In the Supreme Court of Judicature of Jamaica

In Common Law

Suit No. C. L. 161 of 1973

Between Mr. & Mrs. James Clarke Plaintiffs

And George M. McCaffrie Defendant

E. C. L. Parkinson, Esq., Q.C. for Plaintiffs
Winston Spaulding, Esq. for Defendant

May 14, 1976

Willkie, J. :

The plaintiff in his statement of claim pleads as per paragraphs 1, 2, 3, 4, 5 and prays inter alia for:

" An order setting aside the judgment of the Resident Magistrate's Court in the said plaint. "

The defendant's counsel, Mr. Spaulding, took preliminary points that:

(1) (a) the judgment of the Resident Magistrate's Court could not be set aside in these proceedings;

(b) that the judgment is final;

(c) that the plaintiff is estopped;

(d) that the matter is res judicata.

Ruling by the court on these preliminary points were reserved and the trial continued on the merits.

I shall now proceed to deal with these preliminary points.

HISTORY:

(1) By Plaint 331/71 filed on 4th February, 1971, George M. McCaffrie and Edith McCaffrie took proceedings against James Clarke for recovery of possession of the parcel of land subject matter of this suit.

(2) On 1st April, 1971, when the matter came on for trial in the Resident Magistrate's Court, Saint Andrew, James Clarke not having appeared, judgment was entered against him by default and he was ordered to give up possession of the parcel of land to the McCaffries on or before 30th April, 1971, with costs.

(3) The order of possession was not served on Clarke before 30th April, 1971, and an application was made on behalf of the McCaffries

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before His Honour, Mr. Rowan Campbell, for an extension of time within which Clarke was to give up possession.

(4) This application was heard on 2nd June, 1972, both George McCaffrie and James Clarke appearing then.

(5) The application was granted and Clarke was ordered to give up possession to the plaintiffs on or before 31st July, 1972, with costs.

(6) Clarke having failed to giveup possession on 7th November, 1972, McCaffrie applied for warrant of possession to issue.

(7) On 11th December, 1972, Warrants of Possession/Distress were issued by the Clerk of Courts to the Bailiff.

(8) The Bailiff executed warrant by putting McCaffrie in possession and levying distress on 8th January, 1973.

DEFAULT JUDGMENT - THE LAW

(1) The Judicature (Resident Magistrates) Act, sec. 96 provides:

> " Whenever a dispute shall rise respecting the title to land or tenements, possessory or otherwise, the annual value whereof does not exceed two hundred dollars, any person claiming to be legally or equitably entitled to the possession thereof, may lodge a plaint in the Court, setting forth the nature and extent of his claim; and thereupon a summons shall issue to the person in actual possession of such land or tenements, and if such person be a lessee, then a summons shall also issue to the lessor under whom he holds; and if the defendant or the defendants, or either of them, shall not, on a day to benamed in such summons, show cause to the contrary, then, on proof of the plaintiff's title and of the service of the summons on the defendant or the defendants, as the case may be, the Magistrate may order that possession of the lands of tenements mentioned in the said plaint be given to the plaintiff on or before such day, not being less than one month from the date of the order, as the Magistrate may think fit to name; and if such order be not obeyed, the Clerk of the Courts, on proof to him of the service of such order, shall, at the instance of the plaintiff, issue a warrant authorising and requiring the Bailiff of the Court to give possession of such lands or tenements to the plaintiff. "

(2) Section 186 ibid provides:

> " If on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons was issued, the defendant shall not appear or sufficiently excuse his absence, or shall neglect to answer when called in Court, the Magistrate, upon due proof of the service of the

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" summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only; AND THE JUDGMENT THEREUPON SHALL BE AS VALID AS IF BOTH PARTIES HAD ATTENDED: (My italics)

Provided always, that the Magistrate in any such cause, at the same or any subsequent Court, may set aside any judgment so given in the absence of the defendant and the execution thereupon, and may grant a new trial of the cause, upon such terms as to costs or otherwise as he may think fit, on sufficient cause shown to him for that purpose. "

What then is the effect of the Default Judgment?

Mr. Spaulding contends:

(a) that the Default Judgment is a judgment in rem dispossessing plaintiff and putting defendant in possession of the land;

(b) it binds the entire world until it is set aside; reversed or over-ruled by due process of law;

(c) that property has since passed by order of the Court;

(d) that the procedure outlined in the proviso of sec. 186 Judicature (Resident Magistrates) Act was open to Clarke i.e. setting aside the judgment;

(e) that not having availed himself of this and acquiescing in the subsequent proceedings that McCaffrie took up to and including the execution of the Warrant of Possession by the Bailiff;

(f) that he cannot now come to this Court in an endeavour to circumvent the provisions of section 186,

What Mr. Spaulding seems to be submitting is that due to the delay in Clarke's application it should not be entertained by this Court as the delays were unreasonable.

Of course, the setting aside of a judgment is wholly discretionary and laches on the part of the applicant may well incline the Court to refuse to set aside a particular judgment.

Mr. Spaulding further submitted that in asking this Court to set aside the judgment below the plaintiff has adopted

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the wrong procedure in that:

(1) plaintiff made no attempt to set aside the judgment in the Resident Magistrate's Court as provided by sec. 186;

(2) no appeal taken out against the judgment;

(3) only procedure to bring this matter before the High Court is by means of prerogative writ in general and certiorari in particular, complaining of any want of jurisdiction, irregularity or other impropriety.

Mr. Parkinson submits that this Court can set aside the Default Judgment on the grounds:

(a) that Clarke's case was not heard in the Court below i.e. that Clarke did not give evidence and the case was not decided on the merits;

(b) that the Resident Magistrate had no jurisdiction in the matter.

Implicit in the Default Judgment is the fact that one side is not heard at all. But secs. 96 and 186 empower the Resident Magistrate to enter judgment by default if the circumstances prescribed by the sections are fulfilled.

Mr. Parkinson does not seem to me to be impugning the circumstances that obtained when the Default Judgment was pronounced. The only evidence adduced by Clarke is to the effect that he was present within the precints of the Court and did not hear his name called.

McCaffrie, on the other hand, stated that Clarke's name was called and he did not answer. I accept that this was the position and that the Default Judgment was properly pronounced in conformity with sections 96 and 186.

Could it be said that the mere fact that the case was not tried on the merits oust the jurisdiction of the Resident Magistrate?

It is not clear to me if Mr. Parkinson is saying that the intended defence of Clarke would raise the issue of title and that the annual value would exceed $200 which would have the effect of ousting the jurisdiction of the Resident Magistrate. The pleadings

and the evidence in the case before me adduced by Clarke and his witnesses clearly goes to title and jurisdiction but it is clear that when the matter was before the Resident Magistrate, Clarke, then having been absent, the Court was then without any evidence of Clarke which might raise the issue of title and jurisdiction and thereby oust the jurisdiction of the Resident Magistrate. Indeed, the particulars of claim in P. 331/71 makes it clear that in that case the matter was within the jurisdiction of the Resident Magistrate on the face of it. This being so, it follows that when the Default Judgment was pronounced on what was before the Resident Magistrate, The Resident Magistrate was then competent to enter the Default Judgment.

The authorities cited by Mr. Parkinson all seem to relate to a situation in which the inferior Court entering the judgment was without jurisdiction with the consequence that the trial in the court below is a nullity.

Is the judgment in plaint 331/71 a valid judgment?

Section 186 of Judicature (Resident Magistrates) Act reads:

> "If on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons was issued, the defendant shall not appear or sufficiently execuse his absence, or shall neglect to answer when called in Court, the Magistrate, upon due proof of the service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only; and the judgment thereupon shall be as valid as if both parties had attended. "

It is clear from the above that the Magistrate would have the power to enter judgment if the terms of the above section is satisfied and also that of section 96.

There is no evidence that those terms were not satisfied; the Magistrate entered judgment against Clarke, in default. The presumption of regularity would apply and I would hold that the judgment is a valid one. It follows therefore that this judgment still stands and is binding between the parties until set aside or appealed.

Can this court set the judgment aside? Mr. Parkinson submits yes, on the ground that if Clarke had been able to give

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evidence it would have shown that the Magistrate would have had no jurisdiction to try the matter i.e. in that the annual value which is stated in the particulars of claim to be £40 was at least £100. At thattime the Magistrate's jurisdiction was limited to disputes involving title where the annual value of the land did not exceed £50.

I cannot agree with Mr. Parkinson. I am of the view that Clarke's intention of giving evidence which, if accepted, would show that the Magistrate had no jurisdiction cannot affect the validity of the judgment which the Magistrate undoubtedly at the time, and in conformity with section 96 and section 186, was competent to pronounce.

Clarke's intended evidence may well be a strong argument in an application to set aside the judgment but I would hold that that would and could not invalidate the judgment of the Magistrate.

The Default Judgment being a valid judgment, can this Court set it aside?

The proviso to section 186 Judicature (Resident Magistrates) Act reads:

> " Provided always, that the Magistrate in any such cause, at the same or any subsequent court, may set aside any judgment so given in the absence of the defendant and the execution thereupon and may grant a new trial of the cause, upon such terms as to costs or otherwise as he may think fit, on sufficient cause shown to him for that purpose. "

Statutory authority is given to the Magistrate to set aside any judgment in default.

Mr. Parkinson submits that a superior court has inherent powers to set aside a judgment of an inferior court who:

(a) acts without jurisdiction; or

(b) where the justice of the case allows.

The powers of the superior courts to regulate and review the proceedings of inferior courts are regulated by means of the prerogative orders of Mandamus Certiorari or Prohibition.

If the defendant seeks to challenge the validity of the judgment in the High Court for want of jurisdiction he should have proceeded by way of prerogative writ i.e. Certiorari. This he has

failed to do.

In respect of the second proposition i.e. where the justice of the case allows, the defendant cannot adopt this procedure, as in effect he would be constituting this court to be an appeallate tribunal from the judgment of the Magistrate and this court has no such power.

Mr. Parkinson cited Dyson vs. Attorney General /1911/ 1 K.B. p. 410 and quoted from judgment of Fletcher Moulton L.J. p. 418

> " Now it is unquestionable that, both under the inherent power of the Court and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to a summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region; and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in the cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in court, andnot to be refused a hearing in court by an order of the judge in chambers. Nothing more clearly indicate this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a court. To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way withoug any court having considered his right to be heard excepting in cases where the cause of action was obviously and almost incontestably bad. "

Mr. Parkinson submits that his is authority for the proposition that a litigant is not bound to pursue a particular course, you can pursue another course, hence he seeks to justify plaintiff's prayer before this court to set aside the judgment of the Resident Magistrate instead of making an application in the Resident Magistrate's Court.

I disagree with Mr. Parkinson's contention.

Dyson vs. Attorney General was a case in which the plaintiff sought to test the validity of notices issued by the Commissioner of Inland Revenue under the Finance Act 1900 - 1910 and joined the

Attorney General as a defendant. The main question argued was whether the Attorney General could properly be joined.

The Attorney General took out a summons to strike out the statement of claim as disclosing no reasonable cause of action. It came before the Master who made an order in terms of the summons and this order was affirmed by Lush, J. in chambers.

The Court of Appeal held that Order XXV r. 4 which enabled the court or judge to strike out any pleadings on the ground that it discloses no reasonable cause of action was never intended to apply to any pleading which raises a question of general importance or serious question of law.

Implicit in the judgmentis the contention that differences in the law or differences of fact are normally to be decided by trial after hearing in court, and the court will interfere if a procedure is adopted that denies a litigant from coming into court and stating his case.

This case, in my view, bears no parallel with Clarke in that:

(1) Clarke was served with the summons to appear at Half-Way-Tree;

(2) His name was called on the day of hearing;

(3) It is entirely Clarke's fault why he was not in court when his case was called; as a consequence

(4) judgment was entered against him. That the Resident Magistrate acted within his jurisdiction;

(5) Clarke had the right to have the judgment set aside or appealed.

He has done nothing to this end.

Instead, he has adopted a procedure that is untenable in law in that he has by-passed the procudere laid down in the Judicature (Resident Magistrates) Act i.e. the proviso to section 186 in the setting aside of judgments.

Section 186 gives this power to theResident Magistrate where the court had acted within its jurisdiction as in this case.

I am therefore of the view that the course opened to

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defendant was to have applied before the Resident Magistrate to have the judgment set aside and that not having been done the judgment still stands and the court would have no power to set it aside on the grounds that the Resident Magistrate exceeded his jurisdiction because the case was not tried on its merits.

EFFECT OF JUDGMENT:

What effect would this judgment have in this matter before me?

Mr. Spaulding submits that it is a judgment in rem and binding on the parties. That Clarke cannot now seek to reopen the same issues before this tribunal. That it is res judicata. He cited Henderson v. Henderson /1843/ 3 HARE p. 114-115 in which the Vice Chancellor stated:

> " In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties excercising reasonable diligence, might have brought forward at the time. "

Mr. Spaulding submitted that this case lays down that res judicate will apply not only to points which the court was actually required by the parties to form an opinion and pronounce a judgment; but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.

Mr. Spaulding also cited Benjamin Patrick v. Beverly Gardens Development Company Limited Supreme Court Civil Appeals Nos. 36 of 1972 and 21 of 1974. This is a case in which in 1962 Frederica Walker as Attorney of Frederica Gorde laid an information in the Resident Magistrate's Court, Clarendon, claiming recovery of possession of a parcel of land from Benjamin Patrick. The information was heard

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on the merits by His Honour, Mr. Shelly, Resident Magistrate, who ordered a Warrant of Possession to issue. Later Patrick sought before Fox, J. in the Supreme Court in 1963 to obtain inter alia a declaration that plaintiff (Patrick) is entitled in fee simple to the said parcel of land. Fox J. ruled that Patrick was attempting to have questions of fact retried after they have been conclusively decided against him by Shelly, Resident Magistrate, in a court of conpetent jurisdiction and upheld the plea of res judicata.

Mr. Parkinson's submission are to the effect that res judicata does not obtain in this case. As the judgment was by default; there were no issues of fact to be tried so there is no question of having these issues retried in these proceedings.

If I understand Mr. Parkinson correctly his submission is that since no evidence was given by Clarke in the proceedings before in the Resident Magistrate then it cannot be said that issues were joined; in that for the plea of res judicata to succeed it is necessary that:

(a) not only the evidence of the plaintiff (McCaffrie) be given; but

(b) the evidence of defendant (Clarke) must also be given;

(c) that the trial must have been on the merits; and

(d) findings of fact be made by the Resident Magistrate;

(e) that the same evidence which was given in the previous trial is going to be given in the subsequent trial;

(f) that since the judgment was by default, implicit therein is the fact that only the evidence of the plaintiff was given by the defendant Clarke;

(g) consequently res judicata cannot apply.

Mr. Parkinson cited Hunter vs. Stewart reported De. Gex, Fisher and Jones report vol. 4 1861-62 p. 168, p. 177, p. 178.

I do not believe this case supports Mr. Parkinson's contentions. A passage from the judgment of the Lord Chancellor at p. 178 reads:

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> " In the opinion of the judges delivered in the House of Lords by Lord Chancellor De Grey in the Duches of Kingston's case it is said, "The judgment of a Court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another Court." But there has been no judgment upon the matter stated in this present record. One of the criteria of the identity of two suits, in considering an appeal of res judicata is the inquiry whether the same evidence would support both. But in the present case the evidence required to prove the allegations in the first bill would not sustain any of the material allegations in the second and the evidence given in the second suit would not be receivable for want of proper allegations in the first. "

What this passage means is that the criteria of identity of the two suits is the enquiry whether the same evidence would support both. The situation is not that this Court should look to see:

(a) if evidence was given in the first suit by plaintiff and defendant;

(b) then examine what that evidence was; and

(c) see if this is the same evidence that will be adduced in the second suit before it can decide whether res judicata apply.

The doctrine of res judicata by way of estoppel relates to the judgment in the first suit which is conclusive as between the parties and their privies and is conclusive evidence against all the world of its existence, date and legal consequences.

In subsequent proceedings between the same parties on the same cause of action the defendant can plead the former judgment in the Resident Magistrate's Court as an estoppel. If an order made by the Court necessarily involves a finding, whether there was argument or not, on the point which is later sought to be litigated, that point cannot subsequently be argued (see Halsbury 3rd Ed. Vol. 22 p. 780 para. 1660).

In Huffer v. Allen and another, Law Reports Exch. 1865-67 V. II p. 15 the facts were these.

A having issued a writ of summons against B specially indorsed for £28 B without appearing to the writ, paid £10 to A on account of the debt. A afterwards under the Common Law Procedure Act 1852 sec. 27

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signed judgment for default of appearance for the full amount of the debt £28 with costs and issued a ca. sa. indorsed for that amount, under which B was arrested and paid the sum demanded. B having brought an action against A for maliciously and without probable cause signing judgment and issuing execution.

Held that whilst the judgment stood for the full amount it estopped the plaintiff from denying the correctness of the judgment or of the execution.

Kelly C.B. (page 18) in the course of his judgment stated:

> " But we must here determine the legal question, which is, whether the previous judgment, which is in the contemplation of law, the act of the Court, estops the plaintiff from bringing this action, the first step in which is to impeach the record. It is a simple and unanswerable argument against its maintenance that it is not competent to either party to an action to aver anything either expressing or importing a contradiction to the records, which, while it stands is as between them as evidence of uncontrollable verity. "

Brawell B. (page 19) stated:

> " I entirely agree with my Lord, except that I cannot say that I regret the result of our judgment, for the plaintiff has himself caused the difficulty by not pursuing the proper course. That course would have been to apply to the Court to make the judgment regular; he would by the then plaintiff's irregularity, but he would probably also have been restrained from bringing this action. Rather than run that risk, he has chosen to let the judgment stand and resort to this remedy and he had deservedly failed. But however, this may be, we must decide for the defendant for the plaintiff cannot attack any of these proceedings unless he can attack the judgment and this he clearly cannot do. "

This judgment clearly supports the principle that a Default Judgment stands unless set aside and can sustain a plea of res judicata.

In the case of Kok Hoong vs. Leong Cheong Kweng Mines Limited /1964/ 2 W.L.R. p. 150, it was decided as to how far a Default Judgment is effective to estop a subsequent action.

In this case, the appellant in 1954 alleged that under an agreement in June 1952, that he had let certain machinery on hire to the respondent company for 12 months at an agreed monthly rental, and that, on expiry of the 12 months the respondent had continued

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the hiring on the same terms, brought an action against the respondent claiming arrears of rent from September 20, 1953, and for subsequent months. He obtained judgment by default in November, 1954. Thereafter, in June 1957, in an action between the same parties, the appellant, after pleading inter alia the agreement of June 1952, and that by arrangement with the respondent company he had retaken possession of two items of the machinery of 1955, and that the hiring of the remainder was to continue on the rerms and conditions of the agreement of June 1952, subject to the variation that the hearing was to commence from April 20, 1955, and for subsequent months.

The respondents pleaded inter alia that appellant is a money lender within the meaning of section 3 of the Money Lending Act that the transaction was a money lending one and appellant not having complied with the Money Lenders Ordinance the loans were not recoverable etc.

Appellant replied by alleging inter alia that respondents were estopped by the judgment by default of November 1954, from either contending that the appellant was a money lender or that the transaction was a money lending transaction or that the documents were other than what they purported to be or that he was not entitled to the relief claimed.

This case determined:

(a) that a default judgment is capable of giving rise to an estoppel per rem judication; and

(b) outlined the limits of what the default judgment prayed in aid should be treated as concluding and for what conclusion it is to stand.

The judgment of Viscount Radcliffe at page 158 is in point. Having reviewed the authorities in some depth His Lordship stated:

> " In their Lordships' opinion the New Brunswick Railway Company case can be taken as containing an authorative reinterpretation of the principle of Howlett v. Yarde in simpler and less specialised terms. This reinterpretation amounts to saying that default judgments though capable of giving rise to estoppels must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and to use the words of Lord Maugham L.C. they can estop only for what must

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> " 'necessarily and with complete precision' have been thereby determined. "

What then must the default judgment be taken to have decided in the earlier action?

It is my view that the judgement decided of necessity and with complete precision all that was pleaded in the particulars of claim and in conformity with section 96 Judicature (Resident Magistrates) Act i.e. that:

(a) the plaintiff, McCaffrie, has proper title to the parcel of land subject matter of the suit;

(b) that the defendant, Clarke, had no right, title or interest in the said parcel of land;

(c) that the defendant Clarke had no right to possession of the said lands and was occupying the said lands without the permission of the plaintiff;

(d) that the annual value of the land did not exceed $40 per annum.

In the action now before me Clarke is claiming by his pleadings paragraph 3:

> " The Plaintiffs (the Clarkes) have themselves and their predecessor in title been in exclusive and undisturbed possession of the said land since 1955 and have acquired by virtue of sec. 3 and sec. 30 of Chapter 222 of the Revised Edition of the Laws of Jamaica an undefeasable title to the said land. "

It would seem that implicit in the pleading that the same matters covered by the judgment of the Resident Magistrate would be re-opened, and these have already been determined by the judgment in the Resident Magistrate's Court, and res judicata could apply. The matter does not end there however.

The Kok Hoong case is also authority for the principle that a party cannot set up an estoppel in the face of certain statutes.

In the judgment Viscount Radcliffe page 160 he states:

> " The defence from which the appellant claims that the respondent is estopped is intended to rely on certain provisions of two statutes, the effect of either of which is to render void and unenforceable such contracts as the respondent asserts the agreement sued upon to have been. "

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He further stated:

" The respondent has invoked in support of its defence a principle which appears in our law in many forms, that a party cannot set up an estoppel in the face of a statute. Thus a corporation upon which there is imposed a statutory duty to carry out certain acts in the interest of the public cannot preclude itself by estoppel in pais from performing its duty and asserting legal rights accordingly. See Maritime Electric Co. Ltd. v. General Dairies Ltd. and Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd. Given a 'statutory obligation of an undonditional character' it is not open to the court to allow the party bound by that obligation to be barred from carrying it out by the operation of an estoppel. Similarly, there is, in most cases, no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction upon which he is being sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel: see In re Bankruptcy Notice, in particular per Atkin L.J.

It does not appear to their Lordships that the principle invoked is confined to transactions that have been made the subject of legislation or that, where legislation is in question, the bare prescription that a transaction is to be void or unenforceable is sufficient by itself to justify the principle's application. Thus, on the one hand, the common law may itself prohibit the enforcement of certain contracts, such as those of an infant not for necessaries, and it cannot be supported that it would any the less refuse to base a judgment on an estoppel against an infant who had so contracted. An infant who has obtained goods from a tradesman by representing himself to be of full age cannot be estopped from setting up his infancy, if sued for the price of the goods. On the other hand, there are statutes which, though declaring transactions to be unenforceable or void, are nevertheless not essentially prohibitory and so do not preclude estoppels. One example of these is the Statute of Frauds (see Humphries v. Humphries, in which it was no doubt considered that, following Leroux v. Brown, the statute ought to be treated as regulating procedure, not as striking at essential validity); another is the Stamp Act or Acts in their application to oral contracts of marine insurance, which, according to the decision in Barrow Mutual Ship Insurance Co. v. Ashburner, are not prohibited so much as penalised.

It has been said that the question whether an estoppel is to be allowed or not depends on whether enactment or rule of law relied upon is

imposed in the public interest or "on grounds of general public policy" (see In re A Bankruptcy Notice, per Atkin L.J.) But a principle as widely stated as this might prove to be rather an elusive guide, since there is no statute, at least public general statute, for which this claim might be made.

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" In their Lordships' opinion a more direct test to apply in any case such as the present, where the laws of moneylending or monetary security are involved, is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interest of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise. Thus the laws of gaming or usury (Carter v. James) override an estoppel: so do the provisions of the Rent Restriction Acts with regard to orders for possession of controlled tenancies (Welch v. Nagy).

General social policy does from time to time requires the denial of legal validity to certain transactions by certain persons. This may be for their own protection, as in the case of the infant or other category of persons enjoying what is to some extent a protected status, or for the protection of others who may come to be engaged in dealing with them, as, for instance, the creditors of a bankrupt. In all such cases there is no room for the application of another general and familiar principle of the law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit, for what is for a man's benefit and what is for his protection are not synonymous terms. Nor is it open to the court to give its sanction to departures from any law that reflects such a policy, even though the party concerned has himself behaved in such a way as would otherwise tie his hands. See in re Stapleford Colliery Co., per Bacon V-C.

These principles, as their Lordships understand them, would point very directly to the conclusion that there can be no estoppel in face of the Moneylenders Ordinance, since the provisions on which the respondent seeks to rely render him a 'protected person' for this purpose, nor any estoppel in the face of the Bills of Sale Ordinance, the provisions of which, whatever other purposes they may serve, are at least intended for the protection of other creditors who may have dealings with the borrower. The analogy between the latter Ordinance and the Deeds of Arrangement Act, 1914, which was the subject of decision in In re a Bankruptcy Notice, is very close.

It is true, nevertheless, that there have been decisions in England, the effect of which seems to be to allow binding estoppels that preclude reliance on the Bills of Sale Acts, legislation which is for all relevant purposes identical with the Malayan Ordinance. The two decisions that matter on this point are Roe v. Mutual Loan Association Fund Ltd., a decision of the Court of Appeal, and O. Comitti v. Maher. As the latter case was expressly decided on the authority of the earlier, it is to the principle expressed in Roe's case that their Lordships must direct their attention.

They do not think that it is necessary for them to say a great deal about it. What they are concerned with is to interpret the law of England on this subject as applicable to the Federation of Malaya, not to reconcile or adjust all the English decisions that have been given. It is not certain that the principle applied in Roe's case in altogether reconcileable with that adopted in In re a Bankruptcy Notice: see the remarks of Wright J. in Huddersfield Fine Worsteds Ltd. v. Todd. Having regard to what was said in the latter decision of the Court of Appeal (see Atkin, L.J.) it appears to their Lordships that Roe's case cannot now be relied upon for any general principle governing estoppel in the face of a statute and that its continuing authority depends on the resort that a court may feel to be necessary in special circumstances to the general rule forbiding approbation and reprobation on thepart of a litigant. Thus, despite the principle that limits estoppels where statutes are infringed, a litigant may be showm to have

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" acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned.

It is necessary only to notice the facts to see how large a part such considerations must have played in forming the Roe decision. A man had given a bill of sale on his furniture to secure an advance of money. Later, he presented his petition in bankruptcy, showing the lenders as creditors secured by the bill. They seized the furniture, sold it, paid off the debtor's landlord who had put in a distraint, appropriated the balance of the proceeds in part satisfaction of their debt and came in as unsecured creditors for the residue. The bankruptcy proceedings went on, the debtor having notice of all of them and in fact initiating some of them himself. A composition with creditors on the basis of his statement of affairs was proposed, reported on by the official receiver and sanctioned by the court. To quote from the judgment of Lord Esher M.R. the debtor "knew also that his solicitors had but a receipt before the /lenders/ to sign, so that, from beginning to end, he knew that the creditors were acting on the faith of his statement, and that by that means he got a release from all his debts on payment of 2s.6d. in the pound to all the creditors on their debts, and to the defendants on the balance due to them after taking credit for the proceeds of the sale. "

The debtor then started an action against the lenders, alleging that the bill of sale was invalid and that they had trespassed in seizing his goods. The Court of Appeal upheld the judgment of Pollack B. that the action could not proceed. It is difficult to see how in the circumstances of that case they could have done otherwise. They may have thought that what the debtor had done was to "waive the tort," as Atkin L.J. suggested in In re Bankruptcy Notice, or they may have proceeded on the wider principle that a person who had gone so far as the debtor had in approbating the seizure and sale of his goods and in implicating the court and other creditors in the consequences could not on any principle of law be allowed to reprobate them in another action.

It does not appear to their Lordships that any further analysis of Roe's case is called for in order to decide the present appeal. The respondent's actions bear no relation to the proceedings of the debtor in that case. The most that can be said against the respondent here is that it suffered or subjected itself to a judgment by default in the first action. Such a judgment is not incapable of giving rise to an estoppel, but there is nothing in the attendant circumstances which would permit an estoppel based upon it, whatever its range, to exclude a plea based upon the invocation of statutes of such nature as the Moneylenders Ordinance and the Bills of Sale Ordinance. "

The statute involved in this case is the Limitation of Actions Act Secs. 3 and 30 as pleaded in the statement of claim.

Section 3 reads:

" No person shall make an entry or distress, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit shall have first accured to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same. "

Section 30 reads:

"

Extinguishment of Right

At the determination of the period limited by this Part to any person for making an entry or distress, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery where if such entry, distress, action or suit respectively might have been made or brought within such period shall be extinghished, "

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Can this statute be said to confront the estoppel and can be seen to represent a social policy to which the Court must give effect in the interest of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have credited, by their conduct or otherwise? In answering this question one must look at the misdeed the statute is intended to cure.

It is my view that the statute was intended to ensure the policy of the settlement and certainly of titles to land. Is this for the social good and in the interest of the public? I would say yes: as such a policy lend itself to the establishment of tranquility and commerce among the Queen's subjects, I would therefore hold that the Limitation Acts were imposed in the public interest and I would disallow the estoppel. Res judicata is therefore inapplicable.

I shall now proceed to deal with the merits of the case.

The Evidence:

JAMES CLARKE gave evidence and stated that on 8th January, 1973, living at Rock Hall. Left home 9:00 a.m. - left children, Pamela and Segismund in charge. Returned 8:00 p.m. found his 10 children at shop in the Rock Hall Square crying. Made enquiries. Reached down his yard saw his house smashed down i.e. concrete nog house. Two apartments 12 feet wide 24 feet long with out building kitchen, toilet and fowl house all smashed down. Don't remember, it happened long ago. Made note of value he put on house. Saw goods. Saw some outside by the gate and on the Government Road, some burnt up; rest thrown and scattered all over.

Possession:

He stated that land originally owned by Charles Kerr, his wife's grand-father. Charles died and leave land to his son Nemiah Kerr, his wife's father. Nemiah Kerr died in 1955, no, 1945 (don't remember year he died). After his death he left land with John Davis; wife's grandfather on her mother's side. John Davis had son-in-law, Edgar Walker, when he had the land. Edgar Walker married Davis' daughter. Walker had no place to live. He was told this personally by Walker and Davis and Nemiah Kerr before he died. Edgar Walker is also called Elgar Walker. Walker permitted to build house on land by Davis and he lived in the

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house. Can't say how long. Walker left house and went to England July 1955. After Walker left for England land there. Plaintiff and wife getting married andDaniel Davis introduced them to the land. He offered them the land to buy for £100 and plaintiff gave him £25 owing a balance of £75. Don't know how long Daniel Davis on the land. Plaintiff WENT ON LAND IN 1963. Daniel put him in possession of land in 1963. Asked Daniel for receipt of the land he refused saying Walker steal away the land from Nemiah Kerr so he Daniel Davis can steal it back and do what he like with it as Walker can't come from England and take it back. Daniel Davis and Plaintiff had fallen out about the land and he (Davis) took him to Half Way Tree Court and he and his wife get lock up as a result of the case. That Davis said he plaintiff owe the land i.e. owe him Davis some money. After he get locked up he go back on the land and it was then he build the house and after that Daniel Davis did not trouble him.

To summarise plaintiff's evidence of his possession of the land:

Plaintiff states he was put in possession of the land in 1963 by one Daniel Davis from whim he purchased the land for £100. That he paid £25 and never paid the balance. Implicit in his evidence is that he was in undistubered and exclusive possession of the land from 1963 to today.

However, in paragraph 3 of his statement of claim he pleads that he was in possession since 1955. So Plaintiff's date of possession began on his evidence in 1963.

Mrs. Clarke's evidence is that she was put on the land by Daniel Davis as a consequence of his arrangement with her husband who purchased the land from Davis.

In cross-examination Mr. Clarke admitted going to prison with his wife arising out of the action brought by Daniel Davis. He stated that he was sued for money owing in that he had been charged £100 for the land had paid £25 and he was sued for balance of £75. That they were imprisoned for non-payment of the £75. This was in 1966. That he did not go to prison in 1967. It was in 1966.

He denied that Daniel Davis sued him for possession of the land and insisted that it was for money. He denied that he was sued at the instance of Walker and was sent to prison and Daniel Davis acted as Walker's agent and that he was imprisoned for disobedience of the order to give up possession of the land.

He admitted that Edgar Walker left the land in 1955 and was reported to have gone to England.

Exhibit 4 is the Court documents of a plaint filed by Edgar Walker against James Clarke. It is plaint No. 3749/64 and was filed on 21st September, 1964. At that time Edgar Walker was in England. Plaintiff denied that in this suit he was being sued by Walker through his agent Daniel Davis. But to continue: Exhibit 4 (the court records) reveal that the Plaint 3749/64 dated 21st September 1964, was for damages for trespass and the particulars read:

> " The plaintiff's claim is against the defendant to recover the sum of £30 as and for damages for trespass to land for that on or about the 31st day of July, 1964, and on divers occasions the defendant unlawfully entered on the plaintiff's premises at Rock Hall in the parish of Saint Andrew cleared the land, planted bananas, red pea, various fruits and committed other acts of trespass thereon.
>
> And the plaintiff claims an injunction enjoining and restraining the defendant his servant or agent from entering the plaintiff's said land. "

The case on 15th February, 1965, came on for trial before His Honour, L. Gale, Esq., and after a trial, judgment was entered for the plaintiff for £20 with costs and an injunction was granted as prayed. This judgment was not appealed by plaintiff Clarke. He is therefore bound by this judgment.

This judgment also demonstrates the falsity of Mr. Clarke's claim:

(1) that he was put in possession of the land by Davis having paid Davis £25 in 1963; and

(2) that he had been sued for the balance of money - £75 - and was imprisoned for non-payment of same.

The Court records reveal clearly that it was Daniel Davis

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who instituted the proceedings as agent for Edgar Walker against plaintiff. The records also reveal that Clarke's imprisonment was due to his committal for contempt in having disobeyed the injunction enjoining him from further trespass on the land (see affidavit of Daniel Davis dated 12th November, 1965).

An order dated 10th January, 1966, was made by the Court, committing Clarke to the Saint Catherine District Prison for contempt. By order made on 25th May, 1966 (see Court record - exhibit 4) he was released from Prison having purged his contempt. The matter does not end here as it appears that as soon as plaintiff was released from Prison he again went back on the land with his wife. As a consequence, Daniel Davis on 5th September, 1966, made another application to the Court and His Honour, Mr. Grannum, committed Clarke to Prison for a second time (part of exhibit 4). He again purged his contempt and was released - see exhibit 4A. In the purging of his contempt, Clarke swore to an affidavit dated 27th October, 1966 - exhibit 4B. In his affidavit in para. 4 he asserts that the land was left to his wife by her father. This assertion is a direct contradiction of his evidence that he had been put in possession of the land by Daniel Davis having arranged to purchase same for £100. In para. 7 he gives an unequivocal undertaking to obey the order of the Court and not to trespass on the land again. In the face of this, how can he then say that he was in undisturbed possession from 1963? Mr. Bentley Brown, Attorney-at-Law, stated that he prepared this affidavit on the instruction of Mrs. Clarke. He did not deliver it to her but she might have collected it from his office in his absence. He never saw the affidavit again (exhibit 3). He subsequently saw Mr. Clarke at his office who informed him that he had been released. Whatever the situation it is clear that that affidavit was relied upon by Mr. Clarke to obtain his release from prison and it is now part of the court record. He was wholly estopped from denying its existence and contents having obtained the benefit of his release by that document. This he has attempted to do in this case and I reject his evidence.

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Exhibit 4E contains Warrant of Possession and Warrant of Commitment of Clarke for contempt.

Exhibit 4G and H is a letter by James Clarke to the Court dated 27th April, 1967, purging his contempt begging for his release and stating that his wife has removed all her belongings off the land and they will not go back on it.

Exhibit 4I is notice by James Clarke to apply for discharge from custody.

Exhibit 4L - notice to Superintendent of Prison in connection with application as per Exhibit 4I.

All these documents i.e. application by both Clarkes to purge their contempt on which their signatures appear they deny their signatures. They categorically deny having signed any of the documents or to even have knowledge of them (see Exhibits 2, 4A-J and Exhibit 4L).

Mr. Derrick Gutzmore retired Director of Prisons and J.P. gave evidence for the defence. He stated that around this period he was Assistant Superintendent of Saint Catherine District Prison and he identified his signature on Exhibit 4B as a witness to the document. He stated that he cannot now recognise the face of the prisoner whose signature he witnessed. That identification of the prisoner is usually by the escorting officer and the identification would be rechecked by him against the record of the prisoner.

Charles McKenzie Leys Superintendent of the Saint Catherine District Prison gave evidence for the defence and produced entries from the Prison Records Exhibits 8 and 9 in connection with records of a prisoner, James Clarke.

I have not the slightest doubt in my mind that the signatures on the documents exhibited and denied by the plaintiffs in this action are their signatures and I so hold. I find that Mr. and Mrs. Clarke are not witnesses of truth. They are both quite prepared to attempt to support an untenable position with a tissue of falsehood and intransigence.

The whole history of the relationship between the Clarkes

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and this land revealed by the proceedings against the Clarkes in plaint 3749/64 (exhibit 4 and exhibit 4A-L) and plaint 401/65 (exhibit 6 and exhibit 7), established beyond doubt and I so hold as a fact that:

(1) Mr. Clarke never purchased the land from Daniel Davis as he alleges;

(2) that he was never put in possession of the land by Davis;

(3) that the Clarkes were never by themselves and their alleged predecessor in title been in exclusive and undisturbed possession of the land since 1955 or even from 1963.

I reject their evidence entirely. Further, I am of the view that if the defendant had pleaded estoppel in relation to these two plaints having regard to the history of the cases res judicata would have been upheld. However, it was never pleaded and that consequence cannot now arise. Nevertheless, it vividly illustrates the Clarkes' state of mind.

I accept the evidence given by the defendants and their witnesses. To keep the matter in its historical context; I shall deal briefly with the evidence of Edgar Walker, who stated that he had bought the land in 1943 and he got Common Law title to the land at the time. That he bought the land from the Government. That he got a Registered Title in 1964 - exhibit 1. He saw the land advertised in the papers selling out at auction at Half Way Tree and he bought it. He built a house on the land in 1944 and resided there with his family until in 1955 he left for England leaving his wife and son Roy occupying the house on the land. His wife resided there for two years and then joined him in England also his son. While in England he sold the land to McCaffrie in 1970 for £950.

On his wife's departure for England he instructed Daniel Davis to look after the property for him. Davis died about one year ago. He returned to Jamaica in 1971. That Davis acted as his agent concerning some matters in Court.

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When he returned from England in 1971 he saw Clarke on the land. He had never given Clarke permission to live on the land. He never instructed Davis to sell the land to Clarke. In cross-examination he stated he had no papers to show when he purchased the land. He got a Common Law title which he gave (to his lawyers) to make a Registered Title after the land was surveyed. That he never knew Charles Kerr whene he came to Rock Hall he had already died. He knew Nemiah Kerr the son of Charles Kerr. Nemiah Kerr was not on the land when he bought it from the Government. He had heard that Nemiah Kerr had lived on the land a long time ago but had never seen him on the land. He knew that Nemiah Kerr died in 1944 and was the father of defendant, Mrs. Clarke.

Roy Walker gave evidence. He is the son of Edgar Walker and lived with his parents on the land until he went to England in 1959. He returned to Jamaica in 1971, and saw James Clarke living on the land. When he left for England in 1959, the place was occupied. A shop on the premises was being operated by a lady called 'Mother Wompy'. He does not know her other name. One Roy Lee and his wife Edna Cole lived there and looked after him until he left for England also one Mabel Kerr lived there. In cross-examination he stated that as far as the land was concerned Daniel Davis came around and collected rent from the tenant, Roy Lee and his wife, and Mabel Kerr. That Daniel Davis collected the rent after his father left for England. He does not know how James Clarke came to be on the land. He heard something when he was in England. He knew Clarke before he went to England.

The defendant George McCaffrie gave evidence. He stated he bought the land from Edgar Walker who was in England in 1970. That he has lived in Rock Hall since 1950. When he first knew Walker he was living on the land with his family. He knew defendant Mr. Clarke. There had been discussion with him about the land. The first time was when he was surveying a piece of land adjoining the land. The surveyor had gone over Walker's line and Daniel Davis informed the surveyor that he was over Walker's land.

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That at that time he knew there was a dispute between Davis and Clarke. That he told Clarke that Walker had a Registered Title and Clarke said he did not think so. That he bought the land in 1970. He told Clarke that he had bought the land and he must not plant anything more on it but he will give him time to take off his yams. Clarke said 'O.K.' That he waited until 1971, when he saw Clarke preparing to plaint again. He spoke to him and Clarke said he is not coming off. He took proceedings against Clarke (plaint 331/71 - exhibit 5) for recovery of possession of the land. On 1st April, 1971, judgment in default was pronounced in his favour.

After the order was made he saw and told James Clarke that the judge had made an order for him to leave the place. Clarke said it is not his (Clarke's) place it is his (Clarke's) wife's place. He consulted his lawyer and gave him certain instructions.

As I have already stated, I accept the evidence of defendant and his witnesses and reject the evidence of plaintiff and his witnesses. I find that the defendants are entitled in fee simple to the said parcel of land. I therefore hold that the plaintiffs' prayer for a declaration that plaintiffs are entitled in fee simple to the said parcel of land and rectification of the Register of Titles accordingly cannot be maintained and is therefore denied.

THE EXECUTION OF WARRANT

Mr. McCaffrie in bis evidence stated that when he spoke to Mr. Clarke after having obtained judgment against him, Mr. Clarke refused to leave the land. McCaffrie stated he gave his lawyers instructions and a Warrant of Possession was applied for and issued (see exhibit 5 court records dated 11th December, 1972).

The Warrant of Possession was directed to the Bailiff of the Resident Magistrate's Court, Saint Andrew, to put the defendants in possession of the premises and to levy by distress and sale of the goods and chattels of the plaintiff Clarke in an amount of $36.10.

THE EVIDENCE

Plaintiff, James Clarke, stated that on 8th January, 1973, he left his home at 9:00 a.m. He returned at 8:00 p.m. and found his

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10 children at a shop in the Square crying. He made enquiries. Went to his yard. Saw his house smashed down also the out buildings, kitchen, toilet and fowl house. His personal belongings = some were scattered by the gate, some on the road and some were burnt. The rest were thrown and scattered all over. In cross-examination he stated that when the Bailiff came he was not at home. That what he knows about it was what he heard from his children in the yard. He stated that he knows Mr. Meade, the Bailiff. He denied that Mr. Meade saw and spoke to him in the Rock Hall Square that morning and that he was informed by Mr. Meade that he was going to his Clarke's place to execute the warrant.

Pamela Clarke, plaintiff's daughter, (now 15 years old) stated that on 8th January, 1973, she was at home cocking. Her parents had left for Town. At about 11:00 a.m. saw Mr. McCaffrie with three policemen, one in uniform other two in plain clothes. Along with them were Uton Davis, Samuel Burke, Aston Jackson and Tom Whyte and Bailiff Meade. McCaffrie spoke to her. That he pointed a long gun in her face and said, "Where is your father?" She told him her father had gone to Town. That McCaffrie told her to go somewhere until her parents came. She did not go. She remained there. That one of the police officers said, "Let the house stay until the parents come," and McCaffrie said, "And me pay uno so much money." She said McCaffrie search up and down and said where is her father, he wanted her father to shoot him. McCaffrie then told the men to start lick the house. The men started to put out their tools that they brought with them i.e. pick-axe, sledge etc. That they lick off the house, After they finished they started to take the things out of it. The policeman in uniform said they must carry the things taken from the house and place them in the line between McCaffrie's place (i.e. adjoining premises) and her mother's place.

That Bailiff Meade said they must carry every rass cloth thing down the road and McCaffrie agreed for them to carry it. The things were put in the middle of the street and cars could not pass on the road. The cars had to stop and move the things from the road before

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they could pass. McCaffrie told the people gathered on the road, 'who want things come and take what they want,' and the people gathered, about 100 of them took what they wanted.

A man told McCaffrie that her father had some nice goats and McCaffrie sent one Aston Jackson for them - six goats which were tied in her father's field. McCaffrie also sent Aston Jackson to dig yams from the cultivation which he did.

They took the yams and goats in a police jeep and left. She then left for the Square. At McCaffrie's yard she saw Jackson milking one of the goats. She and the other children remained at the Square and about 8:00 p.m. her parents came and she made a report to them.

George McCaffrie gave evidence and stated on 8th January, 1973, he saw Bailiff Meade who spoke with him. Meade was accompanied by three policemen from the Red Hills Police Station, Corporal Manhertz, Detective Staton and Constable Ward. They went to the Square, there he saw Mr. Clarke and he pointed him out to the Bailiff who already knew Clarke. He, the police and the Bailiff went to Clarke. He did not hear what they said to Clarke, but he heard Clarke said, "I don't have anything round there you can go on." McCaffrie, the police and the Bailiff then proceeded to the land.

When they got there the bailiff asked some people there if they could help. He asked them to take out the things that were in the room. Nobody was in the room but on the premises was Clarke's daughter, Vera.

The articles were removed and the bailiff directed they be put on the bank of the road. That the bailiff then asked the people there to push down the building which they did with a pi ce of stick i.e. a piece of round wood. He denied that he had brought men there and directed them to knock the house down with sledge etc. He also denied that house was a concrete building. He stated the house was made of round wood and marl mixed with cement with zinc roof and a concrete flooring. That house was 12 feet by 8½ feet. He denied that he had a gun and threatened anyone, or that he told persons to take any of the articles taken from the house or that he directed anyone to dig

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yams and that one of the goats was killed in his yard.

In cross-examination he stated he told Vera the bailiff is here to execute possession i.e. to put him in possession. That he told her the bailiff is here to take out the things and she must look at all the things. That this was before the house was knocked down.

Of course, what McCaffrie is saying is that Pamela Clarke was not there. It is one Vera who was there. Plaintiff's case is that it is Pamela who was there and she was called and gave evidence.

In cross-examination, he further stated that the bailiff had told him he had come to put him in possession. That it was the bailiff who asked him if the house was to be knocked down or if he wanted it to remain there and he told the bailiff he wanted the house knocked down if not the Clarkes will return there. The bailiff it was who knocked the house down not he. That he observed the goods being put on the bank, he did nothing to prevent it and in his mind he agreed with it.

Vivian Meade, Bailiff, gave evidence. He stated he knew both plaintiffs. That he had a warrant of Disobedience and he went to Rock Hall, arrested the male plaintiff and subsequently took him to Saint Catherine District Prison. This was prior to January 1973 (contempt proceedings).

That he first met Mr. Clarke when he served a summons on him in connection with plaint 3749/64. Arrested him and took him to prison on 14th April, 1966 (exhibit 4E).

Next saw Mr. Clarke as he had a Warrant of Possession in plaint 331/71 between plaintiff and defendant. He executed this warrant on 8th January, 1973. That when making this execution, as was customary, the police was informed and the plaintiff is always present. He also arrested Mrs. Clarke on a warrant about the same land in plaint 401/65. He arrested her on 30th March, 1967 (exhibit 6).

He stated that on the morning of the execution he met Mr. Clarke at Rock Hall Square. He stopped his car and told him he was on his way to Wah Hill i.e. to the land to recover possession. That is, Clarke's house. That Clarke said he should go ahead he has nothing there and that Clarke used filthy language.. That he proceeded/.....

to the place and by the breaking of a twig was sufficient he put Mr. McCaffrie into possession.

He stated he drove to the land in his car, McCaffrie in his car and the police in their jeep. At the land he saw a girl about 17 years old with a baby. That it was not possible that the girl could be as young as 11 years. She was quite mature (Pamela must have been about 11 years old at that time). Saw building on the land made of marl and cement. Building had no steel in it. It was not done properly. Building was about 12 x 10 feet. Fowl coop and pit latrine on the land.

Having seen the young girl on the land he stated he told her his business. She took up the baby and went next door. Other people came from the street and helped him. McCaffrie put the things from the building outside onto the bank of the road. He denied that they were put in the road way. The men then pushed the building over with a piece of wood.

That his warrant said he should levy and he proceeded to do so. That the only thing of value there upon which he could levy were five goats. He levied on these. He denied there were six goats. He took the five goats for keeping and had them kept at McCaffrie's place. The goats must be kept for seven days before they can be sold. That the goats were sold at Public Auction on 24th January, 1973. He denied that any of the goats levied was killed. That he was to recover $36.10 in costs. Sold the goats for $40 and the money was delivered as follows: $13.20 for care and keep of the goats and paid to McCaffrie's servant who cared and kept the goats. $21.40 was lodged to the Court's Office, Half Way Tree. He denied that he took away fowls, cash $546 or clothing, household utensils and he saw no one take these things or destroy a cultivation there.

He stated that it would be impossible to remove the building without destroying it. That it was an unremovable building. He denied that he personally ordered anyone to destroy or throw out any of the property that day. That he had no power to do that. That the building was knocked down by volunteers.

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He stated that he informed Mr. Clarke as he wanted him to be aware of what was happening andhe wanted him to attend so that he could procure his things that was of value to him such as the $800 he was claiming.

He stated that he usually inform the police because he wants the police to attend so that no assault is done. He stated that while he was there no one (Clarkes) come to accept responsibility for the items left there.

In cross-examination he denied that it was false when he said he saw and spoke to Clarke that morningof 8th January, 1973. He stated building pried down by volunteers. He did nothing to stop it neither did he say anything. Heard McCaffrie say and did nothing to stop it. Of course, McCaffrie said it was the bailiff who gave instructions for the building to be knocked down.

Meade in cross-examination further stated that he did hear a man say "The man(Clarke) have some nice goats down there" and McCaffrie said, "Lets take them away" and he said, "Lets take them away," and a man was sent for the goats i.e. four goats and one kid. He denied they were five goats and one kid (these are the goats he levied upon).

Corporal Theodore Malcolm gave evidence and stated that on 8th January, 1973, he was stationed at Red Hills Police Station. At about 10:00 a.m. Mr. Meade, Bailiff, attended at the station and requested the presence of the police, to accompany him to Rock Hall to execute an ejectment warrant. He drove a police land rover with Corporal Manhertz and Constable Ward. He was in plain clothes, the others in uniform. They drove behind Mr. Meade's car to Rock Hall Square where he saw McCaffrie. He also saw Mr. Clarke whom he knew before. Meade spoke to Clarke but he did not hear what he said to Clarke. After Meade spoke to Clarke, Clarke said in a loud voice, "Uno gwan me no have nothing round deh." Corporal Manhertz went out and spoke to Clarke and Clarke just walked away. McCaffrie went in his car. They all drove to Kerr Hill there they alighted from their respective vehicles and went up on a hill where there was an old house. There he saw a young lady with a baby. Meade spoke to the young lady. He can't recall what was said. The young lady appeared to be 17 - 19 years old. She did not

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appear to be 11 - 12 years old. While there a few other people came. He saw them remove from the house a bed. House was zinc roof 12 x 10 feet made of something like concrete wall with wooden posts.

Meade spoke to the men. He can't recall McCaffrie speaking to them. The men took out the bed down to the road bank on the side-walk also a grip with clothing. Two of the men used two pieces of wood and prised over thebuilding. House was not knocked down with sledge. That the house could not be taken up andtransferred elsewhere without being destroyed. After this, Mr. Meade ordered the men to loose some goats which he took away - four big goats and one small goat. Goats put in police vehicle and he drove it. He denied that he received money from McCaffrie or that McCaffrie said he had given them money. He saw no one kill any goat, or people take away items removed from the house or yams. Pamela Clarke was called into court and witness stated that she is NOT the girl he saw with the baby that day.

Corporal Robert Manhertz gave evidence. He was one of the officers who accompanied Meade to Rock Hall. He stated he saw Clarke in the Square, and Meade spoke to him and he said, "Uno gwan round deh me have nothing round deh," and Clarke walked away. That he spoke to Claker and told him that he should be present as the bailiff will be ejecting him. That Clarke said nothing but walked and continued on his way. They proceeded to the land, parked the vehicles and went up to Clarke's house. House has zinc roof, 10 x 10 feet built with material resembling marl and rould posts and cement floor. Some men came along there. The bailiff spoke with a young woman about 18 years old. She had a baby and she went across a home about 20 yards from the house. The men who came took a grip and an old bed and placed it on the road bank at the entrance leading up to the house. Saw two men with a piece of plank and used the plank andforced over i.e. pushed over the hoyse and this resulted in the house being destroyed i.e. it crumpled. Saw goats and fowls on the land.

In cross-examination he stated that when he saw the pushing down of the building it did strike him as being peculiar. That he thought it was lawful because he spoke to Meade and he told him. He stated that

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he thinks it's the bailiff who gave the order for the things (taken from the house) to be put there. That Meade sent two or three men for the goats.

Having reviewed the evidence, I find thefollowing facts:

1. That Meade did see Clarke at the Rock Hall Square on the morning of 8th January, 1973.
2. That he Meade did tell Clarke that he (Meade) was on his way to Wah Hill to the land to recover possession.
3. That Clarke told him to go ahead he has nothing there.
4. That at the land a young lady was there with a baby.
5. I am satisfied on the evidence that the girl there was one Vera and not Pamela. I do not accept Pamela Clarke as a witness of truth as to what transpired there that day.
6. I find that Meade executed the warrant and put McCaffrie in possession and levied on five goats.
7. I find that the goods inside the house were removed and placed on the bank of the road way and not in the road way and that McCaffrie concurred in this.
8. I find that this was done on the instructions of the bailiff, Meade, and that McCaffrie concurred in this.
9. I find that the building was of such a structure that it was fixed to the land and could not be removed without destruction.
10. I find that it was on Meade's instructions that the building was pried loose and pushed over and that McCaffrie concurred in this.
11. I find that only five goats were levied upon by Meade and that the levy was properly carried out and the goats were properly disposed of by Public Auction and the proceeds properly disbursed.

We come now to deal specifically with:

(a) personal effects of the Clarkes:

  (i) What they were; and

  (ii) Disposal;

(b) the destruction of the house.

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PERSONAL EFFECTS:

Mr. Clarke in his evidence stated he lost from his home:

1 Double bed, spring and mattress	valued	$56.00
2 Small beds	"	10.00
1 Pick axe	"	5.90
1 Hoe	"	56
1 Cutlass	"	1.20
1 Shovel	"	1.80
1 Fork	"	9.60
2 Bushels chocolate	"	9.60
2 Tins coffee	"	12.00
3 Dozen coconuts	"	3.44
1 Bottle Canadian Healing Oil	"	80
2 Packs Fab	"	70
1 Dozen Condensed milk	"	2.28
1 Dozen sweet soap	"	1.92
15 lbs white flour	"	1.80
6 lbs corn meal	"	36
5 lbs sugar	"	60
1 Tin Ovaltine	"	22
1 Quart coconut oil	"	75
6 lbs rice	"	48
1 lb codfish	"	35
1 Quart red peas	"	85
1 Bottle Wincarnis Wine	"	1.30
1 Bottle Guiness Stout	"	65
1 Bottle gaseous fluid for goats	"	2.50
10 lbs red oak.	"	3.50
1½ dozen eggs	"	90
1½ dozen fowls	"	150.00
6 goats	"	200.00
Cash (notes)	"	150.00
His clothing	"	300.00
Children clothing - 6 children (small)	"	600.00

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PERSONAL EFFECTS:

Children clothing - 4 children (large)	valued	$400.00
Land diagram	"	32.00
3 chairs and 1 table	"	14.00
Cooking utensils		200.00
Damaged cultivation		2500.00.
Mrs. Clarke's evidence of loss:		
Her clothes	valued	120.00
2 pairs shoes	"	26.00
Money cash (paper)	"	129.00
Money (silver)	"	125.00
Sheets	"	52.00
Food items rice, flour etc. she place and valued		200.00
She valued double bed at		159.00
Small bed at		100.00.

I accept that the Clarkes did have clothing, household utensils and some food on the premises and that these were removed from the house and placed on the bank.

As to what value can be placed on these items it is difficult to ascertain as I find the Clarkes' evidence extremely unreliable.

Mr. Clarke placed a value of $1,826.06 on these items excluding cash, goats and damaged cultivation. Mrs. Clarke placed a value of $463 excluding cash. The difference is significant. I would place a valuation of $750 on these items.

I reject the Clarkes' evidence that there was any cash in the house. I also reject Mr. Clarke's evidence that his fowls were interferred with or his cultivation was damaged.

What liability would be incurred, if any, in relation to these items?

DUTY AND POWERS OF BAILIFF

Section 48 Judicature (Resident Magistrates) Act empowers the bailiff to "execute all the warrants percepts and writs issued out of the Court." Section 213 ibid empowers the bailiff to levy by distress and sale of goods in case of default or failure of payment of money

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recoverable on order of the Court.

Generally, the Warrant issued from the Court is an absolute justification of the bailiff for what is done in pursuance of its execution provided he carries out the order in the warrant.

The duties of the bailiff under the warrant are:

(1) to the judgment creditor to obey the warrant and any lawful instructions that have been given him;

(2) to the judgment debtor not to do any act not authorised by the warrant;

(3) to the Court to make a return to the warrant if required to do so (see Halsbury Vol. 16 3rd Ed. para. 29 p. 21).

In carrying out this levy the bailiff with McCaffrie's concurrence removed the items from the house and had them placed on the bank. He levied on none of these items. He levied on only the goats. After the levy these items were left there on the banks.

Can it be said that the bailiff in having these items removed from the house had gone beyond the powers authorised in the warrant?

I would hold no. In order to ascertain what he can levy upon he may remove the items if they would assist him in the inspection and evaluation of the items, but I am of theview that once he removes them he would in ordinary circumstances be responsible for the replacement and security of those items upon which no levy was made. Was the leaving on the bank of those items wrongful and a trespass to those goods; and would he be liable for such conduct? Unfortunately, Meade is not sued.

Mr. Parkinson contends that Meade has not got to be sued as McCaffrie was Meade's principal. That Meade was acting as McCaffrie's agent at the time. Mr. Parkinson base his submission on thefact that it was McCaffrie's solicitor who applied for the issue of the warrant and consequently anything done wrongfully under the warrant would be not only the bailiff's but also McCaffrie's responsibility.

Would wrongful acts , if any, done in the course of execution invalidate the entire process i.e. would the entire levy i.e. of the goods be bad in law. I would hold that it does not. The execution

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was authorised and justified by the warrant. The levy would be good in law, but if the bailiff did wrongful acts in the course of that execution he would be liable for those wrongful acts.

Would McCaffrie be liable for wrongful acts done by Meade, the bailiff? Is Meade truly McCaffrie's agent for the purpose of the execution?

In the ordinary course of things the law is that:

> " The sheriff and his officers executing a judgment, however wrong the judgment may be or however mistaken they may be as to the effect of the judgment are not necessarily liable to have an action brought against them for damages. "

The principle was well defined in the judgment of Green L.J. in the case of Williams v. Williams and Nathan 1937 2 A.E.R. p. 559. This was a case in which a landlord wrongfully obtained the issue of a writ of possession against a sub-tenant. The sheriff's officers having notice of a dispute between the parties on the question whether the Rent Restriction Act applied, asked the landlord's solicitors, whether they should execute the writ in the circumstances and were advised to execute it. In pursuance of that advice the sub-tenant was ejected. The landlord subsequently accepted that the sub-tenancy was lawful under the Rent Restriction Acts. The sub-tenant, having become a defendant in the landlord's action for possession counter-claimed against the landlord for trespass.

It was held the sheriff's officers had acted in accordance with the writ of possession and did nothing beyond what they were thus authorised to do by the Court; the advice given them by the landlord's solicitors did not make the sheriff's officers the agents of the landlord; and therefore, the landlord was not responsible for the wrongful ejectment and the counter-claim must be dismissed.

In his judgment Green L.J. stated:

> " First of all, with regard to the case of the defendant Williams, the landlord, I think it is clear to demonstrate, from the case that has been cited of Woollen v. Wright (3) and other cases, and from a well-known rule of law, that a sheriff and a sheriff's officer, executing a judgment of the court, are acting, as one may say, on behalf of the court. Each is doing his duty as an officer of the court, and is not a servant or agent of the plaintiff who has recovered judgment in the action. Of course, there may be circumstances which show that

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" the plaintiff by intervention had made the sheriff his agent to do something which was not covered by the judgment, or by the writ of execution. If I had thought that what happened in this case amounted to that, or that the country court judge had found as a fact that the landlord Williams interferred, and requested the sheriff's officer to execute the judgment on property upon which he was not entitled to execute the judgment, then the judge would have been right. But, in my view, there is no evidence justifying any finding as to the special direction given to the sheriff or the sheriff's officer which might make the sheriff or the sheriff's officer the agent of the defendant Williams, the landlord. That is enough to dispose of the case as regards the defendant Williams. It seems to me that, with all respect to the very forcible argument of Mr. Weitzman, the cases he has cited have nothing to do with the matter. They are cases in which the agent of the judgment creditor, the man who has obtained judgment, has requested the officer to execute judgment against somebody who was not a party to the judgment at all, and was not a party to, or included within, the writ of fi. fa. Of course, it a plaintiff who has recovered judgment against Jones says to the sheriff's officer, who is about to issue execution and writ of fi.fa. on the judgment against Jones: 'Issue execution against Williams,' he would be liable for the consequences of having so instructed the sheriff's officer. But in this case there is no evidence of any such instructions. The only evidence before the judge on which Mr. Weitzman relies is that the defendant Williams, being present, did not say to the officer: 'You must not execute judgment on the three rooms which are alleged to have been controlled premises.' But that is quite different from saying that the appellant Williams instructed the officer to execute the judgment otherwise than in the manner in which in law it had to be executed. In addition to that, one has to remember that the judgment given by the master in this case was intended by the master to bind everybody on the premises, as in form it does. "

See also Barclays Bank Limited v. Roberts 1954 3 A.E.R. 107.

What, however, is the position in this case?

Meade was well acquainted with Clarke and familiar with the dispute about the land. He it was who served Clarke the summons in plaint 3749/64.

On April 14, 1966, he arrested Clarke and conducted him to the Saint Catherine District Prison (for contempt Ex. 4E). He stated he executed the warrant and it was in relation to plaint 3749/64. He next saw Clarke as he served him process i.e. Recovering of Possession of land in plaint 331. 71, between Mr. & Mrs. McCaffrie v. James Clar'

In cross-examination he stated that he knew the Clarkes were laying claim to the land. He had also arrested Mrs. Clarke and took her to prison about this land (plaint 401/65).

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Corporal Malcolm's evidence is that Meade spoke to the men there who removed the articles from the house. In cross-examination he stated McCaffrie also spoke to the men.

Corporal Manhertz stated he thinks it's the bailiff who directed the men where to put the articles taken from the house. McCaffrie's action there was clearly not a passive one.

I would therefore hold that in relation to the removal of the articles from the house and the leaving of them on the bank by Meade, Meade was clearly acting as the agent of McCaffrie. Would the leaving of the goods on the bank be wrongful in these circumstances?

Meade had told Clarke in the Square that he was going to the premises to execute the warrant and Clarke said, "Uno can gwan me no have anything there."

Clarke's daughter, Vera, was present there when the warrant was about to be executed. The whole history of Clarke's past intransigence, all these matters have to be taken into consideration.

I would hold that in these peculiar circumstances there was no obligation on the part of Meade and/or McCaffrie to secure the items in any other manner than they did. I would hold that Mead's and McCaffrie's conduct was reasonable in the circumstances.

We come now to the building.

McCaffrie's own evidence is that Meade asked him if he wante the building to stay or taken down and he told the bailiff he prefer to have it down so that Clarke would not come back on it. Corporals Malcolm and Manhertz said Meade spoke to the men and the men used wood and pushed the house down. Manhertz further stated he spoke to Meade about the lawfulness of this and Meade assured him it was.

I would therefore hold that on the destruction of the building Meade was acting as the agent of McCaffrie. Meade was most certainly not acting within the authority of the warrant which empowers him only to put McCaffrie in possession and to levy by distress and having executed the warrant by putting McCaffrie in possession he went on to put articles not levied upon on the bank and to direct the destruction of the house on the land.

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As to the value of this house, Mr. Clarke's evidence was completely hopeless. He started at a valuation of $400 and ended up at $3,500. His evidence is wholly unreliable on this point. I would place a valuation of $2,000 on the building.

Even if Meade was McCaffrie's agent in the destruction of the building, was either Meade or McCaffrie or both acting wrongfully in its destruction?

I am of the view thatunder the warrant McCaffrie having been put in possession of the land would have the right to destroy the house.

Mr. Parkinson submitted that he would have no such right. That McCaffrie's predecessor in title had acquiesced in the building of the house by Clarke. That plaintiff built the house in 1966 when Dan Davis had been in possession. That he was allowed to build. That Davis was Walker's agent and therefore when Walker sold to McCaffrie, McCaffrie took possession subject to the encumberance of Clarke's house being on the land and Clarke was entitled to compensation from McCaffrie for the building. This submission, in my view, is without merit.

Clarke was never put in possession by Davis and I so find, Indeed, Davis took proceedings against Mr. & Mrs. Clarke for trespass, plaint 3749/64 and plaint 401/65. In plaint 331.71, McCaffrie's predecessor in title (Walker) persistently challenged Clarke's presence on the land.

The whole history of the proceedings show clearly that Clarke had no rights on the land and no authority to build on the land. That he persistently disobeyed the orders of the Court to vacate the land and not to return on it.

I would hold that McCaffrie having been put in possession of the land was perfectly justified in destroying the house if he so desired, particularly since the house was so affixed to the land that it became part of the land. It could not be removed without it being destroyed.

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There is therefore no liability on McCaffrie for the destruction of the building.

DAMAGES:

If I am in error and the defendants had no right to have left plaintiff's household articles as they did and to destroy the building, then I would assess damages as follows:

Special Damages	
Household effects	$ 750.00
Building	2000.00
	$2,750.00
General	$5,000.00