

F.

10 pages.

149.

A member of the Bar has suggested that the attached judgment delivered by the Deputy Bailiff, as he then was, on the 26th March, 1985, should be submitted to the Editor of J.L.R. for possible publication.

This has been done.

In the meanwhile, a copy is now being circulated to subscribers to the Jersey Unreported Series.

ROYAL COURT

(Samedi)

26th March, 1985

Before: The Deputy Bailiff, Single Judge

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The Representation (1) of Michael Matthew  
Godfray Voisin and John Marshall;  
and (2) of John Campbell Boothman  
in the matter of an Order under  
Section 5 of the Extradition Act  
1873, concerning James R. Kaminski.

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Advocate R.J. Michel for M.M.G. Voisin  
and J. Marshall;  
Advocate K.S. Baker for J.C. Boothman (of  
Morgan Grenfell (Jersey) Ltd);  
The Attorney General, convened as "amicus curiae".

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**JUDGMENT**

DEPUTY BAILIFF: I am going to give my judgment arising out of yesterday's case. This matter comes before me by way of two representations. One is by Advocate Voisin and Mr. John Marshall, a member of his staff, and thus for the purposes of claiming privilege to be regarded as a professional person. The other is by Mr. J.C. Boothman, who is the custodian of records of Morgan Grenfell (Jersey) Limited, of 12 Dumaresq Street, St. Helier.

Both representations arise because of the request of the United States of America for the execution of a Commission Rogatoire relating

to the investigation by a Grand Jury before the United States District Court for the southern district of Ohio, Eastern Division, into certain allegations against Mr. James R. Kaminski. The request is dated the 1st October, 1984; at that time no indictment had been laid against Mr. Kaminski but an indictment was filed as a result of the Grand Jury's investigations before the Ohio Court on the 11th December, 1984. The Home Secretary, by virtue of Section 5 of the Extradition Act of 1873, which extends in turn to Jersey, made an order addressed to the Bailiff of Jersey to implement that section. The section is as follows: "The Secretary of State may, by order under his hand and seal, require a Police Magistrate or a Justice of the Peace to take evidence for the purpose of any criminal matter pending in any Court or Tribunal in any foreign state, and the Police Magistrate or Justice of the Peace upon the receipt of such order shall take the evidence of every witness appearing before him for the purpose, in like manner, as if such witness appeared on a charge against some defendant for an indictable offence and shall certify at the foot of the deposition so taken that such evidence was taken before him and shall transmit the same to the Secretary of State. Such evidence may be taken in the presence or absence of the person charged, if any, and the fact of such presence or absence shall be stated in such deposition. Any person may, after payment or tender to him of a reasonable sum of his costs and expenses in this behalf, be compelled for the purposes of this section to attend and give evidence, answer questions and produce documents in like manner and subject to the conditions as he may in the case of a charge preferred for an indictable offence provided that nothing in this section shall apply in the case of any criminal matter of a political character."

The date of the Home Secretary's order is the 26th January, 1985; as is customary, the Bailiff in turn directed the Magistrate to act on his behalf. Attached to the Home Secretary's order was a précis of the allegations and the information requested both by way of oral testimony and the production of documents.

On the 25th February, 1985, each representor was served with a summons which is in the following terms, addressed to Mr. Boothman, Mr. Voisin, or Mr. Marshall: "I hereby notify you to appear before the

Police Court sitting at Cyril Le Marquand House, The Parade, St. Helier, on Monday 18th March, 1985, at 9.30 a.m. at the instance of the Juge d'Instruction to give evidence in the Commission Rogatoire concerning Mr. James R. Kaminski and to produce there and then the documents which have been requested together with any documents in support of your evidence".

At the hearing on the 18th March, certain submissions were made and as a result the matter was stayed and now comes before me upon the representations; I should add that the National Westminster Bank (that is to say its Royal Square branch) was also included in the Commission Rogatoire, but the matters affecting them were disposed of by the Assistant Magistrate and do not concern me today.

So far as the representation by Advocate Voisin and Mr. Marshall is concerned, the two issues which I have to decide are as follows: First, was the Commission Rogatoire drawn in too wide terms; and secondly, even if it were, should I admit a list of questions which are sought to be asked and the documents sought to be produced that was, so I was told, handed to counsel for the first representors on Friday last, the 22nd of March? As for the bank, it does not take the same points and would abide by any order which I might make, merely because it seeks clarification and instructions from the Court.

For Advocate Voisin and Mr. Marshall, Mr. Michel has urged me to apply the principles laid down in a number of English cases which deal with civil proceedings and requests for Commission Rogatoires from foreign jurisdictions, because, he says, the statutes relating to the taking of evidence by Commission Rogatoire were not repealed in Jersey as regards civil matters by the Evidence (Proceedings in Other Jurisdictions) Act (1975), part of which, relating only to criminal proceedings was extended to Jersey by an Order in Council of the 18th November, 1983. I do not think it is necessary for me to rule on this point.

The 1873 Act is quite clear and applies in terms and is limited, as I have said, to criminal matters. It is true that there would appear to be two methods open to a foreign court to obtain evidence in

Jersey; one is under the 1873 Act, and the other under the 1975 Act, as extended. Nevertheless, the wording of Section 5 in the 1873 Act is clear: "Each person who appears before the Magistrate is like any other person in an ordinary criminal case and may be asked any relevant question and ordered to produce any relevant document by the Magistrate." But it is true to say, of course, that in ordinary proceedings before the Magistrate, each witness probably will have made a preliminary witness statement.

In the case such as the one before me, I am prepared, by analogy, to say that it might be preferable, but not necessarily essential, for a list of questions to be appended to the Commission Rogatoire as well as a list of those documents sought to be produced.

Should I, therefore, admit that list which was tendered last Friday? Again, by analogy, and looking at the case of Panthalu -v- Ramnord Research Laboratories Limited (1965) 2 All E.R. at p.921, and particularly the passage in the judgment of Sellars LJ at p.923, I rule that the list of the questions and the list of the documents to be produced shall be deemed to be part of the Commission Rogatoire; in doing so I am not ruling as to whether the terms of the Commission Rogatoire itself were too widely drawn and thus there is no need for me to reach a decision on the first question in the light of my present decision. Nevertheless I disallow questions 130, 131, 133, 134, 135, 136, 138, 139, 141, 142, 143 and 144 on the ground that the information which they are seeking is privileged; I further disallow questions 88, 89, 90 and 91 on the ground that they would oblige a witness, or might oblige a witness, to incriminate himself.

Further I have amended the list of documents slightly in relation to (J) and (K) so that at the end of paragraph (J) the words "relating to the above matter" shall be added and paragraph (J) will now read: "any and all other documentations related to James Kaminski relating to any of the above matters".

I turn now to the representation of Mr. Boothman; I am satisfied that the documents sought to be produced under paragraph 6 of the Commission Rogatoire are not so wide as to be labelled, using the term

Commission Rogatoire are not so wide as to be labelled, using the term which is commonplace, "fishing", and therefore should be answered as requested.

In accordance with the undertaking of the Ohio Court, the costs of this hearing of all counsel and parties will be paid for on a taxed costs basis by the Ohio District Court.

(Address by counsel on the matter of costs indistinct).

Well, alright if it's necessary I'll include in the order the costs of the Police Court, yes, certainly. I'm grateful to counsel; as counsel have seen I haven't dealt with the main point of whether the Commission Rogatoire is too wide but I think that I have dealt with it in a way which should protect all the parties concerned and also advance the interests of justice to which we are all committed. No doubt the question of Commission Rogatoire and the points you raised, Mr. Michel, which are distinct points - but I don't think I was called upon to answer them in the way this case went - will be raised again.

Authorities

R -v- Day (1908) 2 KB 333.

Extradition Act 1873.

Foreign Tribunals Evidence Act 1873.

RCA -v- Rauland Corporation (1956) 1 All ER 549.

re Westinghouse Electric Corporation Uranium Contract Litigation  
(1977) 3 All ER 703.

Penn-Texas Corporation -v- Anstalt (1963) 1 All ER 258.

R -v- Cardiff Corporation, Ex parte Lewis (1922) 2 KB 777.

Dicey and Morris Conflict of Laws (10th Ed'n) p.p. 89-94; 97-8; 1092-5.

Panthalu -v- Ramnord Research Laboratories Ltd (1965) 2 All ER 921  
at p.923.

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1A

IN THE ROYAL COURT OF THE ISLAND OF JERSEY  
(SAMEDJ DIVISION)

IN THE MATTER OF AN ORDER UNDER SECTION 5 OF THE  
EXTRADITION ACT, 1873

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R E P R E S E N T A T I O N

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JOHN CAMPBELL BOOTHMAN of Morgan Grenfell (Jersey) Limited, 12 Dumaresq Street, St. Helier, Jersey, C.I. has the honour to Represent to the Court:-

1. THAT on the 26th day of January, 1985 Leon Brittain, one of Her Majesty's Principal Secretaries of State by virtue of the power conferred on him by Section 5 of the Extradition Act 1873 of the United Kingdom authorised and required the Bailiff of Jersey to take and transmit to him in the manner prescribed by the said enactment such evidence in furtherance of a Commission Rogatoire annexed thereto as the Bailiff may be able to obtain from any witness or witnesses within his jurisdiction.
2. THAT on the 25th day of February, 1985 the Representor was notified by the Viscount Substitute to appear before the Police Court, sitting at Cyril Le Marquand House, The Parade, St. Helier, Jersey, C.I. on Monday the 18th day of March, 1985 at 9.30 a.m. to give evidence in the said Commission Rogatoire and to produce there and then the documents requested together with any documents in support of his evidence.
3. THAT the said Commission Rogatoire consisted of a Request for International Judicial Assistance in the Grand Jury Proceedings concerning James R. Kaminsky signed by Joseph P. Kinneary, United States District Judge of the United States District Court for the Southern District of Ohio and dated September 29th, 1984 incorporating by reference an Application of the United States for the said Court to Request Assistance of the Judicial Authorities of the Jersey Channel Island signed by Christopher K. Barnes United States Attorney Southern District of Ohio.
4. THAT the said Commission Rogatoire states that the evidence and documents requested therein were required in connection with proceedings

initiated before a Grand Jury of the said Court expected to culminate in a formal trial of James Kaminsky for conspiracy with another person to defraud the United States government by the evasion of income taxes in violation of title 18 of Section 371 of the United States Code and thus is designed to assist the government of the United States in the enforcement of its revenue laws.

5. THAT it is a principle of law that the Courts of the Island will not give assistance with the enforcement of the revenue laws of any other State and consequently the Jersey Court may not be obliged to compel any person to give evidence or produce any document pursuant to the said Commission Rogatoire.

6. THAT if the Court is obliged to compel the Representor to give evidence and produce documents pursuant to the said Commission Rogatoire the evidence and documents required from the Representor thereunder are those specified in paragraphs 6. and 7. thereof and no other evidence or documents may be requested from the Representor in furtherance thereof.

7. THAT the Representor attended personally at the Police Court at Cyril Le Marquand House aforesaid at 10.15 a.m. on Monday 11th March, 1985 and gave evidence that he was in possession of no document of the description referred to in paragraph 6 of the said Commission Rogatoire having stated through his Advocate that his appearance was without any admission of the validity of the Commission Rogatoire and was made solely on the basis that he had been advised that if any request were made to him in respect of which he had documents to produce or positive evidence to give he should make a representation to the Royal Court to stay the hearing pending the determination of certain legal questions.

8. THAT at the taking of evidence in the Police Court on Monday 11th March 1985 the Assistant Magistrate put to the Representor a supplementary question which was outside the terms of the said paragraphs 6. and 7. of the said Commission Rogatoire but the Assistant Magistrate withdrew the said question following the objection of the Representor through his Advocate.

9. THAT at the conclusion of the taking of evidence in the Police Court on Monday 11th March, 1985 the Assistant Magistrate declared that although he was closing that particular hearing the Commission remained open.

10. THAT on 11th March, 1985 after the taking of evidence the Assistant Magistrate wrote to the Representor's Advocate asking whether, to avoid the Representor being convensed again, the Representor would swear an Affidavit concerning a matter referred to in paragraph 1(e) of the said Commission Rogatoire being a matter not referred to in paragraphs 6. or 7. thereof and thus not a matter upon which the Assistant Magistrate was authorised to take evidence from the Representor.

WHEREFORE the Representor:

A. requests the directions of the Court upon

- (i) whether having regard to the fact that the said Commission Rogatoire relates to proceedings under the revenue laws of the United States the Representor is compelled to give any evidence or to produce any documents pursuant thereto;
- (ii) whether, if the Representor is so compelled, he has given all the evidence that he must give pursuant to the said Commission Rogatoire and should therefore not give any further evidence or produce any documents pursuant thereto;
- (iii) whether, if the Representor can be compelled to give further evidence or produce any documents pursuant to the said Commission Rogatoire, he should answer questions or produce documents outside the terms of paragraphs 6. and 7. thereof.

B. requests his costs in respect hereof.

SAVING ALL JUST EXCEPTIONS

M. du F. & J.

(K.S.B.)

In the Matter of an Application under  
Section 5 of the Extradition Act, 1873;  
(evidence in respect of James Kaminsky.)

Representation of Michael Matthew Godfray Voisin and John Marshall

The Attorney General, having been convened in the present matter, has the honour to set out the following observations:

1. The present application is made under Section 5 of the Extradition Act, 1873, as appears from the Home Secretary's Order of 26th January, 1985. The said Act was registered by the Royal Court of Jersey on 24th July, 1880. It appears, therefore, that the merit of the present application should be judged mainly or only by reference to the provisions of the statutory section in question.
2. The said section is in these terms:

"A Secretary of State may, by order under his hand and seal, require a police magistrate or a justice of the peace to take evidence for the purpose of any criminal matter pending in any court or tribunal in any foreign state; and the police magistrate or justice of the peace, upon the receipt of such order, shall take the evidence of every witness appearing before him for the purpose in like manner as if such witness appeared on a charge against some defendant for an indictable offence, and shall certify at the foot of the depositions so taken that such evidence was taken before him, and shall transmit the same to the Secretary of State; such evidence may be taken in the presence or absence of the person charged, if any, and the fact of such presence or absence shall be stated in such deposition.

Any person may, after payment or tender to him of a reasonable sum for his costs and expenses in this behalf, be compelled, for the purposes of this section, to attend and give evidence and answer questions and produce documents, in like manner and subject to the like conditions as he may in the case of a charge preferred for an indictable offence. ...

Provided that nothing in this section shall apply in the case of any criminal matter of a political character."

Contd./...

3. There is a criminal matter pending before a Court in America - a grand jury has indicted James Kaminsky on criminal charges and he has been sent for trial, the date being fixed as 8th April, 1985. The indictment and a description of it prepared by the American prosecuting attorneys is annexed hereto at Item A. The evidence requested by the American Court and certified by the Home Secretary is clearly for the purpose of that criminal matter.
  
4. It is said against the application that the questions to be asked and the documents listed for production are not specified with sufficient particularity. Accordingly, the Home Secretary's Order and the application which it certifies are said to be invalid. Authority for that proposition is said to be contained in R.C.A. -v- Rauland Corporation (1956) 1 All E.R. 549; Re Westinghouse (1977) 3 All E.R. 703; Penn - Texas Corporation -v- Anstalt (1963) 1 All E.R. 258.
  
5. Reliance upon the said authorities appears to be ill-founded.
  - (i) The R.C.A. case concerns a civil matter and turns upon the construction of a statutory phrase (".... obtaining ... testimony in relation to [any civil or commercial matter].") which does not occur in Section 5 of the Extradition Act, 1873; the said case deals with a now defunct statute (the Foreign Tribunals Evidence Act, 1856); the ratio decidendi of the said case is that the phrase "testimony in relation to any civil or commercial matter" used in the Act of 1856 did not extend to admit of pre-trial discovery of documents against non-parties in civil litigation; that ratio appears to be nothing to the point in the context of an application to examine witnesses in a criminal matter, brought under a different statute, differently drafted, laying down different principles.
  
  - (ii) The Westinghouse case again concerns a civil matter and again turns exclusively upon the construction of a statutory phrase which has no bearing upon the section under which the present application is made. The case concerns commercial litigation and an application under the Evidence (Proceedings in Other Jurisdictions) Act, 1975. It is noticeable that Section 2(4) of that Act recites that

"An order under this section shall not require a person -  
(a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power ....."

No such provision is made by the Act under which the present application is made. As to oral testimony, the case itself does not even support the restrictive view promoted by the present Representation (page 710, letters c - e refers.).

(iii) The Penn - Texas case concerns commercial litigation under the Foreign Tribunals Evidence Act, 1856, and the observations at paragraph 5(i) hereof concerning the R.C.A. case are repeated.

6. It does not appear that the questions and documents specified in the Commission for the attention of the Representors are too widely specified even if judged by the irrelevant standards of the Representors' authorities. Even if that were not so, the present application would not thereby be bound to fail. The proper standard by which to judge the application is found in the section under which it is actually made. That section provides that a witness is to be treated in like manner as if he appeared on a charge against some defendant for an indictable offence. As to oral testimony, the knowledge of a witness in a criminal trial can be probed and he can be asked wide-ranging questions which may be relevant to the issue of the accused's guilt or innocence. The only general constraint is that of relevance, and that is a matter for the trial judge. As to documents, it is equally true that in a criminal trial a witness can be examined as to the existence of any documents likely to be relevant to the issue of guilt or innocence, and can be ordered to produce such documents. Additionally, it is also the case that there is a specific permissive power in the Magistrate to call for a multiplicity of documents in a criminal case and to inspect them to see if they are likely to be material evidence at the hearing (R. -v- Cardiff Corporation, Ex parte Lewis (1922) 2 K.B. 777). The case is of general bearing on the present application and is therefore annexed as Item D hereto.
7. If, despite the contrary view, the application as presently drafted is ill-founded, it would appear to be expedient to make an order in amended form, possibly based upon lists at Items B and C which have been prepared by the prosecuting American Attorneys and annexed hereto for the assistance of the Court. It is respectfully suggested that, as a matter of comity, an order - even in amended form - could be made at the hearing hereof as the criminal proceedings in respect of which the application is made are due to start on 8th April, 1985.
8. The observations contained herein may be summarised in the following way:
- (i) The objection is that the questions and documents listed for the attention of the Representors are not sufficiently specified;
- (ii) As a matter of fact that objection does not appear to be well-founded; but in any event the Representors have not produced any authority sufficient to show that such an objection has substance in a criminal matter under Section 5 of the Extradition Act, 1873. The Cardiff Corporation Case has direct bearing and is against

- (iii) In a criminal matter, relevance is the only general constraint upon the examination of a witness;
- (iv) The application appears to be well-founded as drafted; but if a contrary view prevails, then in the interests of comity and expediency an amended order could properly be made at the trial hereof, based upon Items B & C attached hereto.

Representation of John Campbell Boothman

- 9. The first point taken by the Representor appears to rely upon that rule of international law which provides that Courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a revenue law of another state (Dicey and Morris - Conflict of Laws 10th Edition, Rule 3).
- 10. By reference to Dicey and Morris (op. cit. pages 89-94; 97-98; 1092-1095) it appears that the Commission certified under the Order of the Home Secretary does not constitute attempted enforcement of a revenue law. The proceedings do not involve the gathering of taxes; rather they are designed to bring to justice an alleged criminal. The American statutory provision in question is not a revenue statute. The application simply concerns a criminal matter pending in a foreign country and thus falls within Section 5 of the 1873 Act. The extracts from Dicey and Morris to which reference have been made are annexed hereto as Item E.
- 11. The second point taken by the Representor appears in substance to be an objection to having been asked why he cannot assist by producing documents listed at paragraph 6 of the Commission. Such an objection appears to take an unduly restrictive view of the process of international judicial assistance. Moreover, the objection appears to be founded upon the proposition that the precise wording of the Commission itself provides an exhaustive index of questions which may be put to a witness. Such a proposition would ignore or prejudice the wording of Section 5 of the Extradition Act, 1873. The suggested gravamen or import of that Section is set out at paragraph 6, hereof. Additionally, the said section gives the force of law to the Order of the Home Secretary and not to the draft of the Commission. If the present exercise is capable of being reduced to nothing more than the construction of a document, then it is the Home Secretary's Order which should be construed. The said Order is expansive rather than restrictive in its terms.

Contd./....

12. The third point taken by the Representor appears again, in substance, to raise the proposition that international judicial assistance is to be reduced to the construction of a non-statutory document. Referring to the Commission, it is suggested by the Representor that a 'paragraph 1(e)' matter cannot properly be put to a 'paragraph 6/7' witness. The matter in question is not specified, but it is noticeable that paragraph 6 of the Commission includes a reference to paragraph 1(e) matters. Generally, the observations contained in paragraph 11 hereof are repeated.

The whole of which the Attorney General has the honour to observe in the hope that it will be of assistance to the learned Court in its deliberations.

Crown Offices

20th March, 1985.

IN THE MATTER OF AN APPLICATION UNDER SECTION 5 OF THE  
EXTRADITION ACT, 1873

MICHAEL MATTHEW GODFRAY VOISIN, Advocate, and JOHN MARSHALL,  
both of Templar House, Don Road, St. Helier, Jersey, C.I.  
have the honour to Represent to the Court:-

1. THAT on the 25th day of February, 1985, John Marshall was summonsed by a duly sworn member of the Viscount's Department to appear before the Police Court, sitting at Cyril Le Marquand House, The Parade, St. Helier, Jersey, C.I. on Monday the 18th day of March, 1985 at 9.30 a.m. to give evidence and to produce there and then documents in the Commission Rogatoire relating to the Grand Jury Proceedings concerning James R. Kaminsky and this at the instance of Joseph P. Kinneary, United States District Judge, United States District Court for the Southern District of Ohio, U.S.A.
  
2. THAT Michael Matthew Godfray Voisin was on the 1st day of March, 1985 served with a Summons by a duly sworn member of the Viscount's Department to appear before the Police Court, sitting at Cyril Le Marquand House, The Parade, St. Helier, Jersey, C.I. on Monday, the 18th day of March, 1985 at 9.30 a.m. to give evidence and to produce there and then documents in the Commission Rogatoire relating to the Grand Jury Proceedings concerning James R. Kaminsky and this at the instance of Joseph P. Kinneary, United States District Judge, United States District Court for the Southern District of Ohio.
  
3. THAT both Summonses have been served by virtue of Section 5 of the Extradition Act, 1873, insofar as it applies to the Island of Jersey.

4. THAT neither Summons specifies the questions to be asked nor the particular documents to be produced.

5. THAT insofar as the request refers to the documentation or other written matter, the request is in the broadest, vaguest and least specific form, and is, generally, a "fishing" expedition and is without particulars and of a non-specific nature.

6. THAT the request in no way specifies the particular questions to be asked and furthermore, requests that the Court (the Magistrate's Court) permit the Federal Prosecutors in charge of the case to be present during the questioning and to be permitted to ask, or propose, supplemental questions to the witnesses after the unspecified questions relating to the enquiry have been answered.

7. THAT before any documentation can be produced under the provisions of Section 5 of the Extradition Act, 1873, the individual documents must be specifically described and particularised and that before the Magistrate, to whom they are produced, releases them to the requesting party, he has a discretion as to whether or not he should so release them. R. -v- DAYE [1908] 2 K.B. 333.

8. THAT by virtue of Section 24 of the Extradition Act, 1870 and Section 5 of the Extradition Act, 1873 and Section of the Foreign Tribunals Evidence Act, 1856 only specific questions can be proposed to the witnesses. Furthermore, the information requested must be specific and relevant to the issue being tried and must not be a fishing expedition. R.C.A. -v- RAULAND CORP. [1956] 1 All E.R. 549.

9. THAT the documents to be produced must be specified with particular distinctiveness: RE: WESTINGHOUSE ELECTRIC CORP. URANIUM CONTRACT LITIGATION [1977] 3 All E.R. 703.

Furthermore, that the documents must be ascertained, specified or sufficiently identified and only such documents need be or can be produced. PENN - TEXAS CORP. -v- ANSTALT [1963] 1 All E.R. 258.

10. THAT the application presented to the Bailiff by one of Her Majesty's Principal Secretaries of State (The Secretary of State for the Home Department) does not comply with these provisions and is accordingly null and void.

WHEREFORE the Applicants' request:-

- A. That the Court order that they be not required to answer any questions nor produced any documents until such questions are particularised and such documentation is ascertained, specified or sufficiently identified so as to be by definition already known, ascertained and identified.
- B. That the Applicants should, in accordance with the terms of Section 5 of the Extradition Act, 1873, have their costs in any event.

SAVING ALL JUST EXCEPTIONS