JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT OF APPEAL NO. 95/94

BEFORE: THE HON MR. JUSTICE FORTE, J.A.
THE HON MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (A.G.)

BETWEEN **MARY ELIZABETH GOODISON** **PETITIONER/APPELLANT**

AND **KEITH MORTIMER GOODISON** **RESPONDENT**

Charles Piper instructed by
Piper & Samuda for Appellant

Earle P. deLisser for Respondent

December 8 & 9, 1994 and April 7, 1995

FORTE, J.A.:

This is an appeal from an Order of Record, J. in which, in upholding a preliminary objection, he dismissed a summons for Ancillary Relief, in Suit No. FG046/1994 which, inter alia, sought dissolution of the marriage of the parties.

In the petition, the appellant - wife petitioned in her prayer, inter alia, for the following:

> "1. That the said marriage be dissolved.
>
> 2. That this Honourable Court determines the interest of the parties in the matrimonial home 8 Marley Close,

> Kingston 6, in the parish of St. Andrew and makes such order for the sale and distribution of the proceeds of sale thereof as shall be just;
>
> 3. That this Honourable Court make such order for maintenance of the Petitioner and the relevant child and/or make such financial provision for the said child and/or the Petitioner as shall be just;
>
> 4. Further or alternatively, that there be such property adjustment order as having regard to the circumstances this Honourable Court deems just."

There are no notes of the hearing available but the learned judge's judgment makes it clear that it was on a preliminary objection that the summons was dismissed. He stated in conclusion:

> "It seems therefore that the preliminary objection of Mr. deLisser must be upheld in that the procedure adopted by the Petitioner is wrong and the summons for Ancillary Relief dated 24th June, 1994, is dismissed."

In the summons for ancillary relief the petitioner asked for the following orders:

> 1. A Declaration as to the respective interests of the Petitioner and the Respondent in the premises, 8 Marley Close, Kingston 6, in the parish of St. Andrew being the premises registered at Volume 1126 Folio 42 of the Register Book of Titles;
>
> 2. An Order that upon the determination of the interests of the parties in the aforesaid premises, being the matrimonial home, the premises be valued by a reputable valuator to be agreed upon by the parties and failing

agreement to be appointed by the Court;

3. There be an Order for sale of the said premises and the proceeds of sale thereof be divided between the Petitioner and the Respondent in accordance with the determination aforesaid;

4. That the Respondent be ordered to pay to the Petitioner from the proceeds of sale of the aforementioned premises such lump sum as to the Court may seem just by way of financial provision for the maintenance, education and benefit of Kristina Elizabeth Goodison, the relevant child of the marriage;

5. Further or alternatively, that the Respondent be ordered to pay to the Petitioner from the proceeds of sale of the aforementioned premises such lump sum as the Court may deem fit by way of financial provision for the past maintenance of the children of the marriage."

The summons was brought as interlocutory proceedings under the provisions of the Matrimonial Causes Act, and counsel in advancing arguments in support, took refuge in the provisions of section 10 of that Act. In rejecting the contentions that the provisions of section 10 permitted the granting of the relief sought, the learned judge concluded:

"It seems from the scheme of the section, including subsections 2 and 3 that they all deal with the protection of property and the parties. If Parliament intended to give powers under this Act as to distribution of property, it would have said so in clear and unambiguous terms. The Act is new, having been passed in 1988 and Parliament would be aware of the Married Women's Property Act to make

> orders for the distribution of property between the parties.
>
> Any claim for distribution should properly be made under section 16 of the Married Women's Property Act."

Before us, Mr. Piper challenged the finding of the learned judge, both in respect of the application for the orders in relation to the distribution of the property, and the order for maintenance, the latter to be dealt with later in this judgment.

In respect to the matrimonial home, Mr. Piper filed five grounds of appeal, but the issue was really confined to whether such an order could be sought under the provisions of section 10 of the Matrimonial Causes Act, or whether the proper procedure was to be found in section 16 of the Married Women's Property Act.

Section 10 of the Matrimonial Causes Act provided as follows:

> "10.-(1) Without prejudice to any other powers of the Court the Court may, upon application made by either party to the marriage whether or not an application has been made by either party for any other relief under this Act, grant an injunction or other order, as the case may be -
>
> (a) for the personal protection of a party to the marriage or of any relevant child;
>
> (b) restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides, or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the

> matrimonial home is, or which is the location of the premises in which the other party to the marriage resides;
>
> (c) restraining a party to the marriage from entering the place of work of the other party to the marriage or restraining a party to the marriage from entering the place of work or the place of education of any relevant child;
>
> (d) in relation to the property of a party to the marriage; or
>
> (e) relating to the use or occupancy of the matrimonial home."

Mr. Piper relied on the provisions of section 10(1)(d) to ground his contention that orders as to the interest and disposal of the matrimonial home as prayed in the summons for ancillary relief could be properly made under the Matrimonial Causes Act. He conceded, as he had to, that such orders could be made by virtue of section 16 of the Married Women's Property Act, but contended that that was not to the exclusion of section 10(1)(d) of the Matrimonial Causes Act. It may be appropriate for easy understanding of the issue to set out also the provision of section 16 of the Matrimonial Women's Property Act. It states inter alia:

> "16. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society, as

> aforesaid in whose books any stocks, funds or shares of either party are standing, may apply by summons or otherwise in a summary way to a Judge of the Supreme Court or (at the option of the applicant irrespectively of the value of the property in dispute) to the Resident Magistrate of the parish in which either party resides; and the Judge of the Supreme Court or the Resident Magistrate, as the case may be, may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in questions to be made in such manner as he shall think fit."

The interpretation of section 10, contended for by Mr. Piper, would permit the Court in proceedings brought under Matrimonial Causes Act by virtue of section 10(1)(d)

> "to grant an injunction or other order in relation to the property of a party to the marriage."

He argued that that being so, such a power would include the power to determine the interest of the parties in the property, and also the consequential power of ordering the sale of the property. In support, he made references to sections 21, 23, 26 and 28 of the Matrimonial Causes Act which he maintains are consistent with his interpretation of the powers given under section 10(1)(d).

After a careful examination of the sections to which we were referred, and more importantly section 10(1)(d), I am unable to agree with these arguments.

The sections so referred, all deal variously with provisions for maintenance, custody, and education of the children of the marriage, and specifically do not address any issue as to the distribution of matrimonial property. Consequently, no aid can be gathered from any of these sections in resolving the issue arising in this appeal.

On perusal of section 10, the purpose and intent of its provisions become obvious and absolutely clear.

The subsections speak to the personal protection of a party to the marriage or of any relevant child [section 1(a)], and continues to make specific provisions as to the control of either party in so far as that is warranted for the protection of the other party or of the children. In this regard, the section speaks to the use of the matrimonial home, and allows restrictions to be placed on either party, not only in respect to the matrimonial home or residence of the other party, but also to the work place, and the place of education of any child of the marriage.

Given the provisions of the section as a whole, it is obvious that subsection 1(d) must be interpreted as equally aimed at the protection of one party or the other, in respect to "the property of a party to the marriage."

As the matrimonial home, or other residence of a party is dealt with in other sections, it follows that subsection (1)(d) must therefore relate to other property in respect of which an "injunction or other order" is necessary in order to protect the rights of one party e.g. an attempt by the other party to seize the "family car" leaving a spouse to travel long distances on public transportation at inconvenient

times with young children, while the other spouse enjoys the luxury of two or three vehicles.

Though the above is sufficient to dispose of the contentions advanced by the appellant, some comment is necessary on the reference to rules 2 and 43 of the Matrimonial Causes Rules upon which Mr. piper relies to support his interpretation of section 10(1) (d).

Rule 2 which deals with interpretation defines "Ancillary Relief" as including inter alia "a property adjustment order."

Rule 43 headed "Ancillary Relief" states in its subsection (1):

> "Any application by a petitioner, or by a respondent who files an answer claiming relief, for -
>
> ...
>
> (c) a property adjustment order shall be made in the petition or answer as the case may be."

Both Rules (2 and 43) speak of "a property adjustment order" although the Matrimonial Causes Act makes no provision for the making of such an order by the Court. In the face of this, the reference to such an order in the rule is of no value, and consequently of no effect. It may be that there was some intention to include such a power in the Act but that not having been done, these rules now seem to look to some future amendment of the Act to give it validity. In the meantime, the reference to such an order in the rules is of no assistance in placing the correct interpretation of section 10(1)(d) of the Act.

In the event, I would conclude, that the Matrimonial Causes Act does not permit within its provisions, the adjudication by the court to determine the interest of either party to the matrimonial property, such determination being reserved for the application of section 16 of the Married Women's Property act to proceed by summons in a summary manner, or of course by writ if the parties are already divorced.

The appellant, however, also contends that such a conclusion does not necessarily put her complaint to rest. Mr. Piper submitted that even if he were wrong that section 10(1)(d) of the Act applies, this does not necessarily put the appellant out of court, insofar as the summons for ancillary relief is concerned, for the following reason.

The summons filed, was supported by an affidavit of the petitioner in which she recites the history pertaining to the purchase of the home, etc. and makes out a case for the granting of the orders as prayed. This, having been served on the respondent, he swore to and filed an affidavit in reply, and at no time either in the affidavit or otherwise maintained that he was challenging the particular procedure used by the appellant. It was not until the matter came on for hearing that the respondent per his counsel took a preliminary objection to the procedure. Mr. Piper therefore seeks to rely on the provisions of section 679 of the judicature (Civil Procedure Code) Act which is made applicable to these matters by virtue of rule 3 of the Matrimonial Causes Rules.

Section 679 states:

> "No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."
>
> [Emphasis added]

The respondent in fact filed a detailed response to the summons, resisting, in particular the appellant's prayer that the respondent's share from the sale of the home should be applied in part for "the payment of lump sum by way of financial provision for the maintenance, education and benefit of Kristina Elizabeth Goodison, the relevant child of the marriage."

In addition, he alleges that the appellant withdrew from their joint account in the United States of America the sum of US$60,000 which she applied to the purchase of the home in which she now resides, and in that event he averred the following (para. 20):

> "That having regard to the fact that the Petitioner had withdrawn, on her own admission, SIXTY THOUSAND U.S. DOLLARS (US$60,000) from our joint account she has forfeited her right to claim any share in the premises at 6 Marley Close, Kingston 6."

and asked (para. 21):

> That in the alternative since the Petitioner has acquired during the marriage a townhouse at 33a Norbrook Drive where she resides both properties should be valued together and divided equally between us."

In taking this step the respondent was clearly submitting to the jurisdiction of the court.

On perusal of the summons for ancillary relief and the affidavits by the appellant in support, and the respondent in reply, there are really no material differences, between that summons and a summons which would be filed by virtue of section 16 of the Married Women's Property Act. The documents files would be the same. The learned judge would be faced with the same affidavits and same issues had the summons been filed under the Married Women's Property Act. The only real difference of course, is the fact that the present summons is not an originating summons, but one filed as an interlocutory summons in Matrimonial Causes proceedings and is accordingly entitled "Summons for Ancillary Relief." The learned judge does not have the power to deal with the issues raised and is allowed to do so by way of summons by virtue of section 16 of the Married Women's Property Act. The question, therefore, is whether given the submission to the jurisdiction by the respondent, the court could proceed with the application, treating the summons as an originating summons filed by virtue of section 16 of the Married Women's Property Act.

Before addressing that question, however, it may be helpful to look at the words of Ormrod, L.J. speaking on the English situation in 1979 in the case of **Ward v. Ward and Greene** (1980) 1 All E.R. page 176 (NOTE). The note being relatively short is set out hereunder in full:

> **"Ormrod, L.J.** (with whom Sir David Cairns agreed), after dismissing the

husband's appeal against an order for periodical payments, said: Before leaving the appeal finally, however, there is one point with which I want to deal. At the outset of his judgment the learned judge referred to the fact that he had suggested that the husband should issue a pro forma summons under s 17 of the Married Women's Property Act 1882 asking for the sale of the former matrimonial home. This is a point which has been raised from time to time, which I know is concerning the Law Commission at the moment. I have heard it suggested on a number of occasions that in order for the court to make an order for a sale under the Matrimonial Causes Act 1973, ss 23 and 24, it is necessary to issue proceedings either under s 17 of the 1882 Act or, in appropriate cases, under s 30 of the Law of Property Act 1925.

For my part, I have never understood the advantages of multiplying pieces of paper intituled in particular statutes named at the head of the summons. It seems to me to be quite clear that s 17 of the 1882 Act gives the court power to order a sale (certainly as clarified by the Matrimonial Causes (Property and Maintenance) Act 1958) in proceedings between husband and wife in connection with property. Section 30 of the Law of Property Act 1925 gives the court power to order a sale where there is a trust for sale, and to my mind it cannot matter what the nature of the proceedings are; what matters is whether the circumstances are such as to bring the case within one or other of those Acts which give the necessary power to the

> court to order the sale. So I think it may be helpful if we were to say that it is not necessary to intituled proceedings as being under the Married Women's Property Act 1882 or the Law of Property Act 1925, or to issue pro forma summonses to enable the court to exercise its powers to order a sale where the circumstances justify it under one or other of those Acts. I hope that may be a helpful observation."

In the instant case, although it was argued that the summons was brought under section 10(1)(d) of the Matrimonial Causes Act, the summons itself made no such reference. Had the title been different, and the suit number not recorded, it could easily have been a summons in accordance with section 16 of the Married Women's Property Act. With that background, the question of whether the matter can proceed on the basis of the summons before the court, ought in my view to be approached in a practical way and with the view, if possible, of avoiding added expense which can result from surrendering to technical objections. There are two cases which can be of some value in the determination of this question.

The first **Robert Honiball and George Brown v. Christian Alele**, Privy Council Appeal No. 9 of 1992 dated July 26, 1993, was a case in which an allegation of fraud was raised by way of a motion. Lord Oliver of Aylmerton, delivering the speech of the Board said of that procedure (p. 6):

> "At first sight the raising of an issue of fraud by way of a motion in the action may appear to be an unusual, or even an eccentric, method of proceeding and their Lordship do not wish to say anything which might be thought to

encourage it as a permissible substitute for the normal procedure for setting aside a judgment obtained by fraud by means of an action commenced by writ. A motion supported by affidavit evidence is not an ideal way of defining or trying issues of fraud and misrepresentation. In the instant case, however, there was a certain logic in the procedure adopted. The action in which the order had been made was one against the company and the company by its liquidator was a necessary party to any proceedings to set aside the order and cancel the
Certificate of Title of the appellants, for the effect of that relief, if granted, would merely be to reinstate the title of the company. It would then be for the respondent to lodge his executed transfer and apply to the Registrar of Titles to register him as proprietor, an application which the company might wish to resist. There was, therefore, a certain logic in applying to intervene in the action in which the order under attack had been made and to which the company was already a party, although it must be extremely rare, if, indeed, it is possible at all, for a person to be given leave to intervene in an action in which the judgment has already been delivered and the order has been drawn up, except perhaps in cases where his presence may be necessary for accounts and inquiries to be taken or held in working out the order. The motion was, in truth, more in the nature of an originating motion. Nevertheless, the issue to be determined was fairly and squarely raised and the method of bringing it before the court was, in the final analysis, no more than a procedural

> irregularity. It did not invalidate the proceedings and in their Lordships' judgment in the Court of Appeal of Jamaica was right not to attach critical importance to a purely procedural objection."
>
> [Emphasis added]

In **Herbert W. Eldermire v. Arthur W. Eldermire,** Privy Council Appeal Nos. 33 /89 and 13/90, dated July 23, 1990, Lord Templeman delivering the judgment of the Board, dealing with a case brought by originating summons which perhaps should have been brought by way of writ stated (p. 5):

> "As a general rule, an originating summons is not an appropriate machinery for the resolution of disputed facts. The modern practice varies. Sometimes when disputed facts appear in an originating summons proceedings, the court will direct the deponents who have given conflicting evidence by affidavit to be examined and cross-examined orally and will then decide the disputed facts. Sometimes the Court will direct that the originating summons proceedings be treated as if they were begun by writ and may direct that an affidavit by the applicant be treated as a statement of claim. Sometimes, in order to ensure that the issues are properly deployed, the court will dismiss the originating summons proceedings and leave the applicant to bring a fresh proceeding by writ. In general the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification."
>
> [Emphasis added]

The dicta cited above demonstrate that where, given the circumstances of the case, the issues can be fairly resolved in spite of the irregularity in procedure, the Courts will allow the matter to proceed in order to determine the substantive issues.

In the **Alele** case (supra) Lord Oliver cited with approval the following dicta of Carey, J.A.:

> "The practical effect of the appellant's procedure of a motion ... amounts to the same as if he had proceeded directly. This circuitous route which the appellant chose pales into insignificance and merges into the real issue which fell to be determined, namely, whether the appellant could prove fraud."

Though it cannot be said that the appellant in this case took a "circuitous route" the dicta of Carey, J.A. with that exception certainly applies to the circumstances of the instant case. For my part, given the "fresh step" taken by the respondent, and the nature of the contents of the affidavits which clearly indicate that the intention of the appellant was to call for a determination of matters which she would be entitled to by virtue of section 16 of the Married Women's Property Act, and which could be no different if the summons was in fact filed under that Act, I would conclude applying the dicta of Carey, J.A. in **Alele** (supra) that "the practical effect of the appellant's procedure" amounts to the same as if he had proceeded by way of the Married Women's Property Act. For those reasons, I

would order that the hearing of the summons proceed as if it were filed as an originating summons by virtue of section 16 of the Married Women's Property Act.

However, apart from asking for a declaration of the interest of the parties in the matrimonial home, the summons also prayed that the respondent be ordered to pay to the petitioner from the proceeds of the sale such lump sum as to the court may seem just by way of financial provision for the maintenance education and benefit of Kristina Elizabeth Goodison, the relevant child of the marriage.

On a preliminary objection also being taken in relation to this application, the learned trial judge ruled as follows:

> "With respect to the question of maintenance asked for in the Summons, rule 13 of the Matrimonial Causes Rules provides that where the Petitioner claims maintenance the Notice to Appear shall be in the form of Form 7A. Where however, maintenance is not applied for in the Petition itself, Rule 43 (3) states application should be in form of Form 21.
>
> In the claim before this Court, although maintenance is dealt with in the prayer, it was not dealt with in the Petition. Notice under Form 7A was not filed and Form 21 was never filed also. As a result, there was no opportunity given to the Respondent to file evidence of his means."

On that basis also, he dismissed the summons for ancillary relief.

Rule 13 of the Matrimonial Causes Rules states:

> "13. Where the petition claims maintenance on behalf of a wife, and

> or children, the notice to appear shall be in the form number 7A in Appendix 1, and shall require the husband to file evidence as to his means in accordance with Rule 47 and Form 22."

Rule 43 (3) of the Rules states:

> "(3) An application for ancillary relief not made in the petition or answer should be in Form 21 indicated in Appendix 1, Notice of an application for Ancillary Relief."

Form 7A is in the following form:

> "**FORM 7A**
>
> **And Further Take Notice** that should you not desire to be heard on this petition in regard to any relief claimed other than the claim for ancillary relief you are at liberty within eight days (or as the case may be) after service hereof upon you inclusive of the day of such service to enter an appearance in manner aforesaid to the said petition limited to that claim and that in default of your so doing, the Court will proceed to hear and determine such claim and may order payment of ancillary relief your absence notwithstanding.
>
> **And Further Take Notice** that in the event your entering an appearance to the said petition either generally or limited to the claim for ancillary relief you are required within fourteen days thereafter to file in the Registry an affidavit in pursuance of Rule 46 giving full particulars of your property and income.

Dated this day of 19

(Registrar)"

It is reasonably clear that the procedure adopted by the appellant, was not in respect of maintenance claimed in the Petition, as a separate summons for ancillary relief was filed, in accordance with the requirement of section 43(3). However, the application was not made as is required in Form 21 which states:

"**FORM 21**

NOTICE OF AN APPLICATION FOR ANCILLARY RELIEF (general form)

(Heading as in Form 2)

IN THE MATTER OF A PETITION by (full name) Petition (or Respondent) for a decree of dissolution of marriage

To: (full name) of

TAKE NOTICE that the petitioner (Respondent) intends to apply to the Court for an order that (here set out the relief being claimed).

AND FURTHER TAKE NOTICE that should you the said (full name) desire to be heard on the said application you are at liberty within eight (8) days (or as the case may be) after the service hereof upon you inclusive of the day of such service to enter an appearance to the said petition limited to the subject matter of the said application either in person or by your Attorney-at-Law at the Registry, Supreme Court, Kingston, and that in default of your

> doing so the court may proceed to hear the said application make such order thereon as it may think fit, your absence notwithstanding.
>
> **AND FURTHER TAKE NOTICE** that you are required within 14 days after entering an appearance to file in the Registry of the Supreme Court an Affidavit in pursuance of Rule 46 of the Matrimonial Causes Rules giving full particulars of your property and income."

It appears then that the learned judge was correct in concluding that the application for maintenance for, and in respect of the education of the child was not correctly before the court. The court does have power to make such orders by virtue of section 23 of the Matrimonial Causes Act. The application, however must be made by the correct procedure, which is geared at presenting as full a picture as possible to the court which is asked to make the order.

The appellant in this case sought to attach an order for maintenance and education of the child, to the application for the determination and realization of the interest of the parties in the matrimonial home. In my view such an order cannot be granted under the provision of section 16 of the Married Women's Property Act. The law as it now stands do not permit of this, and accordingly application for maintenance must be dealt with under the Matrimonial Causes Act. In any event, it appears that the relevant child has now exceeded the age, at which maintenance may be granted, and consequently no such order can now be made. Consequently, the summons for ancillary relief may be proved as an

originating summons only in respect of the orders sought in paragraphs 1-3, that is, those dealing with the parties' interest in the matrimonial home and the consequential orders sought.

In the event, I would allow the appeal, and vary the order of the court below so that the hearing of the summons as to paragraphs 1 - 3 may proceed as if it were filed as an originating summons by virtue of section 16 of the Married Women's Property Act. Having regard to the circumstances, I would make no order as to costs.

DOWNER JA

The issue to be decided on appeal is whether Reckord J was correct to have dismissed on a preliminary point, the summons for ancillary relief presented by the appellant Mary Goodison. Pending in the Supreme Court is a petition for dissolution of the marriage which as presented was the principal dispute between the parties. Be it noted however that Keith Goodison is not contesting that issue. His appearance to the petition is limited and it is convenient to set out the relevant limitations filed by his counsel:

> " ENTER AN APPEARANCE for KEITH MORTIMER GOODISON the Respondent in this cause limited to the claim made in the petition for the determination of the interest of the parties in the Matrimonial Home and to the claim made in the petition for maintenance of the Petitioner and the relevant child."

Perhaps it is instructive to quote the second paragraph in the prayer of the petition. It states :

> "2. That this Honourable Court determines the interest of the parties in the matrimonial home 8 Marley Close, Kingston 6 in the parish of Saint Andrew and makes such order for the sale and the distribution of the proceeds of sale thereof as shall be just. "

There were two reliefs prayed for in the summons for ancillary relief. The first seeks a declaration of interest in the matrimonial home and this is how that claim was averred:

> "1. A Declaration as to the respective interests of the Petitioner and the Respondent in the premises 8 Marley Close, Kingston 6 in the parish of Saint Andrew being the premises registered at Volume 1126 Folio 42 of the Register Book of Titles;

2. An Order that upon the determination of the interests of the parties in the aforesaid premises, being the matrimonial home, the premises be valued by a reputable valuator to be agreed upon by the parties and failing agreement to be appointed by the Court;

3. There be an Order for sale of the said premises and the proceeds of sale thereof be divided between the Petitioner and the Respondent in accordance with the determination aforesaid;"

The second claim was maintenance for the children of the marriage. It was stated thus:

4. That the Respondent be Ordered to pay to the Petitioner from the proceeds of sale of the aforementioned premises such lump sum as to the Court may seem just by way of financial provision for the maintenance, education and benefit of Kristina Elizabeth Goodison, the relevant child of the marriage.

5. Further or alternatively, that the Respondent be Ordered to pay to the Petitioner from the proceeds of sale of the aforementioned premises such lump sum as the Court may deem fit by way of financial provision for the past maintenance of the children of the marriage."

Here it is relevant to cite paragraph 18 of the respondent Keith Goodison's affidavit. It states:

"18. That I am informed and I verily believe that my legal obligations to maintain my children ends when they attain the age of 21 years unless they are infirm or ill and that Kareem has already attained that age and that Kristina will attain that age on 9th November 1994 but notwithstanding those facts, I am still willing to assist my children within my financial means."

This paragraph is readily understood when it is juxtaposed with paragraph 6 of the petition for divorce filed on behalf of the appellant Mary. In adverting to the relevant child of the marriage it states :

> ."6. The following are particulars of the relevant child of the marriage:
>
> KRISTINA ELIZABETH GOODISON
>
> Born - on the 9th day of November, 1973.
>
> Residing at 33A Norbrook Drive, Kingston 8 in the parish of Saint Andrew and Broward Community College, Florida in the United States of America
>
> Student of Broward Community College's School of Architecture."

So when the formal order was filed on 4th October 1994 embodying Reckord's J dismissal of the summons for ancillary relief, the relevant child was just a month short of her 21st birthday.

As will be adverted to later, even in the special circumstances of this case by virtue of section 25 of the Matrimonial Causes Act maintenance ceases at age twenty-one.

Summary procedure pursuant to section 16 of the Married Women's* Property *Act

As to the claim for declaration of interest in the matrimonial home, that is a claim to be decided by relevant principles of law and equity as expounded in **Pettitt v Pettitt** [1970] AC 77; **Gissing v Gissing** [1971] AC 886 which have been followed on numerous occasions by this court. Section 16 of the Married Women's Property Act provided an economical and expeditious procedure by summons or other summary

originating procedure as regards access to a judge of the Supreme Court. It states in part:

> "16. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society, as aforesaid in whose books any stocks, funds or shares of either party are standing, may apply by summons or otherwise in a summary way to a Judge of the Supreme Court or (at the option of the applicant irrespectively of the value of the property in dispute) to the Resident Magistrate of the parish in which either party resides; and the Judge of the Supreme Court or the Resident Magistrate, as the case may be, may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit:..."

However, Mr Piper in an interesting and novel submission, contended that section 10 of the Matrimonial Causes Act permitted an alternative procedure. The material part of that section states:

> "10.-(1) Without prejudice to any other powers of the Court, the Court may, upon application made by either party to the marriage whether or not an application has been made by either party for any other relief under this Act, grant an injunction or other order, as the case may be-
>
> (a) for the personal protection of a party to the marriage or of any relevant child;
>
> (b) restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides, or restraining in a specified area, being an area in which the matrimonial home is, or which is the location of the premises in which the other party to the marriage resides;
>
> (c) restraining a party to the marriage from

entering the place of work of the other party to the marriage or restraining a party to the marriage from entering the place of work or the place of education of any relevant child;

(d) in relation to the properly (sic) of a party to the marriage; or

(e) relating to the use or occupancy of the matrimonial home."[Emphasis supplied]

The submission cannot be supported. The section provides a remedy in personam and does not purport to resolve claims for rights of property. Subsection (d) must be so read. It provides protection to one of the parties to the marriage in relation to property owned by that party. It would have had an application in this case if it was alleged and proved that the respondent Keith Goodison was interfering with the appellant in her residence at Norbrook.

The Matrimonial Causes Rules and Forms bears this out. Even when the subject matter concerns property as in paragraph (1)(c), it relates to adjustments which suggests adjustments to settlements in relation to section 20 to 22 of the Act which relates to the powers of the Court to make certain financial provisions. The rules are as follows:

" ANCILLARY RELIEF

Application by petitioner or respondent for Ancillary relief.

(1) Any application by a petitioner, or by a respondent who files an answer claiming relief, for

(c) a property adjustments order,

shall be made in the petition or answer as the case may be.

(2) Notwithstanding anything in paragraph (1) an application for ancillary relief which should have been made in the petition or answer may be made

> subsequently, provided that no application shall be made later than one month after final decree except by leave of a judge.
>
> (3) An application for ancillary relief not made in the petition or answer should be in form 21 indicated Appendix 1, notice of an application for ancillary relief."

A property adjustment order is not in the same category as a claim for an interest in property such as the matrimonial home. Paragraph 45 of the Rules and the legislative reference to sections 20, 21 and 23 of the Act emphasises this.

Reckord J was therefore right to have dismissed both aspects of the claim for ancillary relief on a preliminary point. Since however the procedure was summary and the claim for interest in the matrimonial home could have been decided, then consideration could have been given to the issue of whether the summons could be severed and the valid part adjudicated on condition that the respondent be permitted to supplement his affidavit in these new circumstances. Also relevant is the claim envisaged in the respondent's affidavit for an interest in the Norbrook property which ought to have been supported by a summons. Such an approach could be justified by reliance on section 678 of the Civil Procedure Code. That such an approach was possible was raised by this court and it must be emphasised that it was not adverted to by either party when the matter was before Reckord J.

The Claim for Maintenance which ought to be severed

The claim for maintenance, as presented, is bound up with the claim for declaration of interest in the matrimonial home. It is another strange feature of this case that consideration does not seem to have been given to the imprudence of attempting to join in one application the summary procedure to claim for property

pursuant to the Married Women's Property Act and the ancillary proceedings pursuant to the Matrimonial Causes Act to claim maintenance for a relevant child.

While it is true that one summons may contain all the reliefs sought - see section 528 of the Civil Procedure Code - care must be taken in drafting the affidavit in support. The determination of property rights is one matter, the application for maintenance, if valid, is a different proposition altogether. Clarity suggests that the distinction be made clear if the claims are joined.

In substance, what the appellant Mary Goodison claims, is that after her rights to the matrimonial home has been vindicated, the matrimonial home should be sold and that part which would accrue to her husband, be made available to satisfy her "claims" for past and future maintenance of a relevant child of the marriage. Section 23(1) of the Matrimonial Causes Act makes provision for the maintenance and education of children. It reads as follows:

> "23(1) The Court may make such order as it thinks just for the custody, maintenance and education of any relevant child-
>
> (a) in any proceedings under section 10, or in any proceedings for dissolution or nullity of marriage before, by or after the final decree;

Then the important limitations are in subsection (2) which reads:

> "(2) The Court may, if it thinks fit, on granting any decree of dissolution or nullity of marriage or at any time thereafter (whether before or after the decree is made absolute) order the husband or the wife to secure for the benefit for the relevant children such gross sum of money or annual sum of money as the Court may deem reasonable, and the Court may for that purpose direct that the matter be referred to any attorney-at-law to settle and approve a proper deed or instrument to be executed by all necessary parties and may direct that the costs of such instrument be paid by the parties or such of them as it seems fit:

> Provided that the term for which any sum of money is secured for the benefit of a child shall not extend beyond the date when the child will attain the age of twenty-one years but where the child is unable to maintain himself by reason of an illness or infirmity which is likely to be permanent, such sum of money shall be secured for such period, as the Court may direct."

Then paragraph 13 of the Rules reads as follows:

> "(13) Whether petition claims miantenance on behalf of a wife and or children the notice to appear shall be in the form 7A in the appendix 1 and shall require the husband to file evidence of his means in accordance with Rule 47 and Form 22."

In summary, the relevant child is defined in section 25(a) of the Act and maintenance ceases at eighteen although there are exceptions indicated above which apply to those who are continuing their education. In such an instance, maintenance may continue up to twenty-one years.

Form 7A in the Rules shows the safeguards it gives to the respondent to declare his property and income so that the claims for maintenance will be fairly resolved. The relevant part of Form 7A reads:

> "And Further Take Notice that in the event your entering an appearance to the said petition either generally or limited to the claim for ancillary relief you are required within fourteen days thereafter to file in the Registry an affidavit in pursuance of Rule 46 giving full particulars of your property and income."

These essential requirements were ignored in the summons and in any event, to reiterate, the child does not seem to be relevant child within the intendment of the Act.

What ought to be done

Is it possible that anything can be saved having regard to the odd way in which these proceedings have been conducted by both parties?

Mr. DeLisser has certainly succeeded in demonstrating that the invalid claim for maintenance cannot be continued. But what of the summary procedure for the claims to property? What remains is the summary procedure with a claim for the matrimonial home at 8 Marley Close. In this regard Lord Templeman in what must be interpreted as a gloss on section 678 of the Civil Procedure Code, which emphasises the court's inherent power to control its procedure to serve the interests of justice, said in **Eldemire v Eldemire** Privy Council appeal No. 33 of 1989 delivered 23rd July 1990 :

> "In general the modern practice is to save expense without taking technical objection unless it is necessary to do so in order to produce fairness and clarification."

If severed, the summary procedure may be allowed to stand, by praying in aid section 678 of the Civil Procedure Code.

As reliance is on this section of the Code, it is pertinent to cite it. It reads:

> 678. Non-compliance with any of the provisions of this Law shall not render the proceedings in any action void unless the Court shall so direct; but such proceedings may be set aside either wholly or in part, as irregular, or amended or otherwise dealt with in such manner, and upon such terms, as the Court shall think fit."

The respondent ought be allowed to file a summons if he so desires, to vindicate his claim to an interest in Norbrook Drive, so that both summonses would be heard together. Be it noted that if the order below were to stand without variation, it would

be open to the respondent Keith to institute such proceedings if Mary reinstituted her claims in the appropriate manner. A variation of the order below would permit this to be done with some savings in costs and would avoid multiplicity of actions. So I would be prepared to vary the order to reflect the issues which ought to be clarified to produce fairness.

It is appropriate at this stage to refer to the respondent's claim for an interest in the Norbrook property. It was against the background of Mary's claim for her share in the matrimonial home. She supported her claim with an affidavit and exhibited a registered title which disclose that she is a joint tenant with the respondent Keith Goodison.

The parties had a joint account with a bank in Florida. Here is her version of how the account was operated:

> 9. That as a result of the Respondent's conduct and out of the fear that he would cease supporting our said children and thereby adversely affect their education I instructed the Northern Trust Bank of Florida N.A., at which Bank the Respondent and I held a joint account, to transfer the sum of US$60,000.00 therefrom and open an account in my name with our said children as beneficiaries. That the said sum of US$60,000.00 was approximately sixty per cent (60%) of the sum which stood to the credit of the said Joint Account. I exhibit herewith marked 'MEG 4' for identification a copy of my letter dated October 10, 1986 to the said Bank."

Keith's response was as follows:

> "20. That having regard to the fact that the Petitioner had withdrawn, on her own admission, SIXTY THOUSAND US DOLLARS ($US60,000.00) from our joint account she has forfeited her right to claim any share in the premises at 8 Marley Close, Kingston 6.
>
> 21. That in the alternative since the Petitioner has acquired during the marriage a townhouse at 33a

> Norbrook Drive where she resides both properties should be valued together and divided equally between us."

So it was clear to the respondent and his counsel that there was a live issue to be determined as regards Mary's claim for an interest in the matrimonial home. The implication is that the claim might be admitted but that there are two properties in issue and that he is claiming an interest in 33A Norbrook Drive which was acquired by the wife with their joint funds during the existence of the marriage. Yet there was only an outline of the evidence and there was no summons to support this claim!

The stage is now set to refer to the order below to ascertain how it ought to be varied on appeal. Its material part reads:

> "...IT IS HEREBY ORDERED THAT;
>
> 1. The Preliminary Objection is upheld as the procedure which was adopted by the Petitioner is wrong in law.
>
> 2. Summons dated 24th June, 1994 dismissed.
>
> 3. No order as to costs."

The orders that the preliminary objection was to be upheld and that there be no order as to costs, were certainly correct, but in accordance with section 628 of the Code it is appropriate in the circumstance of this case to allow that part of the summons claiming an interest in the matrimonial home to stand and to permit the respondent Keith to file a cross-summons and adduce further evidence if he so desires, to formalise his claim for a share in the Norbrook residence of his wife. Both summonses would be heard together as the matter is remitted to the Supreme Court. The order to dismiss the summons would be deleted. Further, having regard to the errors and omissions on both sides, there will be no order as to costs on this appeal.

PATTERSON, J.A. (Ag.):

I will add only a short word on the issues raised in this appeal, out of respect to the learned judge from whose judgment I am differing somewhat. The paramount question which falls to be decided is whether the procedure adopted by the appellant in bringing a 'summons for ancillary relief' in a pending cause filed for dissolution of marriage under the provisions of the Matrimonial Causes Act, 1989, is appropriate for the reliefs claimed. The relevant facts are these: The appellant instituted proceedings against her husband, the respondent, for a decree of dissolution of their marriage by filing a petition on the 1st June, 1994. In the prayer, the appellant sought that the marriage be dissolved and, in addition:

> '2. That this Honourable Court determines the interest of the parties in the matrimonial home 8 Marley Close, Kingston 6 in the parish of Saint Andrew and makes such order for the sale and the distribution of the proceeds of sale thereof as shall be just.
>
> 3. That this Honourable Court make such order for maintenance of the Petitioner and the relevant child and/or make such Financial Provision for the said child and/or the Petitioner as shall be just.
>
> 4. Further or alternatively, that there be such property adjustment order as having regard to the circumstances this Honourable Court deems just."

The respondent entered an appearance on the 14th June, 1994, 'limited to the claim made in the petition for the determination of the interest of the parties in the Matrimonial Home and to the claim made in the petition for maintenance of the

Petitioner and the relevant child." On the 24th June, 1994, the appellant filed the 'summons for ancillary relief', which basically sought the reliefs stated in the prayer to the petition, and which was supported by the relevant affidavit. The respondent filed an affidavit in reply. Thus, interlocutory proceedings were instituted in the pending cause relating to the interest of the parties in the matrimonial home, for its sale and a division of the proceeds of sale to satisfy not only the wife's interest but also a lump sum payment for the benefit of a child of the marriage. The summons reads as follows:

> "1. A Declaration as to the respective interests of the Petitioner and the Respondent in the premises 8 Marley Close, Kingston 6 in the parish of Saint Andrew being the premises registered at Volume 1126 Folio 42 of the Register Book of Titles;
>
> 2. An Order that upon the determination of the interests of the parties in the aforesaid premises, being the matrimonial home, the premises be valued by a reputable valuator to be agreed upon by the parties and failing agreement to be appointed by the Court;
>
> 3. There be an Order for sale of the said premises and the proceeds of sale thereof be divided between the Petitioner and the Respondent in accordance with the determination aforesaid;
>
> 4. That the Respondent be Ordered to pay to the Petitioner from the proceeds of sale of the aforementioned premises such lump sum as to the Court may seem just by way of financial provision for the maintenance, education and benefit of Kristina Elizabeth Goodison, the relevant child of the marriage.

> "5. Further or alternatively, that the Respondent be Ordered to pay to the Petitioner from the proceeds of sale of the aforementioned premises such lump sum as the Court may deem fit by way of financial provision for the past maintenance of the children of the marriage;
>
> 6. That the costs of and incidental to this application be the Petitioner's;
>
> 7. There be such further or other reliefs as to the Court may seem just.
>
> 8. Liberty to apply."

When the matter came up for hearing in Chambers before Reckord, J., Mr. DeLisser, who appeared for the respondent, took a preliminary point, objecting to the procedure adopted by the appellant in bringing the matter before the court. He contended that an interlocutory 'summons for ancillary relief' filed in a pending cause under the provisions of the Matrimonial Causes Act, 1989, was not an appropriate process for the reliefs sought. The appellant contended the procedure was permissible under the provisions of section 10(1)(d) of the Matrimonial Causes Act, 1989. The learned judge found merit in the respondent's contention, and accordingly, he upheld the objection and dismissed the summons.

Before us, the appellant submitted that the learned judge was wrong in law by holding that section 10(1)(d) of the Matrimonial Causes Act, 1989, did not give the court power to order the reliefs sought. The relevant part of that section reads as follows:

> "10. - (1) Without prejudice to any other powers of the Court, the Court may

> 'upon application made by either party to the marriage whether or not an application has been made by either party for any other relief under this Act, grant an injunction or other order, as the case may be -
>
> (a) for the personal protection of a party to the marriage or of any relevant child;
>
> (b) restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides, or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or which is the location of the premises in which the other party to the marriage resides;
>
> (c) restraining a party to the marriage from entering the place of work of the other party to the marriage or restraining a party to the marriage from entering the place of work or the place of education of any relevant child;
>
> (d) in relation to the property of a party to the marriage; or
>
> (e) relating to the use or occupancy of the matrimonial home."

The provisions of that section, in my view, do not contemplate an application for reliefs of the nature claimed. It seems clear that, generally speaking, the relief available to either party of the marriage, must be in relation to and for the protection of the person of either party and any relevant child, and in

relation to the property of either party and the use and occupancy of the matrimonial home. It is not uncommon for a party to a marriage that has gone awry to resort to harmful and destructive actions against the person and property of the other party, with quite disastrous consequences. It seems to me that the provisions of section 10 are aimed at the prevention and control of such actions by giving the court power to grant 'injunctions or other orders" in appropriate cases. Specifically, section 10(1)(d) does not give the court the wide power to grant the reliefs sought, as the appellant contends. In my view, it empowers the court to grant an injunction or other order in relation to the sole property of a party to the marriage. The word 'property" must be given its wide meaning of what is owned or possessed by a party to the marriage, be it realty or personalty, including money, goods, land and every description of property. The section does not provide for the determination of disputes between the husband and wife relating to their respective interest in or title to property, nor for its sale and the distribution of the proceeds of sale. In my judgment, the interlocutory 'summons for ancillary relief', in a pending cause, in the circumstances of this case, was not the appropriate process for instituting proceedings for the reliefs sought, and I agree with the conclusion of the learned judge that there was a procedural irregularity.

The learned judge thereupon dismissed the summons. But it does not appear that his attention was adverted to the effect of such an irregularity, and consequently that no proper consideration was given to that matter. He has wide powers under the provisions of the Judicature (Civil Procedure Code) Law, not

only to dismiss the proceedings but also to "set aside either wholly or in part...or amend or otherwise" deal with the matter in such manner and on such terms as he thinks fit (section 678). It is also plain that the learned judge may not have had in mind the provisions of section 679 of the aforesaid Act, which reads:

> "679. No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

I shall, therefore, proceed by considering whether, in all the circumstances, the learned judge was obliged to dismiss the summons as he did. It is quite clear that proceedings for the determination of property rights of the nature claimed may be commenced by summons pursuant to the provisions of section 16 of the Married Women's Property Act. By those provisions, either spouse "may apply by summons or otherwise in a summary way to a judge" to decide questions in dispute between them as to the title to or possession of property. In the instant case, the relief sought by the appellant's summons in respect to the property is couched in terms that would be appropriate for a summons under section 16 of the Married Women's Property Act and it is supported by the relevant affidavit. Had the appellant commenced the proceedings to decide the dispute in respect of the property in accordance with the provisions of that section, then the originating summons would have been properly couched in terms as it now is. The issues to be determined and the relief sought are clearly raised and set out in the summons and are supported by the accompanying affidavit. It must be taken that the

respondent had notice of the appellant's intention to apply for the reliefs sought from the time he was served with the petition for the dissolution of marriage, since the prayer to the petition makes it quite clear. As I have already pointed out, the respondent entered an appearance which was limited to the prayer for the property division and maintenance; he did not appear under protest as it was open for him to do. After the summons for ancillary relief, and the accompanying affidavit, were served on the respondent, he promptly filed an affidavit in reply and subsequently accepted service of a further affidavit of the appellant, all done without any protest to the irregularity.

There can be no doubt that apart from the question of procedure, the learned judge had jurisdiction under the Married Women's Property Act, on the material before him, to determine the dispute and order the reliefs sought in respect to the property, namely, the determination of the respective interest of the parties in the matrimonial home, an order for sale of the said premises and for the proceeds of sale thereof to be divided between the appellant and the respondent. The claim for "maintenance" was by way of a lump sum payment from the respondent's portion of the proceeds of sale, to be paid to the appellant for the benefit of a relevant child of the marriage who was born on the 9th November, 1973, and was, therefore, over the age of 18 years. In those circumstances, I am of the opinion that the learned judge would have no power under the provisions of the Matrimonial Causes Act to make a maintenance order or to grant the reliefs for

maintenance contained in paragraphs 4 and 5 of the summons, and there is no such power under the terms of section 16 of the Married Women's Property Act.

The case of ***Eldemire v. Eldemire*** Privy Council Appeal No. 33 of 1989 (unreported) (judgment delivered 23/7/90) seems to be helpful in the determination of this matter. In that case, an originating summons was used to institute proceedings that should have been commenced by writ. Lord Templeman, who delivered the opinion of the Board, said:

> "As a general rule, an originating summons is not an appropriate machinery for the resolution of disputed facts. The modern practice varies. Sometimes when disputed facts appear in an originating summons proceedings, the court will direct the deponents who have given conflicting evidence by affidavit to be examined and cross-examined orally and will then decide the disputed facts. Sometimes the court will direct that the originating summons proceedings be treated as if they were begun by writ and may direct that an affidavit by the applicant be treated as a statement of claim. Sometimes, in order to ensure that the issues are properly deployed, the court will dismiss the originating summons proceedings and leave the applicant to bring a fresh proceeding by writ. In general the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification."
>
> [Emphasis supplied]

In the instant case, no useful purpose can be served by commencing the matter de novo. Any order that could be made in such fresh proceedings under the

Married Women's Property Act can be made on this summons, and quite apart from the time that would be lost, each party would be placed at great expense without any real benefit if the matter is commenced afresh. Before the trial date, the irregularity was ignored. While I do not wish to encourage procedural irregularities, it is my opinion that, in the circumstances of this case, no injustice will be done and it would not be unfair to sever from the summons paragraphs 4 and 5 which in essence seek an impossible relief for 'maintenance" of a relevant child who is much too old for the court to grant such relief, and thereafter for the matter to be heard and determined on the summons as amended in like manner as a summons under section 16 of the Married Women's Property Act. As I have pointed out, a valid order for 'maintenance" cannot now be made, and, therefore, that issue does not arise for determination between the parties.

I would allow the appeal, set aside the order of the learned judge, and remit the summons to the court below with the order that the summons, as filed, be amended by deleting therefrom paragraphs numbered 4 and 5, and by renumbering paragraphs 6, 7 and 8 as 4, 5 and 6, and thereafter that the summons, as amended, be heard and determined at an early date. I would make no order as to costs.

FORTE, J.A.:

The appeal is allowed to the extent that the order of the court below is varied so that the hearing of the summons as to paragraphs 1-3 may proceed as if it were filed as an originating summons under section 16 of the Married Women's Property Act. There is no order as to costs.

C.A. Divorce Petition – Procedure – Application by wife for (i) determination of rights in and distribution of [illegible] property (2) maintenance brought under S10 Matrimonial Causes Act (MCA)

re (i) matrimonial property – whether should have been brought under S16 Married Women's Property Act – Procedure – whether [illegible] of procedure wrong could be saved by S 678/679 Civil Procedure Code – [illegible]

re (ii) Maintenance – whether matter properly before Court – non compliance with procedure/forms in Rules/Act

Appeal from Order of Recorder [illegible] dismissing summons on preliminary [illegible].

Held: (i) Procedure re matrimonial property under MCA wrong but saved by S678, 679 Civil Procedure Code (ii) wrong procedure in claim for maintenance. Order of Court below varied to allow application re property to proceed as if an originating summons under S16 of Married Women's Property Act.

Cases referred to

(1) Ward v Ward and Green [1980] 1 All ER 176.
(2) Robert Hornball and George Brown v Christian Adele P.C. [illegible] – 26/7/[illegible]
(3) [illegible] W. Eldemire v Arthur W Eldemire P.C. [illegible] 33/89, 13/90 – 25/1/90