15, 1952

No. 47 of 1951.

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF BRITISH GUIANA

BETWEEN

LEJZOR TEPER — Appellant

and

THE QUEEN — Respondent

CASE FOR THE APPELLANT

RECORD

1. This is an appeal by special leave against the conviction of the Appellant in the Supreme Court of British Guiana on the 7th February, 1951, on a charge of arson contrary to Section 141 of the Criminal Law (Offences) Ordinance.

2. The Appellant was charged with having on the 9th day of October 1950, in the County of Demerara maliciously set fire to a shop with intent to defraud. He was found guilty by a jury and sentenced by the learned trial judge to seven years' penal servitude.

3. The shop in question which was owned by the Appellant's wife was situated at 119 Regent Street, Lacytown, Georgetown and was where the Appellant carried on the business of a dry goods store. The case for the Crown was that, having insured both the premises and the stock for amounts considerably in excess of their real value, he went by night to the said premises and deliberately set them on fire with the intention of claiming the said amounts from certain insurance companies.

4. The principal grounds of appeal are as follows:-

(a) The Crown called a Police Constable named Cato who deposed that after hearing the fire

alarm he heard woman's voice shouting "Your
p.63, 1.24. place burning and you going away from fire" and immediately thereafter saw a black car proceeding west driven by a fair man resembling the Appellant. There was no evidence that the man in the car was in fact the Appellant or that this man heard or must have heard the woman's shout, and the woman herself was not called as a witness or identified. It is submitted that this evidence of what the Police Constable heard the woman shout was inadmissible and that (since there was no other evidence identifying the Appellant with the man seen driving the car) its admission was highly prejudicial to the Appellant.

(b) The learned trial judge, although he warned the jury that this evidence was by no means conclusive and that they might dismiss it as being "vague and uncertain", nevertheless directed them that it was some evidence which, if coupled with other evidence, might point in one direction, and that if the other evidence inferred that the Appellant was there and that they might think that this item of evidence served to "tie up with other evidence". By such direction the learned judge was (it is submitted) directing the jury that they might take this evidence into account if they thought fit.

p.178, 1.21. (c) In dealing with Your Petitioner's aforesaid application to have a case stated the learned trial judge held (it is submitted wrongly) that the evidence in question was admissible as part of the res gestae.

5. The principal witnesses for the Crown, other than those who deposed as to the man seen going away from the fire, gave evidence (inter alia) as follows:-

p.9. (a) F.T.de Abreu, Assistant Superintendent of Police, deposed that at 9 a.m. on the 10th October, 1950, he went to the Appellant's premises at 119 Regent Street. He asked the
p.10, 1.1. Appellant how much stock he had at the time of the fire and the Appellant said he had about $30,000. The Appellant told him that two top shelves on the north side of the store had been filled with tweed, but this witness could see no sign of tweed having

been on them. In the back room there were two boxes containing straw and witness noticed a strong smell of gasoline. In one of the boxes he found bits of a glass mug with a dark substance on the inner surface. The Appellant said that he himself and his shop assistants had secured the premises on the previous Saturday afternoon. p.10, l.25. p.10, l.35.

On the 11th October this witness returned to the store in order to search for the stock book. There was a wooden bar leaning on the partition near the back door and the witness formed the opinion that the bar had not been across the door at the time of the fire. He next observed a partially burnt hat box with pages of a book and bills in it. These showed total cash purchases since March 1950 from two suppliers amounting to $3,287.25. p.11, l.4. p.12, l.3.

On the 12th October this witness told the Appellant that the remaining stock had been valued and amounted to only $4,143. He then arrested the Appellant on a charge of arson. p.13, l.10.

This witness further deposed that the Appellant owned a black Hillman car. p.13, l.34.

(b) Walter Aaron, a police officer who accompanied the fire brigade deposed that on arrival at the burning building he kicked open the door and that little force was necessary. The door did not seem to him to have been secured on the inside by a bar. p.16. p.17, l.18.

(c) J.T. Atkinson, Superintendent of the fire brigade, deposed that he went to the burning premises shortly after 2 a.m. on the 9th October. The fire was well alight on three floors. This witness noticed a strong smell of petrol. The Appellant, who arrived while this witness was there, said he did not keep any inflammable liquid stored there. On Wednesday, 11th October this witness examined the door and came to the conclusion that the wooden bar had not been in place when the fire occurred. p.19. p.19, l.19. p.20, l.19.

(d) Oscar Byrne, a detective constable, confirmed the evidence of de Abreu regarding the smell of petrol and the absence of the stock book. He searched the Appellant's p.25.

private house and found a bank book showing
p.28, l.1. a credit balance of $8,000 and a bank statement showing a credit balance of $3,673.95 on the 28th September. He also
p.28, l.6. found 3 insurance policies insuring the stock for a total of $29,500.

p.35. (e) Herbert Hintzen, a police officer, deposed that at about 1.15 a.m. on the 9th October he went into the club over the Appellant's premises at 119 Regent Street.
p.35, l.13. On coming down he heard a sound as if someone was walking on some straw or something of that sort at the back of the store. He could not see into the room. He examined
p.35, l.25. the doors and found everything intact, but observed in the storeroom the glare of what appeared to be a "low watt" electric light.

p.41. (f) Sheila de Camp deposed that she had been employed by the Appellant at his store up to Saturday the 7th October 1950. On that day at 4 p.m. she closed the back door with a wooden bar and two nails. The top shelf
p.42, l.1. contained dress lengths and the third shelf
p.42, l.33. some tweed. In cross-examination this witness deposed that new stock came into the store on that Saturday including four rolls of tweed.

p.57. (g) Neville Newsam, the Government Analyst, deposed that he had analysed the two boxes of straw and discovered petroleum oil.

p.68. (h) Leslie Johnson, a salesman, deposed that he had examined the remaining stock on the
p.70, l.1. 10th October and valued it at $4,143.86. He had examined the second shelf and was of opinion that there was no cloth there when the fire began. In cross-examinarion this witness admitted that he had agreed with one Fernandes who was principal of a firm who were agent's for Lloyds and who had examined
p.70, l.34. the stock on the 10th October that the Appellant might have had $15,000 worth of
p.72, l.4. stock. In answer to the Court he said that $15,000 was an estimate of what remained which, on checking-up, turned out to be $4,143 and that it was not an estimate of what might have been in the store before the fire.

(i) Egbert Bagot, an estate agent, deposed that in the period September - October 1948, before the Appellant's dry goods business had opened up, the Appellant instructed him to sell the said premises at 119 Regent Street in two parts, one part for $5,200 and the other part for $35,000. An offer of $4,500 was received for the smaller part but the Appellant would not accept it. p.73. p.73, l.10. p.73, l.15.

(j) Russell Olton, Supervisor of Canvassers for Hand in Hand Fire Insurance Ltd., deposed that he had arranged two insurances of the Appellant's stock, namely $8,000 on the 7th March 1950 and a further $7,000 on the 6th May 1950. At that time the Appellant estimated the approximate value of his stock at $20,000. In cross-examination this witness agreed that the Appellant's said estimate was approximately correct. In answer to the Court he said that when he inspected the stock in May there were between $6,000 and $7,000 worth of tweeds on the top shelves. p.76. p.76, l.25. p.78, l.25. p.79, l.17.

(k) Reginald Bollers, Chief Clerk of B.G. and Trinidad Mutual Fire Insurance Company Limited, deposed that his company had on the 14th October 1946 insured 119 Regent Street for $1,000 in the name of the Appellant's wife. p.81. p.81.

(l) R.E. Pairaudeau, Assistant Secretary of the Hand in Hand Insurance Company, deposed that on the 12th July 1949 the Appellant had applied to have a policy for $14,500 in respect of certain other property transferred to 119 Regent Street which was already covered for $8,400. This witness inspected the building and decided to reduce the policy from $14,500 to $8,400, this bringing the total insurances on the building to $17,000. His company had received a letter from the Appellant dated the 22nd July 1950 informing them that he had recently taken out additional insurance on stock with Lloyd's for $14,500, his present stock being well over $31,000. He further agreed that his company could then have reduced its insurance on the building. p.81; p.82, l.1. p.82, l.8. p.82, l.16. p.82, l.30.

(m) John McAndrew, Manager of the Insurance p.85.

Department of J.B. Leslie and Co., which took insurance for Lloyds deposed that the said
p.85, 1.11. premises were insured by his Company on the 22nd September 1949 for $10,000. This policy lapsed on the 22nd May 1950 and was replaced by an annual policy on the same building for
p.85, 1.19. the same sum. In June 1950 this witness looked at the Appellant's stock and granted a policy for $14,500, making the Appellant's
p.85, 1.36. total insurance on the stock $29,500. At
p.86, 1.36. that time there were tweeds in stock. These were on two shelves. In cross-examination
p.86, 1.30. this witness said that, at the time of his
p.86, 1.11. inspection, he felt no doubt that the stock was worth $30,000.

p.87. (n) J.H.M. Moore, Secretary of B.G. and
p.87, 1.27. Trinidad Fire Insurance Company, deposed that on the 23rd September 1949 the Appellant asked that a policy for $1,000 which was then in force in respect of certain wearing apparel and household effects belonging to the Appellant, should be transferred to the building at 119 Regent Street. The witness
p.87, 1.30. replied that his directors did not agree to the transfer. Before sending this reply, he
p.87, 1.39. had learned that the building had been insured with other companies. He had inspected the property and made two calculations of the replacement value, the higher being $18,000.

p.92. (o) Patrick Duff, a carpenter, deposed that he had inspected the building at 119 Regent Street on the 22nd November 1950 at the
p.92, 1.33. request of Lloyd's Insurance Company and estimated that it would cost $14,000 to replace the entire building.

p.59. (p) Cecil Stewart, a police constable who was tenant of a room at 119 Regent Street belonging to the Appellant, deposed that he had seen the Appellant visit the store
p.60, 1.10. several times at night between 8 and 10 and had seen him go in by the back door about 3 or 4 months before the fire.

6. The evidence of identification was as follows:

p.50. (a) Cecil Daniels, manager of the New Union Club whose premises were above those of the Appellant at 119 Regent Street, deposed as

follows:-

"During the 8th several members visited the club: the last visitors were Charlie Pestano and Bruce Weatherhead, playing billiards. During the night, about 11.30 p.m. I had occasion to go downstairs to the vat. I went alone leaving the two players upstairs. On going downstairs I observed an individual going towards the east paling of the lot; his back to me; he was a clear individual wearing a white pants and shirt - barehead. I thought it was accused as he usually goes to the store at night. The person was a similar height and build to accused; medium. I paid no particular attention: from a glance I though it was him and did not pay any more attention. I went back upstairs: the two members were there. p.51, 1.1.

There are two members of the Club resembling accused - Charlie Pestani and Carl D'Aguiar: D'Aguiar had not been at the Club for a few days".

In cross-examination this witness said:-

"The only reason I thought it was accused was because he sometimes comes at night to visit the place: did not speak to the person". p.54, 1.14.

"I glanced at the person for 2 or 3 seconds. Did say as at A on p.40 of depositions".

"I only saw the back of the man"

(b) Lucille Green who lived at 116 Regent Street, deposed that on the night in question she was awakened about 2 a.m. and saw a big blaze. Her evidence included the following passage:- p.61, 1.25.

"I saw a fair skin man running from across the pave (sic) on the southern side of Regent Street: he came across the road and got in a small car that was parked in front of our gateway: it was a black car: he reversed it in a westerly direction, turned round and went along Regent Street in a westerly p.62, 1.9.

direction I did not come out of the house that night".

In cross-examination this witness said:-

p.62, 1.26. "I saw the big cloud of smoke about ½ hour after the brigade arrived; it was about 10-20 minutes after I saw the smoke that I saw the man run to his car.

When I first saw the man he was to the east of the Alexander Street Corner; he came diagonally across the street to the car.

I don't know the colour of his hair: was not particular concerned about the man."

p.63, 1.10. (d) Thomas Cato, a police constable, deposed as follows:-

"I walked along Fourth Street; north into Cummings Street; went along Middle Street and entered into Camp Street and 2 a.m. I proceeded south along Camp Street towards Regent Street. I heard a shout of fire. I was then between Church Street and Murray Street proceeding south along Camp Street. Before I got to Regent Street one engine passed while I was between North Street and Robb Street going east along Regent Street.

When I was about 10 to 15 rods from Regent Street the second engine passed going in same direction. I stopped at the corner of Regent and Camp Streets. There were crowds going east and west along Regent Street (to and from the fire); I heard a woman's voice shouting "Your place burning and you going away from the fire"; immediately then a black car which was proceeding west along Regent Street turned north into Camp Street; in the car was a fair man resembling accused. I did not observe the number of the car. I could not see the fire from where I was standing."

Cross-examination: Don't know who or where the woman is.

p.63, 1.31. She was on the pavement on the opposite side of Regent Street near enough for me to hear. The burnt building is about 1½ blocks

from where I was standing.

I saw smoke in the air when the car passed.

Have been in the force 25 years 9 months.

I had no suspicions at the time.

I mentioned this about 2 days after the fire.

I first heard about arson on the Tuesday morning."

7. The Appellant made two statements to the police, dated the 9th and 10th October respectively, in which he stated (inter alia) that he had opened his store in February, 1950, with a stock of about $10,000. On the 15th June he valued his stock in trade for about $30,000 and the property at $45,000. On the 7th October he had left his store at about 4.15 locking the doors and leaving about $30,000 worth of goods intact. At about 5 p.m. he went back to the store with his family to change his child's school grip, they all being on their way to the sea walls. On reaching the store at about 8 a.m. on the 9th October he found that most of the stock in the store had been destroyed by fire and that his store book had also been destroyed. He returned home at about 9 p.m. and went to bed. He did not call at his store on the Sunday. pp.194 and 195, p.195, 1.32. p.195, 1.41. p.196, 1.19 1.25. p.196, 1.29. p.199, 1.21.

8. At the trial the Appellant made a statement from the dock in which he repeated the substance of his statements to the police and further stated (inter alia) as follows:- p.99.

(a) He had overheard Mr.Cecil Daniels, the proprietor of the Club, having a violent quarrel with his (Daniels') brother. Daniels called his brother a villian and a crook and referred to a "flare-up" (i.e. fire) which they had already had in the Club and said "this time I will make sure of it that it happens different". The Appellant commented:- "I can't swear that either Cecil or his brother did it but they could have done it from the threats I heard". p.104, 1.40. p.105, 1.3.

p.105, l.9. (b) He had told the police there were "tweeds up to the top shelf" as he at no time considered that the frame which had been put up in August for display of materials was a shelf.

p.106, l.36. (c) He had never entered his store at night through the back door but had twice done so through the front door between 7 and 8 p.m.

p.113. 9. That the Defence called one Gerald da Silva, a director in a company which owned property on the south side of Regent Street. 10

p.114, l.12. On the night of the fire he was at home and was called to the scene by his sister-in-law. He got into his car and drove to the scene of the fire and went to his brother's house which was the next building to the Appellant's premises. He saw that the fire was practically finished, crossed to the opposite side of the road and then drove west along Regent Street. He

p.114, l.35. heard lots of noise and people's voices. 20

10. The Defence also called a number of witnesses who gave evidence regarding the value of the building and stock including one Askat Ali, a hat manufacturer and salesman with long experience of the dry goods business, who deposed that he had seen the Appellant's stock

p.123,l.30. on the 6th October and estimated the value at

p.130,l.30. $24,000 - $25,000 retail price. Another witness named Ovid James deposed that he had overheard the quarrel between Cecil Daniels 30

p.131,l.2. and his brother. The brother said "Oh you forget that I save you from blazing down". Cecil replied "I don't care, I don't want you upstairs; I hope it won't happen again". The

p.131,l.5. brother then said: "I gwine see it burn down."

11. That the learned judge's notes for summing up included the following:-

p.149, l.39. "Thomas Cato: Left Station 1.45 a.m. for patrol duty from Lamaha to South Street along Camp Street. 40

Proceeded along Camp Street towards Regent Street. About 2 a.m. heard shout of fire. One engine passed; second passed when I was 10-15 rods from Regent Street. I stopped at corner of Regent and Camp Streets; crowds going along Regent Street. Heard woman's voice

shouting "Your place burning and you going away from the fire" - immediately a black car which was proceeding west along Regent Street turned north into Camp Street - in the car a fair man resembling accused.

Cross-examination: Woman was on pavement on opposite side of Regent Street. Smoke in the air when car passed.

By the Court: Medium sized car.

De Abreu says accused owns a black Hillman: Accused drove him in it from C.I.D. to Regent Street".

12. According to a note taken by the Appellant's Counsel the learned judge in the course of his summing up said:-

" this evidence is not conclusive. It can be taken with other evidence. If from the other facts you find that the accused was there, "this evidence ties up with it." But you may find it was vague and uncertain".

There are no official shorthand writers attached to the Courts of British Guiana but an unofficial shorthand note, taken at the time, includes the following passage:-

"Well, that evidence is certainly by no means conclusive but it is some evidence which, if coupled with other evidence might point in one direction. It is so vague that it might be anybody else. It does not necessarily mean it was not the accused. Perhaps the woman Cato heard say that, might have mistaken someone else for the accused. You may think, well, the evidence infers that he was there and that other bit of evidence seems to tie up with other evidence I have heard but it is so vague and uncertain that it does not help me at all in my deliberations."

13. The jury brought in a unanimous verdict of "Guilty" and the Appellant was sentenced as aforesaid to penal servitude for seven years. p.162.

14. The Appellants counsel applied to the learned trial judge to have a case stated under Section 174 of the Criminal Law p.163, 1.28

(Procedure) Ordinance. The first ground of such application was that the learned judge should have directed the jury that the testimony of Police Constable Cato that he heard a woman say "Your place burning and you going away from the fire" was inadmissible and that this very prejudial allegation should not be allowed to influence them.

p.p.173-180. 15. The learned Judge gave his decision in writing on the 29th March 1951. It included the following passages:-

"Of the cases cited by counsel for the
p.177, 1.20. applicant and on behalf of the Crown, there are two of which it may be said that the circumstances are not dissimilar from those attending the use of the words which form the subject of this application. The first of those cases is the Schlwalbe, (Swab.521) in which the question was which of the two vessels waa to blame for a collision: an exclamation made by the pilot of one of them, after she was cut away and while she was backing, of "the d.....d helm is still a-starboard ! " was held admissible as part of the res gestae. It should perhaps be here pointed out that there is no distinction with regard to the admissibility of the declarations between Civil and Criminal proceedings (see Phipson on Evidence, eighth Edition, at page 61). The other case is, Mersey Docks Board v. Liverpool Gas Co. (Times Aug.23rd, 1875). In that case an exclamation by one of the Defendant's workmen as he was escaping from a man-hole just after a fire occurred and nearwhere it was first seen, of "Oh, my God, the stage is on fire. I did it. I'm a ruined man! " was held admissible as part of the res gestae".

x x x

p.178, 1.11. "The question here is: was the interval between the event itself and the shout of the woman such as "to allow of fabrication" or to reduce the words used by the woman "to the mere narrative of a past event"; were the two matters substantially contemporaneous? If it is the case that in my view reasonable doubt exists as to the correct answer to that question then it would be my duty to grant

this application and permit that doubt to be resolved by the Court of Appeal. In the light of the authorities to which reference has been made I have formed the opinion, and it is one on which I entertain no reasonable doubt, that the evidence in question here was admissible as part of the res gestae and accordingly I find myself unable to grant the application. In view of this finding it is not necessary to consider the question of the admissibility of the evidence on the ground of the sufficiency of the identification, by Cato, of the man in the car at the time of the shout by the woman nor the question as to whether or not the applicant was prejudiced by the admission of the evidence".

16. The material sections of the Criminal Law Offences Ordinance and Criminal Procedure Ordinance are annexed hereto.

17. Special Leave to appeal to His Majesty in Council was granted by an Order-in-Council dated the 1st November, 1951.

18. The Appellant humbly submits that this appeal should be allowed, with costs of this appeal and of his defence, and his said conviction quashed and his sentence set aside for the following amongst other

R E A S O N S

(1) Because in view of the fact that no-one had identified the man seen driving the car as the Appellant the trial Judge was wrong in holding that the words which the witness Cato heard a woman use were admissible as part of the res gestae.

(2) Because the authorities relied upon by the trial Judge have no application to the facts of the present case.

(3) Because instead of directing the jury that the evidence in question, although not conclusive, might "tie up" with other evidence the trial Judge should have directed the jury to disregard this evidence altogether.

(4) Because there was no other evidence of identification and therefore it cannot be said having regard to all the circumstances of the case, that if this evidence had been excluded a reasonable jury, properly directed, must have found the Appellant guilty.

(5) Because apart from the evidence in question there was no evidence upon which any jury could properly have found the Appellant guilty.

DINGLE FOOT.

A N N E X U R E

CRIMINAL LAW (OFFENCES) ORDINANCE.

FIRST PART. GENERAL PROVISIONS.

TITLE 1.

Operation of common law rules and principles

4. Subject to the provisions of this Ordinance and of any other statute for the time being in force, all the rules and principles of the common law of England rekating to indictable offences and other criminal matters shall, so far as they are applicable to the circumstances of the colony, be in force therein:

Proviso.

Provided that nothing in this section shall extend to cause any attainder, forfeiture, or escheat.

Setting fire to buildings

141. Everyone who unlawfully and maliciously sets fire to any house, stable, coach-house, outhouse, warehouse, office, shop, store, megass or other logie, mill, boiling-house, curing-house, still-house, store-house, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land or in carrying on the business of any plantation or cattle farm or any trade or manufacture or any branch therein, whether it is then in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony and on conviction thereof shall be liable to penal servitude for life.

CRIMINAL LAW (PROCEDURE) ORDINANCE

TITLE 12.

Crown Cases Reserved.

Reservation of question of criminal law for opinion of the Court.

174. Where any person has been convicted of an indictable offence, the judge of the Court before whom the cause has been tried may in his discretion reserve any question of law which has arisen on the trial for the consideration of the Court of Appeal, and thereupon shall have authority to respite execution of the judgment on the conviction, or to postpone judgment until that question has been considered and decided, as he thinks fit; and in either case the judge reserving the question of law shall, in his discretion, commit the person convicted to prison, or to take a recognizance of bail, with one sufficient surety or two sufficient sureties, in any sum the judge thinks fit, conditioned to appear at the time or times the judge directs and receive judgment, or to render himself in execution, as the case may be.

Mode of proceeding: reservation of case.

175. (1) The judge reserving the question of law shall thereupon state the question in a case signed by him, with the special circumstances in which it has arisen; and a copy of the case shall be delivered by the regisyrar to the registrar of the Court of Appeal.

(2) The Court of Appeal shall thereupon have full power and authority to hear and determine the question, and thereupon to reverse, affirm, or amend any judgment given on the indictment on the trial whereof the question has arisen, or to avoid that judgment and order an entry to be made on the record that, in the opinion of the judges of the Court of Appeal, the person convicted ought not to have been convicted, or to arrest the judgment, or to order judgment to be given thereon at the same or some other sitting of the Court before which the trial took place if no judgment has been before that time given, as they may be advised, or to make any other order that justice requires.

Fourth schedule; form 22.

(3) The judgment and order (if any) of the Court of Appeal shall be certified under the hand of the registrar of the Court of Appeal to the Registrar, who shall enter them on the original record in proper form; and a certificate of that entry, under the hand of the registrar, shall be delivered or transmitted by him to the keeper of the prison where the person convicted is in custody, and shall be sufficient warrant to the keeper and to all other persons for the execution of the judgment as so certified to have been affirmed or amended.

(4) Execution shall thereupon be had on the judgment and for the discharge of the person convicted from further imprisonment, if the judgment is reversed, avoided or arrested and in that case the keeper shall forthwith discharge him, and the Court shall at the next sitting thereof vacate any recognizance of bail.

(5) If the Court is directed to give judgment, it shall proceed to do so at the same or next sitting of the Court.

(6) If any person convicted is in custody, he may be ordered by the Court of Appeal to be brought into Court at any time for the purposes of the case; and the keeper of the prison in which he is confined shall obey the order.

Remitting case for amendment

176. When a case has been so reserved, the Court of Appeal may if that Court thinks fit, cause it to be sent back for amendment, and thereupon it shall be amended accordingly, and judgment shall be delivered after the amendment.

Procedure

177. The practice and procedure under the provisions of the last three preceding sections shall be as prescribed from time to time by rules of Court.

No. 47 of 1951.

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CASE FOR THE APPELLANT

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