent—appendix three. Judge raised point of jurisdiction. Cannot be a waiver confessing jurisdiction. Issue jurisdiction reserve further argument. And *no* further arguments. No question waiver. Mr. Havers for A.G. urged now in agreement with other side that proceedings competent.

Judgment right—one could not move for declaration by way of petition of right. No waiver. A.G. desired Court to decide. Different to saying parties wanted J's views on merits even though he was going to dismiss on procedure. Nothing in R. to indicate parties would be bound by any decision. " Apparently desire " note on record. Inference J. drew from fact A.G. did not argue procedure wrong. Whole R. before Court and it appears what J. meant by reference to waiver. Suit *was* dismissed on a point of procedure. 1st. 17 pages of J. Apparent Cram, J. deemed it desirable to record his views on every aspect of matter. J. pages 12–13. In so far as goes beyond what was necessary for decision is binding on no one.

Words and phrases ' obiter dicta ' p. 1. statements by the way. Judge need not have gone beyond p. 12 J. Does so as thinks parties apparently desire it. S's 40–42 apply only to J's finally deciding issues and expressions—opinion—*obiter*—would be excluded by S. 43. No waiver. Should come back in new pleadings as in other suit no jurisdiction. Misleading to say an agreement that J. should express his views though proceedings not competent.

Because appeal filed does not make expression of views less *obiter*. Decision suit dismissed with costs. An appellant appealing would have to put in a notice of appeal, appealing against whole J. Cannot file notice appealing against part of J. Appeal filed against *effect* of J.

Held no jurisdiction, therefore only expressed views as parties apparently wished it.

Order 2, rule 7 in no way enlarges jurisdiction of Court.

J. did *not* anyway assume jurisdiction under Order 2, rule 7. What J. said after p. 12 of judgment quite obviously binds nobody.

One legal proposition and that is that correct procedure by application for prerogative writ—only authority on that. At end same thing if J. had said " I think " or " it is my view " instead of " I declare."

Alternatives allow no middle course.

J. relevant or not. *Res judicata* or not. Therefore no attempt by respondent deliberately to mislead Court.

P.2. summons ; intended serve on opposite party. intended *inter partes*.

Order 52, rule 3, re *ex parte*.

Assume a deliberate intent to mislead contrary to what R. deposes to—and that 1st. J. relevant to 2nd. decision. The R. must have realised inevitable consequence very shortlived advantages on order *nisi* and on argument on return would be an automatic dismissal and would be inevitable discovery by R. of suppression of truth. Anyone asserting all that has a very heavy burden of discharge.

Report—P.7—unfair way to put items mentioned not point decided.

Page 8 paragraph 8 strictly accurate account.

If J. Cram has to be ignored it has to be ignored. It is *obiter not* declaratory and not binding. P. 10 ? noted. P. 11.—Committee seem to rely on Court record and ignore Hooper's amplification of record in his memo—" Had not time to read J. then "—P. 29 ' B ' (Record p. 5).

P. 13.—paragraph 1 unfair way of putting what was urged on R's behalf. Due to (1) explicable oversight and (2) immaterial—what R. did. P. 13 paragraph 2 (Record p. 67) " truth " applies to fact not law. R. meant that client did not agree to view Cram's paragraph 3 put in a way manifestly ridiculous. Never contended by R. that he *forgot* about the J. He said he did not admit it was a J. that could influence 2nd. application.

P. 13 (Record p. 68) : (4) J. only authority to procedure being incorrect.

(5) " Should " ought to appear for " would."

(8) R. thought had *right* to make 2nd. application and have it determined on its merits. If wrong, no question moral terpitude.

(9) Do not support—no evidence to.

(10) No other mistake except date.

Page 13, paragraph 1 (Record p. 67).

In what way is judgment of Cram J. relevant or material to proceedings before Hooper J. Entitled to adjudgment on 2nd. Cr. Application without irrelevancies being brought in such as Cram J's views.

In the Supreme Court of Kenya.

No. 11. Notes of Mr Justice Bourke. 7th March, 1955— *continued.*

Top p. 14 does little credit as reasoning to Committee.

Deportation Order containing a recital cannot amount to a declaration. Deportation Order annexed to application. Anyway for order *nisi*.

Page 14, paragraph 2. " Why not " ? Why should judgment of Cram J. be mentioned if it has nothing to do with proceedings. Page 14, paragraph 3. Bona fide believed J. had nothing to do with 2nd. decision.

Paragraph 4.

Affidavit to show lawfully in Colony (involves disagreement with Cram J's views),—very matter for decision on merits. Committee begs question. End paragraph 4, do not understand. She could not bring proceedings if did not put forward case contrary to Cram J's views.

Paragraph 5. Question is should J. have influenced HooperJ. —as he was. No ! But Committee thinks right that he should be influenced by earlier J.

Paragraph 6. First sentence—crux—defeats me—second sentence not borne out by evidence. Must be if appeal against judgment. Last sentence sententious and adds nothing. They did not in terms agree to Cram deciding—' apparently.'

(If J. *wrong* on *appeal* then, then his ' obiter ' would be right and no longer ' obiter.'

J. *stands* till reversed and until that arises Cram, J. *obiter*. We *wanted* decision on merits it was our suit.

Adjourned 10.30. 8*th March.*

P.J.B.

8*th March.*

O'Donovan *continues* :—

Record conclusive as to what happened before him. J. Cram, page 8. Would not make Cram's views other than *obiter*. No difference whether final. J. on merits or not *as* being a J. in a civil proceedings would not be relevant in a criminal proceedings.

Ghose v. *Empress* 6 I.L.R. Cal. 247, 248 bottom—(1881). R. page 16—paragraph 7. But was it relevant ? Paragraph 8. If nefarious scheme to suppress J. why should a reference be made to it by Respondent. R. page 26, paragraph 2. Surprising thing to say if endeavouring to suppress all knowledge of earlier case.

Respondent uncontradicted evidence no occasion arose that appropriate to go into what Cram J. decided.

(Respondent merely had to say points decided but do not accept as valid decision. O'Donovan agrees.

N.B. Certiorari. Mandamus proceedings.

Discretion to issue order *nisi* earlier J. on appeal. If Cram J. wrong on *procedure* (not jurisdiction) then his decision on merits by consent would stand and *bind*. Hooper J. if knew of decision and notice of appeal filed might well be influenced not to issue order *nisi*, at any rate pending decision on appeal. ? Relevancy irrelevant.

P. 20 (Record p. 73). No *evidence* Judge "insisted." Before sup. affidavit filed there was a reference to other proceedings and Judge Hooper invited to send for file, therefore no intent to conceal. No "repeated failures." Paragraph 5, page 20—proposition bears no examination. Proceedings would have no effect on deportation order unless Government and Principal Immigration Officer agree. Rule *nisi* no relief, only opportunity to raise matter. No ultimate attempt to mislead Court in getting order absolute. A few days would elapse for return. No negligence. What R. did he did deliberately. Acted within law as he saw it. No inadvertance—negligence could not arise at all. R. p. 78 (Record p. 48)— i.e. acted deliberately. For other side to raise *res judicata*. *Mulla* 12*th* I.P. 94.

Question *not* whether Bhandari right but whether he could, without acting dishonourably, take the view he did.

High onus Com : criminal offence false affidavit (*not* made by R.) Subornation of perjury. All are saying is matter should be proved beyond reasonable doubt.

Duchess of Kingston's case (*Smith's leading cases*). J. on status conclusive if by Court exclusive jurisdiction, e.g. Probate, Divorce and Admiralty. Therefore Section 41 Indian Evidence Act. Useless rely on English decisions if cannot lie under Section 41.

Complainant Hooper J. completely answered. Misunderstanding between Hooper and Respondent. Former got wrong impression. Not canvassed before Committee whether J. Cram material and did not get assistance they should. Ask dismiss.

REID : Principal argument if Cram's J. not R.J. or not relevant then utter irrelevant and Respondent fully entitled not to refer to it before Hooper J. Analogy made habeas corpus wrong.

Importance is view R. took of his duty to Court at relevant time. Several relevant times :

(1) Affidavit drafts.
(2) Appearances before Court.
(3) Affidavit for Advocates' Committee hearing.
(4) Appearance before Advocates' Committee.

Procedural points raised :

Res Judicata. Three grounds argued that not so :

(1) 2nd. proceedings criminal.
(2) The two proceedings not between same parties.
(3) Issues involved different, apart from Temporary Employment Pass.

(1) Argued for opposite party to raise R. Jud.
Opposite party could not raise it as not before Hooper J. If J. brought notice Hooper J., proper course to cause notice to Crown.

(2) Criminal pt. Nothing *criminal* about 2nd proceedings if nominally so. Substance and fact civil proceedings. If Crown advised of application Crown would have pled R.J.

In the Supreme Court of Kenya.

No. 11. Notes of Mr. Justice Bourke. 8th March, 1955—*continued.*

13 *Hals* : paragraph 469, page 414. R.J. is procedure.

P. 409 id. P. 411 fundamental doctrine must be

If pled. would not have failed on nominal criminal

10.7.54. *C.C.* 176/54, Connell, J.

Did not raise before Committee as thought R. admitted he had a duty to disclose and was not depending on procedural point.

Criminal Case 1st. Civil 2nd. R. Jud.

Memorandum of appeal filed against J. Connell, J. 7.10.54. Fundamental importance as R. must have been aware of it (?) J.—when drafted affidavits. P. 58 R.

(2) Sup. No substance. Plaint in Civil Suit P. 61, Ag. A.G. Representing. Principal Immigration Officer.

Prerogative writ application P. 10 R. A.G. party to civil proceedings as mere matter of form on Petition of Right.

(3) No substance. *P.* 63 *R.* contrast *P.* 8 *R.* *P.* 75 answers of R. in cross-examination. Same issues. Irrelevance S's—40–43, Indian Evidence Act. S. 40 *was* a question of *Res Judicata*, therefore Cram J. relevant. Alternative, relevant by virtue Section 41.

Sarkar 9th., pages 404–5.

Woodruffe 9th., 416—re *in rem* status. P. 2 and 3, J. Cram status involved. Therefore relevant within S. 41.

Was J. Cram *obiter* ? If C. wrong on procedural pt. his J. on merits would not be *obiter*. (?) J. Cram P. 5. judgment treated as not P. of R. Appeal against Cram's J. would have been on merits. P. 79 R., paragraph 13 affidavit 20/12 (?). Respondent did not regard J. as *obiter*. Respondent *did* consent to J. on merits. P. 36. *P.* 72–3. Respondent contending properly before Court. Re Habeas Corpus analogy argued wrongly that J. Cram irrelevant. P. 78 R. P. 79.

Ex P. Parkington.

153 E.R. at 286.

Appraised of circumstances—that before other Courts but must give independent judgment.

To 2.15.

P.J.B.

8th March. Resumed.

REID : Vital is view Respondent took in duty to Court at relevant time. S's 40–3 not in mind of Respondent, nor other arguments advanced on his behalf. He well recognised duty to disclose J. on merits by Cram J.

(1) Affidavit of Respondent.

(2) Transcript.

Paragraph 12 P. 57–8 ; P. 58 paragraph 14, paragraph 15. P. 75–6 ; P. 77–8 ; P. 80 ; *P.* 84 ; P. 86.

All these statements show no doubt but that at material time Respondent believed it was his duty to bring whole proceedings before Cram before Hooper. Did not do so. Questions of relevancy etc. never put to Committee. No such case made. No case made so far believing duty to disclose—I considered a duty not to disclose. Those arguments

No. 11.
Notes of Mr Justice Bourke.
8th March, 1955—
continued.

never put forward. Advocate recognised duty. If intentionally did not do so is guilty profesional misconduct. Alternative, if thought duty to disclose but negligently neglected to do so without intent to deceive is guilty professional misconduct.

(?)

200 of 1954. Cr. C. P. 4. *Mohd. Abdul Hamid Batt* v. *R.*

Applicant thought could withdraw case. Proceedings before Committee based on admission by Advocate that he had a duty to disclose decision on merits. Report should be examined in that light. Procedure arguments of other side irrelevant.

Motive P. 17.

Kensington case 1917 (*supra*) 509 top, " essential preliminary " to Writ. Should uphold report. May think Respondent more fool than knave—leave that to Court.

O'DONOVAN : Connell, J.'s judgment. Respondent told me of case with reverse position and there was an appeal and he drafted the appeal. I hushed that aside as beside point—perhaps wrongly and I must accept responsibility for not looking at judgment Connell and quoting it.

I still think it is off the point. Held a civil suit to be stayed whereas contrary situation arose in case before Hooper J. Criminal proceedings does not invalidate my arguments. *Lall Khan* v. *R.* C.A.E.A.

I have not considered self bound to arguments advanced by Respondent before Committee. No difference in context between what I now maintain and he maintained ; he did not develop his arguments.

Analogy in a bribery case no application. Must be *actus reas* and *mens rea*. 1906 33 Cal. 151. *In re Lubeck*, P. 171, 1st paragraph.

C.A.V.

P.J.B.

No. 12.

Judgment.

No. 12.
Judgment.
22nd March, 1955.

REID for the Advocates' Committee.

O'DONOVAN for the Advocate, Respondent.

The judgment of the Court (O'CONNOR, C.J. and BOURKE, J.) was delivered by O'CONNOR, C.J.

JUDGMENT.

This is a proceeding under Section 15 (1) of the Advocates' Ordinance 1949, consequent upon a Report by the Advocates' Committee dated 3rd February, 1955, laid before the Committee under Section 9 (3) (iii) (b) of that Ordinance.

The following statement of facts, which it is understood, are not in

In the Supreme Court of Kenya.

No. 12. Judgment. 22nd March, 1955— *continued.*

dispute, is taken from the Report of the Advocates' Committee and the papers accompanying that Report.

1.—An Asian lady, referred to hereinafter as Mrs. Shantaben, who was previously known as Mrs. Shantaben Someshwar Thaker, and is now known and appears in two proceedings in the Supreme Court of Kenya (Civil Case No. 675 of 1954 and Miscellaneous Criminal Application No. 22 of 1954) as Mrs. Shantaben w/o Jagabhai Kalabhai Patel, was granted a Temporary Employment Pass by the Principal Immigration Officer in Kenya, dated 7th May, 1951, authorising her to enter Kenya and remain therein for a period not exceeding three years from the date of such entry and subject to the other conditions contained therein.

2.—Mrs. Shantaben, by virtue of the said Pass, entered Kenya on 16th July, 1951.

3.—On 18th June, 1953, Mrs. Shantaben married one Jagabhai Kalabhai Patel who, on or about 24th July, 1953, applied to the Principal Immigration Officer for a Dependant's Pass for her.

4.—Mrs. Shantaben left her authorised employment on the 24th June, 1953, but failed to notify the Principal Immigration Officer of the fact, as required by the Immigration (Control) Regulations.

5.—On the 24th October, 1953, the Principal Immigration Officer informed the then Advocates of the said Jagabhai Kalabhai Patel that a Dependant's Pass would be issued in favour of Mrs. Shantaben, on payment of the requisite fees.

6.—On 5th November, 1953, the Principal Immigration Officer rescinded his decision to issue a Dependant's Pass in favour of Mrs. Shantaben.

7.—On 10th April, 1954, a Deportation Order was made against Mrs. Shantaben, under the hand of Sir Frederick Crawford, Acting Governor of Kenya, under Section 9 of the Immigration (Control) Ordinance. The Order recited that she was a prohibited immigrant and that her presence in the Colony was unlawful and ordered her to be deported from the Colony of Kenya by the 15th day of May, 1954. The Deportation Order is attached to the original affidavit of Mrs. Shantaben dated 20th November, 1954, filed in the Miscellaneous Criminal Application No. 22 of 1954.

8. On 21st May, 1954, in response to a request made on her behalf by her Advocates, Messrs. Bhandari & Bhandari, a firm in which the Respondent was then a Partner, the said Deportation Order was suspended till such time as the outcome of any proceedings which might be taken by Mrs. Shantaben in the Supreme Court was known.

A certified True Copy of the letter granting the suspension of the Deportation Order is contained in the record of the aforesaid Miscellaneous Criminal Application No. 22 of 1954.

In the Supreme Court of Kenya.

No. 12. Judgment. 22nd March, 1955— *continued.*

9. On or about the 7th June, 1954, proceedings known as Civil Case No. 675 of 1954, Shantaben w/o Jagabhai Kalabhai Patel *versus* The Attorney General, were initiated by the said Messrs. Bhandari & Bhandari, Advocates, by filing a Plaint which prayed for a declaration :—

(a) that the Plaintiff is not a Prohibited Immigrant ;

(b) that having entered the Colony on a valid Temporary Employment Pass, which was then current, and had not been in any way revoked, her presence in the Colony was lawful ; and

(c) that the Principal Immigration Officer having once approved the issue of a Dependant's Pass, which approval, the Plaintiff contended, he had no right or authority to rescind, the Plaintiff was not subject to a Deportation Order by His Excellency the Acting Governor.

10.—The said Civil Case No. 675 of 1954 was heard by Mr. Acting Justice Cram on the 22nd, 23rd, 25th and 28th October 1954, and judgment was pronounced in Court in the presence and the hearing of the Respondent on 18th November, 1954. The judgment is contained in the record of the case. The judgment decided :—

> that the appropriate procedure for the Plaintiff would have been to apply to the Court for a Rule *nisi* calling on the Acting Governor to show cause why a writ of certiorari should not issue to quash the Deportation Order and that the Plaintiff having applied by the procedure of a Petition of Right, the procedure was incompetent and her Petition would have to be dismissed.

The Judge, however, having come to the conclusion that the procedure was incompetent and that the petition would have to be dismissed, went on to record as follows :—

> " I propose, therefore to do what both parties apparently " desire the court to do and that is to consider this proceeding on " its merits. The Crown, mistakenly or otherwise has waived all " objections to procedure as if it were a declaratory suit—which, " of course, requires no *fiat justitia*."

The Judge then proceeded to consider the application on its merits. He held that Mrs. Shantaben's Temporary Employment Pass had been rendered void by her change of employment without reporting, and summarised a lengthy judgment in the following paragraph :—

> " In the result I declare that the Plaintiff is unlawfully " within the Colony and that she is a prohibited immigrant and " that she is subject to the deportation order made against her " which was properly made against her. She is present in the

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" Colony without any valid pass. Her Temporary Employment " Pass is void and is expired. She was never the subject of a " dependant's pass. The Principal Immigration Officer acted " within his competence in rescinding his approval of the issue " of a dependant's pass in respect of the plaintiff and she acquired " no continuing right and no *status* from his earlier decision."

11.—On 29th November, 1954, the Respondent filed in Court Notice of his client's intention to appeal against the whole of the above judgment.

12.—On the same day, i.e. 29th November, 1954, the Respondent drafted, completed, and arranged for his clients Mrs. Shantaben and Jagabhai Kalabhai Patel to swear two Affidavits.

13.—The Affidavit of Mrs. Shantaben contained, among others, the following paragraphs :

Paragraph 2 : " I entered Kenya Colony on 16th July, 1951, " on a valid Temporary Employment Pass No. 3146 dated 7.5.51 " granted to me by the Principal Immigration Officer of the " Colony of Kenya to work with Messrs. Cutchi Gujarati School, " Nairobi, aforesaid in accordance with the provisions of the " Immigration (Control) Ordinance, 1948, and Rules made there- " under, which said Pass is still valid and current and has been " valid and current at all material times. The said Pass has yet " not been cancelled. I enclose the said Temporary Employment " Pass and is marked ' A.' "

Paragraph 8 : " I have never been declared a Prohibited " Immigrant by the Principal Immigration Officer or any other " authority or authorised Officer of the Government of the Colony " of Kenya under any law in force in the Colony or at all."

Paragraph 10 : " I am informed by my Advocate and I verily " believe that the said Order is not valid as I am neither " a Prohibited Immigrant nor my presence in the Colony is " unlawful."

14.—This Affidavit had annexed to it as Exhibits the originals of the said Temporary Employment Pass, of the letters from the Principal Immigration Officer dated 24th October, 1953, and 5th November, 1953, respectively and of the Deportation Order.

15.—It will be observed that the Affidavit of Mrs. Shantaben made no reference to the declaratory judgment of Cram, J. which it flatly contradicted in alleging :

(a) that the Temporary Employment Pass was valid and current ;
(b) that Mrs. Shantaben was not a prohibited immigrant ; and
(c) that her presence in the Colony was not unlawful.

16.—The said Affidavit of Jagabhai Kalabhai Patel contained the following paragraph :

> Paragraph 3 : " I have been read over and explained the " Affidavit sworn by my said wife, Shantaben at Nairobi on " 29th November, 1954, and the facts stated therein are within " my knowledge and belief true and correct."

17.—On 7th December, 1954, the Respondent filed in the Supreme Court at Nairobi, a Notice of Motion, dated 4th December, 1954, instituting proceedings known as Miscellaneous Criminal Application No. 22 of 1954 asking for the issue of :

> An Order *nisi* directed to His Excellency the Acting Governor of the Colony of Kenya to show cause why a writ of certiorari should not issue to quash the Deportation Order dated 10th April, 1954, or to show cause why a writ of mandamus should not issue, " to the said Acting Governor " to cancel the said Deportation Order ;
>
> and further an Order *nisi* directed to the Principal Immigration Officer of Kenya to show cause why a writ of mandamus should not issue to him to grant a Dependant's Pass to Mrs. Shantaben.

18.—The Respondent filed simultaneously the said Affidavits of Mrs. Shantaben and Mr. J. K. Patel in support of the said Notice of Motion.

19.—The Notice of Motion was, in form, an *ex parte* application. It was to be taken in Chambers on 8th December, 1954.

20.—On 8th December, 1954, when the Respondent presented himself before Mr. Justice Hooper, according to the evidence of the Respondent, the question arose as to whether the notice should be served on the Attorney-General as the opposite party, and the Notice of Motion was stood over till 10th December, 1954. No order in this respect appears on the Court record. Later in the day, however, it was ascertained that the Notice of Motion, so far as the issue of an Order *nisi* was concerned was *ex parte*.

21.—On 10th December, 1954, the Court record shows :—

1. That the learned Judge drew the attention of the Respondent to the fact that the Affidavit of Mrs. Shantaben was inaccurate, as the statement in paragraph 2 was not borne out by the Temporary Employment Pass which had expired on 15th July, 1954, by effluxion of time.
2. That the Respondent stated that the reason why the Deportation Order of 10th April 1954 had not been complied with was that it had been suspended.
3. That the Respondent undertook to produce the correspondence proving the stay of execution of the Deportation Order.
4. That the Application was adjourned to 15th December, 1954.

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22.—On or about 14th December, 1954, the Respondent drafted, completed and arranged for Mrs. Shantaben to swear an Affidavit which was headed " Supplementary Affidavit."

23.—The said Supplementary Affidavit was sworn by Mrs. Shantaben and contains, among others, the following paragraphs :

Paragraph No. 2 : " In para. 2 of my said affidavit, I stated " that the Temporary Employment Pass was still valid and current " and has been valid and current at all material times. In fact " my Temporary Employment Pass expired on 16th July, 1954 ; " but it was valid and current at the time when a Deportation " Order was made against me and I consider that is the material " time as regards my above mentioned application."

Paragraph No. 3 : " I regret the mistake in my original " Affidavit and I state that the other statements in my said " Affidavit are true to the best of my knowledge and belief."

It may here be mentioned that Regulation 22 (4) (b) of the Immigration Control Regulations provides that where a person to whom a Temporary Employment Pass is issued terminates or is discharged from such employment, he must report that fact to the Principal Immigration Officer within fourteen days and that, if he fails so to report, his Temporary Employment Pass shall be deemed to have expired. Cram, J. had held (as indeed was obvious) that as Mrs. Shantaben admitted that she had left the employment specified in the Pass on 24th June, 1953, and admittedly had not reported, her Temporary Employment Pass had expired and become void *ipsa lege*. It had expired in July, 1953. The Deportation Order was made in December, 1953. To state, therefore, that the Pass was valid and current at the time of the Deportation Order was to state something which was flatly contrary to the finding of Cram, J. and to the plain words of the relevant Regulation.

24.—Mrs. Shantaben's supplementary Affidavit continued :

Paragraph No. 4 : " I made representation through my " Advocates to His Excellency the Governor against the making " of the Deportation Order as stated in para. 9 of my said affidavit " and to the best of my knowledge and belief His Excellency " agreed to suspend the operation of the said Deportation Order " to allow me to institute proceedings in this Honourable Court " to establish my right to stay in the Colony."

The comment of the Advocates' Committee on this paragraph is :

" It is somewhat surprising that this paragraph should have " been introduced at all in the Supplementary Affidavit the sole " purpose of which was to correct the patent inaccuracy regarding " the expiry of the Temporary Employment Pass. The Committee " can only assume that he hoped by inserting this paragraph to " satisfy the Judge on this point without producing the actual

" correspondence which, according to his statement on the following " day, he believed to be in Case File No. 675, but when he " appeared before the Judge on the following day the Judge " insisted, in spite of paragraph 4, on the production of the actual " correspondence, and it was then and then only that the " Respondent gave the number of the case file.

" The Committee observe also that the latter part of " paragraph 4 of the Supplementary Affidavit quoted above " is so phrased as to convey the impression that the proceedings " therein referred to were the proceedings before Mr. Justice " Hooper and not, as was the fact, the proceedings which had taken " place before Mr. Justice Cram."

25.—On 15th December, 1954, the application again came before Mr. Justice Hooper in Chambers and the Court record shows :—

1. that the Respondent filed the Supplementary Affidavit ;
2. that the Respondent failed to produce the full correspondence promised on the previous date with regard to the suspension of the execution of the Deportation Order but that he referred to Civil Case No. 675 of 1954, which file, he said, contained all the papers ;
3. that the application was adjourned to 17th December, 1954.

26.—On 17th December, 1954, the Court record shows that the application was dismissed with costs for reasons given. Mr. Justice Hooper, having sent for the file in Civil Case No. 675 of 1954, had discovered that Cram, J. had already dealt with substantially the same issues. He, therefore discharged the application for mandamus and certiorari and reported the matter to the Acting Registrar in a Memorandum dated 17th December, extracts from which are as follow :

" On the 10th of this month I had before me an application " by Mr. Bhandari in connection with a Notice of Motion on behalf " of Jagabhai Kalabhai Patel and Mrs. Shantaben W/O Jagabhai " Kalabhai Patel the Applicants. Before Mr. Bhandari appeared " before me I read the papers attached to the Notice of Motion " and discovered that an Affidavit sworn by Mrs. Shantaben " W/O Jagabhai Kalabhai Patel, the Applicant, was false in " a material particular since it stated that the Employment Pass " attached to the application was still valid and current. When " Mr. Bhandari appeared I drew his attention to this fact and " he stated that it was a mistake and that he would file " a Supplementary Affidavit correcting the mistake. This " Supplementary Affidavit was filed on the 14th December. From " Mr. Bhandari's demeanour and the manner in which he " endeavoured to explain away the false statement contained in " the affidavit there was created in my mind an impression that " he was not being frank and perfectly straightforward. I was " left with the impression that this statement had been " intentionally made by Mr. Bhandari (who admitted this morning

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" that he drafted the affidavit) in order to mislead me into believing " that the state of facts was different from what it really was.

" I asked Mr. Bhandari how it was that the Applicant was " still in the Colony since the Governor had issued a Deportation " Order and Mr. Bhandari undertook, if I would adjourn the " consideration of the Motion, to produce correspondence in his " possession on this point. On the 15th December when Mr. " Bhandart appeared a second time he explained that he had been " unable to find any correspondence on the matter, but that if " I sent for the file in Civil Case No. 675/54 I would find the whole " of the papers relating to the attitude adopted by the Governor " in respect to the Deportation Order.

" I therefore adjourned the application until Friday, " 17th instant. I sent for the file and to my surprise discovered " that the principal question down for consideration on the Motion " Paper had already been decided by Mr. Justice Cram on the " 18th November, 1954. In this case the Plaintiff asked for " a declaration that she was not a prohibited immigrant within " the meaning of Section 5 of the Immigration (Control) Ordinance, " 1948, and that her presence in the Colony was lawful so that she " was not subject to a Deportation Order at the instance of the " Governor in virtue of his powers under Section 9 of that " Ordinance. I find on reading Mr. Justice Cram's judgment " that he held that the procedure which had been adopted in " bringing up the Governor's order was incorrect and after " discussing the authorities on which he based his opinion he stated " (on page 17) that he proposed to do what both parties apparently " desired the court to do and that was to consider the whole " proceedings in the case on their merits. In other words that he " proposed to try the case out, although in his opinion the wrong " procedure had been taken to bring it before the Court. The " result of examination of this matter by Mr. Justice Cram can be " seen in the final paragraph of his judgment which reads as " follows : ' (The learned Judge then cited the declaration made " ' by Mr. Justice Cram which has already been quoted above.)'

" It seems from reading Mr. Justice Cram's judgment that he " has had the whole matter of the Plaintiff's objection to the " Deportation Order made by the Governor before him in all its " details (including the Temporary Employment Pass) and he " has adjudicated upon each and every issue. He has found " against the Plaintiff. Not content with this judgment, Mr. " Bhandari gave Notice of Appeal on the 29th November."

On 20th December Mr. Justice Hooper wrote a further Memorandum as follows :

" Registrar,

" Since writing my minute of the 17th December I feel I ought " perhaps to supplement and clarify certain points.

" (2) When Mr. Bhandari first appeared before me he " mentioned incidentally a long judgment by Cram, J. saying " that he, Cram, J., had told him (Mr. Bhandari) or had ruled— " I am not quite sure which—that the correct procedural method " to adopt in this matter was by way of certiorari or mandamus, " and this explained why his notice of motion of the 4th December " had been filed. The impression I then formed in my mind was " that it was either by reason of Mr. Justice Cram's advice, or as " a result of the terms of his judgment that Mr. Bhandari had " filed his notice of motion. The impression left in my mind was " also that Mr. Bhandari had failed before Cram, J. on the " procedural aspect of the matter and that as a result he was " appearing before me, adopting the correct procedure. I told " Mr. Bhandari I had no time to read the judgment then ; and, " indeed, I was quite prepared at that time to accept his word in " respect to this aspect of the matter : but I was seriously worried " about the statement in paragraph 2 of the affidavit of the " 29th November, 1954, saying that the Temporary Employment " Pass was still valid, when quite obviously a cursory examination " of the Pass showed that it was not.

" (3) One point, however, is clear in my mind beyond " the slightest possible doubt and that is that Mr. Bhandari never " at any time, directly or indirectly, or indeed in any way " whatsoever, told me that Cram, J. had proceeded, with the " consent of the parties, to give judgment in the matter ; had " ruled against him on all points ; and that he intended to appeal " against the judgment ; and had in fact already filed his notice " of appeal.

" (4) I did not discover these latter facts until, as the result " of my asking Mr. Bhandari if he had any correspondence in his " possession to prove that the execution of the Governor's " Deportation Order had been suspended, he told me that I would " find all the papers in the File of Civil Case No. 675/54. When " I sent for this file I discovered for the first time that, while it " did not contain these particular papers, it did contain Cram, J.'s " judgment, and it was on reading this judgment that I discovered " also for the first time, the true position of affairs ; namely, that " Cram, J. had tried out the whole case on its merits, had ruled " against the Plaintiff on all points, and that Mr. Bhandari had " entered notice of appeal.

" (5) When Mr. Bhandari appeared before me on the " 17th December (after I had read Mr. Justice Cram's judgment) " I asked him how it was that he had not been frank and open with " me and had failed to tell me what the true position was ; and " I asked him what he thought the true position would have been " had I acceded to his motion and the writs had eventually " issued. Did he not think a remarkable position would have

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" arisen, especially if the Court of Appeal confirmed Cram, J.'s " declaration ? Mr. Bhandari then said that he deemed this " matter to be of the same nature as habeas corpus and that " he could go from Court to Court until he succeeded. I said " I did not agree.

" (6) I then asked Mr. Bhandari who had drafted the affidavit " of the 29th November. He said he supposed one of his clerks " had. I then asked him whether it was not true that he had " drafted it himself. He then said : " Yes, I suppose I must " have done so." I then told him I intended to strike out his " motion and that I would record my reasons for so doing.

" (7) But I do not wish it to be thought that I am here " concerned with any legal points which may possibly be arguable : " but I am concerned with three points :—

" (1) The fact that Mr. Bhandari did not disclose to me " that the matter dealt with in his notice of motion had " already been adjudicated upon by Mr. Justice Cram and " that notice of appeal had been given ;

" (2) The fact that Mr. Bhandari sought to convey to " my mind the impression that in appearing before me with " his notice of motion he was acting either on the injunctions " of Mr. Justice Cram or in virtue of his judgment to that " effect ;

" (3) The fact that Mr. Bhandari supported his motion " by an affidavit he himself drafted which was false in a " material particular, namely, that Temporary Employment " Pass was still valid, and which, in view of the concluding " paragraph but one of Cram, J.'s judgment, he must have " known was not true.

" C. A. HOOPER,
" 20.12.54. *Puisne Judge.*"

27.—On an application by the Registrar, the matter was put before the Advocates Committee, who heard evidence and reported. The last two paragraphs of their Report read :

" accordingly, the Committee find that it is fully established, " on the evidence, that the Respondent intended to deceive and " mislead the Court and that therefore a *prima facie* case of " disgraceful and dishonourable conduct inconsistent with his " duty as an Advocate has been made out.

" With regard to the alternative submission made on behalf " of the Applicant that the Respondent's failure to make " disclosures to the Court constituted gross negligence amounting " to professional misconduct, if the Committee had not reached the " conclusion that the evidence in this case justified a finding of " a *prima facie* case that disgraceful and dishonourable conduct " had been established, they would have had no hesitation in

" reaching the conclusion that the evidence clearly showed that " the Respondent had been guilty of gross negligence amounting " to professional misconduct."

The Report came on for consideration by the Court on the 7th March, when Mr. Reid argued in support of the Committee's Report.

Mr. O'Donovan, for the Respondent, dealt first with the statement in paragraph 2 of Mrs. Shantaben's affidavit dated 29th November, 1954, that her Temporary Employment Pass " is still valid and current " when its validity had expired by effluxion of time. Mr. O'Donovan explained that the Respondent, in including a statement to this effect in the affidavit, had merely been copying an averment in the Plaint in the previous proceedings, which the Respondent himself had not drafted, and was under the impression that Temporary Employment Passes were usually granted for four years and that this one would, therefore, still be current : that this was merely a formal mistake and, as the Pass itself was exhibited to the Affidavit, there could not have been an intention to deceive. We agree that there was no intention to deceive on the matter of the date of expiry of the Pass, though it was grossly careless of the Respondent not to check the date before permitting the client to swear that the pass was still valid and current : (*Myers* v. *Elman* (1940) A.C. 282.) Quite apart however from the Pass having expired by effluxion of time, it had (as explained above) been held to have expired long before for failure to report change of employment under Regulation 22.

As Mr. O'Donovan realized, the gravamen of the charge against the Advocate (apart from drafting and filing misleading Affidavits) was that he wilfully concealed the judgment of Cram, J. from Hooper, J. Mr. O'Donovan argued that this was not blameworthy because :

I. The proceedings before, and the judgment of, Cram, J. did not make the issues decided by him *res judicata* under Section 7 of the Civil Procedure Ordinance, and were no bar to the exercise by Hooper, J. of his jurisdiction the application for prerogative writs, because—

   (a) the proceedings before Cram, J. were civil proceedings, whereas the application for the prerogative writs was on the criminal side ;

   (b) the proceedings were not between the same parties and the relief asked for was different ;

   (c) the judgment of Cram, J. was not a final judgment on anything but procedure because the suit had been dismissed on a procedural point and the declaration on the merits had not, in fact, been made with the consent of the parties and was merely *obiter :*

   (d) in any event it was for the opposite party and not for the applicant to raise a plea of *res judicata.*

II. The judgment of Cram, J. was irrelevant to the proceedings before Hooper, J., as it did not fall within Sections 40, 41 and 42 of the

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Indian Evidence Act, or any of them, and Section 43 made it irrelevant: the Respondent was, therefore, entitled to refrain from disclosing it, and Hooper, J. was wrong in dismissing the application without going into the merits.

III. Even if these arguments are wrong, the Respondent did not act dishonourably, if he honestly thought that they were right and guided himself accordingly.

IV. The Respondent could not have intended to deceive because (among other considerations) even if he had obtained an Order *nisi* by concealment of the judgment of Cram, J., it would have been produced by his opponent at the hearing of the application for the order to be made absolute, and he must have realized this.

As regards sub-paragraphs (a) and (b) of paragraph I above, it is correct that the Court of Appeal for Eastern Africa in *Lall Khan* v. *Rex* (1950) 17 E.A.C.A. 118; and *Makhan Singh* v. *Principal Immigration Officer* (1950) 17 E.A.C.A. 40, had ruled that in Kenya applications for certiorari and mandamus could only be entertained in the exercise of the criminal jurisdiction of the Supreme Court. Those rulings have now been upset by a decision of a Full Bench; but they were in force when the Respondent filed his application for certiorari and mandamus and this, no doubt, was why his application was given a number on the criminal side.

In reply to Mr. O'Donovan, Mr. Reid argued that both the suit before Cram, J. and the application to Hooper, J. were, in substance, civil matters, that the parties were substantially the same and there was *res judicata*. He referred to *Supreme Court Civil Case No.* 176 *of* 1954 *Nemchand Jechang Popat Shah* v. *The Attorney-General representing the Principal Immigration Officer*, in which it had been decided by Connell, J., in July, 1954, that a suit for a declaration that a plaintiff was a permanent resident of Kenya and, as such, not subject to a Deportation Order was barred by a previous decision of the Supreme Court (in a Miscellaneous Criminal application) refusing to issue a writ of mandamus to the Principal Immigration Officer directing him to endorse a certificate of permanent residence upon the applicant's passport. This was the converse of the case which Hooper, J. would have had to consider if the existence and effect of the judgment of Cram, J. had been disclosed to him at the start. In *Popat Shah's* case (in which the Respondent's firm acted for the Plaintiff and of which it is not denied that the Respondent was, in December, 1954, aware) much the same arguments as were addressed to us by Mr. O'Donovan (which are summarised in sub-paragraphs (a) and (b) of paragraph I above) were addressed to Mr. Justice Connell by the Respondent's brother, but they were not accepted. If we were called upon to decide them, we might feel constrained by comity to follow Mr. Justice Connell's decision; but, for a reason which will presently appear, we do not feel called upon to decide whether Mr. Justice Cram's decision caused the issues raised before Mr. Justice Hooper to be *res judicata* or not.

As regards the argument summarised in sub-paragraph (c) of

paragraph I above, that Cram, J's judgment was not a final decision on anything but procedure, we observe that if an appeal were to succeed on the procedural point and if it should be held by the Court of Appeal that Cram, J. had jurisdiction to decide the case on a petition of right, then his declaration on the merits, if upheld by the Court of Appeal, might well rank as a final decision.

As regards Mr. O'Donovan's argument, summarised in paragraph II above, to the effect that the judgment of Cram, J. was irrelevant as it did not fall within any of Sections 40 to 42 of the Indian Evidence Act, we are of opinion that it was relevant to disclose it under Section 40. To the knowledge of the Respondent (the Advocate for the applicant before Hooper, J.) it had been held by Connell, J. in *Popat Shah's* case *supra* that an application for a prerogative writ, decided on substantially the same issues, could and did bar a subsequent civil suit, and Connell, J. had ruled against the argument that the relief asked for was different. The Respondent may have thought that decision wrong, but in the face of it the Respondent was not safe in assuming (even if it could otherwise safely have been assumed) that the judgment of Cram, J. did not prevent Hooper, J. from taking cognizance of the application. Hooper, J. should have been informed of the existence of the judgment of Cram, J. and given a chance to consider whether it made the issues which it purported to decide *res judicata* or not.

But, in truth, we were not impressed by Mr. O'Donovan's rather technical arguments as to *res judicata* and relevance which seemed to us to miss the salient point in this part of the case, namely that the prerogative writs of certiorari and mandamus are (with certain exceptions which do not apply here) discretionary remedies. An applicant is not entitled to them *ex debito justitiæ :* but has to convince the judge, not only that the judge has power to issue them, but that the case is one in which, in the exercise of his discretion, he should do so. It seems to us idle to contend that upon the question of whether or not a judge should issue certiorari and mandamus to quash and cancel a Deportation Order on the ground that Mrs. Shantaben was not a Prohibited Immigrant, and that her presence in the Colony was lawful, and that her Temporary Employment Pass was valid and current, it was irrelevant for the judge to know that another judge of the Supreme Court had recently held (in whatever species of proceeding, and whether his ruling was contended to be *obiter* or not) that Mrs. Shantaben was a prohibited immigrant, that she was unlawfully in the Colony and that her Temporary Employment Pass had been properly and lawfully cancelled ; and that that other judge's decision was subject to appeal to the Court of Appeal. In effect Hooper, J. was being asked to come into direct collision, not only with the rulings of Cram, J., but, quite possibly, with a decision of the Court of Appeal, without being told anything about them. What, as Hooper J. himself said when he had learnt of the Cram judgment, would have been the position if he, Hooper, J., had issued the writs and the Court of Appeal had confirmed Cram, J's declaration ? How can it be seriously contended that it was not relevant for Hooper, J. to

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have an opportunity of considering the questions of *res judicata*, of whether the decision of Cram, J. was binding on him or not, or whether, even though not binding, he wished to follow it; and of considering (even if he disagreed with the ruling of Cram, J. and thought it not binding on him) whether, in the exercise of his discretion, he should not refuse or postpone the making of an Order *nisi* until the decision of the Court of Appeal was known? We think it idle to argue that the judgment of Cram, J. was irrelevant and need not have been mentioned in the proceedings before Hooper, J. To do the Respondent justice, he has never himself suggested that the judgment of Cram, J. was not relevant or that it was not his duty to produce it. In this connection, see his answers to the Advocates' Committee at pp. 77 and 78 of the Record (Record p. 48):

> " *Q.* You intended to draw Mr. Justice Hooper's attention to " the previous proceedings ?—*A.* Yes because my submission is " that I could not possibly have proceeded with my arguments " before Mr. Justice Hooper had I not referred to the previous " judgment.
>
> " *Q.* It was never your intention to refer to the previous " proceedings in the case before Mr. Justice Hooper ?—*A.* I would " not try to hide anything before Mr. Justice Hooper.
>
> " *Q.* Did you intent to raise it of your own volition ?— " *A.* I intended to refer to the previous proceedings because " I wanted to give him the history of the case.
>
> " *Q.* Had you prepared your argument about *res judicata* ? " —*A.* Yes. I was prepared to answer or satisfy the learned " Judge that, in spite of that judgment, I was properly before the " Court.
>
> " *Q.* Did you intend to argue the question of *res judicata* at " all ?—*Q.* No; what I intended was to bring it to the Notice of " the Judge and tell him about the previous proceedings, and also " tell him that that did not debar me from coming to the Court."

Mr. O'Donovan concedes that what the Respondent intended, and conceived to be his duty, to do is important; but he argues that " the " whole point is: Was Cram, J's judgment relevant to the proceedings " before Hooper, J. ? " He contends that it was not, and that Hooper, J. was wrong in dismissing the application without going into the merits. We have already held that the judgment of Cram, J. was relevant, and it seems to us that Hooper, J., being persuaded that Mrs. Shantaben's Affidavit was not honest and candid and that the Respondent was not being frank, was right in dismissing the application without going into the merits. Support for this view is to be found in the case of *R.* v. *Kensington Income Tax Commissioners ex parte Princess de Polignac* (1917) 1 K.B. 486. In that case the Kensington Income Tax Commissioners had assessed Princess de Polignac, a French national, to British income tax on the ground that she was a resident of Kensington where she owned a house. She then applied for a rule *nisi* to prohibit the Commissioners going further with the

assessment and in support of her application swore an affidavit stating, *inter alia,* that she was not a resident of Kensington and that the house belonged to her brother. She did not mention that she had provided the purchase price and used to refund the running expenses to her brother. A Divisional Court, without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented facts of material to her application. On appeal to the Court of Appeal, it was held :

" that the rule of the Court requiring *uberrima fides* on the
" part of an applicant for an *ex parte* injunction applied equally
" to the case of an application for a rule *nisi* for a Writ of
" prohibition.

" *Held,* therefore (affirming the decision of the Divisional
" Court), that, there having been a suppression of material facts
" by the applicant in her affidavit, the Court would refuse a writ
" of prohibition without going into the merits of the case."

Lord Reading, C.J. said at p. 495 :

" Before I proceed to deal with the facts I desire to say this :
" Where an *ex parte* application has been made to this Court for
" a rule *nisi* or other process, if the Court comes to the conclusion
" that the affidavit in support of the application was not candid
" and did not fairly state the facts, but stated them in such a way,
" as to mislead the Court as to the true facts, the Court ought
" for its own protection and to prevent an abuse of its process, to
" refuse to proceed any further with the examination of the
" merits."

Lord Cozens Hardy, M.R. said at p. 504 :

" Was that " (the fact that the Princess had paid for and upkept the house) " a material matter to be brought before the
" Court ? It is not necessary for me to decide, and I do not
" propose to decide, whether the evidence sufficed to prove that
" she was a resident there or not, but it was a matter which was
" material for the consideration of the Court, whatever view the
" Court might have taken."

This is substantially what we have said in instant case : we do not decide whether Cram, J.'s judgment raised a *res judicata* or not : we say that this was a matter material for the consideration of Hooper, J.

At p. 506 Lord Cozens-Hardy continues :

" If you make a statement which is false or conceal something
" which is relevant from the Court, the Court will discharge the
" order and say, ' You can come again if you like, but we will
" ' discharge this order, and we will apply the general rule of the
" ' Court to applications like this.' Then it is said ' That is so
" ' unfair ; you are depriving us of our right to a prohibition on
" ' the ground of concealment or mis-statement in the affidavit.'
" The answer is that the prerogative writ is not a matter of course."

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If this reasoning applies to an application for prohibition, which is a writ of right though not of course, it applies a *fortiori* to an application for certiorari and mandamus which are (with some exceptions which are inapplicable to the instant case) neither writs of right nor of course, but discretionary remedies.

We think that Hooper, J. was right in dismissing the application without entering on the merits.

The *Kensington* case (*supra*) also lays down very clearly what is the duty of a party on an *ex parte* application.

At p. 505 Lord Cozens-Hardy likens the duty to the principles which govern insurance matters " which are said to require the utmost good " faith, *uberrima fides.*" And he says:

> " That is merely one and perhaps rather a weighty authority " in favour of the general proposition which I think has been " established, that on an *ex parte* application *uberrima fides* is " required. . . ."

At p. 514 Scrutton, L.J. says:

> " and it has been for many years the rule of the Court, and " one which it is of the greatest importance to maintain, that " when an applicant comes to the Court to obtain relief on an " *ex parte* statement he should make a full and fair disclosure of " all the material facts—facts, not law. He must not mis-state " the law if he can help it—the Court is supposed to know the " law. But it knows nothing about the facts, and the applicant " must state fully and fairly the facts, and the penalty by which " the Court enforces that obligation is that if it finds out that the " facts have not been fully and fairly stated to it, the Court will " set aside any action which it has taken on the faith of the " imperfect statement."

At pp. 516 and 517:

> " Again, if there was any evidence on which the Commissioners " could find residence, the remedy would not be prohibition, but " appeal, and before issuing a writ of prohibition the court should " know whether there was any evidence on which the " Commissioners could have found residence, though other tribunals " might think differently, in order that the Court might " know whether the writ of prohibition was the proper remedy, " or they should say, ' We must leave you to your remedy by " ' appeal and case stated if necessary.' It seems to me, therefore, " without deciding the question of what would have happened if " we had been dealing with the case on the merits, that facts were " withheld, and I think, so far as the solicitors were concerned, " deliberately withheld, from this Court which would have been

" material in considering whether the Court should or should not " issue a writ of prohibition."

The Court of Appeal in the *Kensington* case upheld the order of the Divisional Court discharging the rule *nisi*. The Court of King's Bench and the Court of Appeal, apparently, did not take the view (and neither do we) that misrepresentation committed on an application for a rule or order *nisi* is unimportant, because the facts concealed would be bound to be disclosed to the judge by the other party on the return to the rule or order.

Nor do we think that there is any force in the argument of Mr. O'Donovan that *res judicata* is a matter of defence which the Respondent could legitimately leave to be raised by the opposing party. This would, no doubt, have been so on an application *inter partes* ; but on an application *ex parte* it was the Respondent's duty to apprise the judge of all relevant facts, including the existence and nature of the judgment of Cram, J. Did he perform this duty ?

The Respondent told the Advocates' Committee that he had always intended to bring the Cram judgment to the notice of Hooper, J. Apparently he did mention to Hooper, J. the existence of the Cram judgment at his first appearance on the 8th December (Record, p. 29) ; but he then gave the judge the impression that Cram, J. had only said or ruled that the correct procedure to adopt was to apply for certiorari and mandamus. Hooper, J. says that he was not at any time told " directly or indirectly or in any way whatsoever " by the Respondent that Cram, J. had ruled against the Respondent's client on all the points on which he was asking Hooper, J. to rule in her favour and that Cram, J.'s decision was subject to appeal. Hooper, J. only discovered this when he obtained the file as a result of his questioning the Respondent on the 15th December as to why the Deportation Order had not been executed.

Having considered all the evidence and affidavits before the Advocates' Committee, and all the arguments in favour of the Respondent addressed to us, we have come, with great reluctance, to the same conclusion at which the Committee arrived, namely that the Respondent intended to deceive and mislead the Court. We think that the Affidavits drawn by the Respondent were deliberately misleading ; that the Respondent knew his duty to disclose the Cram judgment, and must have known that disclosure of that judgment and of the appeal against it would inevitably result in the dismissal or indefinite postponement of his application for discretionary prerogative writs ; that the Respondent did not suppress mention of the Cram judgment altogether, but misrepresented its effect and refrained from making disclosure of its full contents : and that he postponed until he could postpone no longer giving the judge a reference which would enable him to discover its true contents.

We think that the Respondent may have had some muddle-headed idea in his mind that he could " pursue concurrent remedies," or (as he told Hooper, J.) that having failed before one judge, he could apply to another on the lines of an application for habeas corpus. But we do not believe, and he does not himself aver, that the Respondent did not know that he was

In the Supreme Court of Kenya.

No. 12. Judgment. 22nd March, 1955—*continued.*

under a duty to disclose to Hooper, J., the existence and the complete contents of the judgment of Cram, J. This he refrained from doing, and we think that the way in which the Affidavits are drawn shows that he did not intend to disclose the full contents of this judgment until he was forced to do so, and that the intention to mislead the Court was deliberate. This amounts to professional misconduct.

Ordinarily, upon such a finding, we should suspend the Respondent from practice for a substantial period. In this case, however the finding at which we have arrived may entail other serious consequences for the Respondent. Having regard to this, we consider that this case will be met by admonishing the Respondent. He is, accordingly, admonished, and the Registrar must make the appropriate entry in the Roll. There will be a stay for two weeks to enable an appeal to be filed, if desired, and, if an appeal is filed within that time, there will be a further stay until the disposal of the appeal.

Dated at Nairobi the 22nd day of March, 1955.

No. 13. Order of Supreme Court of Kenya. 22nd March, 1955.

No. 13.
Order of Supreme Court of Kenya.

IN THE SUPREME COURT OF KENYA.

Advocates' Committee Cause No. 3 of 1954.

IN THE MATTER of MAHARAJ KRISHAN BHANDARI, an Advocate

and

IN THE MATTER of THE ADVOCATES' ORDINANCE, 1949.

UPON READING the Report of the Advocates' Committee laid before the Court under Section 9 (3) (iii) (b) of the Advocates Ordinance, 1949.

And upon hearing Counsel for the *Advocates' Committee* and Counsel for MAHARAJ KRISHAN BHANDARI *The Court* finds that MAHARAJ KRISHAN BHANDARI has committed professional misconduct, and *Orders*

(a) that he be admonished,

(b) that there be a stay for two weeks to enable an appeal to be filed, and if filed the stay to continue until disposal of the appeal,

(c) that all costs to the date of this Judgment agreed at £30, be paid by the said MAHARAJ KRISHAN BHANDARI to the Advocates' Committee.

Dated at Nairobi this 22nd day of March, 1955.

(Sgd.) K. K. O'CONNOR,
Chief Justice.

(Sgd.) P. J. BOURKE,
Puisne Judge.

No. 14.

Notice of Appeal.

In the Supreme Court of Kenya.

No. 14. Notice of Appeal. 24th March, 1955.

NOTICE OF APPEAL.

TAKE NOTICE that Maharaj Krishan Bhandari, above-named, being dissatisfied with the decision and order of The Honourable the Chief Justice of Kenya and The Honourable Mr. Justice Bourke given herein at Nairobi on the 22nd day of March, 1955, intends to appeal to Her Majesty's Court of Appeal for Eastern Africa against the whole of the said decision and order.

Dated this 24th day of March, 1955.

B. J. ROBSON
ROBSON & O'DONOVAN,
Advocates for the Appellant.

To :

(1) The Registrar,
Supreme Court of Kenya,
Nairobi.

(2) The Advocate for the Advocate's Committee,
care of the Attorney General's Chamber,
Nairobi.

The Address for service of the Appellant is c/o Messrs. Robson & O'Donovan, Advocates, Lullington House, P.O. Box 5305, Nairobi.

NOTE : A respondent served with this notice is required within fourteen days after such service to file in these proceedings and serve on the appellant a notice of his address for service for the purposes of the intended appeal, and within a further fourteen days to serve a copy thereof on every other respondent named in this notice who has filed notice of an address for service. In the event of non-compliance, the appellant may proceed *ex-parte*.

Filed the 24th day of March, 1955,
at Nairobi.

(Sgd.) R. H. LOWNIE,
Deputy Registrar,
H.M. Supreme Court of Kenya,
Nairobi.

No. 15.

No. 15.

Notice of Address for Service, 30th March, 1955.

(*Not Printed*)

In Her Majesty's Court of Appeal for Eastern Africa at Nairobi.

No. 16. Memorandum of Appeal. 4th April, 1955.

No. 16.

Memorandum of Appeal.

Appeal from a Judgment of the Supreme Court of Kenya at Nairobi (The Honourable the Chief Justice of Kenya and The Honourable Mr. Justice Bourke) dated the Twenty-second day of March, 1955,

in

Advocates' Committee Cause No. 3 of 1954

IN THE MATTER of MAHARAJ KRISHAN BHANDARI an Advocate

and

IN THE MATTER of THE ADVOCATES' ORDINANCE, 1949.

MEMORANDUM OF APPEAL.

Maharaj Krishan Bhandari, the Appellant above-named, appeals as of right to Her Majesty's Court of Appeal for Eastern Africa against the whole of the decision above mentioned on the following grounds, namely :

1.—The learned Judges erred in law in failing to hold that the judgment of The Honourable Mr. Acting Justice Cram in Civil Case No. 675 of 1954 in Her Majesty's Supreme Court of Kenya was *obiter* except upon matters of procedure and jurisdiction.

2.—The learned Judges erred in law in failing to hold that the aforesaid judgment remained, except in so far as it contained a final decision upon matters of procedure and jurisdiction, an *obiter* judgment, and that the Appellant was entitled to regard it as such, unless and until it were reversed on appeal upon matters of procedure and jurisdiction, and upheld on the merits.

3.—The learned Judges erred in failing to hold that, as a judicial authority, the said judgment of The Honourable Mr. Acting Justice Cram was only relevant to Miscellaneous Criminal Application No. 22 of 1954 in Her Majesty's Supreme Court of Kenya in so far as it supported the legal proposition that the procedure followed by the Applicants in the said Miscellaneous Criminal Application No. 22 of 1954 was correct.

4.—The learned Judges erred in law in failing to hold that in any event the aforesaid judgment was, except in so far as it dealt with procedure and jurisdiction, not relevant to the matters in issue, or any of them, in the said Miscellaneous Criminal Application No. 22 of 1954, under the Indian Evidence Act as applied to the Colony of Kenya, or otherwise.

5.—The learned Judges erred in law in holding that an *obiter* expression of opinion in civil proceedings could be relevant to subsequent proceedings

on the criminal side by virtue of Section 40 of the Indian Evidence Act, and in failing to hold that the matters in issue in Miscellaneous Criminal Application No. 22 of 1954 were not *res judicata.*

6.—The learned Judges erred in failing to hold, upon the uncontroverted evidence of the notes of the proceedings, made by The Honourable Mr. Acting Justice Cram in the said Civil Case No. 675 of 1954 that the parties in that suit had never consented to a decision being given upon the merits, either *obiter* or otherwise, if the suit were to be dismissed for want of jurisdiction or upon a question of procedure.

7.—The learned Judges erred in law in holding that a Court in which an application for the issue of a writ of certiorari and/or mandamus had been made, was entitled and/or obliged in the exercise of its discretionary powers, to take into consideration any facts or matters which were irrelevant or immaterial under the rules of evidence.

8.—The learned Judges erred in law in failing to hold that the said judgment of The Honourable Mr. Acting Justice Cram was not a matter to which it was incumbent upon the applicants in Miscellaneous Criminal Application No. 22 of 1954 to refer in their affidavits filed in support of their said application.

9.—The learned Judges erred in failing to take into account that at no time during the proceedings in Miscellaneous Criminal Application No. 22 of 1954 was the Appellant given the opportunity of being heard by The Honourable Mr. Justice Hooper upon the merits of the application for an order *nisi.*

10.—The learned Judges erred in taking into account and stating as a fact which was not in dispute that the Appellant's client, Mrs. Shantaben failed in Miscellaneous Criminal Application No. 22 of 1954 to notify the Principal Immigration Officer of the fact that she had left her authorised employment, and that her Temporary Employment Pass had become void ; having regard to the following circumstances :

(i) That no admissions of the said alleged facts had ever been made by or on behalf of the Appellant either in the proceedings before the Advocates' Committee, or in Her Majesty's Supreme Court of Kenya or otherwise.

(ii) That no complaint relating to the said alleged fact has been made against the Appellant, that he has been afforded no opportunity of giving any explanation thereon, that no question relating to the said alleged fact was at any stage of the said proceedings put to the Appellant, and that no argument was heard or invited thereon.

(iii) That the issue whether the report made to the Principal Immigration Officer by the said Mrs. Shantaben's employers was

In Her Majesty's Court of Appeal for Eastern Africa at Nairobi.

No. 16. Memorandum of Appeal. 4th April, 1955— *continued.*

a sufficient report by an agent on her behalf was one of the issues argued before The Honourable Mr. Acting Justice Cram.

(IV) That the record of the proceedings before The Honourable Mr. Acting Justice Cram which was exhibited as Annexure 3 in the instant proceedings was only evidence of what occurred in the course of the proceedings before The Honourable Mr. Acting Justice Cram, but no evidence of the truth or otherwise of the statements made by witnesses in the course thereof.

11.—That the learned Judges erred in taking into account impressions which The Honourable Mr. Justice Hooper stated he had formed about the Appellant, when it had been agreed between the advocate for the Appellant and the advocate for the Advocates' Committee that The Honourable Mr. Justice Hooper's statement of facts be accepted, but that all such impressions be excluded from consideration.

12.—That the learned Judges erred in holding that the Appellant had ever entertained or accepted a different view of his duties from that urged on his behalf in the course of arguments in the instant proceedings, and failed to take into consideration the Appellant's explanation that he believed that the said judgment of The Honourable Mr. Acting Justice Cram in Miscellaneous Criminal Application No. 22 of 1954 did not give rise to any plea of *res judicata.*

13.—The learned Judges erred in failing to take into account the implications of their finding that the Appellant may have thought that his clients were entitled to pursue concurrent remedies, and in failing to infer that if he so believed, he could not at the same time have believed that the disclosure of the judgment of The Honourable Mr. Acting Justice Cram would inevitably result in the dismissal or indefinite postponement of his application for discretionary prerogative writs.

14.—The learned Judges erred in failing to hold that there was no unprofessional conduct on the part of the Appellant in respect of the statement in paragraph 2 of Mrs. Shantaben's affidavit dated 29th November, 1954, that her Temporary Employment Pass was still valid and current.

15.—The learned Judges erred in failing to take into account the absence of any possible motive on the part of the Appellant or his clients to conceal the existence and substance of the judgment in Civil Suit No. 675 of 1954 from the Court hearing Miscellaneous Criminal Application No. 22 of 1954.

16.—The learned Judges erred in failing to hold that there was no evidence of any intention on the part of the Appellant to mislead the Court, and in failing to take sufficiently into account the facts that the Appellant of his own volition disclosed the existence of the judgment in

Civil Suit No. 675 of 1954 to The Honourable Mr. Justice Hooper on the first occasion on which the Appellant appeared in support of the application in Miscellaneous Criminal Application No. 22 of 1954, and that the said application was drafted as an application *inter partes.*

17.—The learned Judges erred in holding that there was any duty on the appellant to cause matters relating to a possible plea of *res judicata* to be stated and answered in his clients' affidavits in support of their application, instead of leaving a plea of *res judicata* to be made by the Respondents, if they so desired, in due course.

18.—The learned Judges erred in failing to hold that in any event a plea of *res judicata* would have been frivolous and unfounded in the circumstances.

19.—The decision and order appealed from are against the weight of the evidence.

Dated this 4th day of April, 1955.

B. J. ROBSON,
for ROBSON & O'DONOVAN,
Advocates for the Appellant.

To the Honourable the Judges of Her Majesty's Court of Appeal for Eastern Africa

And to The Advocate for the Advocate's Committee, Care of the Attorney General's Chambers, Nairobi.

The address for service of the Appellant is care of Messrs. Robson & O'Donovan, Lullington House, P.O. Box 5305, Nairobi.

Filed the 4th day of April 1955 at Nairobi.

C. G. WRENSCH,
Registrar of the Court of Appeal,
Nairobi.

No. 17.

President's Notes of Arguments at the Hearing of the Appeal.

1.6.55.

Coram : NIHILL P.
WORLEY V.P.
CORRIE J.

O'DONOVAN, A. R. KAPILA with him for Appellant.
REID for Respondent.

O'DONOVAN : No evidence was led in Supreme Court a matter of inferences from record of proceedings in Advocates Committee. Therefore this Court is in as good a position as Supreme Court to Judge.

In Her Majesty's Court of Appeal for Eastern Africa at Nairobi.

No. 17. President's Notes of Arguments at the hearing of the Appeal. 1st June, 1955— *continued.*

COURT: Is Advocates Committee properly cited as Respondent. This may be important in matters of costs.

(1955 1 W.L.R. at 405 Disciplinary Committee cited as Respondent.)

No question of demeanour or creditability of witnesses.

Main question is whether inferences that there was misconduct can be reasonably drawn from the evidence. Agree that if inference is justified that appellant did wilfully try to mislead Court that is professional misconduct.

Reads Hooper J.'s report at p. 10 and p. 13. 2 matters here relevant to the appeal.

(a) Agreed that Mr. Hooper's memoranda should be accepted as statements of fact but that his expression of opinion should be disregarded (p. 63 line 15).

(b) re affidavit. Appellant's explanation accepted by Supreme Court—see p. 90 re expiration of pass by effluxion of time. 1897 A.C. 218 *re Ex parte Renner.*

Case should have been dealt with with same strictness as a criminal case. Unfavourable inferences should not be drawn except for facts.

In re Mayer Cook 1888—9 T.L.R. Vol. 5—407 last 4 lines.

Standard of proof must be beyond mere balance of probabilities. Should approximate to standard required in a Criminal Court.

Hooper J. elected not to appear before Advocates Committee. Mr. O'Brien Kelly I concede agreed.

Bhandari's explanation should have been accepted because it is not contradicted by the memoranda. Case dealt with unsatisfactorily in Supreme Court inadequate material. Uncertain charges. Charges should have been formulated before hearing by Advocates Committee.

Agree duty of advocate although not in law. To the Judge about previous proceedings—technically irrelevant but bad behaviour. This situation frequently arises.

Sec. 40 Indian Evidence Act no applicability. p. 76 of record.

X X at p. 76. Committee put the matter too high. because Not necessary in law to do so. " The point was not strictly relevant in law."

COURT: In *ex parte* application an order is is often made without hearing counsel.

Not suggested that any misconduct in going to another judge after having been refused by one judge. It was reasonable to bring second proceedings and appellant not have been failing in duty to his client had he not advised her to do so.

Cram J. decided he had no jurisdiction and that proceedings were incompetent—see p. 19 of judgment.

Appellant never asked Mr. Justice Cram for an appeal on the merits if it was to be held that his procedure was wrong.

Adjourned to 2.30 p.m.

(Sgd.) J. H. B. NIHILL, P.

2.30 *p.m.* Bench and Bar as before.

O'DONOVAN *continues :*

Appeal might have failed on jurisdiction therefore not unreasonable to try another Court. 2nd attempt was correct procedure. Cram was right in withholding jurisdiction. No misconduct in launching second proceedings. Nothing unreasonable. No misconduct in drafting motion and affidavit in 2nd proceedings without mentioning 1st proceedings if he intended to do so in Court.

Distinction must be drawn between matters strictly relevant in law and duty to make full disclosure.

see p. 13 (Record p. 5) appellant told judge of previous proceedings when he opened before judge. Hooper J. at this stage not interested in Cram's judgment.

Bhandari had no opportunity to enlarge much on 10/12/54.

No one would have gratuitously mentioned long judgment of Cram if there had been an intention to hide it.

Trial adjourned on 15/12 in order that file could be sent for. Whole thing a question of what inference to draw. If facts consistent with no intention to conceal appellant should have benefit. Must rule out Mr. Hooper's impression. Circumstances are more consistent with no intent. Appellant on Oath says he did not wish to deceive. May well be so on circumstances as stated by Hooper J. What could he have gained by deceit.

Rely judgment 166.

Comments on p. 173.

G.N. 1818 of 1954.

XX Supreme Court overlooked this G.N. Only came into force in 1955.

Only a general duty to report within reasonable time not 14 days. In circumstances of the case it was a permissible view to take that the Temporary Pass was still valid at date of deportation order i.e. 10/4/54.

Advocates comment on 174 unjustified. Overlooks that Mr. Bhandari told Judge about Cram's judgment on first day.

p. 174.

XX not supported by Mr. Justice Hooper.

Para 7 at p. 178 of Judgment.

Adjourned to 10.30 a.m. to-morrow.

(Sgd.) J. H. B. NIHILL, P.

2nd June, 1955—

2.6.55. Bench and Bar as before.

O'DONOVAN *continues :*

re third of Mr. Justice Hooper's complaints. Mr. Bhandari was entitled still to assert that pass had never been cancelled and was therefore still valid at material date i.e. 10/4/54. We still asserted this in Supplementary memo.

We thought there was an arguable case. Therefore entitled to assert it.

In Her Majesty's Court of Appeal for Eastern Africa at Nairobi.

No. 17. President's Notes of Arguments at the hearing of the Appeal. 2nd June, 1955— *continued.*

Summary of facts.

No certain inferences to be withdrawn re intention to deceive.

Appellant took the view *bona fide* that not material to mention Cram Judgment in affidavit. Even if not correct no deceit intended. Only a mistake.

B. If Cram J. had stopped on jurisdiction certainly no need to inf. Hooper J.

Crucial part of case is what happened on 10th December.

Concede notice of appeal implies an appeal against whole judgment. Why did appellant gratuitously mention Cram Judgment if he meant to deceive on 10th December. On second occasion he identifies judgment.

Neither Committee or Court appreciated that Judge never gave appellant opportunity to open his case. Onus of proof on intention to deceive NOT established.

XX p. 191 (Record p. 112) " *This he refrained from doing.*" Nothing of the sort. He tried his best to do it.

COURT: He did refrain from disclosing *complete contents* unfair implication that he had a full opportunity of doing so and deliberately wouldn't take it.

Is court's approach was coloured by what Hooper J. felt about it.

XX p. 190 not a fair inference because it does not take into account that Judge said he had no time to read the Judgment then.

The second application was on the Criminal side. Directly a criminal matter at that time.

Therefore governed by Crim. P.C. and not C.P.C. therefore provision about readjudication in C.P.C. would not apply.

Kenya Civil Case 176/1954 Connell J. is against this.

Mr. Justice Cram's judgment on merits was not a final judgment. It was all *obiter res j.* should be raised by other side.

Court at p. 188 (Record p. 109) did not decide whether Cram J.'s judgment raised R.J. or not. If any doubt Court wrong in saying sec. 40 applied.

No sure or safe ground for an inference that appellant had an intention to deceive.

sec. 41 can't apply special jurisdiction neither does Sec. 42. Therefore Sec. 43 applies. cites an *Indian case* 1944 25 *I.L.R.* (*Lahore*) 408, 413. Whole case set out p. 185 & 186 of judgment (Record p. 108). Look at answers to questions. No sufficient reason for disbelieving.

Court: p. 84 (Record p. 73) Advocates Committee made an alternative finding. Not conceded by Supreme Court.

If not legally we to disclose Cram J's first affidavit cannot be professional misconduct.

re parties see *Crim. A.* 127 *of* 1952.

re costs. At least should have refund of costs paid in lower Court.

Don't ask for formal order against Advocates Committee. It might be nugatory.

Mr. REID: Arguments before this Court rather different to arguments in Supreme Court. In lower Court see page 181 and 185. See XX p. 181. XX p. 185. " We think it idle."

Court should have regard to Appellant's conduct as a whole.

If Cram Judgment relevant, within Indian Evidence Act duty to disclose it in affidavit. Supreme Court found it was relevant within Sec. 40 Indian Evidence Act. Submit they were right.

Hooper J. Would have had to decide whether matter was R.J. Woodrofee p. 410.

Sec. 40 is only a means of allowing evidence of the judgment to go in. At least there was the Connell judgment *res judicata.*

Appellant must have known danger of *res judicata.* Problem is facts and inferences in relation to whole juncture.

One or two legal points.

Advocates in best position to draw the inferences. Members of the same brotherhood.

In re a Solicitor 1945 I K.B. 368 at p. 373 and 4. Finding of fact covers inference as well. A secondary fact. Finding in this case was that solicitor had failed to make a reasonable enquiry.

Adjourned to 2.30 p.m.

(Sgd.) J. H. B. NIHILL, P.

2.30 p.m.

Bench and Bar as before.

REID continues his reply :—

1955 2 W.L.R. 418 at p. 409. Here we have two unanimous concurrent findings. To interfere there must exist *a very distinct error.*

Standard of proof. Something less than R.D. but agree more than mere balance of probabilities.

Cases : *In R.F. Hordwich* 1883 12 L.R. K.B. 148 at 149.

A reputation of an advocate can safely be left in the hands of a committee. No strong case of a distinct error has been shown.

re XX p. 190 even if this should not have been put in this way could make no difference on all the circumstances.

XX 173 (Record p. 100) perhaps court were under wrong impression that there must be a report within 14 days : this amendment came in after material date. " then it was " " shall report."

PRESIDENT : there was also the point that court overlooked Mrs. S. statement that her ex employer had reported XX Cram J. at p. 148.

WORLEY V-P. : Do you agree that if this matter had been *inter partes* no obligation on appellant to disclose a judgment.

REID : Yes, but this was an *ex parte* application. 2 other small points.

(a) that proceedings in some way unfair because no formal charge. Appellant had the gravamen of the charge and Mr. Hooper's memoranda see p. 14. Not suggested any misconduct in bringing second proceedings. Only that he tried to smother first proceedings.

In Her Majesty's Court of Appeal for Eastern Africa at Nairobi.

No. 17. President's Notes of Arguments at the hearing of the Appeal. 2nd June, 1955—*continued.*

Civil Application No. 1 of 1955. see para 13 of Woman's affidavit.

O'DONOVAN : objects.

REID : date of affidavit 20. 12. 54. Advocates Committee proceedings Jan. 1955. See para. 13 of affidavit.

COURT : Can you show us that this affidavit was shown to Appellant at trial.

REID : I will try and do so to-morrow. Common ground. Duty to disclose Cram J's judgment at earliest possible opportunity.

Notice of Motion was ex parte.

Suggested that he had drafted it *inter partes*. See Appellant's answers at Committee pages 54 and 55. Note Appellant's equivocation. also p. 57.

Original application at p. 161 (Record p. 136). Whatever the position it was dealt with as an *ex parte* application. Supplementary affidavit. 14/12. Appellant then knew proceedings *ex parte*. Substance of defence now is that he intended to disclose Cram Judgment and did so as far as he could.

There is a difference between drawing an affidavit which does not mention judgment and drawing one expressly designed to conceal it. I submitted this to both tribunals. See p. 15 (Record p. 7) First affidavit. See also p. 31 (Record p. 36) second affidavit.

re What happened on 10th December. XX p. 81 very casual.

Now 15th December : Gave case number. Advocates Committee dealt with this. All this noted in Supreme Court judgment.

Adjourned to 2.30 p.m.

(Sgd.) J. H. B. NIHILL P.

3rd June, 1955—

3.6.55.

Bench and Bar as before.

REID *continues* :

See XX at p. 46 cf. p. 89. p. 110 at X.

See also p. 104 line 15. 120.

To sum up : Quite clear that Mr. Bhandari always regarded Cram's judgment as final on the merits.

re appearance on 15th December. It was because judge insisted on production of correspondence that Bhandari gave case number.

Inferences drawn should be related to the whole of the papers.

Bhandari mentioned case file in relation to the Governor's consent—not in regard to judgment. See para. 5 on page 13. This was Mr. Bhandari's Opportunity to say to the judge you never gave me a chance to tell you about Cram judgment. He did not.

Para. 6 on page 14 evasive answers. Concealing full circumstances until dragged out of him. Hoping Mr. Hooper would accept something which was not in fact true.

Para. 3 page 13 the crux. *None of those things ever said.* admitted facts.

On this was it an unreasonable inference to draw that there was an intention to deceive by concealing Cram J. Any error which might be

thought to have been made by Supreme Court would not affect main result.

Never asserted that any errors made by Advocates Committee. In view of concurrent findings this Court could only depart unless distinct errors found.

Mr. O'DONOVAN: Only function of Advocates Committee is to determine whether there is a *prima facie* case. More parallel to a P.I. which makes this Court first court of appeal.

The crucial finding of fact is in Supreme Court judgment. This court in no way inferior to Supreme Court in evaluating. Advocates Committee report.

re Standard of proof. Maintain W.R.D. If there was nothing wrong in launching second proceedings nothing wrong in allowing his client to continue to assert C. case contrary to Cram J's findings.

Matters not relevant need not be put in affidavit Reid says arguable. If so then Bhandari justified in omitting. Admitted there was no opening.

Judge found out for himself. Can't assume that Appellant would not have told all.

re Sec. 40. Whether affidavits were deliberately designed to suppress judgment. What could Mr. Bhandari possibly gain by all this.

COURT: Advocates Committee has power to admonish, therefore it has power to determine. Amendments to Advocates Ordinance came into force on 1st February 1955. Those proceedings completed on 31st January under amended Ordinance Committee could only report to Supreme Court.

Judgment Reserved.

(Sgd.) J. H. B. NIHILL P.

11.6.55.

11th June, 1955.

Bench and Bar as before.

Judgment of the Court read by me. Appeal dismissed with costs.

(Sgd.) J. H. B. NIHILL,
President.

No. 18.

Judgment.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI.

JUDGMENT.

NIHILL—President.

This is an appeal by an advocate practising in Kenya from a judgment of the Supreme Court of that Colony given in proceedings taken under the Kenya Advocates' Ordinance consequent on a report laid before the

In Her Majesty's Court of Appeal for Eastern Africa at Nairobi.

No. 18. Judgment. 11th June, 1955— *continued.*

Court by the Advocates' Committee in accordance with the provisions of Section 9 (3) (iii) of that Ordinance. The Supreme Court after considering the evidence taken by the Committee and the report, and having heard Counsel for the Committee and for the advocate, arrived at a finding that the advocate had committed professional misconduct in that he had intended deliberately to mislead a Judge of the Supreme Court. The advocate was ordered to be admonished. In effect this finding endorsed a finding by the Advocates' Committee contained in its report which was expressed in the following terms:

> " Accordingly, the Committee find that it is fully established " on the evidence, that the Respondent intended to deceive and " mislead the Court and that therefore a *prima facie* case of " disgraceful and dishonourable conduct inconsistent with his duty " as an advocate has been made out."

In one respect only did the Supreme Court differ from the Advocates' Committee Report in that it was prepared to accept the advocate's explanation that the false statement made in paragraph 2 of Mrs. Shantaben's affidavit dated 29th November 1954 that her employment pass was " still valid and current " (that is to say that it had not expired by effluxion of time) was due to a genuine error by the advocate and did not justify the inference that in this respect he had an intention to deceive.

The facts leading up to and surrounding this whole matter are so fully set out both in the Advocates' Report and in the judgment appealed against, that we do not propose to set them out again in detail. In truth so far as primary facts are concerned there was no conflict either before the Committee or the Court because the Appellant's advocate accepted the facts stated by Mr. Justice Hooper in his two memoranda sent to the Registrar of the Supreme Court under dates 17th and 20th December which were supported by an affidavit sworn by the Judge on the 28th January 1955. The Committee accordingly proceeded on the facts as stated in the memoranda but excluded from consideration all expressions of opinion or impressions contained in the memoranda.

This was apparently done because Mr. Justice Hooper had expressed his reluctance to give evidence before the Committee and so submit himself to cross-examination, and it is clear from the record that Mr. O'Brien Kelly, the advocate's counsel, was content with this compromise.

Before leaving the facts we should perhaps point out two matters in which the Supreme Court did go a little wrong when stating them. They are in our opinion, minor and unimportant.

(a) In stating that Regulation 22 (4) (b) of the Immigration Regulations contained a requirement that where a person to whom a temporary employment pass had been issued left such employment he was required to report the fact to the Principal Immigration Officer within fourteen days and that if he failed to do so his temporary employment pass was deemed to have expired. The Court here must have been referring to an amendment to

the Principal Immigration Regulations which came into force on the 23rd of December 1954 (see G.N. No. 1818 of 1954). This amendment was therefore not in force at the date of the Deportation Order made against Mrs. Shantaben or on the date when she swore her first affidavit. The Regulation as it stood on the material dates was as stated by Cram J. in his judgment in Civil Case No. 675 of 1954, namely as follows :—

> " If the person to whom such pass was issued does not " continue therein he shall report the fact to the Principal " Immigration Officer, and, if he fails to report his temporary " employment pass shall become void."

Incidentally, the date of Deportation Order was the 10th of April, 1954, and not in December, 1953 as stated at the top of page 9 of the Supreme Court judgment. This, however, is clearly a slip, because the correct date appears in other parts of the judgment. Mr. O'Donovan has conceded that the requirement in the Regulation as it stood before the 1954 amendment must be construed as meaning that a person had to report the fact that he had left the employment covered by his temporary employment pass within a reasonable period. If this be accepted the mistake made by the Supreme Court in concluding that Mrs. Shantaben's employment pass had expired and become void *ipsa lege* within fourteen days of the 24th of June 1953 the day on which she left her employment is of little significance, and does not really affect the validity of the Court's observation that it was contrary to the plain words of the relevant Regulation to state in the supplementary affidavit sworn on the 14th of December 1954 that the employment pass was valid and current on the 10th of April, 1954.

(b) Objection has been taken by the advocate's counsel that on page 25 of the Supreme Court judgment the Court has referred to one of Mr. Justice Hooper's " impressions," which is contrary to the understanding arrived at between the parties at the beginning of the hearing before the Advocates' Committee that " impressions " should be excluded from consideration. The point under consideration by the Supreme Court in this part of its judgment is whether, when the advocate did mention the existence of the Cram judgment to Mr. Justice Hooper on the 8th December, he brought the out the point that Mr. Justice Cram had given judgment on the merits.

It is true that the Court has referred to an " impression," but their Lordships went on to refer also to what is a fact, because it is stated by Mr. Justice Hooper in his memorandum that he is sure that at no time was he told " directly or indirectly " or in any way what-soever by the advocate that another Judge of the Supreme Court had already ruled against his client on all the points on which he was asking Mr. Justice Hooper to rule

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in her favour. It is clear, therefore, that the lapse made by the Court in referring to an " impression " is quite immaterial.

As we have already said, the primary facts are not in dispute. The whole issue in this appeal is whether the inferences drawn from these facts by the Advocates' Committee and the Court below can be said to be reasonable ones and free from error. The Advocates' Committee consisted of the Attorney General and the Solicitor-General of Kenya and two senior practitioners. Mr. O'Donovan for the advocate has addressed us at length on the standard of proof required to establish professional misconduct and on our function as an Appellate Court in a proceeding of this nature. He has submitted that since these proceedings involved the application of penal sanctions, the standard of proof must be as high as in a criminal case, and that since the advocate's explanation is not an impossible or improbable one the Committee and the Court had no right to reject it even if not wholly assured as to its truth. We agree that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities. That it is not the same thing as saying that the allegation must be proved beyond any reasonable doubt. We think the standard required should approximate to the kind of standard a civil court would look for before finding against a party on issue of fraud. Certainly there is authority to show that proceedings of like disciplinary committees in England are not governed by the rules of criminal law, whether or not such proceedings can properly be described as quasi criminal. See for example *In re A Solicitor* reported in 1945 L.R.K.B. at page 368. The following passage is taken from the judgment of the Court at p. 374.

> " This brings us to a contention, most strenously argued by " Mr. Paull, that proceedings before the disciplinary committee are " governed by the rules of criminal law, or that such proceedings " are, at any rate, quasi-criminal. On this footing he suggested " that the proceedings were irregularly conducted in certain " respects. Whether the proceedings can properly be described as " quasi-criminal or not, in our opinion there is nothing in the " statutes or rules which binds the disciplinary committee to the " rules of criminal law."

Likewise there is nothing in the Kenya Advocates Ordinance. In the much older case of *In re Hardwick A Solicitor* 12 L.R. (1883–4) Q.B. 148 the Court of Appeal held that when the High Court makes an order ordering a solicitor to be struck off the rolls for misconduct, it does so in the exercise of a disciplinary jurisdiction over its own officers, and not of a jurisdiction in any criminal cause or matter.

In any event Mr. O'Donovan has not been able to show us that either the Committee or the Court applied too low a standard of proof. It is quite apparent from the long and careful report submitted to the Court that the Committee appreciated that the crux of the case turned on the

issue of intention and that they applied correct principles before coming to a finding. Neither has Mr. O'Donovan been able to show us, apart from the two minor matters mentioned above, anything in the nature of a misdirection on the evidence either by the Committee or the Court.

Mr. O'Donovan has also argued that because the primary facts are agreed we are in just as good a position as the Court to draw a correct inference. That may be so as far as the Court hearing is concerned, but it must not be forgotten that the Committee had the great advantage of studying the advocate's demeanour when he gave his evidence.

We are left then in this position that, the facts being agreed, we are asked to say as an Appellate Court that the adverse inferences drawn from these facts are so patently unjustifiable, that it is our duty to intervene. This brings us to consideration of the question as to what is the function of this Court in a proceeding of this nature ? Again we cannot do better than to go for guidance to the case of *In re A Solicitor* cited above and to quote from a passage in the judgment at p. 373 :—

> " It is important to consider the attitude which the Court of " Appeal ought to adopt towards a second re-investigation of the " disciplinary committee's findings of fact. There are two " reasons for special caution. In the first place the disciplinary " committee of today is a ' specialized tribunal,' created by " Parliament to deal with questions of professional duty peculiarly " within the knowledge of the profession itself, for that reason " constituted of members of that profession specially selected for " their knowledge, experience and position by the Master of the " Rolls (who in one sense is the head of that profession), or in his " absence by the Lord Chief Justice. As Lord Hewart C.J. said, " the intention was to make solicitors as far as possible masters " in their own house (*In re a Solicitor* (I)). The second reason " is that we ought to apply the general principle on which the " House of Lords acts in regard to appeals from concurrent " findings of fact of the two lower courts, viz., that unless such " findings are vitiated by some error of law, the House will very " rarely interfere with the findings of the first court. In " considering the scope of the first principle we see no reason " why the conclusions of fact reached by the solicitors' statutory " tribunal should be given any less weight than the decisions on " fact of a judge of the High Court sitting without a jury. In " regard to the second principle it is enough to refer to three " decisions of the House of Lords. *In Owners of P. Caland* v. " *Glamorgan SS. Co. Ltd.* (1) and *McIntyre Bros.* v. *McGavin* (2), " Lord Herschell L.C., held that it was not the practice of the " House on Appeal by way of rehearing to differ from concurrent " findings of fact in two courts below, unless both courts ' have so " ' distinctly erred as to justify (their) Lordships in saying that " ' the concurrent findings of these two courts ought not to stand '."

Mr. O'Donovan has made the point that the profession in Kenya is not armed by statute with such extensive powers of disciplinary control as pertain to the Law Society in England and that the wording of the

Advocates Ordinance shows specifically that the function of the Committee is merely to find a *prima facie* case and then to report. We concede this but the analogy which he sought to draw between a preliminary investigation undertaken by a Magistrate which ends in a committal for trial is clearly unsound. The proceedings in the Supreme Court on reception of the report are in no way comparable to a trial in first instance for no evidence is taken unless the Court sees fit to take further evidence. Its statutory duty is to consider the evidence taken by the Committee and the report. In fact, its function is much more akin to an exercise of a confirmatory or revisional jurisdiction than anything else. In spite of the use of the expression *prima facie* in the Ordinance we see no reason why a decision on facts by the Committee should carry any less weight than a decision on fact by a Judge sitting in first instance. If we are right in this, it follows that our status is nearer to that of a second appellate tribunal rather than a first. That being the case we are fully persuaded that it must be shown that the Committee and the Court have so " distinctly erred " as to justify us in saying that the concurrent findings of fact of these two tribunals ought not to stand.

Mr. O'Donovan to whom we are greatly obliged for his painstaking examination of the evidence and his careful argument, has been hard put to it to show where anything amounting to a distinct error lies, and in attempting to do so it appears to us he has been forced in this Court to change somewhat the nature of the Defence. At least from our study of the notes of the arguments in the Court below we can find no indication that in the Supreme Court he made the clear distinction which he has made before us that although there was no duty on the advocate to disclose the Cram judgment in the affidvaits there was a duty cast upon him to disclose it subsequently to Mr. Justice Hooper before he ruled on the motion for an order *nisi*. We are unable to say whether the distinction was made before the Advocates' Committee, because the addresses of counsel are not included in the record. Mr. O'Donovan has argued strongly that the judgment of Mr. Justice Cram was not relevant within the meaning of Section 40 of the Indian Evidence Act and therefore there was no obligation to disclose it in the affidavits. The Supreme Court held it was relevant, but whether the Court was right or wrong on that issue a reference to the judgment shows that the Court did not decide the issue of disclosure on a narrow ground but on the wider aspect, which is now conceded before us for the first time, that there was an ethical obligation on the advocate to disclose to Mr. Justice Hooper at some stage before he was asked to exercise a discretionary power. As the case was not argued before the Supreme Court in precisely the same way as before us it is not surprising that the Supreme Court did not come to an express finding as to whether or not a legal obligation rested on the advocate to disclose the Cram judgment in the affidavits.

For ourselves we see no reason to decide this narrow issue. Indeed we will assume that Mr. O'Donovan may be right, then what is the outcome ? Surely this, that if the advocate chose to make no disclosure in the affidavits supporting the application before Mr. Justice Hooper, then he must have known that a heavy responsibility lay on him to bring

the whole judgment of Mr. Justice Cram to Mr. Justice Hooper's attention at the very first opportunity. On the facts as agreed it is clear that he did not. Two tribunals looking at the picture as a whole have come to the conclusion that the advocate never intended to make a full disclosure to Mr. Justice Hooper if he could help it, and we regret that we find it impossible to say that this conclusion or inference from the facts was unjustifiable or unreasonable. We have not overlooked Mr. O'Donovan's argument that since the advocate was never heard on the merits of his application he had never any real opportunity of discharging his ethical duty of fully disclosing the scope and effect of Cram J's judgment; this aspect of the defence has naturally received more emphasis before us consequent from the defence conceding for the first time that this ethical duty existed. It is clear, however, that this point was not overlooked either by the Committee or the Court and both tribunals have given their reasons why they believed that it was not for lack of opportunity that full disclosure was never made. We cannot say that this conclusion was unreasonable. Even if it be assumed the advocate had some excuse for not pressing the matter of the judgment in his first appearance before Mr. Justice Hooper, that was not his only opportunity of doing so. There were other opportunities but they were not taken. Can it be said, therefore, that the inference of deliberate suppression is unreasonable when it is remembered (a) that when the advocate mentioned the judgment on the 10th December it was for the purpose of explaining why he had come before Mr. Justice Hooper on a different procedure, (b) that when the advocate gave the Judge the case file number on the 15th December, there was again no disclosure as to the scope and effect of the Cram judgment but merely a reference to the fact that on the file the Judge would find all the papers relating to the promise by the Government not to execute the deportation order during the currency of the legal proceedings, and (c) that the advocate drafted the supplementary affidavit on a date between his first and second appearances before Mr. Justice Hooper.

For the above reasons we are constrained to dismiss this appeal.

There is one observation which we wish to make on the title to this appeal. It is in the form of an appeal between parties, the advocate being the Appellant and the Advocates' Committee the Respondent. We raised this point during the hearing but it was not pursued. It must not however be assumed that we accept the title as being necessarily correct. We observe that the recognised form for appeals to the High Court in England from Orders of the Disciplinary Committee under the Solicitors Acts, does not intitule the appeal as between parties: the title used is:

"In the matter of C. D. a Solicitor

"and

"In the matter of the Solicitors Acts, 1932 to 1941."

(see Atkin's Encyclopædia of Court Forms and Precedents: Vol. 14 p. 616 Form 123). The Notice then is addressed to the Registrar of Solicitors

In Her Majesty's Court of Appeal for Eastern Africa at Nairobi.

No. 18. Judgment. 11th June, 1955—*continued.*

and to the original applicant. Under the Acts the Registrar of Solicitors has the right to be represented on the appeal by counsel, as has the Advocates' Committee under the Kenya Ordinance.

The appeal is dismissed with costs.

(Sgd.) J. H. B. NIHILL P.
(Sgd.) N. A. WORLEY V-P.
(Sgd.) O .C. K. CORRIE J.

Nairobi,
11th June, 1955.

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No. 19. Order dismissing Appeal. 11th June, 1955.

No. 19.

Order dismissing Appeal.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI.

Civil Appeal No. 26 of 1955.

IN THE MATTER OF THE ADVOCATES ORDINANCE, 1949.

20

Between

MAHARAJ KRISHAN BHANDARI ... ... *Appellant*

and

ADVOCATES COMMITTEE ... ... *Respondent.*

In Court this 11th day of June, 1955.

Before the Honourable the President (Sir BARCLAY NIHILL) the Honourable the Vice-President (Sir NEWNHAM WORLEY) and the Honourable Mr. Justice CORRIE a Judge of the Court.

This appeal coming on for hearing on the 1st 2nd and 3rd days of June, 1955, in the presence of Mr. O'Donovan and Mr. A. R. Kapila, 30 Advocates for the Appellant and Mr. Reid, Crown Counsel, Counsel for the Respondent it was ordered that this appeal do stand for judgment and upon the same coming for judgment this day IT IS ORDERED that this appeal be and is hereby dismissed with costs.

GIVEN under my hand and the Seal of the Court at Nairobi the 11th day of June, 1955.

C. G. WRENSCH,
Registrar.

L.S. Issued on 21st day of June, 1955.

No. 20.

Order granting conditional leave to Appeal to Privy Council.

(*Not Printed.*)

In Her Majesty's Court of Appeal for Eastern Africa at Nairobi.

No. 20.

No. 21.

Order granting Final Leave to Appeal.

No. 21. Order granting Final Leave to Appeal. 23rd September, 1955.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI.

Between

MAHARAJ KRISHAN BHANDARI, an Advocate ... ... *Appellant*

and

THE ADVOCATES COMMITTEE ... ... *Respondent.*

IN CHAMBERS this 23rd day of September, 1955.

Before the Honourable the President (Sir BARCLAY NIHILL)

ORDER.

UPON the application presented to this Court on the 13th day of September, 1955 by Counsel for the above-named Applicant for Final Leave to Appeal to Her Majesty in Council coming up for hearing this day AND UPON READING the affidavit of Mr. Bryan O'Donovan of Nairobi in the Colony of Kenya, Advocate, sworn on the 12th day of September, 1955 in support thereof AND UPON HEARING Counsel for the Applicant and Mr. A. C. B. Reid, Crown Counsel and an advocate for the Advocates Committee IT IS HEREBY ORDERED that the application for final leave to appeal to Her Majesty in Council be granted AND IT IS FURTHER ORDERED that the cost of this application be costs in the appeal to Her Majesty in Council.

Dated at Nairobi this 23rd day of September, 1955.

(Sgd.) C. G. WRENSCH,
Registrar,
H.M. Court of Appeal for Eastern Africa.

Issued this 23rd day of September, 1955.

Other Documents.

No. 22.
Extract of Record of Civil Case No. 675 of 1954.
22nd October, 1954.

No. 22.

Extract of Record of Civil Case No. 675 of 1954.

IN HER MAJESTY'S SUPREME COURT OF KENYA
AT NAIROBI.

Civil Case No. 675 of 1954.

SHANTABEN W/O JAGABHAI KALABHAI PATEL ... ... *Plaintiff*

versus

THE ATTORNEY GENERAL OF THE COLONY AND PROTECTORATE OF KENYA REPRESENTING THE PRINCIPAL IMMIGRATION OFFICER OF KENYA ... ... *Defendant.* 10

July 19*th* 1954.

Appearance entered for the Defendant.

W. S. O. DAVIES,
Deputy Registrar,
Supreme Court of Kenya.

July 28*th*, 1954.

Defence filed.

W. S. O. DAVIES,
Deputy Registrar,
Supreme Court. 20

6*th October*, 1954.

Bhandari.
Webber.
Hearing fixed for 22nd October, 1954. 10.30 a.m.

W. S. O. DAVIES,
Deputy Registrar.

22*nd October* 1954.

Bhandari for Plaintiff.
Hayworth for Defendants.
COURT: Fiat on file. Jurisdiction. 30
BHANDARI: Declaratory suits. Order 2, rule 7. Petition of Rights Ordinance.
Hayworth: Status of subject. Cap. 7; as such subject always had a right to bring a suit against Crown to rule on *status* viz. Declaration of Legitimacy.
BHANDARI: Petition of Right. Fiat is essential.
ORDER: Issue of jurisdiction reserved for further argument.
BHANDARI: Preliminary points to raise. Satisfactory answer could be given. Facts admitted.

Asks leave to amend paragraph 5 to read 15.6.53 instead July, 1953.
HAYWORTH : I do not object and I admit it.
ORDER : Amendment of paragraph 5 of plaint accordingly.

A. L. CRAM.

Bhandari *continues* :—
Letters put in by consent (copy) Exhibit 1.
Shs. 40/– sent in reply.
HAYWORTH : I admit that.
Bhandari : Pass not issued. I admit that. Changed mind.
Date money sent not known. Find out and put in letter by Principal Immigration Officer (copy) Exhibit 2 Admitted correct by Hayworth.

Having entered Colony, entered lawfully and at no stage cancelled pass or issued any notice stating Plaintiff prohibited immigrant. On finding on fact Principal Immigration Officer cannot say she is a prohibited immigrant. Section 5 (3), Section 5 (f)—only in one case found ; deemed ; safeguard confirmation of Governor required. Must find must make a decision. Section 5 declares or say who are prohibited immigrants other than permanent residents. Then follows a list. Burden of proof. Can only discharge it if asked if he is a prohibited immigrant. Can only be declared at time of his entry.

Section 33 Regulations. Regulation 34. Regulation 35. Regulation 36. No other provisions made except where person wishes to enter the Colony.

Section 6 Prohibition of entry.

Section 5 (3) : No question of " deeming." One of " finding." He may serve immigrant who arrives with a notice. But a person on whom :—An Appeal shall be from finding. P.R. Regulations Government Notice 1943/1953. R. 2 (ii). No finding at all. Then to Resident Magistrate's Court and appeal. In absence of " finding " cannot appeal.

BHANDARI : I wish to substitute by way of amendment the word " found " for declared in paragraph 9 of plaint.
HAYWORTH : No objection.
ORDER : Accordingly.

A. L. CRAM.

Original Ordinance, finding ought to be communicated. My client at this stage knows nothing of the finding of the Principal Immigration Officer, all she knows is she is a prohibited immigrant. I produce the order, Exhibit 3. Nothing of finding ever communicated.

BHANDARI : I will put client into the witness box.

P.1 : Affirmed : SHANTABEN W/O JABAGHAI KALABHAI PATEL :

I claim to be a British subject. I am married to a permanent resident. I am a School teacher. I entered Colony on 16th July, 1951 on a Temporary Employment Pass No. 3146. I produce it, Exhibit 4. I was a widow before I entered. I worked with Cutchi Gujarati Union. I then got married, J. K. Patel in Court, on 15th June, 1953. I produce marriage certificate, Exhibit 5. I applied for a dependent's pass, on 27th July 1953. I received

Other Documents.

22. Extract of Record of Civil Case No. 675 of 1954. 22nd October, 1954— *continued.*

a letter from Principal Immigration Officer that my application was approved Exhibit 1 is a copy. As a result I gave Shs. 40/- and my passport to De Souza and Patel, Advocates, with instructions to send them to Principal Immigration Officer as soon as I got the letter. The next day. I left the service of Cutchi Gujarati Union on 24th June, 1953. I left because I was not getting on well with the employers. The School authorities intimated they would inform Principal Immigration Officer. I do not know if they did do so. My passport and money were returned by a letter Exhibit 2, which is a copy of the original. After this letter I received no further letters from the Principal Immigration Officer. So far as I know they have not received any letters. I saw De Souza and Patel. I have last been to their Office when I got the deportation order. That is the only time. They have never told me about any other correspondence. My husband used to go to these Advocates. He has not told me of any letters which De Souza and Patel might have received. I then received a deportation order, Exhibit 3; I was served with Exhibit 3. Then I went to my Advocates, De Souza and Patel. We had no discussion with them. Then I went and consulted Mr. Bhandari and he wrote to Governor. (copy agreed correct) and I received this reply (all Ex. 6). I saw the letter to the Govenor, Exhibit 6, before it was sent. It was sent on my instructions. I received no letter from the Principal Immigration Officer finding me a prohibited immigrant. I received Shs. 250/- per month from Cutchi Gujarati. I have a daughter when I came here. She is now eighteen years of age. She is not working. I am working now in Vohra Nursery School. I now receive 225/- per month. I had a room when I came here. My husband had also a room. I have now two rooms. My husband and I have no difficulty in maintaining myself. I ask for a declaration that I am not a prohibited Immigrant. My Temporary Employment Pass has never been cancelled. It has never been varied to permit me to work for the Vohra Nursery School. I was unemployed for two months. I had applied for a Dependant's Pass. I think I am here on a Dependant's Pass. I never had one. I have not got one now. I know that if one takes up other employment one needs to have a Temporary Employment Pass varied, else it is invalid. I am a lawful resident in the Colony.

Questioned by Court:

I have seen Mr. Pearce before. I was served with the deportation order. After my money was returned with passport I went to enquire of the Principal Immigration Officer why he was refusing my pass. It was this year. I demanded of him the reason. He flatly refused to give me any reason. He said I had to return to my country. He would not tell me why. I asked. He refused to tell me. I asked my advocates to write to the Immigration, Hirabhai Patel of De Souza and Patel. I have no knowledge if he wrote. I did not ask. I got no reply. When I got deportation order I knew the reason was that the Immigration Authorities did not want me here.

Cross-examined : HAYWORTH :

Q. Did you write to the Committee of the Cutchi Gujarati School ?—*A.* Yes, in writing.

Q. Did you receive a communication from the Committee ?—*A.* Yes. A written reply. I produce it Exhibit " A." (Translated.)

Q. You said the School Authorities said they would intimate to the Immigration Authorities ?—*A.* Yes.

Q. The letter makes no mention of it ?—*A.* It was oral. It was when I tendered my resignation.

Q. Did the letter come after the conversation ?—*A.* Yes.

Q. Did your letter tendering resignation come before your talk with the Authority ?—*A.* Before my letter I had the talk.

Q. You first offered to resign orally ?—*A.* Yes. The School Authority gave no undertaking in writing. I trust them. The Committee . . . One especially—Mohanbhai. He could confirm my statement.

Q. Who told you you would be issued with a dependant's pass ?—*A.* There was a letter. I was quite confident I would get a Pass because I had married a permanent resident. I received the letter through my advocates I am not sure of the date I sent money and passport through my advocates, next day after receipt of the letter. I sent it personally, I went there.

Q. Your husband went on certain occasion to see your advocates and the Immigration Authorities ?—*A.* On one occasion my husband was orally called by the Immigration Authority and told to send me off to India.

Q. Did you have a conversation with him ?—*A.* He repeated what had taken place between himself and the Immigration Officer.

Q. As a result you knew you had to leave the Colony, or were wanted to by the Principal Immigration Officer ?—*A.* On a point of law I said I was residing here on my right.

Q. (Repeated) ?—*A.* Yes.

Q. You saw Mr. Pearce. Did you ask to see him ?—*A.* Yes, I wanted to see him.

Q. What did you ask him ?—*A.* I asked him to show the grounds for not granting me a Dependant's Pass. He replied " You wont get the Dependant Pass. I shall be obliged to take and force you to jail and warn you once again you will have to leave this Country."

Q. You then knew the Immigration Authorities wished you to leave the Country ?—*A.* Yes.

Q. Did you know why ?—*A.* I knew nothing whatever.

Q. Mr. Pearce said you had to leave the Country ?—*A.* Yes.

Q. Did you ask why you have to leave ?—*A.* Yes.

Q. Did Mr. Pearce say anything else ?—*A.* No. Except he would not show me any reason and he would not issue me with any pass. That was after month of December, that being the deadline when I had to leave the Country. There was only one meeting with Mr. Pearce.

Other Documents.

No. 22. Extract of Record of Civil Case No. 675 of 1954. 22nd October, 1954—*continued.*

Re-examined : BHANDARI :

I had oral conversation with Committee members ; one only, Mr. Mohanbhai. He was a Committee member at that time. He said he would inform the Principal Immigration Officer on my behalf and also have my permit transferred. The bond is mentioned in the letter. It was furnished by the School. My salary is not paid for twentyfour days because the question of the bond is not settled. I took those words to mean that the Committee might have settled the matter with the Principal Immigration Officer, and transferred the permit and all was settled. I saw Mr. Pearce about one thing only, on what ground he wanted me to leave the Country and withhold the Dependant's Pass. If my Temporary Employment Pass is valid I should like to take advantage of it to remain.

R.O.D.W.
A. L. CRAM.

HAYWORTH : I concede a report was made by School, but both ought to report, Regulation 22 (4) (5). Letter put in by consent " B."

No. 23. Record of Miscellaneous Criminal Application 22/54 comprising :—

No. 23.

Record of Miscellaneous Criminal Application 22/54 comprising :—

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI.

Misc. Criminal Application No. 22 of 1954.

IN THE MATTER OF AN APPLICATION FOR A WRIT OF CERTIORAI AND AN APPLICATION FOR A WRIT OF MANDAMUS

and

IN THE MATTER OF THE IMMIGRATION (CONTROL) ORDINANCE, 1948 AND RULES MADE THEREUNDER.

JAGABHAI KALABHAI PATEL and Mrs. SHANTABEN W/O JABABHAI KALABHAI PATEL ... ... *Applicants.*

(*a*) Notice of Motion. 4th December, 1954.

(a) NOTICE OF MOTION.

TAKE NOTICE that this Honourable Court will be moved on 8th day of December, 1954, at 9.30 o'clock in the forenoon or so soon thereafter as counsel can be heard on behalf JAGABHAI KALABHAI PATEL and Mrs. SHANTABEN W/O J. K. PATEL (being persons interested in the decision

No. 23. Record of Miscellaneous Criminal Application 22/54 comprising :—

(*a*) Notice of Motion. 4th December, 1954—*continued.*

or an order of the Principal Immigration Officer and His Excellency the Acting Governor of the Colony of Kenya) FOR—

AN ORDER NISI directed to His Excellency the Acting Governor of the Colony of Kenya to show cause why a writ of certiorari should not issue removing into this Honourable Court and quash the Deportation Order made by the said Acting Governor on 10.4.54 on the said Mrs. Shantaben w/o J. K. Patel by virtue of his powers under section 9 of the Immigration (Control) Ordinance, 1948, or to show cause why a writ of mandamus should not issue to the said Acting Governor to cancel the Deportation order issued by him against the said Mrs. Shantaben J. K. Patel :

AND FURTHER FOR AN ORDER NISI directed to the Principal Immigration Officer of the Government of the Colony of Kenya to show cause why a writ of mandamus should not issue to him to grant to the said Mrs. Shantaben w/o J. K. Patel a Dependant Pass in terms of a letter issued by the said Principal Immigration Officer to the said Mrs. Shantaben w/o J. K. Patel under Regulation 21 (1) of the Immigration (Control) Regulations, 1948, on the grounds and reasons shown in the accompanying affidavits of JAGABHAI KALABHAI PATEL and Mrs. SHANTABEN W/O J. K. PATEL and further reasons and arguments to be offered at the hearing hereof :

AND ALL NECESSARY DIRECTIONS be given and that the costs of this Application be provided for :

DATED AT NAIROBI this 4th day of December, 1954.

(Sgd.) H. F. HAMEL,
Registrar,
Supreme Court of Kenya.

This Notice of Motion was taken out by—
BHANDARI & BHANDARI,
Applicants. Advocates,
Ibea Buildings,
Government Road,
Nairobi.

Advocates for the Applicants.

To be served upon—

The Principal Immigration Officer,
Department of Immigration,
Campos Ribero Avenue,
Nairobi.

And

His Excellency the Deputy Governor,
The Secretariat,
Nairobi.

Other Documents.

(b) Letter, Office of the Chief Secretary to Messrs. Bhandari & Bhandari.

No. 23. Record of Miscellaneous Criminal Application 22/54 comprising :—

(*b*) Letter, Office of the Chief Secretary to Messrs. Bhandari & Bhandari. 21st May, 1954.

Office of the Chief Secretary,
P.O. Box 621,
Nairobi, Kenya.

21st May, 1954.

A. IMM. 75/219/19.

Gentlemen,

I am directed to refer to your letter No. GB.3/1954 of the 4th May, 1954, addressed to His Excellency the Governor, and to say that your submissions have received careful consideration but it is regretted that the Deportation Order on Mrs. Shantaben w/o Jagabhai Kalabhai cannot be revoked.

2. I am to add that in the event of proceedings being instituted in the Supreme Court, the Deportation Order will be suspended until such time as the outcome of such proceedings is known. You are requested to adduce proof of such proceedings at an early date. Otherwise of course, the Deportation Order will be executed.

I have the honour to be,
Gentlemen,
Your obedient servant,

P. C. NANCARROW,
for *Administrative Secretary.*

Certified True Copy.

W. H. LIVERSIDGE,
Assistant Secretary,
16th December, 1954.

Messrs. Bhandari & Bhandari,
Advocates,
P.O. Box 1591,
Nairobi.

(c) Proceedings.

Other Documents.

(Copy)

No. 23. Record of Miscellaneous Criminal Application 22/54 comprising :—

(c) Proceedings. 10th December, 1954.

COLONY AND PROTECTORATE OF KENYA.
IN HER MAJESTY'S SUPREME COURT OF KENYA
AT NAIROBI.

Misc. Criminal Case No. 22 of 1954.

IN THE MATTER OF AN APPLICATION FOR A WRIT OF CERTIORARI AND MANDAMUS

and

IN THE MATTER OF THE IMMIGRATION (CONTROL) ORDINANCE 1948 AND THE RULES MADE THEREUNDER.

JAGABHAI KALABHAI PATEL
MRS. SHANTABEN W/O JAGABHAI KALABHAI PATEL *Applicants.*

10.12.1954.

Mr. Bhandari for applicants.

I draw Mr. Bhandari's attention to the fact that the affidavit of the 29th November, 1954, is inaccurate it being quite clear that the statements in paragraph 2 are not borne out by Exhibit "A," the Temporary Employment Pass itself, which expired on the 15th July, 1954, since the holder entered the Colony on the 16th July, 1951, the pass being valid for three years only.

Mr. Bhandari also states that the reason why the Deportation Order of the 10th April has not been complied with is that he has been in touch with the authorities who agreed to suspend executing the Deportation Order.

Mr. Bhandari undertook to produce correspondence in his possession to prove this point. I adjourn this application till Wednesday the 15th inst.

(Sgd.) C. A. HOOPER,
Judge.

15th December, 1954.

15.12.1954.

Mr. Bhandari files a supplementary affidavit correcting the mistake in the affidavit of the 29th November last. Mr. Bhandari fails to produce the full correspondence promised on the previous application with regard to the suspension of the execution of the Deportation Order, but refers to Civil Case No. 675/54 which file, he says, contains all the papers. I adjourn the application till Friday the 17th instant.

(Sgd.) C. A. HOOPER,
Judge.

17th December, 1954.

17.12.1954.

Upon reference to the case file in Civil Case No. 675/54 I find that this matter has already been dealt with by Mr. Justice Cram in a judgment dated the 18th November, 1954, in which he dismissed the applicant's

Other Documents.

No. 23. Record of Miscellaneous Criminal Application 22/54 comprising:—

(c) Proceedings. 17th December, 1954—*continued.*

prayer for a Declaration that she is not a prohibited immigrant; and that Mr. Bhandari has given notice of appeal against this judgment. The true state of affairs has not been revealed to me by Mr. Bhandari. I have had to find this out myself by reading the case file.

Having failed before Mr. Justice Cram, Mr. Bhandari now seeks to re-open the matter before me, before any final decision is given by Her Majesty's Court of Appeal for Eastern Africa, by applying for a writ of certiorari and a writ of mandamus.

Paragraph 2 of the Affidavit of the 29th November contains a statement which is obviously untrue. The pass was not valid and had expired. Mr. Bhandari has sought to remedy this by the supplementary affidavit of the 14th December but the statement in paragraph 2 of this affidavit is contrary to Mr. Justice Cram's ruling that the applicant's Temporary Employment Pass was void, and had expired automatically before the period for which it was issued had elapsed. Mr. Bhandari must have known this: he argued the case before Mr. Justice Cram. I cannot understand how these affidavits could be sworn in the face of the facts and of the finding of Mr. Justice Cram, nor why Mr. Bhandari did not inform me that Mr. Justice Cram had decided the whole case against him. The matter was dealt with by Mr. Justice Cram with the agreement of the parties. I hold that the motion is premature to say the least, and is supported by affidavits not true in some particulars, which must have been known to Mr. Bhandari. The motion is dismissed with costs.

(Sgd.) C. A. HOOPER,
Judge.

In the Privy Council.

No. 39 of 1955.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

MAHARAJ KRISHAN BHANDARI
Appellant

AND

THE ADVOCATES COMMITTEE
Respondent.

RECORD OF PROCEEDINGS

HERBERT OPPENHEIMER, NATHAN & VANDYK,
20 Copthall Avenue,
London Wall, E.C.2,
Solicitors for the Appellant.

CHARLES RUSSELL & CO.,
37 Norfolk Street,
London, W.C.2,
Solicitors for the Respondent.

GEO. BARBER & SON LTD., Printers, Furnival Street, Holborn, E.C.4, and Cursitor Street, Chancery Lane.
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