for the benefit of certain limited interests. The trust deed gave the trustees wide powers of investment, which they used to purchase certain shares to the value of Five Thousand Pounds.

As at the time of death of the settlor in 1948, within five years from the date of gift, these shares had increased in value to £9,250, the question then arose whether duty was to be assessed on £5,000, being the amount of the settlor's cheque, or on £9,250, being the value of the shares as at the date of death of the settlor. The Crown naturally relied in its argument mainly on the judgment of Scott, L.J. in *Re Payne*, claiming that the gift was a gift of the trust fund which was now constituted by the shares.

The House by majority with Lord Keith dissenting, rejected the *dicta* of Scott, L.J. holding that there was no reason why settled gifts should be treated as an exception to the well-established rule of *Lord Strathcona's Case*. Lord Reid as well as Lord Morton stated that such an exception would be more in the public interest, but both stressed the wording of the relevant statute[21] which speaks of "property taken". And as Lord Morton pointed out the term "property taken" could only refer to the property which passed from the settlor and was taken by the trustees from the settlor, i.e. the cheque for £5000. The opposite view that the words "property taken" referred not to the property actually passing from the donor to the trustees, but to the mere right of the beneficiaries to require proper administration of the trust was too artificial a construction of the statute to be upheld. Lord MacDermott in his judgment said also that a trust fund was not "property" in the ordinary sense of the word and the statute did not require a different meaning nor did it make a difference between out-and-out gifts and settled gifts. Even Lord Keith in his dissenting judgment followed the reasoning of Clauson, L.J. in *Re Payne* rather than that of Scott, L.J. As a result *Re Payne* must now be regarded as completely overrruled, for even Luxmoore, L.J.'s judgment in that case was rejected by Lord Reid. The effect in Britain is to establish without qualification the rule that the original property given should be valued as at the date of death of the donor notwithstanding the fact that it has been squandered or converted into other less or more valuable property in the meanwhile.

It seems likely that the Australian Courts will now follow the House of Lords decision and reverse their previous approach. An indication of this is given in a footnote to the end of the report of *Elder Trustees and Executors Co. Ltd.* v. *Federal Commissioner of Taxation*, where Fullagar, J. wrote[22] that if he had been aware of *Sneddon's Case* at that time he would have come to the same conclusion by a shorter route, and his Honour suggested that *Teare's Case* was now no longer good law. It would seem, indeed, that not only *Teare's Case* but also *Watt's Case* and all other decisions based thereon may have to be reviewed, insofar as the High Court may follow House of Lords decisions in preference to its own. If this is correct *Sneddon's Case* has, apart from statutory provisions in New South Wales, dealt a death blow to the principle of continuity of gifts and done away with the anomalous position in Australia setting a premium on dissipation.

P. E. NYGH, Case Editor—Fourth Year Student.

IS A VIEW EVIDENCE ?

SCOTT v. *SHIRE OF NUMURKAH*

Is a view evidence? To this question Dean Wigmore[1] returns an emphatic

[21] Finance Act, 1894, 57 and 58 Vict. c. 30, s. 2 (1) (b) of which provides, read in conjunction with s. 2 (a) of the Customs and Inland Revenue Act, 1881, 44 and 45 Vict. c. 7, that property passing on the death of the testator shall be deemed to include *inter alia* "any property taken under a voluntary disposition purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been made five years before the death of the deceased".

[22] (1953) 88 C.L.R. 200 at 214.

[1] Wigmore, *On Evidence* (3 ed. 1940) 254 ff.

affirmative. The High Court, however, has now returned an equally emphatic negative in *Scott* v. *Shire of Numurkah*.[2] It is now laid down that a view is not evidence, but is purely for the purpose of enabling the tribunal to understand the issues raised, to follow the evidence and apply it.

The facts of this case were that the plaintiff, Scott, by deed dated 28th February, 1950, had obtained from the Shire of Numurkah a licence to show moving pictures in the amusement portion of the Numurkah Town Hall (which did not include the supper-room and kitchen) on two nights each week. During the currency of this licence the Shire gave other persons the right to hold dances in the supper-room on (*inter alia*) these two nights. The plaintiff alleged that the noise from the band which played in the supper room while the films were in progress substantially interfered with his patrons' enjoyment of the films. Scott, therefore, claimed that the Shire was in breach of an implied covenant that they would not "cause or permit to be caused in or about the said premises any act, matter or thing which would disturb or interfere with the proper exhibition of motion pictures with sound tracks."[3] He sought an injunction to restrain the breach of this implied covenant.

During the hearing of evidence, counsel for the respondent suggested that the judge witness a "practical demonstration". The trial judge concurred in this suggestion and expressed his wish that counsel for both sides should confer so that a sound could be produced having a real similarity to the sound complained of. After the close of the evidence, the demonstration took place in the Numurkah Town Hall. No consultation in fact took place between opposing counsel; and indeed senior counsel for the plaintiff claimed that he did not concur in the demonstration, but in any case it was clear to the High Court[4] that the demonstration was by no means the result of joint action.

Gavan Duffy, J., in his address immediately after his return and again in his judgment, said that had he been at liberty to treat the experience as evidence, it would have destroyed his confidence in the plaintiff's evidence. But, as he was bound to disregard the evidentiary value of the experience, he felt compelled to accept the plaintiff's evidence. The learned judge therefore granted the injunction sought by the plaintiff, but this decision was reversed on appeal by the Victorian Full Court, who discharged the order. The High Court in turn reversed the Full Court's decision, but ordered a new trial in the action on the ground that the trial judge had not made even proper use of the view. Two separate judgments were given in the High Court, the first a joint judgment by Dixon, C.J., Webb, Kitto and Taylor, JJ., and the other a judgment by Fullagar, J. In both judgments it was pointed out that what the trial judge saw at Numurkah was not a view *simpliciter*, but was, in reality, a combination of a demonstration and a view.[5] Dixon, C.J., Webb, Kitto, and Taylor, JJ. were of opinion that this demonstration was not the product of the parties' joint action and so, in this case, could not be treated as evidence. A demonstration could only be treated as evidence[6] "if the demonstration took place at the request of or with the complete concurrence of both parties." Fullagar, J., while agreeing that the demonstration could not be regarded as evidence in this case, took, as the quotation following shows, a more liberal attitude with regard to the admission of demonstrations as evidence.[7]

> For what his Honour was really being asked by the defendant to do was to treat what he heard as a demonstration or reproduction of what the witnesses had described to him in court. It seems clear to me that he could properly do this only in one or other of two events. He could do it if the parties specifically admitted that the demonstration was, or agreed that it should be treated as, a reproduction of what the witnesses had attempted

[2] (1954) A.L.R. 373.
[3] *Id.* at 375.
[4] *Id.* at 377, 381.
[5] *Ibid.*
[6] *Id.* at 379, 381.
[7] *Id.* at 381.

to describe. Or he could do it if it were proved by evidence to his satisfaction that the demonstration really did reproduce what the witnesses had attempted to describe.

It is felt that the view put forward by Fullagar, J. is to be preferred. The objection raised by the majority against the use of a demonstration as evidence, was the possibility that the tribunal might be misled unless the parties could establish by their concurrence that the view faithfully represented what it purported to demonstrate.[8] It is submitted that this difficulty would equally be obviated if the demonstration was proved by testimonial, evidence subject to cross-examination, to reproduce what the witnesses had described. One cannot with any confidence say which opinion will ultimately be accepted, but should the test set out by Fullagar, J. find favour, it will greatly increase the possibility of demonstrations serving a useful purpose, particularly in cases like *Scott* v. *Shire of Numurkah*[9] wherein it would have been practically impossible to obtain any measure of agreement as to the relative intensities of the various sounds.

The next question in issue in this case was the use to which a view could be put. On this point both judgments were in agreement[10] that the test had been properly stated by Davidson, J. in *Unsted* v. *Unsted*:[11]

> Whilst a view is frequently a valuable adjunct to a hearing to enable the truth to be elicited, there are well-recognized limits within which such a procedure must be kept. The subject has been discussed recently by the Full Court in *Hodge* v. *Williams*.[12] In a general form the rule is that a view is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence and to apply it, but not to put the result of the view in the place of evidence: *London and General Omnibus Co.* v. *Lavell*.[13] Yet, sometimes, for example, in cases of passing off, or otherwise when what appears to the eye is the ultimate test, the Judge, looking at the exhibits before him, or examined by him as if they were exhibits in the case, and also paying attention to the evidence adduced, can apply his own independent judgment notwithstanding what witnesses have deposed to on the particular point: *cf. Bourne* v. *Swan & Edgar Ltd.*;[14] *Payton and Co.* v. *Snelling Lampard & Co.*[15] It is not permissible, however, for the judge to gather anything in the nature of extraneous evidence and apply it in the determination of the issues, unless the facts are openly ventilated and exposed to the criticism of the parties: *Way* v. *Way*,[16] *Kessowji Issar* v. *The Great Peninsula Railway Co.*[17]

While it is difficult to define a view as distinct from a demonstration, it seems that in this case what the judge saw at the Town Hall in the form of background, i.e. the physical proportions of the rooms, the relative positions of the auditorium and the supper-room, and the position of the band, and so on, constitutes what the High Court was referring to when they spoke of the view as distinct from the demonstration. The view of the majority as to the use to which the trial judge should have put the view in the light of Davidson, J's principle has to be gleaned from the following passage:[18]

> In the first place, although the learned judge was at liberty to use the results of his view for the purpose of determining the credibility of conflicting bodies of evidence, he was at liberty to make use of the view only within the limits and subject to the principle already indicated. . . .

Fullagar, J. said:[19] "Moreover, it must be borne in mind that his Honour was not bound to put entirely out of his mind all knowledge gleaned at

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[8] *Ibid.*
[9] (1954) A.L.R. 373.
[10] *Id.* at 379, 381.
[11] (1947) 47 S.R. (N.S.W.) 495.
[12] (1947) 47 S.R. (N.S.W.) 489.
[13] (1901) 1 Ch. 135.
[14] (1903) 1 Ch. 211.
[15] (1901) A.C. 308.
[16] (1928) 28 S.R. (N.S.W.) 345, 347.
[17] (1906) 23 T.L.R. 530 (P.C.).
[18] (1954) A.L.R. 373, 380.
[19] *Id.* at 383.

Numurkah, and it is impossible for us to say that his view of the evidence could not have been legitimately affected by what he saw there . . . ." It would therefore seem that all the judges were of opinion that the trial judge could have used the results of his view in order to decide which body of evidence he would accept. This interpretation is also borne out by the actual decision since the High Court ordered a new trial on the ground that the trial judge did not give the view sufficient weight. It was certainly in the *application* of the law as to views rather than in its *formulation*, that the trial judge's error lay. For the law which he said covered the point cannot now be doubted: he held himself bound *inter alia* by the decision in *Unsted* v. *Unsted*[20], and quoted the statement of the law by Davidson, J.,[21] from that case. Basing himself on this he said that as the view was not evidence he was bound to find for the plaintiff.

While the test of admissibility in evidence of a view has now been clearly laid down, at least on a verbal level, the differences between the High Court and the trial judge show that the application of this test to actual cases is a matter of far greater difficulty than is involved in the mere statement of the test. One reason for this may be that it is difficult to conceive how a view could enable the understanding of facts upon which evidence has been given without also constituting evidence in itself concerning those facts. In explaining what is being described, the view is at least evidence of the existence of the thing being described. The High Court has made the theoretical difficulty more explicit in characterising the view of something which enables the tribunal of fact to decide between conflicting bodies of the evidence while at the same time insisting that it is not in itself evidence. Although a view does not establish a fact in issue directly, neither does evidence of character, which is undoubtedly evidence, and like evidence of character, it enables the judge or jury to decide between conflicting bodies of evidence. With this decision the courts in Australia appear to have reached a position which rests on unsound distinctions.

How has this come about? Dean Wigmore, trenchant critic of the position now adopted here, treats this notion as having its origin in an attempt to reconcile the propriety of taking a view with the supposed rule that all the evidence taken at the trial must be of a type which can be transmitted to an appeal court. According to this supposed reconciliation, a view is nevertheless proper because it is not "evidence".[22] In England, however, the history is different. The exclusion of a view as evidence dates back to the decision in *London and General Omnibus* v. *Lavell*[23]. The Company sought an injunction to restrain Lavell using buses painted so as to resemble its own. At the trial before Farwell, J., two sample buses, one belonging to the plaintiff, the other to the defendant, were brought into the court yard, where the learned judge viewed them and decided that deception was likely. He granted the injunction on slight additional testimonial evidence being given for the Bus Company. On appeal, the court held that the finding was against the weight of the evidence, Lord Alverstone, C.J., laying down that a view is only for the purpose of understanding, following and applying the evidence.[24] A curious feature of this case is that the action was one for passing off, though referred to in the case itself as deceit, and yet it is just in passing off cases that views have since been recognised as evidence proper by way of exception to the general rule.[25] Whether the decision was wrong or not is not important for our purposes, for the dictum of Lord Alverstone was taken up in later cases. Most of these have been decisions of first instance, but since the decision in *London & General Omnibus* v. *Lavell*[26], the

[20] (1947) 47 S.R. (N.S.W.) 495.
[21] *Id.* at 498.
[22] Wigmore, *On Evidence* (3 ed. 1940) 288-293.
[23] (1901) 1 Ch. 135.
[24] *Id.* at 139.
[25] *Payton & Co.* v. *Snelling, Lampard & Co.* (1901) A.C. 308, *Bourne* v. *Swan & Edgar Ltd.* (1903) 1 Ch. 211.
[26] (1901) 1 Ch. 135.

question of views has come before the English Court of Appeal on two principal occasions, firstly in *Cole* v. *United Dairies*[27] and again in *Goold* v. *Evans*.[28]

In *Cole* v. *United Dairies*[29] the arbitrator at first instance looked at the defendant who had lost his ear in an accident in the course of his employment and concluded that it would not prejudicially affect his career as a milk carter. Evidence was given that the defendant's manager had said that Cole's disfigurement would decrease his chances of re-employment. The decision was upset by the Court of Appeal. Lord Greene, M.R. said:[30] "The learner arbitrator was putting his own observation against what I have already said was really a type of expert evidence. In my judgment, the learned arbitrator was not justified in doing that". In this case it is submitted that the real objection raised by the Court of Appeal was not that the view had been used as evidence, but rather that too much weight had been attached to the view. This view of *Cole* v. *United Dairies*[31] is taken by Mayo, J. in *Fielke* v. *Municipal Tramways Trust*[32].

The second case, *Goold* v. *Evans*,[33] seems to be more in favour of Lord Alverstone's theory. In that case, Hodson, L.J. said:[34] "Mr. Croom-Johnson has, I think, rightly contended that a view is not evidence. A view does not do away with the necessity of evidence". Denning, L.J., took the opposite position:[35] "Speaking for myself, I think that a view is part of the evidence just as much as an exhibit. It is real evidence. The tribunal sees the real thing instead of having a drawing or photograph of it. But even if a view is not evidence the same principles apply".

In the Australian States the tendency to approve Lord Alversonte's principle has been less evident than it has been in England. In particular, the Supreme Court of South Australia has on three separate occasions held that a view is evidence in itself. These cases were well summarised by Mayo, J. in *Fielke* v. *Municipal Tramways Trust*:[36]

> In *Coldwell* v. *Municipal Tramways Trust*[37] the Full Court referred to "the obvious physical conditions of a locality apparent to any observer" as being matters that "may be observed and taken into account *as evidence*". In *Matthew* v. *Flood*[38], Cleland, J. indicated that in his opinion objects seen may properly form the basis of, or be used with the evidence to form "conclusions of fact", nor is this idea dissented from by the Full Court when the same case was under appeal.[39]

Mayo, J. then went on to say that the use of the view set out in *London General Omnibus Co.* v. *Lavell*[40] was not the sole use to which a view could be put[41], referring to *Clark* v. *City of Edmonton*.[42]

In *Hodge* v. *Williams*[43] it is submitted the Full Court of New South Wales held that a view was admissible as evidence. In this case a workman was injured on his way to work while alighting from a train. The judge visited the railway station and observed the time trains waited at the station while passengers were alighting. Davidson, J. (with whom Street and Edwards, JJ. concurred) decided that the judge's independent observations on these stopping times were not admissible in evidence.[44] However, in the course of his decision, Davidson, J. said:

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[27] (1941) 1 K.B. 100.
[28] (1951) 2 T.L.R. 1189.
[29] (1941) 1 K.B. 100.
[30] *Id.* at 102.
[31] (1941) 1 K.B. 100.
[32] (1944) S.A.S.R. 235, 236.
[33] (1951) 2 T.L.R. 1189.
[34] *Id.* at 1192.
[35] *Id.* at 1191. Somervell, L.J. (at 1190) was of opinion that what the Judge saw was not a view but a demonstration and a view. Secondly, in the absence of one party, a view could not be used. He did not deal with the question of the admissibility of the view as such.
[36] (1944) S.A.S.R. 235, 236.
[37] (1928) S.A.S.R. 234, 238.
[38] (1939) S.A.S.R. 389, 391.
[39] (1940) S.A.S.R. 48.
[40] (1901) 1 Ch. 135, 139.
[41] (1944) S.A.S.R. 235, 236.
[42] (1929) 4 D.L.R. 1010.
[43] (1947) 47 S.R. (N.S.W.) 489.
[44] It may be noticed that, although the discussion of the propriety of the Judge allowing himself to be influenced by this evidence was confined to consideration of the principles affecting views, the further objection might have been raised that the view in this case involved the admission of similar fact evidence.

> Sometimes there may be a very fine line between what is proper and improper in the conduct of a view by a jury or by a judge when exercising the function of deciding issues of fact. Impressions formed in such circumstances may be of potent value. Inspection is a substitution of the eye for the ear in the reception of evidence.[45]

If a view is the substitution of the eye for the ear[46] in the reception of evidence, then clearly Davidson, J. is laying down that a view is to be regarded as a source of evidence. The dictum in *London and General Omnibus* v. *Lavell*[47] was distinguished:[48]

> But it has been stated that a view is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence and to apply it, and a judge is not entitled to put the result of the view in place of evidence. (*London and General Omnibus* v. *Lavell*[49]). In that case, however, the action was for deceit and there was no oral evidence whatever on the issue whether anyone was in fact misled.

The turn of the wheel so far as New South Wales was concerned came with the decision of the Full Court in *Unsted* v. *Unsted*.[50] This case was decided four days after the decision in *Hodge* v. *Williams*.[51] In *Unsted* v. *Unsted* the respondent to a divorce petition on the ground of adultery gave evidence that at the time of the alleged adultery she was sitting in front of a fire talking to the co-respondent. The trial judge visited the room and looked at the fireplace. From the accumulation of dust therein he concluded that the respondent was not telling the truth when he said there had been a fire in the grate ten months previously. This decision was reversed on appeal. Davidson, J. in this case laid down the rule that a view was not admissible as evidence.[52] It was his statement of the rule in this case which was accepted by the High Court in *Scott* v. *Shire of Numurkah*.[53] The other judges in this case were similarly of opinion that a view did not provide evidence.

In *Yendall* v. *Smith Mitchell and Co.*[54] Sholl, J. quoted with approval the *dicta* of Davidson, J. in *Unstead* v. *Unsted*.[55] Whether this case is really an application of the prinicple is, however, open to doubt. Sholl, J., in upholding the decision appealed from, said:[56]

> In my opinion the magistrate here did not go beyond the limits stated by Davidson, J. which I have quoted.[57] Accepting the view of Wigmore that the result of a view may itself be evidence, he was, I think, entitled to utilise his view for the purpose even of rejecting the evidence of the architect that the premises were uninhabitable.

The learned judge seemed clearly to be holding that a view may itself be evidence, basing himself on Wigmore, whose views the High Court were later to reject.[58]

The upshot of the above review is that the state of the authorities was not such that the view accepted by the High Court in *Scott* v. *Shire of*

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[45] (1947) 47 S.R. (N.S.W.) 489, 492.

[46] Probably this expression was not intended to be understood in too precise a sense. A view might well involve auricular as well as visual impressions.

[47] (1901) 1 Ch. 135.

[48] (1947) 47 S.R. (N.S.W.) 489, 492.

[49] (1901) 1 Ch. 135.

[50] (1947) 47 S.R. (N.S.W.) 495.

[51] (1947) 47 S.R. 489.

[52] (1947) 47 S.R. (N.S.W.) 495, 498. In this case, as in *Hodge* v. *Williams*, it may well be that the evidence on the view ought to have been rejected on any interpretation of the law as to views. Counsel's attention had not been properly drawn to the *aspect* of the view on which the judge intended to place reliance, and consequently counsel had no opportunity to present evidence directed to the point or even to argue that inferences drawn from the state of the grate on the matter in question must be so speculative that the evidence was worthless.

[53] (1954) A.L.R. 373.

[54] (1953) V.L.R. 369.

[55] (1947) 47 S.R. (N.S.W.) 495, 498.

[56] (1954) A.L.R. 373, 380.

[57] (1953) V.L.R. 369, 377.

[58] (1954) A.L.R. 373.

Numurkah[59] was forced on the court by the weight of authority. In these circumstances it is perhaps permissible to express some regret that a principle has been adopted involving difficulties of principle which are perhaps quite insoluble. In practice it is likely that tribunals will continue to use views as part of the materials which by a conscious or unconscious logical process influence their decisions. The rule of law then becomes merely a banner to which formal obeisance is made in ordinary cases, but which may cause some injustice when emphasis is thrown on the existence of the rule by the paucity of testimonial evidence and the correspondingly enhanced importance of a view, or when the judge cannot conscientiously feel that there is any part of the evidence which he does not understand so that he cannot conscientiously assent to a suggestion that he take a view.

F. P. DONOHOE, Case Editor—Fourth Year Student.

VARIATION BY THE ARBITRATION COURT OF ITS OWN MOTION

THE QUEEN v. *KELLY; EX PARTE AUSTRALIAN RAILWAYS UNION*

The present nature of the Arbitration Court's power to vary its awards was examined by the High Court in *The Queen* v. *Kelly; ex parte Australian Railways Union*.[1] The Commissioner for Railways (N.S.W.) had lodged an application for the variation of the Railways Metal Trades Grades' Award (1953) to give effect to an earlier decision of the Arbitration Court[2] abolishing quarterly adjustments of the basic wage.[3] When the matter came on for hearing, the Commissioner sought leave to withdraw his application. This leave was refused, and the Arbitration Court proceeded to make the variation order, notwithstanding that the parties were no longer in disagreement about the terms of their award. The Australian Railways Union thereupon applied to the High Court for a writ of prohibition restraining the Arbitration Court from further proceeding with the matter. Prohibition was unanimously refused, and in the result the High Court upheld the validity of ss. 49[4] and 34[5] of the Commonwealth Arbitration Act.[6]

The grounds on which Dixon, C.J., Taylor and Webb, JJ. based their decisions were substantially the same.[7] The power to vary awards[8] was held to be incidental to the Arbitration power[9] provided, here, the variation was within the ambit of the dispute in respect of which the award sought to be varied had been made. The court was further of opinion that a new dispute or difference between the parties to an award was not a "condition precedent"[10] to the exercise of the Arbitration Court's power of variation.[11] The present case

[59] *Ibid.*

[1] (1953) 89 C.L.R. 461.

[2] I.e. *The Basic Wage and Standard Hours Case* (1953) C. Arb. R. 698.

[3] I.e., according to the "C" Series retail price index numbers.

[4] S. 49 reads: "The Court may . . . if for any reason it . . . considers it desirable to do so . . . (b) vary any of the terms of an award."

[5] S. 34 provides that: "The Court . . . may exercise any of its powers, duties or functions under this act of its own motion or on the application of any party to an industrial dispute . . . ".

[6] The Commonwealth Conciliation and Arbitration Act, No. 13, 1904—No. 34, 1953.

[7] The two other judges in the case, Fullagar and Kitto, JJ. concurred with the Chief Justice.

[8] I.e., as in s. 49 of the Arbitration Act.

[9] S. 51 (xxxv) of the Commonwealth Constitution provides that: "The parliament shall have power to make laws . . . with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."

[10] (1953) 89 C.L.R. 461, 480, *per* Taylor, J.

[11] It was also held that the power to make variations in these circumstances was not equivalent to the power to make a common rule. The High Court has unequivocally denied