JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 19/83

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE ROSS, J.A.

BETWEEN: W. BENTLEY BROWN - PLAINTIFF/APPELLANT

A N D : RAPHAEL DILLON)
) - DEFENDANTS/RESPONDENTS
A N D : SHEBA VASSELL)

Mr. B. Macaulay, Q.C. instructed by Mr. R. L. Francis for the plaintiff/appellant.

Mr. R. Fairclough instructed by Thwaites, Fairclough, Watson & Co. for the defendants/respondents.

February 3 & 6 1984 and February 18, 1985

CARBERRY, J.A.:

This is an appeal from the judgment of Downer, J. delivered on the 10th of March, 1983 after three days of hearing on the 7th, 8th and 9th March, 1983. The judgment was an oral one, but we have a note of the judgment which has been approved and signed by Downer, J. It was in favour of the defendants/respondents, (hereinafter called the clients).

The action was begun by a writ, with an accompanying statement of claim, both dated the 14th of March, 1979. In it the plaintiff, Mr. W. Bentley Brown, a barrister-at-law and duly entered on the Roll as an attorney-at-law under The Legal Profession Act, sued the two defendants to recover the sum of $39,000.00 (J) fees due for having defended the defendant Dillon before the Supreme Court of Bermuda on charges of conspiracy to import into that country a "controlled drug" (cannabis or ganja) and actually importing it into that country. Dillon was charged with another accused named Errol A. Williams,

and Exhibit 3, a "ruling" in writing made by Mr. Justice Seaton of the Supreme Court of Bermuda in the case against the two accused men states that Mr. Brown and Mr. Michael Mello appeared for both accused. The defendant Sheba Vassell was the mistress of the defendant Dillon and the statement of claim alleged that she, in Jamaica on the 14th February, 1978 on behalf of Dillon (who was then in prison in Bermuda awaiting trial) retained the services of Mr. Brown to represent and conduct Dillon's defence at the preliminary enquiry and trial on those charges, for a fee of (J) $40,000.00. The statement of claim alleges that that oral agreement made by Sheba Vassell on behalf of Dillon was ratified by a written agreement made by Dillon in Bermuda on the 24th April, 1978. The evidence showed that it was signed by Dillon in the cells of the Court-house as the trial was due to commence. (The written agreement actually set the fee at U.S.$20,000.00 but the case has been conducted on the basis that the fee was (J) $40,000.00). The statement of claim alleged that the defendants (Vassell and Dillon) paid J$1,000.00 leaving a balance of J$39,000.00 unpaid. and both are sued for this sum. The statement of claim alleges that the trial lasted three weeks. Nothing is said there as to the preliminary enquiry. This then is an action brought by an attorney-at-law of the Jamaican Bar for the recovery of fees said to be due for services rendered by him to a client in the island of Bermuda.

The two defendants filed a joint defence, settled on the 5th October, 1979. In it the defendant Sheba Vassell in effect says "I made no agreement with Mr. Brown in Jamaica. I made only an inquiry. I had neither money nor authority." The alleged oral agreement is therefore denied. As to the written agreement of 24th April, 1978, the defendant Dillon says, in effect, "that I did sign 'a piece of paper' while in custody,

but I did not read it, and I was induced to sign it by a representation made to me by the plaintiff, Mr. Brown, that he was in contact with a juror, and that if the juror received the sum of $5,000.00 he would guarantee acquittal." Dillon admits that Mr. Brown did appear at the trial, but says this was on behalf of the co-accused Errol Williams. If Exhibit 3 shows him as appearing for Dillon also, this says Dillon was not due to any oral or written agreement made between the defendants and the plaintiff. He also denied ever having paid $1,000.00 on account. In short the defendants allege that Mr. Brown was not Dillon's lawyer, and that no fees were due. As to the written agreement Dillon appears to set up the defences of non est factum, or alternatively that it was made on an illegal consideration, to bribe the jury or a juror.

At the trial the written document (to use a neutral term) was put in evidence as Exhibit 1: it reads thus:

> "I, RAPHAEL CONSTANTINE DILLON do hereby retain Mr. Walter Bentley Brown, Q.C. of the Jamaican Bar to conduct my Defence at my Trial for Conspiracy and Importing cannabis into Bermuda, in the Supreme Court of Bermuda commencing 24th April, 1978 and agree to pay to Mr. W. Bentley Brown the sum of Twenty thousand U.S. Dollars (U.S.$20,000.00) for his professional services by 30th May, 1978 in full.
>
> Dated this 24th day of April, 1978.
>
> RAPHAEL CONSTANTINE DILLON"

A reply was filed to the defence: it exhibited the document of the 24th April, 1978; it asserted that Dillon read, understood and signed the document in the presence of the defendant Sheba Vassell before the jury of twelve were empanelled, and it denied the allegation of any representation about bribing the jury. The reply alleges that Williams the co-defendant paid his fees (unspecified), but that Dillon did not. It adds a new allegation, that Dillon gave Sheba Vassell oral instructions on the last day of the three week trial to

secure the unpaid balance of fees from the Victoria Mutual Building Society and pay them to the plaintiff before the 30th May, 1978.

The outline of the evidence that appears below is taken from the judge's notes of the evidence. In his evidence Mr. Brown stated that he had been in private practice since 1966; that Sheba Vassell on the 14th February, 1978 came to his office and said she would like him to represent her common law husband Dillon at a preliminary enquiry and any trial which might ensue. Dillon was then in custody in Bermuda, having been extradited there from Jamaica. Mr. Brown says he accepted this retainer and told her the fee would be U.S.$20,000.00 or J$40,000.00. Mr. Brown stated that she returned some days later, not having been able to make arrangemengs for payment but asking him to wait till he went over for the preliminary examination or enquiry scheduled for the 6th March when a substantial amount would be paid.

He agreed to this after making certain phone calls, and observes that one was to Mr. Miller of J.C. Smith "which firm was now to instruct me," adding that in Bermuda it is obligatory that I be instructed by attorney in a Court appearance. The significance of this remark was not explored at the trial, but was canvassed on the appeal as will be seen later. Mr. Brown went to Bermuda on 6th March, 1978 and met Dillon for the first time. He put in an appearance at the enquiry, but did not represent Dillon then, as one Shirley Simmons was representing him there. "I associated myself with Simmons at the preliminary."

(It is not clear what exactly this remark means, but it is necessary to note that the fee of $40,000.00 which Mr. Brown states was agreed was to cover "the preliminary enquiry and any trial which may follow." At that stage it could not be known for certain that there would be a consequential trial, yet the

fee was to cover both! He did not "represent" Dillon at the enquiry, but that had no effect on the fee!).

To continue Mr. Brown's evidence: Dillon was on 6th March, 1978 committed to stand trial on 24th April, 1978. Mr. Brown left Bermuda on the 6th March, the same day on which he had arrived. It is to be gathered from his evidence that on that day, presumably after the preliminary enquiry had ended, he interviewed Dillon. He agreed to represent him at the trial for the same U.S.$20,000.00 or J$40,000.00 previously mentioned to Sheba Vassell in Jamaica, as covering both preliminary enquiry and possible trial. Mr. Brown states that Dillon told him he did not want Miss Simmons, and therefore asked him to represent him. This seems at variance with Mr. Brown coming to Bermuda already retained by Sheba Vassell on behalf of Dillon. It suggests that Dillon in Bermuda had made his own arrangements otherwise.

Two things should be noticed at this stage: Dillon was in custody, and Mr. Brown was already representing the co-accused Errol Williams.

Mr. Brown states that at that conversation with Dillon they discussed how the fees would be provided, and arranging payment in Jamaica before the trial date. The discussions as to payment were continued with Sheba Vassell who returned to Jamaica after the preliminary enquiry. No money was forthcoming, the arrangements did not materialize.

Nevertheless Mr. Brown returned to Bermuda for the trial on the 24th April, 1978: he was representing Errol Williams. Mr. Brown states that he again interviewed Dillon, and payment of fees was discussed. Dillon asked for time till the 30th May, which would presumably be a date after the trial was over. Mr. Brown then dictated and had prepared the written document dated the 24th April, 1978 set out above. It speaks in the

present tense, and arguably, leaving aside Dillon's account of it, it represents the retainer of Mr. Brown, as opposed to mere discussions as to whether he would be willing to accept a retainer, and if so on what terms as to fees and payment. Having had the document prepared outside the lock up, Mr. Brown returned with it and Dillon signed it. Mr. Brown says in evidence that this fee was to cover hotel expenses, travelling, and also re-imbursement for his instructing attorney. No such person is mentioned in the document. But Mr. Brown remarks: "I had to pay instructing attorney otherwise I would not be allowed to appear at trial." He states that he represented Dillon at the trial which lasted three weeks. He also says that he received from one Tuzo U.S.$500.00 (or Jamaican $1,000.00) towards fees of Dillon. This was on the first day of trial. No other payment had been made since.

The document of 24th April, 1978, describes Mr. Brown as a Queen's Counsel. That document was prepared by him. It is not true that Mr. Brown is a Queen's Counsel. In cross-examination Mr. Brown admitted this, but said that he was so styled in Bermuda. Once again this suggests that Mr. Brown was appearing in Bermuda as a Barrister-at-Law, but the matter was never pursued below, and the circumstances of his qualification and capacity to practice in Bermuda were never resolved. He speaks of "my lawyer", that is his instructing attorney in Bermuda, indicating that the fees were to be set to include both preliminary and trial, yet the fee had already been fixed in Jamaica according to Mr. Brown's account of his interview with Sheba Vassell! It appears from Mr. Brown's evidence, which is far from clear on this point, that he had two instructing attorneys, one on behalf of Williams, and another on behalf of Dillon. It appears that both have been paid; the attorney

instructing on behalf of Dillon having collected his fee out of other moneys that he was holding for Mr. Brown. Yet he also advanced the $1,000.00 which Mr. Brown says was received on account of the fee of $40,000.00. Perhaps the explanation is that Mr. Brown was giving his evidence some five years after the event, and apparently without the aid of any written notes other than Exhibit 1, the document of the 24th April, 1978. His memory of the exact details may well have become blurred.

Mr. Brown was extensively cross-examined as to the circumstances surrounding the making of Exhibit 1. He denied that it was made and signed some two or more days after the case had begun. He admitted that it was he who dated the document. He denied the suggestion that its object was to reassure a juror or some of the jurors that their promised bribe would be forthcoming. He was also cross-examined as to a meeting that took place long after the trial and which seems to have involved Mr. Brown, Dillon, and one Mr. Smith and to have taken place in Jamaica.

To the Court Mr. Brown stated that Dillon was in his cell when he spoke to him and pointed out that he had not received his fees; Dillon asked for time to pay and Mr. Brown then went away and had Exhibit 1 prepared and brought it back for signature. Sheba Vassell was not present when Dillon signed the document, as she was not allowed into the cell. She had been left at the back door of the Court. (This appears to contradict the allegation in para. 4 of the reply, that the document was signed in the presence of the second defendant).

This concluded the case for the plaintiff Mr. Brown. No supporting evidence was called, as for example the Bermudan attorney who instructed Mr. Brown.

the cells and told him that he was attending a party on the Saturday at which he expected to meet the foreman of the jury and hinted that he would contact him. On the Monday following, Mr. Brown came to him in the cells and told him in effect that the foreman and he had had discussions. Some seven jurors were agreed to give a not guilty verdict, and two others might also agree. During the lunch adjournment Mr. Brown again visited him in the cells, and talked of money needed to pay the juror, and mentioned $5,000.00. This was to be paid to Mr. Brown about three weeks after. Mr. Brown produced a paper which he was to sign to assure the jury that their money was secure. He signed it. He did not read it nor was it read to him. Dillon states that this (bribing the jury) was his only hope. He knew he was guilty. His hope was not realized. He records that the jury found him guilty, and he received a sentence of either twelve years or five years (the notes show both figures). He had up to that time already been in custody for over nine months. He was released (and deported) in 1980, when he came back to Jamaica.

Dillon stated that some weeks after he had returned to Jamaica after having served his sentence in Bermuda, Mr. Brown visited him, demanded his fees, and presumably showed him the document, Exhibit 1. Dillon says that it was then that he became aware for the first time of what it was he had signed. He suggested a visit to a Mr. Smith for further discussion, in which, according to him when the allegation of bribing the jury was mentioned Mr. Smith remarked "Bentley you try another shot" and Brown replied that that was long ago.

To the Court, Dillon said he had never asked Sheba Vassell to have Mr. Brown represent him. He had first met and heard of him at the preliminary enquiry in Bermuda. He did not request or ask Mr. Brown to represent him, (it is not clear

whether this relates to the opening day of the trial or generally); he signed the document because he felt he would be locked up (found guilty) if he did not sign it.

Dillon in cross-examination admitted that Sheba Vassell was the mother of his children, but denied that he ever asked her to find him a Jamaican attorney to defend him. He wanted Mr. Ramsay, who had appeared for him at the extradition proceedings in Jamaica at a fee of $20,000.00 (J.). He had made his own arrangements for his defence with Miss Simmons in Bermuda and paid her $1,500.00, and agreed a fee with her for the trial of $6,000.00. He did not read the document that he signed. He knew that the suggestion of bribing the jury was wrong, but he wanted to get out.

Sheba Vassell in her evidence admitted that she had visited Mr. Brown at his office, but said this related to some chairs that had got broken (by the police) when Dillon was arrested. She did not approach Mr. Brown to defend Dillon, but on Mr. Brown's return from Bermuda after the preliminary enquiry he had told her that Dillon wanted him to represent him, as he was already representing Williams, and that his fee would be $40,000.00 or $20,000.00 (U.S.). She said that Mr. Ramsay had charged $20,000.00 for three lawyers: implying that she thought Mr. Brown's proposed charge was too high. She evidently went back on a second occasion taking with her two friends to hear and confirm that that was the fee Mr. Brown was proposing. She herself had made no agreement with Mr. Brown as to retaining him for the defence of Dillon.

The judge's notes of evidence do not record anything of the addresses made to him on behalf of the parties, but these seem to be reflected in the Note made of his oral judgment.

The trial judge seems to have seen the case as involving two questions: (a) Did Sheba Vassell make any contract retaining the plaintiff to conduct the defence of Dillon in Bermuda; and (b) "Was Raphael Dillon liable on the promissory note to pay Mr. Brown the equivalent of US$20,000.00 for legal services connected with the criminal trial which lasted for two weeks in Bermuda?"

As to (a) Downer, J. found that no agreement was made by Sheba Vassell to retain Mr. Brown as alleged, and that in any event Sheba Vassell would not herself have been liable if such a contract had been made, she being a mere agent.

This means that the trial judge rejected Mr. Brown's evidence on this point, as also allegations made thereon in the statement of claim.

Mr. Brown in his notice and grounds of appeal challenged this finding both as to fact and as to the law. At the hearing before us however wiser counsel prevailed. This section of the appeal was abandoned, and the only argument that arose was as to the question of the liability for costs in respect of the defendant/respondent Sheba Vassell. The judgment in her favour will stand. The question of her costs will be discussed hereafter.

This left for decision the point which Downer, J. formulated as (b) above. Perhaps as this was an oral judgment the learned judge did not formulate his findings on the facts as carefully as he might otherwise have done, but rushed forward to consider what he thought was the essence of the case. This has resulted unfortunately in a number of issues that were raised not receiving the consideration which they deserved. It may be that in view of the conclusion at which he arrived the learned judge did not think it necessary to reach a conclusion

on some of those issues. We must now however attempt to see what conclusions he did reach either expressly or impliedly.

The <u>first</u> issue is the obvious and fundamental one: Did Mr. Brown represent Dillon at (i) the preliminary enquiry of the 6th March, 1978, and or (ii) at his trial in Bermuda, which commenced on the 24th April, 1978?

Mr. Brown has not been consistent in his evidence and pleadings on this point: he pleaded that he was engaged to represent Dillon at both, and that he appeared for him at both. In his evidence however, though he attended the preliminary enquiry he represented the other accused on that occasion, he did not represent Dillon then, but was content to "associate himself with Miss Simmons at the preliminary". He asserts however that at the trial, on the basis of the document of the 24th April, 1978, he represented Dillon throughout the trial.

Dillon pleaded that Mr. Brown was never his lawyer, that he appeared only for the other accused Williams, and that he signed the document of the 24th April, 1978 at a much later date and did not intend in signing it to retain Mr. Brown. In his evidence however he states that Mr. Brown approached him on the morning of the trial, suggested that he should take over the defence as he was already appearing for Williams, and that he (Dillon) should terminate the services of Miss Simmons who had appeared for him at the preliminary enquiry and was due to appear in the trial also. Dillon states that he accepted this suggestion, in that he terminated Miss Simmons' retainer, and it must logically follow that he also accepted the suggestion and thereafter employed Mr. Brown to represent him. Exhibit 3, the written ruling made by Seaton, J. at the trial on the 24th April, 1978, shows that the trial judge understood that Messrs. Brown and Mello appeared for <u>both</u> accused.

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Dillon states however that no terms were ever agreed. As to the document of 24th April, 1978, though he signed it, he was of the view that it was a step to be used in the process of bribing the jury. The learned trial judge made no finding on this evidence. Had he accepted Dillon's evidence it would have provided a short answer to the plaintiff's claim: that the document was non est factum, i.e. it was not the document of the client Dillon; and that in any event the whole transaction was fraudulent, and that ex turpi causa non oritur actio: no action could be brought on a fraudulent transaction. While a reluctance to arrive at a conclusion of this sort as to the conduct of a member of the legal profession is understandable, the issue had been raised, and the learned judge did not reject it. There should have been a finding one way or the other. Not to resolve it in favour of Mr. Brown is only a little less odious than a finding against him would have been. The failure to make a finding puts this Court in a difficult position. On what basis should we proceed? The trial judge does seem to find that the document was read to Dillon by Mr. Brown, who appended the date. It must we think be necessary to proceed, on the basis that the judge did not accept the evidence of Dillon, and that he impliedly found that the document of the 24th April 1978 was a document that had been signed on that date, and that it represented in the terms of the Legal Profession Act, Section 21(1) an agreement in writing between an attorney and client as to the amount and manner of payment of fees for the legal business to be done by the attorney, namely the conduct of Dillon's defence at his trial in Bermuda.

Such a finding would then raise the third issue to be decided, either at equity or common law, or under the Act: was the agreement void or voidable for undue influence? or under the Act was it "unfair and unreasonable"?

It was to this third issue that the trial judge addressed his mind. In effect he found the following points: (a) that Dillon was in custody (and had been so for some months) at the time that he made the agreement; (b) that Mr. Brown was already retained on behalf of and representing the co-accused Williams; (c) that Dillon was induced by Mr. Brown to dismiss his Bermudan lawyer Miss Simmons. (This involves accepting Dillon's evidence on this point: Mr. Brown is curiously silent on it. He certainly knew of Miss Simmons defending Dillon at the preliminary enquiry and "associated himself" with her at the preliminary. Yet at the trial she disappears, and is replaced by a new junior, Mr. Mello); (d) that Mr. Brown represented himself to Dillon as a Queen's Counsel, a matter which would affect both Dillon's confidence in him, and also the size of the fee he would be expected to pay; (e) that Dillon had no independent advice as to the wisdom of having one lawyer to represent both himself and his co-accused; (f) that Dillon had no independent advice as to the size of the fee being demanded; (g) that not even Mr. Mello was present when the agreement was made. The trial judge found (h) that the relationship between Dillon and Mr. Brown, client and attorney, was a fiduciary one, and that because of that a presumption of undue influence arose, and that in consequence there was a duty resting on Mr. Brown to justify the agreement and to rebut that presumption.

Downer, J. observed that Mr. Francis, representing Mr. Brown, complained that the defence had not raised the issue of "undue influence" in the pleadings, but he accepted the defence submission that it would arise once you had a case of an attorney sueing a client for his fees in these circumstances.

The learned judge seems to have formed the view on the law that once there is a fiduciary relationship, giving rise to a presumption of undue influence, which is not rebutted, then the necessary result must be that the agreement is to be deemed unconscionable and is void, and unenforceable: nothing can be recovered. Downer, J. therefore dismissed the claim and set aside the contract and ordered judgment to be entered for the first and second defendants, with costs to be taxed or agreed.

We have no note of the argument as it was presented below, but in support of his findings and conclusion on this aspect of the case the learned trial judge relied on Allcard v. Skinner (1887) 36 Ch. D. 145 and Wright v. Carter (1903) 1 Ch. 27. The former dealt with gifts made by the entrant into a religious order who took vows of poverty and obedience and ceded her property to the order and attempted to recover such of it as was still extant when she left the order some years later. At issue was the revocation of the gifts still remaining in the hands of the order. The second case dealt with an application to revoke a trust set up by a donor who settled all his property in trust for his two children and his solicitor (to whom he owed fees for a considerable time and to a considerable amount). Both cases contain dicta of great importance and value on this branch of the law, but neither was particularly apt to this situation. They dealt with the revocation of gifts, conveyances or trusts, rather than the problem of unconscionable bargains, where the recipient or person attempting to enforce the bargain has in fact given some consideration, and what is being suggested is that the return which was promised to him is grossly dispro-portionate to the consideration furnished, and intervention is sought on equitable principles.

Oddly enough no mention is made of the Legal Profession Act and it appears not to have been brought to the attention of the learned judge.

A further point that was never canvassed below was the capacity in which Mr. Brown appeared for Dillon in the Supreme Court of Bermuda: had he been admitted to practice there? If so on what basis? Was that basis the fact that he was a barrister-at-law of the English Bar? or was it on the basis that he was an attorney-at-law practising in Jamaica under the Legal Profession Act of this country? On what basis and by what rules do members of the legal profession practice in Bermuda? Is it the traditional English or common law system of solicitor and barrister? Or is it some other e.g. a fused profession such as we now have in Jamaica, or a variant such as exists in New Zealand where the legal practioner may be a solicitor or barrister or practice as both?

On appeal the respondents sought to canvass this issue by a respondent's notice to that effect, given out of time, (in fact on the opening day of the appeal). The Court refused leave to raise this point at this stage, and it is discussed further on in this judgment. It was one that depended on evidence, or might have been met by evidence, and the Court was not in a position to determine what was the legal position in Bermuda in this respect.

The original grounds of appeal were abandoned in favour of two supplementary grounds of appeal which read as follows:

> "(1) The judgment subsumed an erroneous proposition in law, that is, that in the fiduciary relationship between an attorney and client in a matter of his remuneration, there is a presumption of undue influence and that independent legal advice was necessary as to the remuneration a client must pay. The learned trial judge mistook the rule relating to transactions outside remuneration by applying such a rule to retainers (be they by deed, or oral or written).
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> (2) The judgment was against the weight of the evidence, particularly, as (a) it was never disputed that the written retainer was signed by the first respondent and (b) the

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> "appellant actually rendered his legal services and paid expenses incidental to such services out of his own pocket."

The argument put forward by Mr. Macaulay for the plaintiff/appellant in effect was that the basis on which the trial judge operated, or that the principles of law that he purported to apply, that is the presumption of undue influence arising from the relationship of attorney and client applied only to transactions outside of the contract of employment, that is to say to cases of gifts to and sales to or by attorneys by and to clients. Another way of putting the argument was to say that the principle only applied where the relationship of attorney and client already existed, and not to its inception. It was suggested that if independent advice as to fees and conditions were required before an attorney could be engaged, logically this might lead to there having to be a second opinion to advise whether the first opinion as to the fairness and reasonableness of the original agreement was reasonable and fair, and so forth ad infinitum. It was submitted that as a matter of law there could be no presumption of undue influence with regard to the entering into a contract of employment of an attorney by a client. It was submitted that there were no cases in which the presumption of undue influence had ever been applied to the original employment of an attorney.

It was submitted that the trial judge appeared to have been unduly influenced by the representation to the client that Mr. Brown was a Queen's Counsel, and by considering the size of the fee being offered to a mere junior counsel.

Finally it was submitted by Mr. Macaulay that the only law applicable to the situation was to be found in Section 21(1) of the Legal Profession Act, and that this authorized the Court to reduce the amount of the fees payable - this was the only step that the Court could take, - and that it could take it only if the

agreement appeared to the Court to be unfair and unreasonable. In short it had no power to set the agreement completely aside as had been done here. In support of these propositions particularly those relating to undue influence arising out of the relationship between attorneys and clients he referred to the following cases: Demerara Bauxite Co. Ltd. v. Hubbard (1923) A.C. 673 (P.C.). This case dealt with the purchase of land by a solicitor from a client, where the client had no independent advice, and where the solicitor failed to reveal to the client all the information in his possession. He bought the land for $5,500.00 and resold it shortly after for $11,200.00. The principle on which the case was decided is set out in the Privy Council judgment delivered by Lord Parmoor at pages 681-682. Without repeating the passage it is sufficient to say that it dealt with a solicitor-client relationship already established, and the duty lying on the solicitor to show that the transaction was a fair one and that the solicitor had made full disclosure to the client.

McMaster v. Byrne (1952) 1 All E.R. 1362 (P.C.) was another case of a solicitor buying shares from his client and failing to disclose to him information in his possession which made the shares far more valuable. In this case the solicitor bought the client's shares for $30,000.00 and resold them for $127,000.00. In both this case and that of Demerara Bauxite Co. referred to above, the relationship of solicitor and client which had existed had come to an end, and what was at issue was whether the presumption of undue influence and the duty normally owed by a solicitor to his client when conducting a business transaction between them still continued to apply. Both cases deal with the continuation of the fiduciary duty and not the time at which it begins.

Wright v. Carter (1903) 1 Ch. 27 (Already referred to as having been relied on by the trial judge) was a case in which the principle was applied to gifts bestowed by a client by a voluntary settlement made in favour of the solicitor and the client's two children. In this case the relationship of client and solicitor had already been established when the gift was made.

Alcard v. Skinner (1887) 36 Ch. D. 145 (also already mentioned as having been relied upon by the trial judge) was a case of gifts to a religious order made by an entrant into the order at a time when the undue influence of the order had been established, when the gifts were made.

Mr. Fairclough on behalf of Dillon appeared to base his argument on the analysis contained in Cheshire and Fifoot on Contract, 10th Edition (1981) pages 274 et seq. He argued that in this case there was a fiduciary relationship, the presumption of undue influence arose and had not been rebutted. Alternatively there was sufficient evidence to find that undue influence had in fact been exercised. In support of his argument he cited Mearns v. Knapp (1889) 37 W.R. 585: this was a case in which the plaintiff, a gentleman's valet, instructed the defendant, a solicitor, to act for him in the proposed purchase of a tea and coffee business, (apparently a café) for the sum of £500. The sale eventually fell through. In its closing stages the solicitor when asked for his bill asked for forty guineas to settle his fees to date, and in lieu of an itemized bill prepared a memorandum which was signed by both the solicitor and the client and which "agreed" the cost at £42. The plaintiff went to new solicitors and presently brought action to set aside the agreement regarding fees as unfair, and claiming that it was signed by the client through ignorance and pressure. (The solicitor had moneys in hand for the client).

Kekewich, J. found for the plaintiff (the client) and set aside the agreement, but, be it observed, left it open to the solicitor to submit a detailed Bill in respect of his costs. He did so on the basis that the agreement appeared prima facie to be unfair and unreasonable. On this finding the solicitor agreed to accept the scale fee, based on the value of the premises proposed to be bought, which yielded a fee of £7.10. (30s per £100). At that date, under the Solicitor's remuneration Act 1881, S. 8, an agreement as to costs could be entered into, but to be enforceable had to be fair and reasonable. The English Legislation on the subject is discussed below. The moral to be drawn from the case is that the setting aside of an agreement as to costs made between a solicitor and client does not necessarily result in the former getting nothing at all for his work and labour, which was the result Downer, J. reached in the instant case. To anticipate, the correct attitude or approach to this problem appears in a sentence taken from the judgment of Wilberforce, J. in Electrical Trades Union v. Tarlo (1964) Ch. 720 at 734:

> ".... The court has inherent jurisdiction to secure that the solicitor, as an officer of the court, is remunerated properly, and no more, for work he does as solicitor."

This also seems to be the principle on which Section 21(1) of the Legal Profession Act is based. As to this Mr. Fairclough pointed out that on the judge's findings, when Mr. Brown went to Bermuda for the 24th April, 1978 trial, no agreement retaining him or fixing his costs had yet been made: he was then representing the co-accused Williams. Items such as his transportation and hotel bills etcetera were items which presumably Williams was already contributing to. These were factors to be taken into consideration when discussing whether the agreement appeared to be fair and reasonable. So also was

the representation that he was a Queen's Counsel. It appeared from Dillon's evidence in cross-examination that he had agreed a charge of Bermuda $6,000.00 with Miss Simmons to conduct the defence at the trial, and Mr. Fairclough argued that Mr. Brown's entitlement based on these considerations should not exceed J$4,000.00.

In reply, Mr. Macaulay pointed out that the judge had not found that there was in fact undue influence; he had instead based his judgment on a presumption of undue influence which he said arose from the nature of the relationship. Where the relationship did not create any presumption of undue influence (and he submitted that there was none as regards employing an attorney for the first time) undue influence must in fact be proved. The defendant Dillon was, he suggested, a dealer or traveller dealing in ganja, and to such a person he argued that the fee of U.S.$20,000.00 was quite reasonable. The suggestion of J$4,000.00 would be gross underpayment, seeing that he had apparently paid J$20,000 to cover the costs of the extradition proceedings. (Dillon said that that figure represented fees for three lawyers).

We have reviewed so far the pleadings, the evidence, the judgment, and the arguments presented to us on appeal. The central problem in this case is what control, if any, do the Courts in Jamaica have over the fees demanded or agreed to be paid to attorneys at the private bar by their own clients?

The words "their own clients" are used to distinguish the present question from a different but associated question, i.e. what fees may be recovered from the other side by the successful party in litigation. Those fees have always been subject to taxation of costs: what is recoverable is not necessarily the fee that the victorious party has paid or agreed to pay to his barrister or solicitor, but the fee that the

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taxing master or Registrar will allow as reasonable on taxing the costs. What we are concerned with is the question of the extent to which the barrister, solicitor, or attorney can recover from his own client recompense for work done on his behalf, and more particularly when the fee has been agreed between them before, during or after the litigation in question. There is some common ground in that the costs that the successful party may recover from the other side is by way of indemnity only.

A preliminary observation may be made: an agreement between an attorney and his client, if one is made expressly, is like any other agreement in that it is subject to all the rules affecting a normal contract, and is for example liable to be set aside on the ground of undue influence, or that it is unconscionable, or that it is affected by fraud, misrepresentation and the like. But it has additional features not present in ordinary contracts. The attorney apart from the duty he owes to his client owes a duty to the Court, and this duty may on occasion override the duty owed to the client. Further, the attorney and his conduct of cases before the Courts play a vital part in the whole administration of justice. As Lord Warrington of Clyffe said in delivering the Privy Council decision in Macauley v. Sierra Leone Supreme Court Judges (1928) A.C. 344 at 350, where one wishes to induce people to resort to the Courts for the settlement of their disputes rather than to personal violence

> ".... it is essential that the people should be brought to feel the greatest respect not only for the impartiality and independence of the tribunal, but for the honesty and fairness of those who practice before them."

(Emphasis supplied)

Jamaica, is, like several other countries, an inheritor of the common law system. The aim of that system was to produce not only impartial and independent tribunals or Courts, but to produce an independent and fearless advocate, honest in his practice before the Court, and reasonable in the charges that he made (if any) for taking up the cause of his client.

The method traditionally adopted by the common law was to have a two tier system of legal representation: a solicitor or attorney who saw the client and dealt directly with him, and a barrister or advocate who dealt not with the client, but the solicitor, and who screened from personal contact with the client, could objectively argue such law as arose to be dealt with, and present the facts with the minimum of personal emotional involvement. A central feature of this system was that the barrister had the exclusive right of audience before all the higher Courts civil or criminal of the land.

AS TO BARRISTERS:

The problem of controlling the size of the fees charged, agreed or accepted for advocacy in the higher Courts has always been seen as a problem that could affect not only the advocate client relationship, but the functioning of the Courts themselves.

In Roman Law for example, there was a period in which the advocate was forbidden to accept any fees at all for the work that he did, so as to better secure a disinterested and objective presentation of the case.

There was another factor at work in the common law system. If it is desired to have a fearless and independent advocate it is necessary to protect him in his work, to grant him immunity on the one hand from attack by the persons against whom he is appearing, and on the other hand to protect him from attack by those for whom he appears and who may blame him for

> "not to be left to the chance whether they shall ultimately get their fees or not; and it is for the purpose of promoting the honour and integrity of the bar, that it is expected all their fees should be paid at the time when their briefs are delivered. It is their duty to take care, if they have fees, that they have them beforehand, and therefore the law will not allow them any remedy, if they disregard their duty in that respect."

Holroyd and Best, JJ. made observations to like effect.

Perhaps the case that best illustrates the common law view is that of the trilogy in Kennedy v. Broun:

The story begins with the case of Swinfen v. Lord Chelmsford (1860) 5 H & N 890. In that case Miss Swinfen, claimant under the will of her father as against the heir who had attacked the will, sued her previous barrister for having compromised her case against the heir by accepting a settlement against her express instructions. He had honestly thought this was in her best interest. Mr. Kennedy, a barrister in practice in the midlands, left his country practice and devoted some two or more years to the prosecution of Miss Swinfen's claims. In this particular case he appeared against his predecessor, who had since become Lord Chancellor! They lost, and the case established the immunity of the barrister from being sued by his client for his conduct of the case, even where he had deliberately disobeyed his client's instructions! Nevertheless the actual settlement was set aside, and Kennedy went on to establish his client's claim to the estate. He had collected little or no fees from his client for these prodigious efforts. She had from time to time promised that he would be well looked after if they won, and having won she promised to give him £20,000. Unfortunately for Kennedy, Miss Swinfen married soon after her victory which had brought in an estate worth some £60,000. Her new husband did not share her previously expressed desires as to what should be paid Mr. Kennedy. Even though she had at Mr. Kennedy's suggestion

given him a charge for that amount upon the estate that he had recovered for her. In Kennedy v. Broun (1863) 13 C.B. NS 677 143 E.R. 268; Mr. Kennedy sued his client for these fees. He lost. The Headnote records:

> "A promise made by a client to pay money to a counsel for his advocacy, whether made before or during or after the litigation, has no binding effect. The relationship of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation."

(By an odd quirk of history, it is of interest to note that it was a Mr. Macaulay, Q.C. who appeared for the client and established the inability of the barrister to sue for his fees!).

The case occupies some sixty-seven pages in the law reports; Mr. Kennedy appeared for himself and many will be interested in the arguments put up by both sides as to whether or not a barrister should be allowed to sue for his fees. Erle, C.J. delivered judgment to the effect set out in the Headnote at page 727 (E.R. 287). He observed at page 737 (E.R. 291):

> "The incapacity of the advocate in litigation to make a contract of hiring affects the integrity and dignity of advocates, and so is in close relation with the highest of human interests, viz., the administration of justice. .... But, if the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his performance would be guided by the words of his contract rather than by principles of duty..."

The Court in that case consisted of Erle, C.J., Williams, Byles and Keating, JJ.

For those interested there was a further sequel. In Broun v. Kennedy (1863) 33 Beav. 133; 55 E.R. 317 and on appeal Broun v. Kennedy (1864) 4 De G J & Sm 217; 46 E.R. 901, Miss Swinfen, now Mrs. Broun, successfully sued to have set aside the charge upon the estate that she had given to

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Mr. Kennedy to secure his fees. The charge was set aside on the ground of undue influence, and Mr. Kennedy condemned to pay the costs of these actions!

Incidentally the Court expressed some shock at the size of the promised fee of £20,000.00, though this formed no part of its ratio.

In the case of In re LeBrasseur and Oakley (1896) 2 Ch. 487 (C.A.) nearly eighty years after the views expressed by Bayley, J. in Morris v. Hunt (ante) Lindley, L.J. said very much the same thing, at pages 493 to 494, but he went further in that he tied the barrister's inability to sue his client for his fees with his immunity from suit by his client for negligence. He said:

> "But I think it is of the utmost importance that the Court should not assist barristers to recover their fees. If they do so, the whole relation between a barrister and his professional client will be altered, and a door will be opened which will lead to very important consequences as regards counsel. The inevitable result will be to do away with that which is the great protection of counsel against an action for negligence by his client."

Lopes, L.J. supported those views, and at page 496 observed:

> "The decision of the Court of Common Pleas in Kennedy v Broun (ante) has always been acted upon, and it establishes the unqualified doctrine that the relation of counsel and solicitor renders the parties mutually incapable of making any legal contract of hiring and service in regard to litigation. That rule has existed for a long time, and speaking for myself, I should be very sorry to see it in any way impugned."

The barrister's inability to sue for his fees has continued to be a part of the structure of the legal profession in England, see for example Wells v. Wells (1914) P. 157; In re Sandiford (No. 2) Italo-Canadian Corporation Ltd. v. Sandiford (1935) Ch. 681; (1935) All E. R. 364.

The barrister's immunity from suit for negligence by his client was recently reviewed and reaffirmed by all levels of the judicial hierarchy in England in Rondel v. Worsley (1966) 1 All E.R. 467, Lawton, J; (1966) 3 All E.R. 657 (C.A.: Lord Denning, M.R., Danckwerts and Salmon, L.JJ.) (1967) 3 All E.R. 993; (1969) A.C. 191 - (H.L.: Lord Reid, Lord Morris, Lord Pearce, Lord Upjohn and Lord Pearson).

In their Lordship's speeches in the House of Lords the dictum of Lindley, L.J. In re LeBrasseur and Oakley (ante) was considered, and their Lordships made it clear that the immunity from suit did not flow from the inability to sue for fees: both were separate and distinct rules, but both derived from considerations of public policy laid down in the common law relating to the structure of the legal profession and more particularly the role of the barrister or advocate therein.

It might perhaps be noted that though the barrister could not sue for fees, he was not without all remedy. Primarily he should collect them in advance when the brief was delivered. Secondarily, he looked to the instructing solicitor to pay them, and if this was done, the solicitor himself could recover them from the client: (see for example Medlicott v. Emery (1933) All E. R. 655; 149 L.T. 303). Thirdly he might complain to the Law Society, which exercised disciplinary powers over solicitors.

To summarize: the problem of the size of the fee paid to the barrister was minimized under the common law: he could not sue either the client or the instructing solicitor for it. If he got it, he kept it. If he did not, nothing was heard further of the matter. There were indirect controls in that so far as civil litigation was concerned, in taxing the costs to be paid by the loser in the action, the taxing master had a control and discretion as to the number of counsel to be

allowed and as to the size of their fees that the loser would have to pay. The fee that had actually been charged by counsel to the winner would not necessarily be recovered in toto from the side condemned in costs. This would no doubt play its part when the solicitor instructing counsel was discussing the fee to be charged in the first place.

There were two other controls that should be mentioned in connection with the barrister: the power of the Courts to control proceedings before the Court, i.e. the power to punish for contempt of Court, (too large a topic to be dealt with here), and the Court's inherent control over those who appear before them. The barrister was not an officer of the Court, but the Court possessed at common law a control over those whom they permitted to appear before them. The judges of the High Court exercised this jurisdiction which was a jurisdiction to grant or deny audience to persons appearing for litigants before them and the right to give licences to practice in the Courts. This necessarily involved as incidental thereto the right to deny audience and to recall such licences. In the case of Attorney General of the Gambia v. N'jie (1961) A.C. 617; (1961) 2 All E.R. 504; a Privy Council case which dealt with the right of the Supreme Court of The Gambia to discipline legal practitioners (in that case a fused profession of barrister-solicitor) by striking them off the roll of those entitled to practice before them, Lord Denning, giving the judgment of the Privy Council said, at page 630 et seq:

> "By the common law of England the judges have the right to determine who shall be admitted to practice as barristers and solicitors: and, as incidental thereto, the judges have the right to suspend or prohibit from practice. In England this power has for a very long time been delegated, so far as barristers are concerned, to the Inns of Court: and, for a much shorter time, so far as solicitors are concerned, to the Law Society. In the colonies the judges have retained the power

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> "in their own hands, at any rate in those colonies where the profession is fused."

Lord Denning then referred to In re The Justices of the Court of Common Pleas at Antigua (1830) 1 Knapp 267; 12 E.R. 321. In that case the advocates at Antigua practised both as Barristers and Attornies, and were admitted to practise in both characters by the Court of Common Pleas there, and afterwards practised in all the other Courts in the island. The petitioner (to the Privy Council) had been disbarred by the justices of the Court of Common Pleas for various acts of professional and general misconduct. Lord Wynford delivering the Privy Council judgment, observed:

> "In England the Courts of Justice are relieved from the unpleasant duty of dis-barring advocates in consequence of the power of calling to the Bar and dis-barring having been in very remote times delegated to the Inns of Court. In the colonies there are no Inns of Court, but it is essential for the due administration of justice that some persons should have authority to determine who are fit persons to practice as advocates and attornies there. Now advocates and attornies have always been admitted in the Colonial Courts by the Judges, and the Judges only. The power of suspending from practice must, we think, be incidental to that of admitting to practice, as is the case in England with regard to attornies. In Antigua the characters of advocates and attornies are given to one person; the Court therefore that confers both characters may for just cause take both away. Although indeed our own Courts do not dis-bar for the reason I have mentioned, I have no doubt they might prevent a barrister who had acted dishonestly from practising before them...." He then added: "whilst advocates in the colonies have an appeal to His Majesty the power to remove them from practice can never be abused."

In the case from the Gambia Lord Denning went on to observe that the powers of the judges had been embodied in the Rules of the Supreme Court there, "But it seems to their Lordships that it is simply a restatement of the inherent power of the Judges at common law and is intra vires," (i.e. intra vires the powers of those who made the Supreme Court Rules). The judgment then observing the right of appeal to the Privy Council went on to deal with a number of other points.

The common law position was again explored recently in England in the case of In re S (a barrister) (1969) 2 W.L.R. 708, where a panel of five High Court Judges heard an appeal by a barrister against being struck off by the Senate of the four Inns of Court, to whom the Inns of Court, with the consent of the judges, had assigned their individual disciplinary powers, though they reserved the right to give effect to such findings and Gray's Inn had done so. The appellant challenged this delegation by his Inn. The new arrangement was upheld, but what is of interest is that the judges re-asserted their overriding supervisory jurisdiction, exercised by them as "visitors" to the Inns of Court. In the result the judges reviewed the charges, allowed the barrister's appeal against one, and as to the sentence of disbarment substituted a suspension of one year.

The Courts of various jurisdictions in the commonwealth have adopted these common law powers: see for example Macauley v. Sierra Leone Supreme Court Judges (1928) A.C. 344 (P.C.) (striking off of a solicitor-barrister - (fused profession) - for obtaining from an unsophisticated local chief a fee out of all proportion to the importance of the case and the work done by him); Re Sinanan, ex parte the Attorney General (1964) 7 W.I.R. 93 (Trinidad C.A.) (barrister struck off after conviction for fraudulent conversion).

Finally as to barristers, though the opportunities of direct contact with the client are obviously less, they are as subject to attack on the score of undue influence in respect of barrister/client transactions as are solicitors (see for example Thornhill v Evans (1742) 9 Mod 331; 88 E.R. 487; 3 Atk. 330 (mortgage from client to barrister set aside for undue influence and relief given against unconscionable interest though this was said to be by way of fees due).

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Carter v. Palmer (1841) 8 Cl & Fin 657; 8 E.R. 256 (H.L.) Barrister employed for some years in negotiating client's financial problem, after his retainer ceased, went and bought from client's creditors charges on client's estate at a discount: held unable to collect their face value, but only re-imbursement of what he had actually spent. See also Broun v. Kennedy (1863) 33 Beav 133 55 E.R. 317; and (1864) 4 De G.J. & Smith 217; 46 E.R. 901, already mentioned.

AS TO SOLICITORS:

If under the common law the barristers in England had a loose rein, (and there are practically no English statutes dealing with them), by contrast the solicitors were always subject to the closest control both by the Courts and by statute as to the fees they charged and the agreements they made with their clients. Statutes controlling their admission and regulating their business go back at least to 15 Edward II. C1, and from time to time, apart from the control exercised over them by the Courts (the inherent jurisdiction) there are a long series of Acts affecting them in one way or the other. From time to time there have been a series of consolidating Acts which took in past legislation and re-enacted it into comprehensive codes. See for example the U.K. 1843 Solicitors Act, 6 & 7 Vict. C. 73, and the schedules thereto. That Act forms a convenient starting place: it provided for the admission of solicitors and attorneys, their qualifications and service under articles, their examination, admission and enrolment. It provided against unqualified persons taking out legal process, and from Section 37 on provided in detail controls over the fees that they could charge and how they might be taxed and recovered. It is enough to notice that they could not commence or maintain any action or suit for the recovery of any fees, charges or disbursements for any business done until the expiration of one month after they had sent in a detailed bill of their

charges. Within that month the client could refer the bill to be taxed and settled by the proper officer of the Court. While this process was going on no action could be brought on the bill. It was also possible for the solicitor to refer the bill for taxation himself. The costs of taxation were provided for: if one sixth or more were deducted on taxation, the solicitor bore the costs of the taxation, if however the bill was not reduced by one sixth, then the client bore the cost of taxation. Provision was made for the taxing master or officer to refer any special problem to the judge for ruling, or directions. After taxation judgment could be entered for the amount so ascertained. There were many other provisions contained in the Act: bills could be taxed on the application of third parties, they could be re-opened and taxed even if they had been paid, if the application was made to the Court within twelve months of payment, and there were shown to be special circumstances warranting such taxation.

Apart from these statutory provisions the Courts exercised over solicitors and attorneys an inherent jurisdiction as they were officers of the Court, and as such bound to do what was considered right and just, regardless of whether or not they were liable in Law. For example undertakings given by them in their capacity as solicitors were enforceable by the Courts whether they created a legal obligation or not: Re a Solicitor, ex parte Hayles (1907) 2 K.B. 539 (1904-7) All E.R. 1050; United Mining and Finance Corpn. v. Beecher (1910) 2 K.B. 296. Further they might be held liable to pay costs incurred by the other side due to their default in the conduct of the litigation: Myers v. Elman (1940) A.C. 282.

Further, because of their direct contact with their clients, solicitors as a group were often placed in situations where their influence over their clients was brought into question, and dispositions made by the client were set aside as having been

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procured through undue influence on the part of the solicitor or attorney, particularly in cases in which they benefitted from the disposition: see for example Liles v. Terry (1895) 2 Q.B. 679 and Wright v. Carter (1903) 1 Ch. 27 and see also Nocton v. Lord Ashburton (1914) A.C. 942 (solicitor's special duty to a client with whom he had embarked on a joint enterprise).

Turning however to the special case here of agreements between client and solicitor as to fees:

First as to agreements between client and solicitor or attorney as to fees, attorneys were expected to charge no more than scale fees or fees allowable on taxation by the taxing master, and clients were allowed to reopen and challenge their bills and submit them to taxation even after they had been paid or security given, and a considerable time had elapsed. See for example Walmesley v. Boothe (1741) 2 Atk. 25; 26 E.R. 412 (a case discussed at some length later); Saunderson v. Glass (1742) 2 Atk. 298; 26 E.R. 581; Drapers' Coy v. Davis (1742) 2 Atk. 295 (taxation ordered of a bill sent in seventeen years earlier); Edwards v. Meyrick (1842) 2 Hare 60; 67 E.R. 25 is perhaps worth a closer look, as it neatly straddles both a client's agreement as to fees and a client-solicitor transaction. Here the solicitor had discovered the client's entitlement to certain property and for a considerable period prosecuted the client's claims, until - not being paid - he desisted. To cover the costs then due the client mortgaged some land to the solicitor, and later, having tried to sell it unsuccessfully, he sold it to the solicitor, the consideration being that the fees due should be set off, leaving a small balance owing by the solicitor to the client.

The client eventually succeeded in establishing his claim, and gained a substantial settlement. He showed his gratitude

Downer, J. made no finding as to which version he accepted as to the date and circumstances in which Exhibit 1, the document of the 24th April, 1978 was signed. But it is implied at least in his judgment that he regarded it as having been signed on the 24th April. If so it would be a written agreement retaining Mr. Brown for the conduct of the defence at the trial.

On this first issue then, we must proceed on the basis that Mr. Brown was engaged to represent Dillon at the trial which commenced on the 24th April, 1978. The learned judge did not accept Mr. Brown's evidence that he was orally engaged by Sheba Vassell in Jamaica to represent Dillon at the preliminary enquiry and if necessary at the subsequent trial. He must however have found that Mr. Brown was engaged, whether orally on the 6th March after the preliminary enquiry, or orally or by the document dated the 24th April, 1978, to represent Dillon at the trial.

The second point that would arise is on what terms was Mr. Brown so engaged. Mr. Brown is not entirely consistent on this point, save for one allegation: that is that whatever he was engaged to do his fee was U.S. $20,000.00 or J. $40,000.00, whether the work was for the preliminary enquiry and the actual trial, or only the latter. Having regard to the fact that the trial judge rejected Mr. Brown's evidence as to his agreement with Sheba Vassell in Jamaica, this leaves Mr. Brown only with the evidence of the written document dated the 24th April, 1978, and the evidence he gave as to discussions with Dillon on the 6th March, 1978, when he met him for the first time, and again those of the 24th April, 1978, just before the trial commenced. Dillon seems clearly to have admitted that Mr. Brown was engaged when he terminated Miss Simmons' retainer.

having lost their case. Consequently the common law attached privilege for what may be said by the advocate in Court, in the same way that it protected the witness, the party, and the judge, (See Munster v. Lamb [1883] 11 Q.B.D. 588). The common law also attached privilege or immunity to the advocate, the barrister, in his conduct of the case, as against the client who may have lost and wished to sue him in negligence or for breach of his duty to the client, complaining that this witness should have been called, or that this question should have been asked or not asked etcetera. The barrister's immunity and privileges were subject to the inherent powers of the Court to curb abuses by use of the power to punish for contempt of Court.

Under the traditional common law system the barrister was unable to sue for his fees. Such fees were debts of honour only. So as to be able to present his case "disinterestedly" the barrister ought to be paid in advance: he should collect his fee before going to Court. He was not allowed to sue for it after.

In Morris v. Hunt (1819) 1 Chit 544, a case in which Bayley, J. was hearing an appeal from the losing party as to what the master had done in taxing the costs he was required to pay to the other side, that learned judge not only upheld the discretion exercised by the taxing master as to the number of counsel for which the loser should be charged with, but the quantum of their fees, and as to the fees he made some observations at pages 550-551 that reflect the views of the common law Courts on that topic. He said:

> "But it is said that counsel can maintain no action for their fees: why? because it is understood that their emoluments are not to depend upon the event of the cause, but that their compensation is to be equally the same whether the event be successful or unsuccessful. They are to be paid beforehand, because they are

At this stage a no-case submission seems to have been made on behalf of Sheba Vassell. The judge's notes do not record any ruling as having then been made.

Both defendants gave evidence.

Dillon gave evidence to the effect that he had been arrested and extradited from Jamaica to Bermuda to face charges for certain drug offences. There was a preliminary enquiry at which he was represented by Miss Shirley Simmons. Mr. Brown was to represent the co-accused Errol Williams he can't remember if Mr. Brown was present at the enquiry. On the morning of the actual trial he was approached by Mr. Brown in the cells. Mr. Brown suggested that it would be better if one attorney represented both accused, and pointed out he was appearing for Williams. He suggested that he should dismiss Miss Simmons from the case, and engage Mr. Brown. The quantum of fees was not discussed. Miss Simmons was announced as coming in to see him. Mr. Brown departed saying "remember what I just told you". He then dispensed with the services of Miss Simmons. No figure for fees had been discussed with Mr. Brown nor any mention made of an instructing attorney.

At this stage then, Dillon appears to be saying that he was persuaded to and did engage Mr. Brown to represent him at the trial, and had dispensed with the services of Miss Simmons. This contradicts the defence filed on his behalf which had stated that Mr. Brown never at any time represented him at the trial.

According to Dillon this nebulous state of affairs continued for some days of trial, which he says lasted for two weeks (not three). Dillon says that a stage was reached when the trial adjourned over a week-end, and it was expected that the jury would come in with their verdict soon after it resumed in the next week. At this stage says Dillon, Mr. Brown came to

to his former solicitor by bringing a Bill in Equity to set aside the sale of the other land to him: by this time a railway line had been run into the district and mining of the coal known to be under that land had now become commercially feasible. In point of fact and law, the sale transaction was upheld. The solicitor was able to show conclusively that the price paid by him for the land was substantially better than any other offer obtainable at that time. Nevertheless the bill of costs was referred for taxation some errors in it having been pointed out. The Bill had been presented some thirteen years before! Giving judgment, Sir James Wigram said - (at p. 29 E.R.):

> "The rule of equity which subjects transactions between solicitor and client to other and stricter tests than those which apply to ordinary business transactions is not an isolated rule, but is a branch of a rule applicable to all transactions between man and man, in which the relation between the contracting parties is such as to destroy the equal footing on which such parties should stand. In some cases, as between trustee and cestui qué trust, the rule goes to the extent of creating a positive incapacity; the duties of the office of trustee requiring on general principles that that particular case should be so guarded.
>
> The case of solicitor and client is, however different ..... (The Vice Chancellor went on to say that each case had to be considered on its merits, and that dependent on the circumstances of the case various duties were required of the solicitor ..... in general the solicitor must be able to show either that the client had independent advice, or that he had given to his client all that reasonable advice against himself, that it would have been his duty to give if a third person had been involved with the client).

Two years later, in Re Whitcombe (1844) 8 Beav. 140, Lord Langdale, M.R. was to say of an agreement between client and solicitor agreeing a lump sum for costs, instead of a detailed bill: (at p. 144):

> "I must remark on the great danger which solicitors incur when they enter into such arrangements with their clients. An agreement like this between a solicitor and client for taking a fixed sum in satisfaction of all demands for costs is an agreement which may be perfectly good; but this Court, for

"the protection of parties, looks at every transaction of this kind with great suspicion. The matter may turn out to be perfectly fair and right, still it exposes the conduct of the solicitor to suspicion, and naturally awakens the vigilance and jealously of this Court, seeing that one party has all the knowledge, and the other is in ignorance."

(Emphasis supplied).

Holman v. Loynes (1854) 4 De G. M & G 270 illustrates the difficulty of the solicitor's position. Here the solicitor had been acting for a client in an attempt to sell the client's property. It had been subdivided into some nine lots and offered for sale at auction. Only one found a purchaser. Some two years later the solicitor bought four of the lots, for the sum of £600, on the face of the conveyance, but in actual fact for £260 and an annuity of £40 for the life of the vendor. The remaining four lots were sold two years after that to the same solicitor in consideration of an annuity of £26. The vendor died two years after the last sale, and his heir brought suit to set aside the two sales, on the grounds that they were made between an attorney and client and that the attorney had not duly protected the client in the transaction. The defence was that the relationship had ceased to exist at the time of the sale, and that the sale was fair.

The Court had little difficulty in finding that though the attorney-client relationship had ended in that at the time of the two sales the attorney was no longer acting for the vendor, nevertheless the influence continued. There was an onus on the solicitor or attorney to prove that the terms on which he bought were the best that could have been obtained from anyone else. It was shown that the vendor was in fact in bad health, he was addicted to drinking, and a man of gluttonous propensities, excessively indolent and took no proper exercise: consequently the annuities provided in respect of his life were worth very little. The sale was set aside, and Edwards v. Meyrick (ante) distinguished.

In the same year, in Stedman v. Collett (1854) 17 Beav. 608, a solicitor who had been acting for a client who was unable to pay him to continue, surrendered the papers he had acquired in support of the client's claim, in consideration of a promise in writing by the client to pay him £200 if the claim should ultimately be established. This having occurred the solicitor sued on the agreement. The Master of the Rolls remarked, at page 614:

> "Notwithstanding some difficulty that may arise from the dicta in some of the cases referred to on this subject, I am of opinion that the settlement of a solicitor's bill by the client for a fixed sum is valid, and will not be disturbed by this Court, where it has been entered into fairly and with proper knowledge on both sides:" (citing In re Whitcombe (ante).

> At page 616 he added:

> "But I see nothing in that case to countenance the opinion, that provided the transaction be open and fair, a solicitor and his client may not agree that a fixed sum shall be paid to the solicitor, in liquidation of his bill of costs, even though that bill of costs has not been delivered, and even though the object of the arrangement is to enable the solicitor to escape the trouble of making out his bill."

On the facts of this case he held the agreement valid, having negatived pressure and having found that though the defendant had no professional assistance he was conversant with legal matters and understood the agreement fully; and that the fixed sum was not so grossly disproportionate to what might have been reasonably due. He observed that there had been a considerable lapse of time since the agreement was made, and that because of the agreement the client had in fact succeeded in his claim. (The lapse of time here was nine years).

In 1870 the U.K. Parliament passed the Attorneys' and Solicitors' Act, 1870. Part 1 of the Act dealt with agreements between attorneys and solicitors and their clients. Section 4 of the Act provided:

> "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or per-centage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this act contained: Provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable he may require the opinion of a court or judge to be taken thereon by motion or petition, and such court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled and the costs, fees, charges and disbursements in respect of the business done to be taxed in the same manner as if no such agree- had been made."

Section 8 provided that no suit should be brought on the agreement, but that every question with respect to it may be examined and dealt with on a motion or petition to the appropriate Court in which the business, or any part of it, was done.

Section 9 provided that on such a motion or petition if it appeared that the agreement was in all respects fair and reasonable between the parties the same may be enforced by that Court; if it did not the Court might order it to be cancelled and direct fees and costs to be taxed in the ordinary manner.

Section 10 provided that even if paid, the client might on application made within twelve months after payment apply to have it reopened if the Court found that special circumstances of the case required it to be re-opened.

There were other provisions and conditions which it is not necessary to look at here.

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By the Supreme Court of Judicature Act, 1873, Section 87, solicitors, attorneys and proctors were fused under the generic name solicitors, and deemed to be Officers of the Supreme Court, and the Court's inherent jurisdiction expressly retained.

A further U.K. Act, The Solicitors Remuneration Act, 1881 (44 & 45 Vict. C. 44) introduced a distinction between "uncontentious" and "contentious" business; as to the former it provided for the laying down of set scales of fees by General Orders to be made by a committee presided over by the Lord Chancellor. Section 8 dealt again with the possibility of solicitors and client agreeing in writing as to the remuneration to be paid for such work.

In Clare v. Joseph (1907) 2 K.B. 369 (C.A.). The Court of Appeal reviewed the position as it stood before the 1870 Act, and considered the effect of the Acts.

Lord Alverstone, C.J. at page 372 et seq said:

> "We have had considerable discussion in this appeal as to the state of the law before 1870; in my opinion it is correctly stated in Cordery on Solicitors, 3rd Edn. at p. 261. Agreements as to costs were often made before 1870, and, upon the application of the client, they were not infrequently held to be binding both on the solicitor and the client. The inquiry was always directed to the question whether the agreement was fair and reasonable, and an agreement by the solicitor to take less than the usual remuneration was not looked upon as unfair or unreasonable, but was held binding upon him. We must remember that that was the state of the law in 1870 when we are called upon to construe the Act of that year, an Act which was designed to provide fresh safeguards for the protection of the client and to give the solicitor certain rights which he did not previously possess, provided that he himself complied with the requirements of the Act. .... it (The Act) provided that he might enter into an agreement in writing as to his costs, and went on to enact that, if he did so, there should be a further safeguard for the protection of the client, who should be entitled to have the agreement examined by the taxing Master to see if it was fair and reasonable, and if that officer was of opinion that it was not fair and reasonable he could require the opinion of the Court or a judge upon the point. The section is an empowering section, and in my opinion

> "a less rate that the ordinary rate, an agreement between him and his client to that effect must be in writing, if the solicitor sets it up ....."

This case I think indicates very clearly the approach of the common law to what one may call lump sum agreement as to costs made between solicitor and client. They were viewed with suspicion as there was so great an opportunity for the exercise of undue influence, and the solicitor wishing to enforce them had to satisfy the Taxing Master and or the Court that they were fair and reasonable.

Before the Act of 1870 the Courts were prepared to examine such agreements to see whether they were fair and reasonable. It is important to appreciate that even after the Act, and the subsequent Acts, (they were consolidated in 1932, and again in 1957) the Courts have exercised an inherent jurisdiction over solicitors and their charges, over and above any powers given to them by the statutes. That power rests on the concept that solicitors or attorneys are officers of the Court: as we have seen in looking at the position of the barrister, Courts have an inherent jurisdiction over those who practice in their Courts, and this is especially true of solicitors and attorneys, who are (unlike the barrister) officers of the Court. The following cases, illustrate the continued exercise of this inherent jurisdiction separate and apart from Statute:

In re Johnson and Weatherall (1888) 37 Ch. D. 433: (C.A.) country solicitors wished to challenge parts of certain bills that had been rendered to them by their town agents in respect of certain clients. All the bills had been put into one bill, and apparently it was not possible under The Solicitors Act of 1843 to tax part of a town agent's bill. A strong Court of Appeal, consisting of Cotton, Lindley and Bowen, L.JJ. unanimously held that under the Court's inherent jurisdiction, quite apart

> "The superior Courts of law and equity possess a jurisdiction to ascertain, by taxation, moderation, or fixation, the costs, charges and disbursements claimed by an attorney or solicitor from his client, and that jurisdiction is derived from three sources and falls under three corresponding heads.
>
> First, a jurisdiction founded upon the relation to the Court of attorneys and solicitors considered as its officers. This jurisdiction, commonly called the general jurisdiction of the Court, enables it to regulate the charges made for work done by attorneys and solicitors of the Court, in that capacity, and to prevent exorbitant demands.......
>
> Second, when a contested claim for costs comes before the Court it has jurisdiction to determine by taxation or analogous proceedings the amount of costs....
>
> Third, there is a statutory jurisdiction derived at first from"(here he refers to a mixture of early England legislation and later the New South Wales Legal practitioners Act, ...).

The case illustrates the High Court of Australia asserting the inherent jurisdiction of the Court over "its officers".

More recent assertions of the inherent jurisdiction of the Courts over the charges made by solicitors appear in the judgments of Cross, J. in In re A Solicitor (1961) 1 Ch. 491; (1961) 2 All E.R. 321 and that of Wilberforce, J. in Electrical Trades Union v. Tarlo (1964) Ch. 720.

In the former, Cross, J. said at page 502:

> "I turn now to the question of the inherent jurisdiction. From the earliest times the various courts of law and equity exercised control over the attorneys or solicitors who practised in them. In time the profession of attorney or solicitor came to be regulated by statute, but the inherent jurisdiction of the court over its officers continued to exist as a supplement to the statutory regulation....
>
> (Cross, J. then referred to Storer & Co. v. Johnson and Weatherall (ante) ... and pointed out that dealing with solicitor's costs under the inherent jurisdiction differed from ordering taxation under the Solicitors Act (1957)).

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In the latter, Wilberforce, J. said at p. 734:

> "I think it is undisputed that secn. 50 of the Solicitors Act, 1957, has not taken away the general jurisdiction which the court has always possessed over solicitors as officers of the court ..... the court has inherent jurisdiction to secure that the solicitor, as an officer of the court, is remunerated properly, and no more, for work he does as a solicitor....."

Incidentally the Court's inherent jurisdiction over solicitors may arise not only in solicitor and own client relations, but even in solicitor and his relations to the other party: see Myers v. Elman (1940) A.C. 282, where a solicitor who failed effectively to see that his client made a proper affidavit of documents was ordered by the Court to pay 2/3rds. of the taxed costs of the opposite party, who had been adversely affected by this failure of the solicitors duty to the Court.

It may be thought that the Court's control over the fees of solicitors or attorneys is confined to civil as opposed to criminal work. This is not so. There are cases in the reports where the jurisdiction has been exercised in criminal cases, though these are less frequent, for obvious reasons.

One of the earliest is the case of Walmesley v. Booth (1741) 2 Atk. 25; 26 E.R. 412. In that case the client Japhet Crook had been arrested and was to be prosecuted for perjury and forgery (the latter was then a capital offence), and engaged the defendant to get bail for him. The defendant managed to get two persons to stand bail, and also persuaded the client to make a will in his favour giving him a legacy of £1,000 and also a bond to ensure the payment of the legacy, plus legacies of £500 each to the bailors. On his release the client revoked that will, and by a new will appointed the plaintiff his executrix and residuary legatee. It appears that the law eventually caught up with the client. He died (he afterwards suffered as he deserved) and the plaintiff sued to set aside the bond. The defendant set up that it was given in respect

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of his legal services. This seems to have at first succeeded, but on reconsideration the Lord Chancellor set it aside. He observed that it was obtained by an attorney from his client while the client was under criminal prosecution, "a very material ingredient in the case" and a principal ground for giving judgment. Lord Hardwick (the Lord Chancellor) then observed:

> "Attornies and solicitors, especially since the late act of Parliament, 2 Geo 2 C 23, have been considered as officers of justice, and they have stated fees allotted them, which they ought not to exceed; and therefore in all courts, but more especially in courts of law, there are certain rules for regulating their behaviour with regard to their clients.........
>
> ...... The consequence of this is, that there is a strong alliance between an attorney and his client, and a great obligation upon the attorney to take care of his client's interest; and the court will relieve a client against the extortion of an attorney....."
>
> (Turning to the facts of the case he observed that at most the fees due could not have been more than 26 shillings.)
>
> "It has been said that Japhet Crook was a very cunning fellow, and a very great knave, and I believe it to be true; but the court must not consider the particular circumstances of the man, but the case in general; for a person may be prosecuted for these very crimes, and yet be innocent; and it would be very mischievous if there was any encouragement given to an undue advantage taken of another under such circumstances.....
>
> Because all the courts, both of law and equity, order their bills to be taxed; and there are a number of cases in this court, where a client, unassisted by an attorney, has paid a law bill, and accepted a receipt for it, and yet has been allowed to open the whole account notwithstanding, and to take exceptions to any improper or extravagant charge in an attorney's bill. .... And what is the reason the court goes upon in such determination? why, the great power and influence that an attorney has over his client... Now consider the present case; here is an extravagant reward given for services......"

In the event the Lord Chancellor directed "the Master to inquire what extraordinary services the defendant had done to intitle him to any reward, and what is justly due for fees."

Lord Hardwicke followed this approach in Saunderson v. Glass (1742) 2 Atk. 298; 26 E.R. 581, where he remarked:

> "It is truly said at the bar, that a security obtained by an attorney, whilst he is doing business for his client, or whilst a cause is depending, appears to this court in quite a different light than between two common persons; for if an attorney, pendente lite, prevails upon a client to agree to an exorbitant reward, the court will either set it aside intirely, or reduce it to the standard of those fees to which he is properly intitled; and this was the rule that weighed with me in Walmsley v. Booth .... (ante)."

Other such cases in which the Courts have had to consider and on occasion order taxation in attorneys' bills in respect of criminal cases may be found, for example in the following: Re E. D. Lewis, ex parte Munroe (1876) 1 Q.B.D. 724 (bill of costs for criminal proceedings in the Magistrate's Court frequently taxed by the master of the Crown Office).

In re Jones (1895) 2 Ch. 719, a decision of Stirling, J. in which the headnote records:

> "Costs relating to business done by a solicitor in the court of a police magistrate, or in a Court of Quarter Sessions, are subject to taxation in the usual way; and an agreement as to the amount of such costs may be examined into, and, if necessary, be set aside by a judge of the High Court.

And see Stirling, J. at p. 725, citing and following Re Lewis (ante). Stirling, J's decision was affirmed by the Court of Appeal in In re Jones (1896) 1 Ch. 222: that report contains more details. The client was charged with receiving stolen goods. He retained Jones as his solicitor to defend him. After being committed for trial he paid his solicitor £25 on account, and two days later signed the following document:

> "I agree your costs in the matter of my defence, you to pay counsels' fees, and all other disbursements, at £75," and he signed it.

The client was tried and acquitted. He paid the balance of £75 but later took out a summons attacking the agreement and seeking taxation, under the Act of 1870. The Court of Appeal ruled that the High Court did have jurisdiction, and that the words in Section 4 of the Act of 1870 "apply to business done in all Courts, including a criminal Court, or no Court at all." The decision to order taxation was affirmed, (see also Re Jackson [1915] 1 K.B. 371 and [1914-5] All E.R. 959.

The conclusion to be drawn from this review of these cases relating to solicitors fees for legal work done by them, is that apart from statutory provisions the Courts have an inherent or as it is sometimes called a general jurisdiction over them, and the fees that they charge. This derives from the fact that solicitors or attorneys are officers of the Court, and as such subject to its jurisdiction, particularly as to the fees they charge. Further this jurisdiction extends to all legal work, including work in the criminal Courts. The English Legislation has given solicitors there increased freedom in making lump sum agreements with their clients, with a view to avoiding the necessity of preparing detailed bills of costs for taxation, but that legislation contains safeguards for the client in that before it may be sued on by the solicitor it must be examined by the Master to see whether it is fair and reasonable, and he in turn may refer it to the Court for decision on this score.

Under either the statutory or the inherent jurisdiction the Court may set aside any such lump sum agreement as unfair or/and unreasonable, and of course on the score of undue influence.

Mr. Macaulay's submission that the Court's power to examine such an agreement and set it aside for undue influence applies

only to relationships that are already established and does not apply to initial engagements is not correct. The cases show that the Courts view such agreements with some suspicion and will intervene when and where justice demands such intervention.

For the sake of completion it may be noted that the traditional view is that attorneys or solicitors do not have the same immunity from suit by their client for negligence that barristers enjoy. However the dicta in Rondel v. Worsley at all levels have left the position unclear, as several of their Lordships were of the view that in so far as they are conducting a case, the solicitor-advocate ought for the same reasons of public policy to enjoy immunity from suit by the client for negligence similar to that enjoyed by the barrister. See however Groom v. Crocker (1939) 1 K.B. 194 (solicitors for insurance company held liable to their client the insured) and Goody v. Baring (1956) 2 All E.R. 11 (solicitor acting for both vendor and purchaser held liable in negligence to purchaser for failing to make adequate enquiries as to the position of tenancies on the premises that were bought under the Rent Restrictions Act).

(Leaving aside for the moment consideration of the English Legislation, this then was the common law position, that Jamaica inherited. It is now necessary to examine how far we have departed from it in the Legislation that has been enacted in Jamaica).

THE POSITION IN JAMAICA:

A preliminary remark may be made before attempting to trace the Jamaican Legislation with respect to Solicitors and Barristers: In general the Jamaican Legislation usually followed fairly closely, with necessary modifications and adaptions, the corresponding English Statutes, but not infrequently there is considerable difficulty in finding where exactly they have put

the borrowed Legislation, and to what extent they have adopted, or omitted provisions, and then seeing what the net effect is. It might be without offence a legal game of hide and seek.

AS TO SOLICITORS IN JAMAICA:

The earliest Jamaican Statute that has been traced with regard to Solicitors is Jamaica Law 9 of 1869 entitled - "A Law to amend the Laws for the admission of Attorneys, Solicitors and Proctors in Jamaica." This Law was clearly modelled on the U.K. Solicitors Act, 1843 (6 & 7 Vict C 73). In many of the clauses the wording is identical. Like its English counterpart, Jamaica Law 9 of 1869 provided for the admission and enrolment of Attorneys, Solicitors and Proctors. It provided for their qualifications and service under articles, their examination, admission and enrolment. It provided against unqualified persons purporting to take out legal process and execute legal documents. And there the Jamaican Statute stops! Completely missing are the U.K. provisions that appear from Section 37 onwards dealing with solicitors sueing for their fees, the necessity of first submitting a detailed bill, the possibility of sending it to be taxed, the one sixth rule and so forth. But there are provisions dealing with striking off a solicitor from the rolls.

Chapter 460 of the 1938 Revised Code of the Laws of Jamaica: The Solicitors Law gives the law 9 of 1869 as the basic law, and lists all the amendments made to it from that time until the last such amendment in 1929: all have been carefully examined; without exception they deal with minor amendments concerning the admission of solicitors and amendments of the machinery that set up the Solicitors' Disciplinary Committee and the mode of application to it by a lay person or client who had complaints against a solicitor and wished to have redress for them.

It will however be remembered that the U.K. Supreme Court of Judicature Act, 1873, contained in Section 87 a provision

fusing solicitors, attorneys and proctors into the generic name of solicitors, and expressly preserving the power of the Courts over them as "Officers of the Court." In 1879 the Jamaican Legislature adopted the provisions of that famous Act (which fused the principles of law and equity) in the Jamaica Judicature Law of 1879, and it appears that shortly after by Law 31 of 1885 a section similar to that in Section 87 of the U.K. Act of 1873 was incorporated therein. It appeared in subsequent re-enactments of the Jamaica Judicature Law, see Section 20 of Cap. 430 of the 1938 Code, and Section 19 of Cap. 180 of the 1953 Code.

Further the Jamaica Judicature Law 24 of 1879 contained a general provision with regard to Costs being in the discretion of the Court. The last line of that section states "No costs shall be recoverable until they have been taxed by the Registrar or his deputy."

A fair reading of the section would confine "costs" there to being costs of and incident to proceedings in the Supreme Court.

The very next section, Section 36 provided for Rules of Court to be made by the Chief Justice with the concurrence of the puisne judges, and provided that rules might be made:

> "For regulating matters relating to costs and the taxation thereof, of proceedings in the Court, including the costs of solicitors, the expenses of witnesses, and the fees of bailiffs."

These provisions of the Jamaica Judicature Law, 1879, have continued to be brought forward in subsequent re-enactment of the Codes of Jamaica Laws: They appear in the 1938 Code as Cap. 430 Sections 42 and 43; in the 1953 Code as Cap. 180 Sections 42 and 43.

Quite apart from the Civil Procedure Code containing the Rules of the Supreme Court, under the provisions of the Judicature

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Law of 1879 there was issued a Book of "General Rules and Orders", of the Supreme Court of Judicature, Part VII of which is entitled: "General Provisions" and they contain from para. 24 onwards provisions dealing with "Costs". The opening lines of para. 24 state:

> "In all cases of costs, whether between party and party, or between solicitor and client, it shall be competent for the party having to pay such costs to offer by notice a sum in gross in lieu of such costs;......."

The rule continued to the effect that this offer can be accepted, but if not accepted and taxation is insisted on the party refusing the offer shall be charged with the costs of the taxation if he gets less costs awarded to him than had been originally offered. Then there follows from para. 29 onwards of the General Provisions a series of provisions under the caption "Taxation of Costs" and it is clear from the provisions that there could be taxation of costs between solicitor and (own) client. The provisions contain the well known one sixth rule as to the costs of taxation. Para. 30 allowed for appeals from the taxing officer to the judge, while para. 31 stated:

> "No action shall be commenced for the recovery of any bill of costs until the same shall have been taxed by the Registrar after notice to the party intended to be charged thereby."

The present General Rules and Orders are still in current use, and have been amended from time to time. They are also specifically referred to in the Judicature (Civil Procedure Code) - see Section 687.

The Solicitors Law, Cap. 460 of the 1938 Jamaica Revised Laws appears in the 1953 Revised Laws as Cap. 363: The Solicitors Law. There was no substantial change, save that by Law 64 of 1941, (matching a similar development that had taken place earlier in the U.K.) the solicitor's disciplinary committee was given the power itself to make orders striking off solicitors from the roll,

instead of merely making a report and recommendations to the Court, as was the case before. Provisions were made as to the form which their orders should take, and for appeals to the Supreme Court. The possibility of similar applications to the Supreme Court to strike off solicitors was preserved and slightly modified. The statute continued to recognize expressly the inherent jurisdiction of the Supreme Court over solicitors: see Section 43 of Cap. 363, re-enacting a revision that dated back to Section 17 of Jamaica Law 36 of 189[illegible]. This was also reinforced by the re-enacting in Sec. 19 of the Judicature (Supreme Court) Law, Cap. 180 of the 1953 Laws of the provision that stated that solicitors were officers of the Supreme Court, and expressly preserved the Courts inherent jurisdiction over them.

Turning to the Jamaican Law Reports of the period up to 1953 to see how in Jamaica the Courts exercised jurisdiction with regard to taxing costs as between solicitor and own client, two things become apparent: (a) the Jamaican Courts were aware of and exercised the Courts inherent jurisdiction over solicitors as officers of the Court, and (b) that despite the absence of substantive law, such as existed in the U.K. Statutes referred to above, the Courts by the application of this jurisdiction and the provisions in the General Rules and Orders of the Supreme Court in fact exercised control over the fees charged by solicitors to their own clients.

The second volume of Stephens Reports which spans a period from 1855 to 1922 contains under the caption "Solicitors" several cases that illustrate both propositions.

The inherent jurisdiction, or summary jurisdiction as it is sometimes called, was referred to and exercised in Anderson v. Watson (1876) 2 Stephens 1797. This was a case of a complaint

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to the Court of an excessive and extortionate bill of costs to the client. The Court there asserted its inherent jurisdiction, but declined to exercise it, following an English case, Meux v. Lloyd (1857) 2 C.B.N.S. to the effect that unless there was also evidence of fraud the Court would leave excessive charges to be dealt with by taxation which offered sufficient protection and would not on that score exercise their jurisdiction to strike off or discipline the solicitor.

In White v. Bell (1881) 2 Steph. 1799 the Court referred to an equitable rule which was in force long before the U.K. Solicitors Act of 1843 (6 & 7 Vict. C. 73) which required "that every bill of cost for whatever description of business done shall be liable to taxation." The rule applied to suits in equity, and applied both in England and Jamaica to dealings between solicitor and client.

Presumably, since the Judicature Act in England of 1873 and in Jamaica of 1879, the equitable rule would now take precedence and operate generally, though it had not been specifically enacted in Jamaica as it had, in England in the 1843 Solicitors Act.

The case is of some interest otherwise, in that the client complained that despite the large cash advances he had paid the solicitor the latter did not apply them to paying counsel with the result that when the case first came to trial it was adjourned with costs against the client, the solicitor saying that he had appropriated these advances to his own fees. The Court here exercised its inherent jurisdiction and ordered the solicitor to pay out of his own pocket the costs of the adjournment that his conduct had forced on the client.

In In re Bell (1901) 2 Steph. 1819 a Solicitor's bill to his own client was the subject of taxation and reduced on taxation from £181.9.7. to £116.2.10 and the Court was asked by

the Registrar to consider whether the making of certain charges for work that the solicitor did not in fact do amounted to conduct which should be dealt with by the Court exercising its inherent jurisdiction. The solicitors disciplinary committee seems to have been of that opinion, but the Court, exercising its jurisdiction found the offence proved but was content to reprimand the solicitor and order him to pay the costs of the motion. Mr. Bell did not apparently learn from this experience, as two years later in In re Bell (1903) 2 Steph. 1823 he was found guilty of professional misconduct and the Court accepted the report of the solicitor's committee and suspended him from practice for two years.

It is of interest to note that in those days it was considered professional misconduct for a solicitor to accept money for doing legal work, and not doing it or refunding the fee: See In re a Solicitor (1891) 2 Steph. 1807; In re Lyon (1897) 2 Steph. 1816, and more recently In re a Solicitor (1937) 3 J.L.R. 95.

Stephens Reports also contains cases in which solicitors sued for their fees: Johnson v. Williams (1895) 2 Steph. 1815 and Livingston & Alexander v. Fay (1915) 2 Steph. 1836, and cases in which their clients sued them for negligence: Manley v. Bailhache (1893) 2 Steph. 1809 (The solicitor won), Alexander v. Simpson (1903) 2 Steph. 1825 (the solicitor lost).

After a gap of several years the problem of solicitor and own clients fees came before the Courts again in Neita v. Bernard (1943) 4 J.L.R. 110 (C.A.). The case is of interest for several reasons: it shows the registrar of the Supreme Court, as taxing master, being asked to tax a solicitor's bill (at the request of the solicitor who wanted to sue the client) in respect of several items including the cost of appearing in criminal cases in the Resident Magistrate's Court.

As to the taxation on those items there was apparently no appeal, and they were confirmed by both the judge in Chambers and the Court of Appeal. As to the other items, or those in dispute, there appears to have been a conflict as to whether they were covered by the solicitors's retainer, or had been performed after it had been determined, and the matter was sent back to the judge for decision on that point. Giving the main judgment, Furness, C.J. remarked at page 111 that the Court of Appeal approved the practice set out in the Report of the Registrar (Mr. Trevor Lyons) as to practice on taxation in Jamaica. That Report notes:

> "In the first place I wish to say that in Jamaica there is no authority by statute for the Registrar to tax solicitor and client bills of costs which have no reference to proceedings in the Supreme Court and might on that account be held to come within the powers of the Registrar under secn. 10 (1) of Cap 430 (The Judicature Law), but that the Registrar has always taxed such bills by virtue of long existing practice which appears to have originated as a result of, or to have been acknowledged by, Rule 31 of Part VII of the General Rules and Orders of the Supreme Court which were made by the Judges on 28th August, 1880, and published in the Jamaica Gazette of 13th April, 1882, and which came into operation on the 1st July, 1882 - see Jamaica Gazette of 27th April, 1882....."

After referring to certain other items, the Report states:

> "5. Agreement to charge a lump sum:
>
> I have followed the practice which I understand has always existed and refused to decide whether or not there was an agreement by the solicitor to charge a lump sum - I tax as to quantum and leave that question for the trial judge."

Having regard to the available English Legislation dealing with these problems, and possibly to the fact that Jamaican Solicitors were required to take and pass examinations set by the Law Society in England, it appears that there was a tacit assumption that the provisions of Part VII of the General Rules

and Orders of the Supreme Court made under the Judicature Law of 1879, and the Courts inherent jurisdiction over solicitors as officers of the Court were sufficient to produce a situation similar to that in England, where bills of costs to one's own client had to be taxed prior to being sued on and so forth. As to agreements to charge a lump sum in the absence of express legislation they fell to be determined by the general law on the subject as it appears in cases such as Edwards v. Meyrick (1842) ante, Re Whitcombe (1844) ante, Steadman v. Collett (1854) and the cases such as Clare v. Joseph (1907) in which the Courts considered the law both before and after the legislation of 1870 and 1881 had given recognition to the making of lump sum agreements with respect to solicitors' fees.

AS TO BARRISTERS IN JAMAICA:

Turning to the situation of the barristers in Jamaica they enjoyed without benefit of legislation the same freedom from control that was enjoyed by their counterparts in England, with this difference that they were so far removed from the control exercised by the Inns of Court that we have seen that the judges had to assume and exercise their inherent jurisdiction over them, (see the cases cited earlier and Section 6 of Law 39 of 1896, supra).

The earliest Law dealing with barristers in Jamaica appears to be Law 45 of 1869 (repealed by Law 39 of 1896 supra). It provided for the admission of a limited number of attorneys to be called "advocates" to whom was given the right of audience in the Higher Courts; it was apparently an attempt to meet a then existing shortage of barristers by providing that attorneys or solicitors, if so chosen, might act as such. The existing barristers were not happy with this arrangement. Three years later, apparently at their request Law 36 of 1872 was passed. It returned the compliment by providing that the barristers for their part might also be admitted as attorneys,

solicitors or proctors under Law 9 of 1869. They would have all the privileges and liabilities of the new status, but would continue to be entitled to act as barristers.

At this stage then Jamaica had arrived at a situation not unlike that existing in New Zealand today. There were solicitors or attorneys who might become "advocates" and gain the right to practice as barristers (without the title), while on the other hand there were barristers who might apply for and gain the right to practice as attorneys and solicitors, without in any way jeopardizing their status as barristers. No doubt there were members of each profession who continued to practice as either barrister or solicitor, simpliciter.

The next Law dealing with barristers was Law 39 of 1896, The Jamaica Bar Regulation Law. It did several things: first it extended to persons who had been solicitors in Jamaica for not less than ten years (or in certain positions in the Legal Service for not less than five years) the privilege of being enrolled as members of the Jamaica Bar on their passing the examination prescribed in England by the Inns of Court for admission to the Bar and dispensed with the necessity of their serving terms. They had of course to be struck off the roll of Solicitors before being enrolled as Barristers.

The same Law permitted also the reverse movement, that is that Barristers who had been enrolled for three years could be removed from the roll of Barristers and enrolled as Solicitors.

Section 6 of that Law also expressly recognized the inherent power of the Supreme Court to strike barristers off the roll for any professional misconduct for which a Barrister-at-Law would be disbarred by the Inns of Court in England.

Finally, Law 39 of 1896, repealed both Law 45 of 1869 and Law 36 of 1872, without prejudice however to the rights which practitioners had acquired under them.

The net effect then is that for a period of twenty-five years Jamaica had a system under which solicitors or attorneys might become "advocates" and enjoy the rights of audience normally reserved for barristers, while barristers for their part could if they wished acquire the additional status of solicitors or attorneys, and enjoy the rights of direct access to the client, while preserving their right of audience in the Supreme Court. It was a situation rather similar to that which obtains today in New Zealand. Unfortunately the full story of how it worked out in practice is a task for the legal historian of the future. It was abandoned and the dividing line between the two professions was once again drawn up or laid down. The practitioner who enjoyed both statuses disappeared from the legal scene, at least for the time being, not to re-appear for another sixty years. (It might perhaps be noted that a clerical mistake occurred in Law 39 of 1896: S. 9, the repeal section, by mistake repealed Law 37 of 1872 (The Kingston Slaughter House Law) instead of Law 36 of 1872, and this was corrected in Law 10 of 1897).

Law 39 of 1896, The Jamaica Bar Regulation Law, continued to be re-enacted in the successive codes of Jamaican Laws: It became Cap. 459 of the 1938 Revised Laws, and Cap. 171 of the 1953 Revised Laws (with a minor amendment to permit barristers to join the Jamaica Government Legal Service and practice at the Bar without having been formally admitted as barristers to the Jamaica Bar).

It was some sixty or more years after 1896, that Legislation affecting the Jamaica Bar was again reintroduced. This was Law 3/1960 - The Bar Regulation Law, 1960. Part I of the new law provided a formal Roll of Barristers admitted to practice in Jamaica, to be kept by the Registrar of the Supreme Court. Part II provided for the setting up of a Disciplinary Committee

of the (Jamaica) Bar Association to consist of the Attorney General and six other members drawn from barristers in private practice appointed by the Governor on the recommendation of the Bar Association made in general meeting. The model used was that of the Solicitors Disciplinary Committee. The Committee was given the power to strike off or suspend or fine offending barristers. Appeals lay to the Court of Appeal at the instance of the barrister concerned. There were in addition provisions similar to that in the Solicitors Law against practice by unqualified persons as barristers. Finally the second schedule of the Law provided for the Bar Council, with the approval of the Bar Association to determine rules of practice and etiquette, while Section 17 provided that where the rules so made permitted a barrister to act for a client without the instruction of a solicitor, then he should in such instances be entitled to sue for his fees, but should lose the immunity of the barrister and was to be liable for negligence in his professional capacity, and would be required to tax his fees before the Registrar of the Supreme Court or a Clerk of the Courts as if those fees were solicitor's costs. He was also made liable to account to the client for money received in the same manner as if he were that client's solicitor. The Law repealed Section 7 of the Jamaica Bar Regulation Law. That Section, mentioned earlier as Section 6 of Law 39 of 1896, had expressly recognized the inherent power of the judges of the Supreme Court, with or without an application, to order that a barrister be struck off the roll for any professional misconduct for which he would have been disbarred by the Inns of Court in England. It may one day be a matter of some consequence to determine if the repeal of a Section that simply recognized the inherent jurisdiction of the judges of the

Supreme Court over members of the Bar practising before them has resulted not merely in repeal of the recognition of a power that has existed for several hundred years, but repeal of the power itself. As, has been pointed out earlier, that power, applicable to solicitors as well as barristers, extends far beyond disciplining or striking off of members of the profession to considerations of how the litigation has been conducted before the Court, and includes a power to order the legal practitioner to personally pay the costs out of his own pocket wherever the situation warrants this finding: See for example Myers v. Elman (1940) A.C. 282. A repeal of such a power may leave defenceless or without any adequate remedy those who have suffered as a consequence of the way in which the legal practitioner has conducted the litigation against them.

The power given to the Bar Council to determine the "rules of practice and etiquette in Jamaica" was speedily exercised. By Proclamation Rules and Regulations No. 60 p. 277 published on Thursday 30th June, 1960 - The Bar Council with the approval of the Bar Association approved the following rules of practice and etiquette:

> "1. A Queen's Counsel may appear in any case or matter without a Junior and may settle Pleadings and Grounds of Appeal.
>
> 2. A barrister may appear in a Criminal case without being instructed by a Solicitor."

On the 9th November, 1961, by P.R.R. No. 236 p. 540 it was announced:

> "It is proper practise for Counsel"
>
> (a) To negotiate the settling of negligence cases out of Court, up to the stage where liability is denied;
>
> (b) To apply for Probate and letters of Administration in the various Courts of this Island up to the stage where any such application becomes contentious.

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> "(c) To file suits in all matrimonial causes and do all matters in connection therewith until appearance has been entered:
>
> Provided that no advocate who has the rank of Queen's Counsel shall perform any of the functions which in England are performed by a Solicitor and are not performed by a Barrister."

In Stewart v. Lewis (1967) 10 J.L.R. 129; 11 W.I.R. 99, the appellant, a barrister-at-law, was retained by the respondent to represent him at the hearing of a preliminary enquiry into a charge of manslaughter against the repondent. The fee charged was seventy-five guineas, and a portion was paid leaving a balance of £40 in respect of which the client gave a promissory note. The barrister sued on the note, but was non-suited by the Resident Magistrate on the principle that a barrister could not sue for his fees. On appeal to the Court of Appeal, Henriques, J.A. pointed to the provisions of the Bar Regulation Law, 1960, and to the rules of practice and etiquette that had been made under it and which permitted a barrister to appear in a criminal case without a solicitor. The appeal was allowed, but a new trial was ordered on the question of the genuineness or otherwise of the promissory note, a matter raised by the defence but not decided by the Resident Magistrate.

A few comments on the case may be made as it left unresolved certain issues: Section 17 of The Bar Regulation Law, 1960, said that the barrister might be liable to be required to tax his fees. Unfortunately it did not indicate (a) whether taxation was a condition precedent to an action for recovery; nor (b) did it deal with the position of client and barrister having agreed a lump sum fee: was this fee demandable as of right, or was it liable to be reviewed, on ordinary principles as to whether it was fair and reasonable

or not? Up to that stage no law had ever been passed, for either profession, dealing with agreements between legal practitioner and client as to the size of the fee or its manner of payment. Turning back to Neita v. Bernard and the observations of the then Registrar of the Supreme Court, could the Rule 31 of the Supreme Court General Rules and Orders which provides that no action shall be commenced for the recovery of any bill of costs until the same shall have been taxed have been applied? In any event those rules made no provision for agreements to charge a lump sum, and as to these the Registrar was content to remark that he taxed the bill and left it to the judge to decide issues as to the lump sum agreement. The case is however authority for the Registrar's taxing of bills including those for criminal work in the Resident Magistrate's Courts.

The better opinion would appear to be that the ordinary rules of common law and equity applied: and that if the issue of whether the charges made by the agreed fee were reasonable was raised, it would be resolved by the general law as it appears in cases such as Edwards v. Meyrick (1842) ante, Re Whitcombe (1844), Stedman v. Collett (1854) and the views expressed in cases such as Clare v. Joseph (1907) ante, viz. that it is a question of fact, the onus of which would lie on the legal practitioner to show that the agreement was fair and reasonable. If it were not, then the practitioner should be allowed to recover only what was fair and reasonable. If the Court's inherent jurisdiction still survives, it would be possible to say as Wilberforce, J. said in the Electrical Trades Union v. Tarlo "that the Court has inherent jurisdiction to secure that the solicitor, (read barrister), as an officer of the Court, is remunerated properly, and no more, for work he does....."

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> "does not affect the position of a client who sets up an agreement as to costs with a solicitor."

In Clare v. Joseph the agreement was an oral one by the solicitor to charge no costs if he won his action, and, if he lost it, to charge only the same amount for costs as he would have recovered from the opposite party had the action been successful. Though oral, it was upheld against the solicitor.

Fletcher Moulton, L.J. at page 376 put the matter thus:

> "Let us now consider the state of the law on this subject at the date of the coming into operation of the Act of 1870. At that date agreements between a solicitor and his client as to the terms on which the solicitor's business was to be done were not necessarily unenforceable. They were however viewed with great jealousy by the Courts, because they were agreements between a man and his legal adviser as to the terms of the latter's remuneration, and there was so great an opportunity for the exercise of undue influence, that the Courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his client's expense......
>
> Section 4 therefore, was not required for the purpose of enabling persons to enter into these agreements, nor was it required in order to strengthen the hands of the Courts in their examination of them. Before 1870 the Court had full power to investigate their propriety, and in my opinion the specific provisions of s. 4 did no more than provide and regulate a procedure for the control of such agreements; they did not in substance alter the law affecting them. ..."

Fletcher Moulton, L.J. then considered the scheme of the Act as a whole.

Buckley, L.J. at p. 378 said:

> "The law in existence when the Act of 1870 was passed is clear; the solicitor could not charge his client more than the amount of his bill of costs when taxed, and it was his duty to advise his client that it was contrary to his interest to pay more ....."

He concludes his examination of the Act of 1870, S. 4:

> "The effect of s. 4 is, I think, that whether the solicitor is to have remuneration at a greater or

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from the Acts, the Court could order taxation of bills relating to Court business, and also could refer part of a bill for taxation. That decision was upheld on appeal by the town agents to the House of Lords: see Storer & Co. v. Johnson and Weatherall (1890) 15 A.C. 203. At page 206 Lord Halsbury, L. Ch. after noting that such a reference was not possible under the Act, said:

> "..... I think it is quite clear that the Solicitors Act did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might therefore order that the costs should be taxed, although not in terms of the Solicitors Act..."

The other members of that Court agreed in affirming the Court of Appeal decision, though varying slightly the terms on which the taxation was ordered.

In In re park, Cole v. Park (1889) 41 Ch. D. 326 (C.A.) at page 331. Stirling, J. at first instance put the matter very clearly. He said:

> "Now, in dealing with solicitors' costs, the Court has a threefold jurisdiction. First, the statutory jurisdiction conferred by the Solicitors Acts. ....
>
> Secondly, the Court has, I apprehend, jurisdiction to deal with solicitors' bills of costs under its general jurisdiction over the officers of the Court. .....
>
> Then, thirdly, there remains the ordinary jurisdiction of the Court in dealing with contested claims. ...."

He went on at pages 333 et seq. to discuss how the Courts of Common Law dealt with an action on a solicitor's bill of costs. The decision was affirmed by the Court of Appeal.

In re Park, (ante) was followed in re Foss, Bilborough, Plaskitt and Foss (1912) 2 Ch. 161, and again in Jones & Son v. Whitehouse (1918) 2 K.B. 61 (C.A).

In Woolf v. Snipe (1933) 48 C.L.R. 677, Dixon, J. delivering the judgment of the High Court of Australia in a case involving taxation of costs by a solicitor against his client, said at p. 678:

The situation created by the Bar Regulation Law, 1960, which in effect licensed barristers to make incursions at will into the fields traditionally reserved for solicitors, without giving the latter any reciprocity to enlarge their right of audience into the Supreme Court and fields reserved for barristers, did not long survive. By Act 15 of 1971, The Legal Profession Act, 1971 the two professions were "fused", the barrister ceased to exist as such and the two professions were in effect amalgamated into the solicitors profession with a change of name; the new legal practitioner became known as an Attorney-at-Law. The Law provided for the setting up of a common roll to be kept by the Registrar of the Supreme Court. Section 5 provides for the new status of the legal practitioner, the attorney-at-law, and for his "practice as a lawyer." This phrase is defined as meaning "practise as a barrister or a solicitor or both as provided or recognized by Law whether before or after the passing of this Act." However, as the Section shows, taken with the whole of the Act, no difference now remains between the two branches of the profession; there is not only a common roll but a common discipline and function. Section 5 sub-sections 1, 2, and 3 read:

> "5. (1) Every person whose name is entered on the Roll shall be known as an attorney-at-law (hereinafter in this Act referred to as an attorney) and -
>
> (a) subject to subsection (2), be entitled to practise as a lawyer and to sue for and recover his fees for services rendered as such;
>
> (b) be an officer of the Supreme Court except for the purposes of section 23 of the Judicature (Supreme Court) Act; and
>
> (c) when acting as a lawyer, be subject to all such liabilities as attach by law to a solicitor.

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> "(2) Subject to section 7, a person shall not practise as a lawyer except by virtue of and in accordance with a practising certificate which shall be issued by the Council, on payment to the Secretary of the Council of the prescribed fee, in the appropriate form in the Second Schedule.
>
> (3) A person who practises in contravention of subsection (2) shall be incapable of maintaining any action for the recovery of any fee or reward on account of or in relation to any act or proceeding done or taken by him in the course of such practice..."

It will be noted that Section 5(1)(b) provides that the attorney-at-law is to be:

> ".... an officer of the Supreme Court except for the purposes of section 23 of the Judicature (Supreme Court) Act."

It will be remembered that following a similar Section in the U.K. Judicature Act of 1873 a Section had been inserted into the Jamaican Judicature Acts and appeared as Section 20 of Cap. 430 of the 1938 Code and Section 19 of Cap. 180 of the 1953 Code, it had the marginal note "status of solicitor" and preserved the inherent jurisdiction of the Supreme Court over solicitors as "officers of the Court." It had a corresponding Section in the Solicitors Law, see Cap. 363 Section 43 with marginal note "jurisdiction of judges over solicitors", and a further corresponding Section in Section 7 of the Jamaica Bar Regulation Law, which gave the judges power to strike a barrister off the rolls for misconduct which would have caused him to be disbarred by the Inns of Court in England. It will be remembered, as remarked above, that the Jamaica Bar Regulation Law, **Law 3 of 1960 had repealed** the Section 7 of the previous Jamaica Bar Regulation Law, and doubt was expressed as to whether this involved the repeal of the judges inherent powers over the barristers.

Section 41 of the Legal Profession Act refers to a Schedule 5 consisting of Laws repealed by the new Act: they include the entirety of (a) the old Jamaica Bar Regulation Law,

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(Cap. 171); (b) the Solicitors Law (Cap. 363); (c) the new Bar Regulation Law, Law 3 of 1960; and in addition Section 19 of the Judicature (Supreme Court) Law, (Cap. 180). The fact that a repealing Law has itself been repealed does not of course revive the Laws that it repealed. The draftsman of the Legal Profession Act has however gone out of his way to repeal all the Sections, wherever they were to be found, that recognized in the judges of the Supreme Court an inherent jurisdiction over both solicitors and barristers. The reason appears to have been because it was thought that such inherent powers related solely to the disciplining of these legal practitioners by striking off or suspending, and these particular powers had now been given to disciplinary committees appointed for that purpose. This was of course not so, as reference to cases dealing with the enforcement of undertakings and costs will show: see again Myers v. Elman (1940) A.C. 282. However the insertion in the new Legal Profession Act of Section 5(1)(b) which expressly makes the attorney-at-law "an officer of the Supreme Court" will have the effect of once again recognizing the inherent jurisdiction of the judges over the legal practitioners, so that one may perhaps say "all is well that ends well".

It is necessary to pause here however to make a complaint against the printing of our new sets of Jamaica Laws in their loose leaf format. The Legal Profession Act, 15 of 1971, had forty-two Sections and five Schedules. Reprinted for the purposes of the current set of Acts it has shrunk to forty Sections and three Schedules. This method of truncating Legislation is going at some stage when one attempts to interpret an Act by following its history through the Statute Books to produce chaos and to lead to some very odd and unintended

results. Using the loose leaf system as we do may tell us us where we stand now, but it certainly will not tell us how we got there, which on occasion may be of the greatest importance in telling us where we have in fact reached.

Part V of the Legal Profession Act, (1971) (Sections 21-29) is entitled "Recovery of Fees" and addresses the problem of both recovery of fees and control of the same. Section 21 of the Act deals with the recovery of fees where there had been an agreement in writing between the attorney and the client, and is set out in full below, along with Sections 22 and 23.

"PART V. RECOVERY OF FEES

21. (1) An attorney may in writing agree with a client as to the amount and manner of payment of fees for the whole or part of any legal business done or to be done by the attorney, either by a gross sum or percentage or otherwise; so, however, that the attorney making the agreement shall not in relation to the same matters make any further charges than those provided in the agreement:

Provided that if in any suit commenced for the recovery of such fees the agreement appears to the court to be unfair and unreasonable the court may reduce the amount agreed to be payable under the agreement.

(2) Fees payable under any such agreement shall not be subject to the following provisions of this Part relating to taxation nor to any other provisions thereof.

22. (1) An attorney shall not be entitled to commence any suit for the recovery of any fees for any legal business done by him until the expiration of one month after he has served on the party to be charged a bill of those fees, the bill either being signed by the attorney (or in the case of a partnership by any one of the partners either in his own name or in the name of the partnership) or being enclosed in or accompanied by a letter signed in like manner referring to the bill:

" Provided that if there is probable cause for believing that the party chargeable with the fees is about to leave Jamaica, or to become bankrupt, or compound with his creditors or to do any act which would tend to prevent or delay the attorney obtaining payment, the Court may, notwithstanding that one month has not expired from the delivery of the bill, order that the attorney be at liberty to commence an action to recover his fees and may order those fees to be taxed.

(2) Subject to the provisions of this Part, any party chargeable with an attorney's bill of fees may refer it to the taxing officer for taxation within one month after the date on which the bill was served on him.

(3) If application is made within the period of one month aforesaid a reference for taxation may be ordered by the Court either on the application of the attorney or on the application of the party chargeable with the fees, and may be ordered with such directions and subject to such conditions as the Court thinks fit.

(4) An attorney may without making an application to the Court under subsection (3) have the bill of his fees taxed by the taxing master after notice to the party intended to be charged thereby and the provisions of this Part shall apply as if a reference for such taxation has been ordered by the Court.

23. In this Part "taxing officer" means the Registrar or such other person as may be prescribed by rules of court."

The remaining Sections in this part of the Law deal with what may be termed the mechanics of taxation.

The following comments may be made on these provisions. For the first time there is now statutory authority in Jamaica for the taxation of bills as between attorney and own client, and it is no longer necessary to rely on the provisions of the Supreme Court General Orders referred to before, though it is possible that these may still be relevant to the new situation. In fact both the new statutory provisions and those contained in the Supreme Court General Rules and Orders were set out in full in a booklet "A practitioner's Guide to fees and costs in the Supreme Court, Jamaica, 1974" published in 1974 by Attorneys Douglas Brandon and Paul Levy.

The Sections of the Jamaican Act follow very closely the provisions in the New Zealand Law Practitioner's Act of 1955, though they also have echoes of the U.K. Solicitors Act of 1957.

We have not so far adopted the distinction made in the U.K. between fees and costs for "contentious" and non-contentious" matters.

We have however drawn a very sharp distinction between cases in which the attorney and client have made an agreement in writing between them as to the quantum of fees and those in which they have not. The Act provides that the Fees payable under such an agreement shall not be subject to taxation. Further the attorney may sue on such a contract immediately, and is not subject to the provisions set out in Section 22 et seq. which require him to submit a bill and wait for one month before suing. These provisions are in sharp contrast to those contained in the U.K. Attorneys' and Solicitors' Act of 1870 (modified by the Solicitors Remuneration Act 1881) referred to earlier and reproduced in the U.K. Solicitors Act, 1957 as Sections 57 and 59 (Agreements with respect to remuneration for non-contentious business, and in respect of contentious business).

As to non-contentious business in the U.K. there is power to lay down a set scale of fees for various items and the power has been exercised. It is therefore possible for the Courts there to compare the agreed charge with the scale fee in addressing itself to the question of whether the agreement is unfair or unreasonable. As to contentious business, Sections 59-61 of the U.K. Act provides in effect that the agreement cannot be sued upon until or unless the Court has approved it, and it has been scrutinized by the taxing master. These particular safeguards are missing from the Jamaican Act, the only safeguard

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being that contained in the proviso to Section 21(1) to the effect that "if in any suit for the recovery of such fees the agreement appears to the Court to be unfair and unreasonable the Court may reduce the amount agreed to be payable under the agreement."

Section 21 does not legalize such agreements between attorney and client for the first time. They were legal before, though "viewed with great jealousy by the Courts" which required to be "satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his client's expense" (see Fletcher Moulton, L.J. in Clare v. Joseph (1907) ante). The Courts were always put upon enquiry to see whether the agreement had been "entered into fairly and with proper knowledge on both sides."

Section 21 does not in terms specify on whom the onus of proof lies: is the onus on the attorney to show that the agreement is fair and reasonable? Or is the onus on the client to show that the agreement is "unfair and unreasonable?"

Certainly before Section 21 was enacted the onus lay at common law and equity on the solicitor or attorney to justify the agreement but giving the proviso the construction intended by the Act as a whole, it appears that the onus of proving the agreement unfair and unreasonable now rests upon the client who is sued on it.

When Downer, J. in this case found that there was a fiduciary relationship (which there was) and that this put upon the attorney the burden of establishing that the agreement was fair and reasonable, he was applying the old common law and equitable principles applicable before the enactment of Section 21, and in this respect he was in error, no doubt because the effect of Section 21 and apparently the entire act was not brought to his attention below.

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Nevertheless it appears that his instinct was sound. I would hold in the circumstances of this case that the client, the defendant Dillon, had discharged the onus of showing that the agreement was "unfair and unreasonable", for the following reasons:

(a) It clearly appears that the fee charged was arbitrarily set in the mind of the attorney from the inception of the negotiations, and quite regardless of any consideration of the work likely to be involved. It was at one time to cover both the appearance at the Preliminary Enquiry and the subsequent trial. It was not earned in respect of the Preliminary Enquiry, yet no diminution of the set fee was ever suggested.

(b) It clearly appears that the attorney involved was in any event already briefed in respect of the second defendant or accused Errol Williams, and in that regard would have already incurred the necessity for travel to and accommodation in Bermuda for the duration of the trial. Presumably he charged Williams a fee that would have reflected those expenses. We are not told what that fee was. We are not told that any reduction was made in it in consideration of the fact that those expenses would now be shared by the fee forthcoming from the co-accused Dillon.

(c) It clearly emerges that a false representation was made to the client Dillon to the effect that the attorney was a Queen's Counsel, and had presumably attained the status and standard which such a counsel would be expected to enjoy, with a consequent appreciation in the fees expected to be paid for his services.

(d) While the conclusion of such an agreement in the cells, by a client who had already been in jail for several months and who foresaw (accurately) conviction staring him in the face, would not by itself necessarily have led to the conclusion that this was a setting that invited extortion, yet when it is borne in mind that the attorney, required the summary dismissal of the client's previous attorney, this would appear to have resulted in the dismissal of an independent mind that might have given advice as to the wisdom of one attorney (or set of attorneys) appearing for both accused, and also as to the fee charged.

(e) The size of the fee charged, U.S.$20,000.00 converted at the then rate to J$40,000.00 is on the face of it exorbitant. It not only exceeds by far the salary paid to a judge of the Supreme Court for an entire year (perhaps the size of judicial salaries in Jamaica is an unsafe guide),

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but it bears no relation to any of the scale of fees issued by the Jamaica Bar Association for the guidance of practitioners as to reasonable minimum charges to be made by Junior Counsel or Queen's Counsel for contested litigation in Jamaica. See the "Recommended Scale of Counsel's Fees" set out at pages 29 to 30 of the Practitioners Guide (referred to earlier) and said to have been issued in October 1974 by the Jamaica Bar Association. (The instant case was conducted in 1978).

While it is true that those scale fees relate primarily to civil litigation, and are suggested minimums the fees charged in the instant case exceed those by a proportion of several fold.

(f) the size of the fee charged was not justified by any evidence as to charges made in Jamaica or in Bermuda for similar work for a client of similar status, on a similar charge, by a Junior or for that matter a Queen's Counsel.

In these circumstances the proviso to Section 21(1) applies and the Court may reduce the amount agreed to be payable under such an agreement.

On what basis should this Court act? Clearly in view of the representation that the attorney was a Queen's Counsel the very least that could be done is to reduce the fee by one third!

This clearly is a case falling within the observations of Lord Hardwicke in Walmesley v. Booth (1941) and Saunderson v. Glass (1742):

> "....for if an attorney, pendente lite, prevails upon a client to agree to an exorbitant reward, the court will either set it aside entirely, or reduce it to the standard of those fees to which he is properly entitled....."

Since the coming into effect of the Legal Profession Act (1971) the Registrar of the Supreme Court, acting under the provisions of Section 22 et. seq. has in fact had on occasion to tax bills for criminal work done by an attorney for a client, and in the absence of any clear evidence before us of the size of fee that might be charged for similar work in either Bermuda or Jamaica, I would propose that we refer the matter to the

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Registrar for taxation, which will give both the attorney and the client the opportunity of producing any further evidence that they have as to proper costs of transportation, hotel accommodation etcetera, and also as to the fee in fact charged of the co-accused Williams in this case. I am of opinion that the appeal should be allowed in part, in that the judgment of Downer, J. in favour of the respondent Dillon should be set aside: the plaintiff's attorney to recover such costs or fees for his work as may be certified to be reasonably payable by the Registrar of the Supreme Court after taxation. The judgment in favour of the respondent Sheba Vassell should stand. In view of the fact that the fees charged will be reduced by over one third at the very least, the appellant while getting the costs in this Court, and the Court below should pay the costs of taxation before the Registrar. Sheba Vassell should get her costs in this Court and the Court below.

There are two remaining points to be noticed. The first may be termed the "conflict of Laws" point. It was sought to be argued on appeal that Mr. Brown had appeared for Dillon as a barrister called to the English Bar, rather than as an attorney-a-law of the Jamaican Bar. This was a point on which evidence could have been called at the trial below but was not, and this Court held it was too late to raise it now. What was involved was in fact a conflict of Laws point, and it arose in R. v. Doutre (1884) 9 App. Case 745. In this Privy Council case, an appeal from Canada, Mr. Doutre, a member of the Quebec Bar was asked to represent the Canadian Federal Government in respect to some negotiation concerning fisheries which was to take place in Halifax; according to the Law of Quebec members of the Bar were entitled to sue for their fees and to recover on a Quantum meruit if no fee had been fixed. According to the Law of Ontario where the Federal Government was situate, and also of Nova Scotia where the work was to be done, barristers

could not sue for their fees. On completion of the work a dispute arose as to the fees payable, and Mr. Doutre had to sue the Federal Government for his fees, and did so in Quebec. The defence set up was that a barrister could not sue for his fees. The defence failed. It was observed that if he had appeared as a member of the English Bar he would not have been able to recover any fees owing to the rule in Kennedy v. Broun (ante). However it appeared that he had been retained as a member of the Quebec section of the Bar of Lower Canada and consequently it was an implied condition of the employment that the barrister retained there was to be remunerated on the same terms on which these services were rendered to clients in Quebec. In the instant case it would have been a point to be decided on evidence in what capacity Mr. Brown was employed to conduct a criminal case in Bermuda, and depending on which legal system was found to have the closest connection with the agreement as to representation, it may or may not have been decided, subject to what the Law of Bermuda provided, whether the defence could have applied or not. It certainly could not have been argued without evidence as to the situation in Bermuda, and at that might not have succeeded.

The second point is shorter: I have suggested that the Registrar of the Supreme Court be asked to tax Mr. Brown's bill: Section 21(2) of the Act says that fees payable under an agreement of this sort shall not be taxed. Yet it seems to me that this would be a proper way in which to arrive at material on which to base a reduction of the bill. Perhaps the way out of this apparent impasse is to ask the Registrar to make a report to this Court, and to give liberty to apply when it is made.

The reference to the Registrar should be regarded as the exercise of the Court's inherent jurisdiction over attorneys as "officers of the Court", and is a jurisdiction separate and distinct from that given by the statute. I have already cited a number of cases in which the Courts in England have ordered taxation though it was clear that this was not possible under the U.K. Solicitors Acts. For convenience they are again referred to: see In re Johnson & Weatherall (1888) 37 Ch. D. 433, (C.A) affirmed by the House of Lords in Storer & Co. v. Johnson & Weatherall (1890) 15 A.C. 203 (ante); see also In re Park, Cole v. Park (1889) 41 Ch. D. 326; In re Foss (1912) 2 Ch. D. 161; Jones & Son v. Whitehouse (1918) 2 K.B. 61 (C.A.). In re a Solicitor (1961) 1 Ch D. 491 and Electrical Trades Union v. Tarlo (1964) Ch. D. 720 are modern instances of assertions of and exercise of this jurisdiction.

Finally I would draw attention to the fact that while in the better known cases of "undue influence" gifts, conveyances and the like are set aside usually in their entirety, there exists and derives from the same set of equitable principles a doctrine often called "the unconscionable bargain" in which what is involved is not a gift or voluntary conveyance, but a bargain in which the inequality of the bargaining parties has been such as to move the Court to set aside the bargain as unfair: in these cases in as much as there has been some consideration moving from the stronger to the weaker, the bargain is usually set aside on terms which permit the return of the consideration or a fair value for it. There are a long line of cases dealing with this type of situation, starting from cases such as Longmate v. Ledger (1860) 2 Giff 157; 66 E.R. 67; Clark v. Malpas (1862) 31 Beav. 80; 54 E.R. 1067; Baker v. Monk (1864) 33 Beav. 419; 55 E.R. 430; Fry v. Lane (1888) 40 Ch. D. 312

(purchases of land from poor and ignorant (and often senile) people at a gross undervalue). See also cases such as Blomley v. Ryan (1954) 99 C.L.R. 362 (High Court Australia); Morrison v. Coast Finance Ltd. (1965) 55 D.L.R. (2D) 710 (C.A. British Columbia following Fry v. Lane ante); Marshall v. Canada Permanent Trust Co. (1968) 69 D.L.R. (2D) 60; citing an article from the Canadian Bar Review Vol. 44, p. 142 entitled: "Restitution - unconscionable transaction - Undue advantage taken of inequality between parties" by B. E. Crawford).

In this case Mr. Brown, the attorney-at-law, had rendered services to the defendant Dillon. The bargain made as to fees was unconscionable, and cannot stand, but to cite once more Wilberforce, J. in the Electrical Trades Union v. Tarlo: (1964) Ch. D. 720 at 734:

> "..... the court has inherent jurisdiction to secure that the solicitor, as an officer of the court, is remunerated properly, and no more, for the work he does as a solicitor."

If Downer, J. had been referred to this line of authority, the most recent exposition of which is to be found in the judgment of Lord Denning, M.R. in Lloyds Bank v. Bundy (1975) Q.B. 326; (1974) 3 All E.R. 757 at page 765, and which was cited to us, doubtless he would not merely have set aside the agreement as to fees, but would have gone on to consider, as was done in several of the cases cited earlier, the further question of what was the proper fee that should be awarded for the work done here.

Since writing the above I have had the opportunity of reading the judgment of Kerr, J.A. and though I would have been happier to have the Registrar tax the appellant's Bill I agree with the judgment proposed by him which will, hopefully, secure finality in respect of these unhappy proceedings.

KERR, J.A.:

I have had the benefit of reading the draft of the judgment of Carberry, J.A. in which he has reviewed with scholarly industry a number of cases relevant to the relationship of solicitor and client and the changes brought about by the fusion of the two branches of the profession - Solicitors and Barristers- by the Legal Profession Act and in which he has carefully summarised the evidence.

I am in agreement with him that in respect to the appeal against the judgment in favour of the respondent Vassell that the appeal should be dismissed, the judgment in the Court below affirmed with costs of appeal to the respondent for the reasons set forth in his judgment.

With respect to the judgment in favour of the respondent Dillon I agree that the appeal should be allowed, the judgment in the Court below set aside and judgment entered for the plaintiff/appellant.

Having regard to the full treatment given to the questions raised on appeal by Carberry, J.A. this addendum of mine will concisely be confined to the bare essentials.

The appellant's claim was for $39,000 for the balance of professional fees due and owing for representing the respondent Dillon in the High Court of Bermuda before judge and jury in a criminal case in which the respondent and one Errol Williams were jointly charged and tried for conspiracy to import and importing a controlled drug, namely, ganja.

The action was brought pursuant to the right of action and remedy provided by Section 21 of the Legal Profession Act and, as a memorandum of agreement in writing, a document signed by the appellant was exhibited and read:

"I RAPHAEL CONSTANTINE DILLON, do hereby retain Mr. Walter Bentley Brown, Q.C. of the Jamaican Bar to conduct my Defence at my trial for conspiracy and importing cannabis into Bermuda, in the Supreme Court of Bermuda commencing 24th April, 1978 and agree to pay to Mr. W. Bentley Brown the sum of TWENTY THOUSAND U.S. DOLLARS (US$20,000) for his professional services by 30th May, 1978, in full. Dated this 24th day of April, 1978 and signed by RAPHAEL DILLON."

The averments in the defence filed positively contended to the following effect:

1. That the plaintiff at the trial represented only the co-defendant.

2. The respondent was not aware of the nature of the document at the time he signed it, because

3. The plaintiff had represented to him that a juror or jurors would be offered a bribe to return a verdict in favour of the respondent and the document was required to guarantee that payment would be duly made.

Evidence in support of these specific issues was tendered for and on behalf of the respondent. There was therefore an inescapable obligation on the Learned Trial Judge to deal with these issues. A positive finding on any of them would be sufficient to support a judgment in favour of the respondent Dillon. Carberry, J.A. has been sufficiently critical of the Learned Trial Judge's oblique treatment of these cardinal issues. It is therefore, enough to say that he was so preoccupied with the unpleaded and uncontested issue of undue influence that he omitted to express in simple and unambiguous language his finding on these issues.

However, implicit in his resting his judgment on undue influence is that he rejected these specific averments by the respondent Dillon. That conclusion is fortified by the fact that the record of the Criminal Proceedings relative to representation and the Learned Trial Judge's finding supported the plaintiff's claim that he appeared for the defendant.

The pleaded issues having been resolved in favour of the plaintiff that ought to have been the end of the matter save for consideration of the power conferred on the Court by Section 21 of the Legal Profession Act which provides:

> "(1) An attorney may in writing agree with a client as to the amount and manner of payment of fees for the whole or part of any legal business done or to be done by the attorney, either by a gross sum or percentage or otherwise; so, however, that the attorney making the agreement shall not in relation to the same matters make any further charges than those provided in the agreement:
>
> Provided that if in any suit commenced for the recovery of such fees the agreement appears to the court to be unfair and unreasonable the court may reduce the amount agreed to be payable under the agreement.
>
> (2) Fees payable under such agreement shall not be subject to the following provisions of this Part relating to taxation nor to any other provisions thereof.

Mr. Fairclough by an application filed the morning fixed for the hearing of the appeal anxiously sought leave to argue grounds in an appended Respondent's Notice. Leave was refused for reasons which were indicated in the exchanges between Bench and Bar and which reasons have been set forth in the judgment of Carberry, J.A.

However, the specific question of undue influence raised in this appeal is of general public importance and in deference to the arguments presented I feel constrained to add a few words of my own.

The arguments for the appellant were based on the following grounds:

> "(1) The judgment subsumed an erroneous proposition in law, that is, that in the fiduciary relationship between an attorney and client in a matter of his remuneration, there is a presumption of undue influence and that independent legal advice was necessary

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"as to the remuneration a client must pay. The learned trial judge mistook the rule relating to transactions outside remuneration by applying such a rule to retainers (be they by deed, oral or written).

(2) The judgment was against the weight of the evidence, particularly, as (a) it was never disputed that the written retainer was signed by the first respondent and (b) the appellant actually rendered his legal services and paid expenses incidental to such services out of his own pocket."

The learned judge after considering the circumstances under which the document was signed said:

"The question therefore arises whether the equitable doctrine of undue influence is applicable to the circumstances of this case, to enable the document to be set aside as being unconscionable.

There can be no doubt there was a special relationship as explained in the leading case of ALLCARD V. SKINNER (1887) 36 Ch. D. 145 and there is the settled authority of WRIGHT v. CARTER (1903) 1 Ch. 27, that the Lawyer/client relationship presumes undue influence."

And later:

"It is to be noted that under the Doctrine of undue influence where a special relationship exists, the presumption of undue influence arises and it is for the plaintiff to rebut the presumption. Nowhere has any attempt been made to rebut the presumption in this case."

And finally:

"The Doctrine of undue influence is intended to help the weak, the aged, those with incapacities - mental or otherwise and those in custody. I do not wish to be understood or construed that I am making any criticism of Mr. Brown for his conduct in this case. In appearing for the defence in Bermuda he probably had to act with great haste and with not enough time to deliberate on the finer points of equity.

Nonetheless, he has brought forth this claim and on the evidence, and the legal principles I have adverted to, I am compelled to dismiss his claim set aside the contract and order that Judgment be entered for the First and Second Defendant with costs to be agreed or taxed."

I interpret the judgment that the learned judge therein held:

(i) There was a presumption of undue influence based upon the special relationship of Attorney and Client.

(ii) In any event there was evidence from which undue influence may be inferred and

(iii) In either case there was no evidence in rebuttal from the plaintiff.

Mr. Macaulay submitted that the principle as to the presumption of undue influence arising from the special relationship between Attorney and Client applied to transactions, e.g. sale, purchase, gift, where the relationship already existed and should not be extended to the negotiations between prospective client and attorney leading up to and concluding with the establishment of such a relationship and could not extend or include arrangements made for the payment of fees for professional services rendered under the contract of service. He contended that the cases on which the learned judge relied both dealt with transactions entered into during the existence of the special relationship. Further, that the special relationship may have such residual effect that even after the relationship may technically be said to have terminated, the undue influence may exist so as to set aside a transaction. As illustrative he referred to Demerara Bauxite Co. Ltd. v. Louisa Hubbard & Others (1923) A.C. 673 and McMaster v. Byrne (1952) 1 All E.R. 1362. The Law applicable, argued Mr. Macaulay, is contained in Section 21 of the Legal Profession Act. Neither by presumption nor on the evidence was any undue influence made out against the plaintiff.

Mr. Fairclough in supporting the judgment submitted that there was, apart from the presumption, evidence upon which the learned judge could find that there was undue influence. He cited in support the case of Mearns v. Knapp (1889) 37 W.R. 585.

I am in agreement with Mr. Macaulay that in the cases on which the learned judge relied the special relationship existed when the transactions were effected. I am therefore of the view that an in-depth examination of the dicta, reasoning and the accepted propositions of Law in those cases is unnecessary. Were it, as the learned trial judge held, then before an attorney could conclude the business of his retainer with a prospective client he had to ensure that the client had independent advice otherwise the agreement as to his fees would be unenforceable by action. It would be like employing a watchman to watch the watchman - so incongruous, inconvenient and extravagant. There is neither good sense nor am I adverted to any authority to support such a proposition. In that regard Mearns v. Knapp is distinguishable and unhelpful to the respondent. In that case Kekewich, J. observed:

> "If I set aside this agreement I must necessarily reserve the power to Mr. Knapp to deliver a bill of costs which will be subject to taxation in the usual way. And it may be that if Mr. Knapp's view of the matter is correct the taxing officer, with whose discretion I must not in the slightest degree interfere, may allow Mr. Knapp, not only the forty guineas, but perhaps more."

And although he held that the agreement was unfair and unreasonable nevertheless, the solicitor was not, as in the instant case, wholly deprived of his fees as the defendant consented to the offer by the plaintiff of the scale charge fee of 30s. per cent., according to Schedule 1, Part I, of the General Order under the Solicitors' Remuneration Act, 1881.

In holding that there was no presumption of undue influence in the negotiations concluding with the establishment of attorney and client relationship, I am not to be taken as saying it could never occur. The absence of the presumption means that the client has the burden of proving that there was in fact undue influence.

Waving aside for the moment, the fact that the issue was not raised on the pleadings as it should have been, the question is, - was there evidence of undue influence that would render the claim wholly unenforceable? From the judgment the learned trial judge relied in the main on the following factors:

(i) The respondent Dillon was in custody with serious charges against him.

(ii) The appellant represented both defendants at the trial.

(iii) The respondent had no independent advice on whether or nor there was any disadvantage in having joint representation at the trial.

(iv) Appellant advised respondent not to retain for the trial Miss Simmons who represented him at the preliminary examination.

(v) That the respondent had no independent advice on the quantum of remuneration.

(vi) The appellant misrepresented himself as a Queen's Counsel.

Re (i) Above:

This would be common to all persons in custody charged with a serious offence and that fact by itself would not necessarily render a prisoner incompetent to conclude a transaction of legal representation.

Re (ii) and (iii):

There is no impropriety in an advocate representing defendants jointly charged with criminal offences providing this could be done without disadvantage or detriment to any one of such defendants. There was no complaint that there was any conflict of interest in the defence or that the respondent was at a disadvantage by such representation.

Re (iv):

Retaining Miss Simmons would be an unnecessary expense as the appellant had his own junior.

Re (v) and (vi):

In my view these considerations go not to the creation of the contract of service, but to the question of the unfairness and unreasonableness

> of the fees charged. Appellant personally interviewed the respondent and concluded the arrangements. In retaining the appellant to represent him at the trial, it was clearly a case of "what you see, is what you get."

However there can be no doubt that a prisoner in custody with serious charges pending against him would be anxious to secure representation timeously. In the anxiety and urgency of the moment he would obviously be at a disadvantage at the bargaining counter in relation to his fees. Accordingly, the Legislature in its wisdom, in granting a right of action to an Attorney to recover fees based upon an agreement in writing, conferred on the Court the discretion if the agreement appeared unfair and unreasonable to reduce the amount payable thereunder. (Section 21(1) of the Legal Profession Act - (supra)).

Surprisingly, the provisions of Section 21 of the Legal Profession Act were not brought to the attention of Downer, J. nor was he asked to consider the effect of those provisions in relation to a finding in quantum meruit if he was of the view that the amount stated in the agreement was unfair and unreasonable. Instead, he wrongly declined to consider quantum meruit because it was not pleaded.

How it was highly improper and wholly inexcusable for Brown to style himself in the document as "Q.C." for despite his many years at the Bar, he has not been so honoured. The honour is usually conferred on the basis of excellence in advocacy. In representing himself as a senior counsel to the plaintiff it is reasonable to infer that he charged fees commensurate with that status. On that basis his retainer in keeping with general practice should be one-third less.

Further, the appellant had been retained by the co-defendant before concluding his arrangements with the respondent and it is reasonable to infer that his expenses for travelling to Bermuda on behalf of the co-defendant were included in the fees charged to that defendant.

Accordingly, in all the circumstances including the fact that he had not appeared in the Preliminary Examination I am of the view that his global fee of $40,000.00 was manifestly excessive, unfair and unreasonable.

On the otherhand in assessing what would be fair and reasonable, due regard must be given to the length of the trial - the gravity of the charges and the jurisdiction in which the cases were tried. With due consideration to these factors, I am of the view that an award of $20,000.00 less $1,000.00 already paid would be adequate.

Accordingly, I would enter judgment for the plaintiff for $19,000.00 with costs here and in the Court below.

ROSS, J.A.:

Having read the judgments of my learned brethren Kerr and Carberry, JJ.A. there is nothing that I can usefully add. I agree that the appeal must be allowed in so far as the respondent Dillon is concerned and that the appellant should be awarded $19,000.00 as fees on a quantum meruit basis.