J A M A I C A

IN THE COURT OF APPEAL

R.M. CIVIL APPEAL No. 82 of 1970

BEFORE: The Hon. Mr. Justice Luckhoo, Ag. P.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

****

BETWEEN	-	HUGO BERRY and VERNON MORRIS	-	DEFENDANTS/APPELLANTS APPLICANTS
AND	-	THE KINGSTON AND ST. ANDREW CORPORATION	-	PLAINTIFF/RESPONDENT

H. Edwards, Q.C., and N. Wright for the applicants.

Miss B. Walters for the respondent.

January 27, 28, March 24, 1972

LUCKHOO, AG. P.:

This is an application to relist a civil appeal from the Resident Magistrate's Court which was dismissed for want of prosecution when it was called on for hearing on December 17, 1970.

The application is supported by an affidavit sworn by counsel for the applicants on February 25, 1971 setting out the circumstances under which the applicants and their counsel came to be absent when the applicants' appeal was called on for hearing on December 17, 1970.

Counsel's affidavit discloses that the appeal was originally listed for hearing during the week commencing November 17, 1970. It was not heard during that week and was subsequently relisted for hearing on Wednesday, December 16, 1970. On that day the Court was engaged in hearing another

/appeal .....

appeal - Kent Smith et al v. R. - the arguments in which had commenced on Monday, December 14, 1970. Counsel attended Court on December 16 and was informed that the hearing of the appeal of Kent Smith et al v. R. was likely to continue for the remainder of that week. On the following day counsel enquired of counsel for the appellant in the Kent Smith appeal whether that appeal was likely to last all that day and was assured that it would. In fact on that day the hearing of the Kent Smith appeal came to an abrupt and unexpected end the Court deciding to refer the matter for hearing by a panel of five judges. The Court thereupon proceeded to call on for hearing the appeals which stood next in the list up to that date and dismissed those in respect of which appellants (or counsel) were not present to prosecute their respective appeals. It was in those circumstances that counsel for the applicants was absent when the applicants' appeal was called on for hearing. Counsel for the respondent was, however, present. Without a hearing on the merits the applicants' appeal was dismissed for non-appearance of the applicants (the appellants). Upon being informed of what had occurred counsel for the applicants approached two of the judges who had sat in disposing of the applicants' appeal in this way and the judges suggested that counsel might in the circumstances apply to the Court for the appeal to be relisted. The present application was accordingly made, though not earlier than February 26, 1971 because of the supervening illness of counsel.

The hearing of this application began in July, 1971 when the Court reserved judgment at the end of the arguments. In the course of its researches into the matter prior to arriving at a decision the Court discovered two reported cases - Palmer v. Vernon (1943) 4 J.L.R. 103 and Brooksbank v. J.L. Rawsthorne & Co. (1951) 2 All E.R. 413; (1951) W.N. 393 - which it desired to bring to the attention of

/counsel .....

counsel. This was accordingly done and the application was relisted for further hearing.

Upon the matter coming on for hearing before us attorney for the applicants Mr. Horace Edwards submitted that this Court has an inherent jurisdiction to relist an appeal which has been struck out or dismissed for non-appearance of the appellant where there is no hearing on the merits of the appeal and that such an appeal will be relisted in a proper case when the justice of the circumstances requires it. Good and sufficient reason for non-attendance on the part of an applicant would have to be shown. Mr. Edwards urged that in the circumstances of the present case good and sufficient reason for the applicants' non-attendance when the appeal was called on for hearing has been shown to exist and that this Court should accordingly direct that the appeal be relisted for hearing.

Mr. Edwards' submission raises the question whether this Court has an inherent jurisdiction to do what the applicants now ask us to do. To answer that question we must seek to discover what are the jurisdiction and powers of the Court.

This Court was constituted in 1962 under the Judicature (Appellate Jurisdiction) Law, 1962 (No. 15 of 1962) intituled a Law to make provision for the jurisdiction and powers of the Court of Appeal for Jamaica, and for matters incidental thereto or connected therewith. Section 8 of that Law provides as follows -

> " 8. There shall be vested in the Court of Appeal -
>
> (a) subject to the provisions of this Law the jurisdiction and powers of the former Court of Appeal immediately prior to the appointed day;

/(b) such .....

(b) such other jurisdiction and powers as may be conferred upon them by this or any other law."

By s. 2 of the Law (No. 15 of 1962) the "former Court of Appeal" means the Court of Appeal established by the Judicature (Court of Appeal) Law, Cap. 178 prior to the appointed day, that is prior to August 5, 1962. The Judicature (Court of Appeal) Law was enacted in 1932 and amended from time to time. That Law was repealed by s. 36 of Law No. 15 of 1962. Section 11 of Cap. 178 conferred a right of appeal from Resident Magistrates' Courts in civil proceedings in the following terms -

" 11. Subject to the provisions of this Law, to the provisions of the Judicature (Resident Magistrates) Law, regulating appeals from Resident Magistrates' Court in civil proceedings, and to rules made or deemed to be made under that Law, an appeal shall lie to the Court of Appeal from any judgment, decree or order of a Resident Magistrate's Court in all civil proceedings."

Section 7 of that Law provided for the making of rules of Court inter alia regulating generally the practice and procedure under the Law (Cap. 178) or any matter relating to the Court of Appeal. Section 251 of the Judicature (Resident Magistrates) Law, Cap. 179 the provisions of which were in force when the Judicature (Court of Appeal) Law was enacted, regulates appeals from Resident Magistrates' Courts in civil proceedings in the following terms -

" S. 251 Subject to the provisions of the following sections, an appeal shall lie from the judgment, decree or order of a Court in all civil proceedings, upon any points of law, or upon the admission or rejection of evidence, or upon the question of the judgment, decree, or order being founded upon legal evidence or legal presumption, or upon the question of the

/insufficiency .....

insufficiency of the facts found to support the judgment, decree, or order; and also upon any ground upon which an appeal may now be had to the Court of Appeal from the verdict of a jury, or from the judgment of a Judge of the Supreme Court sitting without a jury.

And the Court of Appeal may either affirm, reverse, or amend the judgment, decree, or order of the Court; or order a nonsuit to be entered; or order the judgment, decree or order to be entered for either party as the case may require; may assess damages and enter judgment for the amount which a party is entitled to, or increase or reduce the amount directed to be paid by the judgment, decree or order; or remit the cause to the Court with instructions, or for rehearing generally; and may also make such order as to costs in the Court, and as to costs of the appeal, as the Court of Appeal shall think proper, and such order shall be final:

Provided always, that no judgment, decree, or order of a Court shall be altered, reversed, or remitted, where the effect of the judgment shall be to do substantial justice between the parties to the cause:

Provided also, that an appeal shall not be granted on the ground of the improper admission or rejection of evidence; or on the ground that a document is not stamped or is insufficiently stamped; or in case the action has been tried with a jury, on the ground of misdirection, or because the verdict of the jury was not taken on a question which which the Magistrate was not at the trial asked to leave to them, unless in the opinion of the Court of Appeal, some substantial wrong or miscarriage has been thereby occasioned in the trial, and if it appears to the Court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, The Court may give final judgment as to part

/thereof .....

thereof, or some or one only of the parties, and allow the appeal as to the other part only, or as to the other party or parties."

Simultaneously with the repeal of Cap. 178 there was enacted as s. 11 (1) of Law 15 of 1962 a provision in terms identical with the provisions of s. 11 of Cap. 178. Subsection (2) of s. 11 of Law 15 of 1962 relates to the time for giving of notice of appeal, security for costs and filing of grounds of appeal and is not relevant to the matter under consideration. In fact there is no other provision of Law 15 of 1962 which bears on the question of the jurisdiction or powers of the Court in relation to appeals from Resident Magistrates' Courts in civil proceedings. In so far as provision is made by Rules of Court regulating the practice and procedure of the Court in appeals from Resident Magistrates' Courts in civil proceedings, rules 72 to 75 (inclusive) of the Court of Appeal Rules, 1962 (which revoked the Court of Appeal Rules 1935 and all amendments thereto made for regulating the practice and procedure of the former Court of Appeal) are the only rules which relate to appeals in such proceedings. These rules deal with the making of preliminary objections by a respondent, evidence relating to such objection, amendment of grounds of appeal and copies and notice of grounds of appeal respectively. In the light of these various statutory provisions, there being no other jurisdiction or powers conferred on this Court by any other enactment in relation to appeals from Resident Magistrates' Courts in civil proceedings brought under s. 251 of Cap. 179, it would follow that by virtue of s. 8 of Law 15 of 1962 the powers of the Court in relation to appeals from Resident Magistrates' Courts in civil proceedings are the same as those possessed by the former Court of Appeal in like proceedings.

It might be useful therefore to have regard to decisions of the former Court of Appeal on applications for rehearing of appeals from Resident Magistrates' Court in

/civil

civil proceedings to that Court where such appeals have been struck out or dismissed not on the merits but because of the non-attendance of the appellants to prosecute their appeals when called on for hearing. One such reported authority is Palmer v. Vernon (1943) 4 J.L.R. 103. Counsel for the applicant in that case cited in support of his application to relist the English cases of Hession v. Jones (1914) 2 K.B. 421, Walker v. Budden (1879) 5 Q.B.D. 267 and Rackham v. Tabrum (1923) 39 T.L.R. 380. The application was opposed. The former Court of Appeal whose judgment was delivered by Sherlock, J.A. said -

> " Having considered the above authorities and especially the observations of L.C.J. Lord Hewart in Rachman (sic) v. Tabrum we are of the opinion that this Court has the power in a proper case to re-list an appeal that has been dismissed for non-appearance of appellant, there being no hearing on the merits. It appears that this has previously been done in Resident Magistrates' civil appeals where the application was not opposed. We think that the power to re-list should only be exercised in a proper case and for good and sufficient reasons."

The Court went on to hold that the case was not one where the power should be exercised in favour of the applicant. The case of Palmer v. Vernon was cited with approval by this Court in Brown v. Nembhard and anor (1966) 4 Gl.L.R. 128, where a similar application came up for determination. In Rackham v. Tabrum relied on by the former Court of Appeal a judge in chambers dismissed a summons for non-attendance of the plaintiff. The order of dismissal was drawn up. Upon application of the plaintiff the judge in chambers restored the summons and made the order sought therein. Upon appeal to the Divisional Court it was held that the judge in chambers had jurisdiction to entertain the summons after it had been dismissed.

/Lord Hewart .....

Lord Hewart, C.J. with whose judgment Salter and Branson, JJ. agreed said (1923) 39 T.L.R. at p. 381) -

> " The principle is that where a summons or case has not been heard, but merely struck out, the Court may, if it thinks fit, hear or entertain the summons or case, but if there has been a hearing on the merits, though in the absence of one party, it cannot do so after the order is perfected."

After referring to Walker v. Budden and distinguishing Hession v. Jones the Lord Chief Justice concluded (ibid) -

> " There is, in the present case, a narrower ground. Mr. Kennedy admitted that there was jurisdiction before the order was drawn up. An application was made to Mr. Justice Bray" (the judge in chambers) "on February 2, before the order was drawn up, and was still under consideration when it was drawn up. One of the reasons given by Mr. Justice Bankes for his decision in Hession v. Jones was that the order had been drawn up. It appears from Walker v. Budden and In re Grove, in both of which the orders must have been drawn up, that in cases falling within the branch of the principle applicable to this case the Court has jurisdiction, even though the order has been drawn up."

The Divisional Court in that case invoked the inherent jurisdiction of the Court in applying the principle stated by the Lord Chief Justice. The judgment of Bankes, J. in Hession v. Jones (1914) 2 K.B. 421 shows how the inherent jurisdiction of the Divisional Court in this regard is derived. There the Divisional Court was dealing with a motion by the plaintiff praying that an appeal by the defendant from the judgment of a county court in a claim to recover the price of 20 cases of eggs sold to the defendant be re-instated and reheard. The Divisional Court in the absence of the plaintiff had heard the appeal, reversed the judgment of the county court and ordered

/judgment .....

judgment to be entered for the defendant. When the plaintiff heard the result of the appeal he applied to the court to reinstate and rehear the appeal. By that time the order of the Divisional Court had been passed and entered. In support of the plaintiff's application it was urged that the Divisional Court had jurisdiction to reinstate and rehear the appeal under O. XXXVI, r. 33 and O. LIX r. 16 (1) of the Rules of the Supreme Court, 1883. Reference was also made to Walker v. Budden and In re Morris (1881) 19 Ch. D. 216 among other cases, where the inherent jurisdiction of the Court was invoked. The application was resisted by the defendant who contended that the Court had no jurisdiction to reinstate and rehear an appeal where the appellant had appeared and had been heard and the Court had determined the appeal, and the order of the Court has been passed and entered. A distinction was to be drawn between such a case and the cases where there had been no hearing but the appeal had merely been struck out. Further the rules of court relied on by the plaintiff were inapplicable. **Bankes**, J., with whose judgment Avory, J. stated he agreed, said [(1914) 2 K.B. at p. 425] -

> " Now the Divisional Court is a statutory Court of Appeal created for hearing appeals from county courts. It is constituted under s. 45 of the Judicature Act, 1873 (36 & 37 Vict. c. 66) and it is provided by s. 17 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), and s. 23 of the Judicature Act, 1884 (47 & 48 Vict. c. 61), that the Rule Committee shall have power to make rules regulating the procedure on appeals from inferior courts to the High Court. Under these enactments certain rules have been made, among them those incorporated in Order LIX of the Rules of the Supreme Court. 1883. In my view our jurisdiction is not absolutely limited by those rules because we have reserved to us as judges of the High Court by s. 16 of the Act of 1873 all the powers and jurisdiction of all the judges whose jurisdiction was transferred, and also by s. 73 of the Act of 1873 and s. 21 of the Act

/of 1875, ...

> of 1875, the right to exercise all the forms and methods of procedure which were in force before the Judicature Acts and are not inconsistent with those Acts and the rules made under them. Our jurisdiction therefore is in part a statutory jurisdiction regulated by the Rules of the Supreme Court, 1883, and partly an inherent jurisdiction which we possess as judges of the High Court. The question is whether by the rules or by reason of our inherent jurisdiction we have the power to reinstate this appeal."

Bankes, J. then went on to consider the rules urged in support of the plaintiff's application and found that they did not confer on the Court the jurisdiction it was asked to exercise. As to the inherent jurisdiction of the Court, Bankes, J. said (ibid at pp. 426 - 427) -

> " Before the Judicature Acts the Courts of common law had no jurisdiction whatever to set aside an order which had been made. The Court of Chancery did exercise a certain limited power in this direction. All Courts would have power to make a necessary correction if the order of the Court as drawn up did not express the intention of the Court; the Court of Chancery, however, went somewhat further than that, and would in a proper case recall any decree or order before it was passed and entered: but after it had been drawn up and perfected no Court or judge had any power to interfere with it. That is clear from the judgment of Thesiger L.J. in the case of <u>In re St. Nazaire Co.</u> (1879) 12 Ch. D. 88. Therefore apart from some authority to the contrary it would seem that neither under the rules, nor under the statutes, nor by the practice before the Judicature Acts has the Court this jurisdiction. But Mr. McCardie has referred to several authorities from which he says we ought to infer that judges of the Court of Appeal have taken the view that the Divisional Court has this jurisdiction. Of those authorities my view is that some are not applicable and none contains a decision upon

/the point .....

> the point. At most they contain dicta upon a question which was not in issue and upon which there had been no argument. First there is Walker v. Budden. It was there held that where an appellant from the judge in chambers to the Queen's Bench Division had not appeared, and his appeal had been struck out, he could not appeal to the Court of Appeal from the order of the Queen's Bench Division striking out his appeal. The Court of Appeal did say "the defendant must apply to the Queen's Bench Division, which possibly, in the exercise of its discretion, may allow the appeal from chambers to be argued." But that was a case of the first class I have mentioned, where the appellant had not appeared, the appeal had been struck out, and the Queen's Bench Division was only asked to reinstate a case which had never been heard."

Bankes, J. observed that that was not the position in the matter then before the Court. He referred to the distinction pointed out by the Court in the case of In re Grove (1884) 4 T.L.R. 272 between a case where a proceeding is struck out for non-appearance of the appellant and the case where, as in the one under consideration, although the respondent was absent the appellant had argued the case and satisfied the Court that he was right. In the latter case the Court had no jurisdiction to make the order asked for. In the result the application was refused.

In Hession v. Jones the Divisional Court (which forms part of the Supreme Court of Judicature) did not doubt that the Court could, in its exercise of its inherent jurisdiction, relist a proceeding which has been struck out for non-appearance of an appellant provided that the decree or order pronounced had not been passed and entered. The Court did not, however, decide that where the decree or order pronounced in such circumstances had been passed and entered the matter could not be relisted. Indeed the Court sought to distinguish the position between a matter struck out for

/non-appearance ..

non-appearance of the appellant and a matter in which the was present and appellant/had argued his case in the absence of the respondent.

It is to be observed that the views of Thesiger, L.J. in the case of In re Nazaire Co. referred to by the Divisional Court in Hession v. Jones were given in relation to an application for rehearing where both parties had been present at the original hearing. This was pointed out by Lord Hewart, C.J. in Rackham v. Tabrum. Indeed the matter at the original hearing had been fully argued. I do not understand the remarks of Thesiger, L.J. or indeed of any of the ~~other~~ judges of the Court of Appeal who sat in Hession v. Jones as having any reference to a situation, such as the one here, where the appellant has failed to appear and the appeal is dismissed without a hearing on the merits. In the later case of Rackham v. Tabrum, as has already been observed, the Court held that the inherent jurisdiction could be exercised to relist a case struck out for non-appearance of the appellant even where the decree or order pronounced had been passed and entered.

In Brooksbank v. Rawsthorne & Co. (1951) W.N. 393 an appeal was brought in civil proceedings by the plaintiff from a decision of Lynskey, J. sitting at Liverpool Assizes. When the matter was called on for hearing the plaintiff did not appear. He was not represented by solicitors and no counsel had been briefed. On the application of counsel for the defendant company the Court of Appeal dismissed the appeal but directed that the order be not drawn up before 2 p.m. on the following day. The order was duly drawn up on the following day. Upon a motion for the re-instatement of the appeal it was explained that the failure of the plaintiff and his legal representatives to appear when the appeal came on for hearing was due to a mistake on the part of a clerk in the office of the London agents of the plaintiff's solicitors. It was urged that although dismissed the Court had jurisdiction to reinstate it. For the defendant

/company .....

company it was urged that the appeal not having been merely struck out but dismissed, had been determined and the Court had no jurisdiction to undo that which it had done, citing Flower v. Lloyd (1877) 6 Ch. D. 297 and Hession v. Jones (1914) 2 K.B. 421. Counsel for the plaintiff cited Rackham v. Tabrum (1923) 39 T.L.R. 380. Singleton, L.J. with whose judgment, Morris L.J. and Harman, J. concurred said that it appeared to him that the appeal had never been heard and determined by that Court and in the circumstances the Court ought to have, and in his opinion had, jurisdiction to hear the application and to make such order as it though proper.

The position in England seems to be that where an appeal to the Court of Appeal or to the Divisional Court has been struck out or dismissed for non-appearance of the appellant without a hearing on the merits the appellate court may in the exercise of its inherent jurisdiction reinstate the appeal in a proper case whether or not the decree or order pronounced is passed or entered but that where the appellant has appeared and the respondent has not and there has been a determination after a hearing it has no jurisdiction to do so.

The question arises - does the Court of Appeal in Jamaica have an inherent jurisdiction to do likewise? Now as has already been seen such a jurisdiction was exercised in England prior to the enactment of the Judicature Acts by the Court of Chancery. That jurisdiction was reserved to all the judges of the Supreme Court of Judicature by s. 16 of the Act 1873. Further s. 73 of that Act and s. 21 of the Act of 1875 preserves to all the judges of the Supreme Court of Judicature the right to exercise all the forms and methods of procedure which were in force before the Judicature Acts and are not inconsistent with those Acts and the rules made under them. The jurisdiction and powers of the Court of Appeal in Chancery were reserved to the Court of Appeal to which also was transferred the jurisdiction exercised by the Lord Chancellor in the Court of Chancery.

/In

In Jamaica according to the First Report of the Commissioners of Enquiry into the Administration of Civil and Criminal Justice in the West Indies (ordered by the House of Commons to be printed in 1827) the Governor, by virtue of the letters patent appointing him Governor, exercised the office of Chancellor. He was in fact the High Court of Chancery in Jamaica. The equity jurisdiction of that Court was similar to and co-extensive with that of the Court of Chancery in England and the rules and orders of the Jamaica Court appeared to have been founded on those of the Court of Chancery in England with variations with respect to time to appear and answer, etc., as local circumstances required. It was stated that the course of pleading in the local Court of Chancery was the same as it was in England. Indeed the Registrar in Chancery is quoted in the Report as having stated that the proceedings in the local court were almost in every particular analogous to those of the Court of Chancery in England. On appeal from orders or decrees of the local court security had to be given for the prosecution of the appeal and once given the appeal could not be dismissed at the instance of the respondent otherwise than with consent. The Rules and Orders to be observed in the High Court of Chancery in Jamaica were modelled on those in force in the Court of Chancery in England and it was provided therein that the course of proceedings used in the High Court of Chancery in England was to be followed in all other things not provided for by these Rules and Orders "as near as the circumstances of the place and things will reasonably allow."

By the statute 3 Vict. c. 65 the office of the Vice-Chancellor was set up. The Vice-Chancellor had to be a barrister-at-law and was empowered to try matters in the High

Court of Chancery which the Governor as Chancellor would normally have tried.

The Judicature Law, 1879 consolidated the Supreme Court of Judicature, the High Court of Chancery and certain other courts in much the same way as the Judicature Act, 1873 did in England in respect of corresponding English Courts. Henceforth there was constituted one Supreme Court of Judicature in Jamaica called the "Supreme Court". Sections 20, 21 and 28 of the 1879 Law provided as follows -

" 20. The Supreme Court shall be a Superior Court of Record and shall have and exercise in this Colony all the jurisdiction, power and authority, which at the time of the commencement of this Law was vested in any of the following Courts and Judges in this Island, that is to say:-

The Supreme Court of Judicature,
The High Court of Chancery,
.....
..... "

21. Such jurisdiction shall be exercised, so far as regards procedure and practice, in manner provided by this Law, and the Civil Procedure Code, and the Laws regulating Criminal Procedure, and by such rules and Orders of Court as may be made under this Law; and where no special provision is contained in this Law, or in such Code or Laws, or in such Rules or Orders of Court with reference thereto, it shall be exercised as nearly as may be in the same manner as it might have been exercised by the respective Courts from which it is transferred, or by any of such Courts or Judges, or by the Governor as Chancellor or Ordinary."

/28. A single .....

" 28. A single Judge of the Supreme Court may exercise, in Court or in Chambers, any part of the jurisdiction of the Court which before the passing of this Law might have been exercised in the like manner, or which may be directed or authorized to be so exercised by Rules of Court to be made under this Law.

In such cases a Judge sitting in Court shall be deemed to constitute a Court."

These provisions are the local counterparts of ss. 16 and 23 of the English Supreme Court of Judicature Act, 1873, and are now ss. 24, 25 and 36 of the Judicature (Supreme Court) Law, Cap. 180. Under s. 32 of the local 1879 Law appeals in civil matters from District Courts were to be heard by the Full Court of the Supreme Court. Later on when Resident Magistrates' Courts replaced the old District Courts, appeals in civil proceedings from Resident Magistrates' Courts lay to the Full Court of the Supreme Court. In 1932, a Court of Appeal declared by s. 3 of the Court of Appeal Law, 1932 (No. 9) to form part of the Supreme Court of Judicature established under the Judicature Law, 1879 was constituted and was empowered to hear, inter alia, appeals in civil proceedings from Resident Magistrates' Courts, subject to the provisions of that law and to Rules of Court made under that Law. Section 11 of the 1932 Law provided as follows -

"11 - (1). Subject to the provisions of this Law, to the provisions of the Resident Magistrates Law, 1927, regulating appeals from Resident Magistrates' Courts in civil proceedings, and to rules made or deemed to be made under that Law, an appeal shall lie to the Court of Appeal from any judgment, decree or order of a Resident Magistrate's Court in all civil proceedings.

/11 - (2) .....

"11 - (2) On appeals from a Resident Magistrate's Court under this section the Court of Appeal shall have and may exercise the powers and authorities conferred on the Court of Appeal by the Resident Magistrates Law, 1927, and references, wherever they occur, in sections two hundred and fifty-five to two hundred and sixty-eight inclusive of that Law to "Court of Appeal," "Appellate Court," "Supreme Court" and "Clerk of the Appellate Court," shall where the context admits, be deemed to be referenced to the Court of Appeal established by this Law and the Registrar thereof respectively, and the said sections shall be read and construed accordingly."

This provision later appeared as s. 11 of Cap. 178 (now repealed) and is substantially the same as that contained in s. 11 of the Judicature (Court of Appeal) Law, 1962. No provision has been made under any law or in any rule in relation to the re-hearing of appeals which have been struck out or dismissed for non-appearance of the appellant. It has already been noted that under s. 8 of the Judicature (Appellate Jurisdiction) Law, 1962 there has been transferred to the Court of Appeal the jurisdiction and powers of the former Court of Appeal constituted by Law 9 of 1932 which formed part of the Supreme Court of Judicature.

Now appeals in civil proceedings before the Divisional Court and the Court of Appeal in England and before the former Court of Appeal of Jamaica and now before this Court are in the nature of re-hearings. The terms of s. 251 of the Judicature (Resident Magistrates) Law, Cap. 179 leave no room for doubt that this is so in the case of appeals in civil proceedings from Resident Magistrates Courts though it is otherwise in the case of appeals in criminal proceedings

/from .....

from Resident Magistrates' Courts as was pointed out by this Court in R. v. Thompson (1964) 6 W.I.R. 381.

If the Court of Appeal has acquired the jurisdiction and powers of the former Court of Appeal which itself formed part of the Supreme Court of Judicature established under the Judicature Law, 1879 and the Supreme Court by the combined effect of ss. 20, 21 and 28 of the local 1879 Law (now ss. 24, 25 and 36 of Cap. 180) was vested with the jurisdiction and powers exercised by the old High Court of Chancery in Jamaica which in such matters as it tried adopted the practice and procedure of the High Court of Chancery in England then it follows that, there being no enactment or rule regulating the practice or procedure in respect of the matter here in issue, this Court has jurisdiction in a proper case to rehear an appeal which has been struck out or dismissed for non-appearance of an appellant there being no hearing on the merits. By way of contrast rule 36 of the Judicature (Court of Appeal) Rules, 1962 regulates the procedure for making application for rehearing of an appeal from the Supreme Court in its civil jurisdiction where that appeal has been struck out or dismissed for non-appearance of the appellant. There is no similar regulatory provision in respect of Resident Magistrates Courts' appeals in civil proceedings.

The final question is whether or not the affidavit filed in support of this application discloses a good and sufficient reason for this Court to relist the appeal. In the circumstances set out in the supporting affidavit we are of the view that it does.

/The appeal .....

The appeal is accordingly relisted for hearing at a date to be notified.

The costs of this application shall be respondent's in any event.

SMITH, J.A.:

I agree.

GRAHAM-PERKINS, J.A.:

I agree with the conclusion arrived at by my brother LUCKHOO. I wish, however, to reserve for further consideration the question whether an appeal in civil proceedings from a Resident Magistrate's Court is in the nature of a re-hearing.