servitium has not been finally settled. It was not raised in the appeal, although some of the judges adverted to it. Fullagar J. (with whom Taylor J. agreed on the point), concluded both here[59] and in the *Policeman's Case*[60] that these payments were consequent on an antecedent obligation to pay them and not upon loss of *servitium*, and that neither were they a measure of damages.[61] However, Windeyer J. and the Chief Justice were of opinion that these payments were consequences of the loss of services.

It is submitted that this is a correct approach. The employer is antecedently obliged to make the payments, but they need only be paid on the occurrence of a condition, that is, when a servant is so injured that he cannot carry out his duties.

A. A. BROWNE

R. v. TEITLER[1]

Criminal law—Evidence of accomplices—Warning as to corroboration—Miscarriage of justice—Application for separate trials

T (Teitler) and Z (Zucchi) were charged jointly with unlawfully and maliciously setting fire to a dwelling-house, one A (Anderson) being therein. The Crown alleged that T procured A and F (Tommasi) to assist him in the enterprise. F was given an indemnity against prosecution and turned Queen's evidence against T and Z. At the trial, counsel for T applied for separate trials. This application, being opposed by the prosecutor, and by counsel for Z, was dismissed by the judge. During the course of the trial, Z and F both gave evidence on oath implicating T. The trial judge warned the jury that F was an accomplice and that it was dangerous to accept his evidence unless it was corroborated; but he did not explicitly refer to the fact that Z also was an accomplice. Both T and Z were convicted. T applied for leave to appeal on the grounds, *inter alia*, that: (1) the trial judge was in error in refusing to order separate trials; (2) the jury was not warned against accepting the evidence of Z who, the verdict shewed, was an accomplice of T, or told that Z's evidence could not be regarded as corroboration of that of F. The Full Court refused the application for leave to appeal, holding: (1) that the ordering of separate trials is entirely within the discretion of the trial judge, and no reason was here shewn why his exercise of the discretion should be disturbed; (2) that the jury should be warned against accepting the evidence of an accomplice in cases where that accomplice is a co-accused, as well as where he is called as a witness for the prosecution; but although there had here been no such specific warning, warning in substance had been given (Sholl J. dissenting); and even had it not, the application should be dismissed because *(per* Lowe and O'Bryan JJ.) there

[59] [1959] Argus L.R. 896, 904. The dissenting judgment of Kellock J. in *R. v. Richardson* (1948) 4 Can. S.C.R. 57, 71-72 was cited to support this view.

[60] (1952) 85 C.L.R. 237, 289 ff.

[61] As Denning and Parker L.JJ. considered in *I.R.C. v. Hambrook* [1956] 2 Q.B. 641, 667, 673.

[1] [1959] V.R. 321. Supreme Court of Victoria; Lowe, O'Bryan and Sholl JJ.

was substantial evidence corroborative of that of F and Z, and *(per* Sholl J.) because there had been no substantial miscarriage of justice.

Counsel for T urged that the interests of justice required that the trials should be separate because, prior to the trial, F and Z had both made statements implicating T, and counsel contended that it would be impossible for a jury to understand properly what evidence was admissible against Z only, and what was also admissible against T. Moreover, he said, if the jury found F's statements against Z corroborated by Z's admissions, they would use their confidence in F's veracity to the detriment of T. The Court rejected this argument for two reasons: (1)

> It is inherent in our system of criminal jury trials that the jury is expected to understand reasonably simple directions as to the application, and in proper cases, the distributive application, of the evidence in a given case.[2]

Indeed the Court had a high opinion of the intelligence of juries, being unwilling to attribute to them 'a singular unresponsiveness',[3] and saying 'Juries are much more logical and astute than some people imagine'.[4] (2) The Court emphasized that in this matter the trial judge has an absolute discretion, and indeed it is 'accepted that where the essence of the case for the Crown is that the accused persons were engaged on a common enterprise, they ought ordinarily to be jointly tried'.[5] Moreover, the judge must have regard to the interests of the co-accused, and of the public, and in the instant case he properly bore those in mind, as well as considering the length of the trial (and therefore the consequent expense to T) and the fact that the accused might challenge different jurors. The majority said,

> But the judge's decision is assailable on the grounds ordinarily open to an attack on discretion, *e.g.* that he has taken into account matters that he should not have considered, or omitted to take into account something he should have considered, or has given improper emphasis to some factor or has acted on some wrong principle of law or, though one cannot say precisely where he has gone wrong, his decision is so out of accord with what the facts required that he must have erred at some point. But in addition to such grounds in a case of the judge's exercise of discretion as to severance it may be shown that the decision has led to a miscarriage of justice—see *R. v. Grondkowski*[6].[7]

Even if the discretion was properly exercised at the trial, yet if the subsequent course of proceedings results in a miscarriage of justice, the verdict and judgment can be set aside. A miscarriage of justice occurs (a) when there is a denial of a legal right, or (b) when there has been no mis-direction of law or fact but the jury has convicted although 'no reasonable jury should on the evidence admissible against him have found him guilty'.[8] Neither limb was applicable here. Indeed the majority 'would have been surprised if the jury had acquitted him'.[9]

[2] *Ibid.* 340. [3] *Ibid.* 331. [4] *Ibid.*
[5] *Ibid.* 334, *per* Sholl J. citing *R. v. Grondkowski* [1946] K.B. 369.
[6] [1946] K.B. 369. [7] [1959] V.R. 321, 324-325. [8] *Ibid.* 325.
[9] *Ibid.*

This ground of the application therefore failed. On the other ground the opinions of the majority (Lowe and O'Bryan JJ.) and the minority (Sholl J.) diverged, although both arrived at the same conclusion, and were in substantial agreement on several issues. This ground comprehended several questions of law.

First, counsel for the Crown, relying on the decisions in *R. v. Martin,*[10] *R. v. Barnes; R. v. Richards,*[11] and on the implied opinion of the Lords and Bar (said, by the majority in the instant case, to be 'very strong') in *Davies v. Director of Public Prosecutions,*[12] argued that the jury need not be warned as to the danger of accepting the uncorroborated evidence of an accomplice, when that accomplice is charged jointly with the accused. The Court rejected the distinction.[12a] After saying 'The only justification for the suggested limitation would seem to be historical and not a logical consideration',[13] the Court proceeded to stress two cases contradicting *R. v. Barnes*—*R. v. Rudd*[14] and *R. v. Garland*[15]—and the reservation in Viscount Simonds' speech in *Davies* case (in which the other Lords present concurred). His Lordship, after citing the above cases, had said, 'but those cases concern the proper procedure as to warning and the like when one co-defendant gives evidence implicating another—a case with which your Lordships are not troubled here'.[16] The Court pointed out that to accept the distinction would involve over-ruling *R. v. Bassett,*[17] and the Court was reluctant to do this for two reasons:

> first because we do not necessarily follow English decisions, even of the courts of the highest authority on matters of practice (and this is a matter of practice), and secondly because this very point would seem to have been reserved for further consideration by their Lordships in *Davies' Case, supra.*[18]

It may be questioned whether the first reason adduced is a good one. What is the status of a rule of practice that has been said by the highest authority to have the force of a rule of law? What is the difference between a rule of practice and a rule of law? The Court nowhere adverts to these questions. But it does seem that the ultimate distinction must be demonstrated by considering the effect of non-compliance with the rule. If the infringement automatically invalidates the decision, it seems impossible to maintain that the rule is not one of law. The problem is similar to that met with in the field of statutory interpretation when it must be decided whether a provision is mandatory or directory. No principle can guide one: the only distinction between the two is the result of non-compliance. So it is here. When the rule was clearly one of practice only (before *R. v. Baskerville*)[19] it was settled that an omission to give the usual warning had no legal effect. But in that and subsequent cases it was decided that, in England, the rule had the force of a rule

[10] (1910) 5 Cr. App. R. 4.
[11] [1940] 2 All E.R. 229.
[12] [1954] A.C. 378. See especially *arguendo* 384, *per* Lord Simonds 398.
[12a] Since this Note went to Press the Court of Criminal Appeal has come to the same conclusion: *R. v. Prater* [1960] 2 W.L.R. 343.
[13] [1959] V.R. 321, 329.
[14] (1948) 64 T.L.R. 240.
[15] (1941) 29 Cr. App. R. 46. Reported as a note to *R. v. Meredith, ibid.* 40.
[16] [1954] A.C. 378, 398-399.
[17] [1952] V.L.R. 535.
[18] [1959] V.R. 321, 329.
[19] [1916] 2 K.B. 658.

of law, and any failure to give the warning as to accomplices resulted in the quashing of the conviction, unless there could be applied the saving as to where there had been no substantial miscarriage of justice. After forty years of this procedure, surely the rule now *should be* a rule of law for all purposes whatsoever. It relates no longer to practice, but to law. And if this is so, the Supreme Court of Victoria should regard itself as being bound by decisions of the House of Lords on the point.

The judgment of Sholl J. puts the matter more clearly. 'In England it is now settled that it is in effect a rule of law. . . . In Victoria, however, we still treat the duty to give the appropriate warning as a rule of practice.'[20] And so, being here a rule of practice only, the fact that in England it is a rule of law is irrelevant. In Victoria the rule has not yet hardened into a rule of law.

Is it permissible for the Supreme Court to say this? No decided case gives an explicit answer. The leading authority is *Piro v. Foster*[21] in which the High Court was very concerned to emphasize the authority of decisions of the House of Lords. The judgments in *Foster's* case do not support any exception for those rules which were formerly of practice only, or of new rules of law of any description. But because of the infrequent birth of these, the matter is at least arguable.

Second, the whole Court re-affirmed the principle, laid down in *R. v. Bassett,*[22] that if an adequate direction was given in substance it does not matter that the rule was not specifically adverted to and explained to the jury. The members of the Court differed in their interpretation of the summing-up, Lowe and O'Bryan JJ. being of the opinion that there was here such a direction in substance, whilst Sholl J. was unable to satisfy himself that this had been given.

Third, the question was: supposing that a warning ought to have been given, and was not, in what circumstances should an appeal be allowed? In *R. v. Bassett*[23] it was stated by Lowe J., delivering the judgment of the Full Court, that the conviction would be quashed only if there was (a) in fact no corroboration of the evidence, *and* (b) a miscarriage of justice. The majority in the instant case was of the opinion that this stated the rule too harshly against the accused, and that requirement (a) was satisfied if there was no *substantial* corroboration.[24] The judgment of Sholl J. expounded different principles. The learned Judge was of opinion that the words of section 568 (1) of the Crimes Act 1958 should be closely followed, so that once an error of law is established the conviction should be quashed automatically unless the proviso can be applied. He thought that the existence of a variety of tests, appropriate to different circumstances, as to when a conviction should be quashed, was insupportable in principle; and in practice

> difficulty and confusion are introduced into the whole topic by treating the question of the presence or absence of substantial corroboration . . . , as a question distinct from that of substantial miscarriage of justice.[25]

[20] [1959] V.R. 321, 337.
[21] (1943) 68 C.L.R. 313.
[22] [1952] V.L.R. 535.
[23] *Ibid.*
[24] [1959] V.R. 321, 330, 332.
[25] *Ibid.* 339.

The test laid down in *R. v. Bassett,* he said, was appropriate when the matter was 'merely a counsel of prudence, and therefore the accused originally could not complain of its omission at all'.[26] But as it is now recognized that an omission to warn *prima facie* invalidates the conviction,

> this Court should now in view of the decisions in *Stirland's Case, supra,* and *Davies' Case, supra,* reconsider its practice, and adopt the same test in all cases of misdirection.[27]

The test is, of course, the oft-quoted one of 'a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict'.[28] In *R. v. Wann*[29] the Court of Criminal Appeal held that, in an appeal concerning a matter of fact, the Court would not quash a conviction unless it was 'reasonably probable' (instead of, as formerly, 'reasonably possible') that the jury might have acquitted the accused. This distinction was sought to be made because section 568 of the Victorian Crimes Act 1958, and its English equivalent, separate errors of law from all other grounds of appeal.[30] Sholl J. rightly criticized this case. The learned Judge also took the opportunity to attack the tendency towards giving the words in section 568 (1) 'miscarriage of justice' different meanings according to whether a question of law or of fact was involved. He demonstrated that any such distinction rested on slender authority *(R. v. Wann,*[31] *R. v. Brookes and McGrory*[32] and *R. v. Jones*[33]) which in turn was based on a misunderstanding of *R. v. Cohen and Bateman.*[34]

Several aspects of this judgment present themselves for comment.

(1) The Judge states that, for the purposes of section 568 (1), the failure to warn as to corroboration must be regarded as an error of law;[35] this contrasts with the previous discussion[36] in which he distinguished *Davies* on the ground that in England the rule is one of law, but in Victoria of practice only. If the rule *is* of practice, breach of it gives a ground of appeal only if 'on any ground there has been a miscarriage of justice'. If the rule is of law, breach of it is surely 'a question of law'. This apparent *volte face* has no practical consequence but is slightly confusing.

(2) The courts have not drawn a distinction between 'miscarriage of justice' and 'substantial miscarriage of justice'. It may be that there is

[26] *Ibid.* 338. [27] *Ibid.* 339.

[28] *Stirland v. Director of Public Prosecutions* [1944] A.C. 315, 321. This was cited both by Lowe and O'Bryan JJ. ([1959] V.R. 321, 325) and by Sholl J. *(ibid.* 337).

[29] (1912) 7 Cr. App. R. 135.

[30] S. 568 (1) reads: 'The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable . . . or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal.

'Provided that the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.'

[31] (1912) 7 Cr. App. R. 135. [32] [1940] V.L.R. 330. [33] 10 May 1956, unreported.

[34] (1909) 2 Cr. App. R. 197. [35] [1959] V.R. 321, 341. [36] *Ibid.* 337.

none. This seems to be the opinion of Sholl J.[37] A consideration of the proper use of the English language would seem to bear this out. If anything can be said to be a 'miscarriage of justice', surely there must be an implied element of 'fair, solid and substantial' cause: the matter must be already grave, and the word 'substantial' can add little. The phrase itself imports some opinion that the verdict might have gone the other way: and surely this makes the matter 'substantial'. In addition, the writer knows of no case that gives even a verbal *definition* of the difference between the two phrases, let alone of a case which *applies* such a distinction. The books lay down an identical meaning for both phrases. At the time the Act was drafted, courts were much more ready to quash for trivial technical errors in the summing-up, or in the form of the proceedings. Presumably this is the *raison d'être* of the proviso. But those conditions now no longer obtain. Surely the section would have the same effect if it said, 'The Full Court on any such appeal against conviction shall allow the appeal if it is of the opinion that there has been a miscarriage of justice'. As the section stands at present, an appeal will succeed if there has been a miscarriage of justice, *or* if the jury has been unreasonable or there has been an error of law: but in these last two cases there must have been a substantial miscarriage of justice as well, or the proviso will be applied. Thus (always making the not-altogether-certain assumption that the word 'substantial' is superfluous) it seems that the latter grounds add nothing to that of 'miscarriage of justice'. It is the desire to give them some meaning that has induced the courts to differentiate between one case and another. But if the grounds *have* no meaning, it is absurd that courts should confuse the law to such an extent merely in order to perpetuate an out-moded caution. If the simpler interpretation be adopted, the opinion of Sholl J. must enthusiastically be endorsed.

(3) It seems possible that the differences between the English and Victorian courts, and between the majority and Sholl J., are not really substantial at all, but merely a matter of semantic disagreement. In practice, it seems to the writer, all would arrive at the same conclusion in any one case, and a consideration of the application of the different formulations of the test to the cases on the subject seems to demonstrate this. In addition to the cases already cited, see *R. v. Ready and Manning*,[38] *McNee v. Kay*,[39] *R. v. Weston*[40] and *R. v. Malouf*.[41] In all of these cases, the actual result would have been the same, it is thought, no matter what the actual form of words used by the court. This can be demonstrated by an examination of the meaning, in this context, of the phrase 'miscarriage of justice'. It is well settled that the court cannot substitute its own opinion of the guilt of the accused. The question the court must decide is whether it is *possible* that a reasonable jury properly directed could have acquitted the accused. Now it is obvious that if no warning was given, and in fact there was no corroboration of the accomplice, the

[37] *Ibid.* 336, where he cites Ross, *The Court of Criminal Appeal* (1911) 113-114.
[38] [1942] Argus L.R. 117.
[39] [1953] V.L.R. 520.
[40] [1924] V.L.R. 166.
[41] (1918) 18 S.R. (N.S.W.) 142.

appellate court must hold that there has been a miscarriage of justice because 'on the whole of the facts and with a proper direction, the jury might fairly and reasonably have found the appellant not guilty'.[42] Conversely, if there was no warning but ample corroboration in fact, it is not even reasonably possible that the jury would have acquitted, and so the conviction must be sustained: the giving of the warning could have had no effect on a reasonable jury. But a difficulty does arise when the corroborative evidence is disputed, or there is some other factor that places its credibility in doubt: the appellate court then has no way of knowing which evidence the jury has accepted. What is the present practice of courts in these cases? None of the cases advert to the problem, and it would seem that usually such testimony is not disputed. But even if it were, there should, on principle, be no difference. Theoretically the jury is not bound to accept uncontradicted evidence no matter how convincing,[43] and thus the question is always one of degree. An appellate court *never* knows, quite certainly, that the jury accepted (or a reasonable jury would have accepted) any particular single word of testimony. Thus the upholding of *any* conviction must inevitably contain some element of speculation. The drafter of section 568 wished to keep this element to a minimum, but not an unreasonable minimum. And courts still profess to put this laudable intention into practice. But it seems clear that this minimum is frequently exceeded. In the instant case, for example, the majority, after detailing all the evidence against the accused, admitted that 'all these matters were in controversy' and yet thought 'the case against the applicant . . . so strong'[44] that there was no miscarriage of justice. Surely this indicates that opinion has considerable weight. Speculation as to yet another element is thus not out of step with practice. The strength of the evidence against the corroborative testimony is one factor to be taken into account by the court in deciding whether there was in fact 'corroboration' or a 'miscarriage of justice'. Each of these terms represents a complex of factors, each of which courts *do* consider and weigh (although they frequently deny that they are doing so), and a dispute as to some of the evidence is a not uncommon factor.

Thus the thesis that the apparent dispute between judges, as to the consequence of mis-direction, is in fact no dispute at all, is at least tenable. Of course, it is not a thesis susceptible of proof, depending, as it does, on hypothetical applications of vaguely worded definitions. But it seems a realistic rationalization of all the cases discussed.

Finally, the members of the Court had no hesitation in holding that the application should be dismissed, thus demonstrating once again that all agree in the result, whatever the devious routes by which it is reached: there was ample corroboration, and no miscarriage of justice.

N. H. M. FORSYTH

[42] *R. v. Cohen and Bateman* (1909) 2 Cr. App. R. 197, 207-208. This test has since been approved and quoted on numerous occasions.

[43] This has been disputed in some civil cases *(Swinburne v. David Syme & Co.* [1909] V.L.R. 550) but seems well established in the criminal law, and even in civil cases this seems the better view. See *McPhee v. S. Bennett Ltd* (1934) 52 W.N. (N.S.W.) 8, *Giles v. Dodds* [1947] V.L.R. 465, *Elrick v. Terjesen* [1948] V.L.R. 184, *Llewellyn v. Reynolds* [1952] V.L.R. 171.

[44] [1959] V.R. 321, 331.