decisions of the group in which *In Re Keen and Keen* supra falls, could well be construed as a mild disapproval, viz.,

> "In the former case it has sometimes been held that the clause was ineffective to achieve its aim and that the property remained in the builder, *at the mercy of his creditors and trustees in bankruptcy.*"

The underlined words cannot easily be construed as being part of an assenting opinion.

Dr. Barnett was able to suggest some 14 features of the contract in the instant case which rendered it similar to the agreement in *Re Keen and Keen* supra and he submitted that the use of the deeming provision is to indicate that at all times the ownership of the plant and materials rests with the builder (Thompson) but while on the site they were to be deemed to be the property of the land-owner.

Clause 53 (7) of the contract makes provision for the revesting of plant, goods or materials in the contractor where such plant etc have been removed from the site with the approval of the employer. This sub-clause also specifically provides for the revesting in the contractor of all surplus plant, goods or materials upon the completion of the works.

In none of the cases reviewed herein were there such precise revesting clauses as are to be found in the instant contract. True, the contractor is permitted to remove plant, etc. from the site during the currency of the contract and that permission may not be unreasonably withheld by the employer. But the occasion for removal only arises when the plant etc. are no longer immediately required for the purposes of the completion of the works. To underpin the relationship between the contractor and the employer, the contract goes on to provide that although the plant etc. on site are deemed to be the property of the employer, the contractor is entitled to their exclusive use while the contract is being timely performed. If indeed the property in the plant etc. did not pass to the employer all the provisions for revesting would be meaningless. Bingham, J., did not have a similar situation in *Re Keen and Keen ex parte Collins* supra and he was anxious that an employer should not be unjustly enriched at the expense of the contractor unless the contract contained the clearest words to produce that effect.

When the relevant clauses are read and construed together the only reasonable interpretation is that as a security for due performance of the contract, the machinery were vested in the Ministry and the Ministry thereby acquired possession and a special property in the machinery which was only determinable on revestment to the contractor in accordance with the terms of the contract. The contractor had divested himself of any power to deal with the machinery (whether by sale or hypothecation) in defeasance of the Ministry's rights and interest. By failing to disclose the ministry's interest the loan obtained from the bank was an obtaining by fraud. Accordingly, unless and until possession and property in the goods had been determined as provided by the contract, neither in conversion nor in detinue would an action be maintainable against the Ministry.

Thompson Construction Company Ltd. purported to pass the property in the two pieces of equipment in question to the respondents. This they had no power to do as at the time of the entry into the two bills of sale with the respondents, the property in the equipment had already been transferred to the appellants. I am of the opinion that the appellants were entitled to reject the demand of the respondents for the delivery of the machinery as the works had not been completed. The appellants were entitled under the contract to retain the machinery as security for the due completion of the works.

I would allow the appeal and enter judgement for the appellants with costs both here and in the court below to be agreed or taxed.

KERR, J.A.: I agree.

WHITE, J.A.: I agree.

LANCE MELBOURNE *v.* CHRISTINA WAN

[COURT OF APPEAL (Rowe, P., Carberry and White, JJ. A) May 17,18; July 4, 1984; February 22, 1985]

Limitation—Disability—Negligence—Action upon the case—Trespass—Whether action statute-barred—Limitation of Actions Act, s. 46—Limitation Act, 21 Ja. 1, c. 16.

The plaintiff's statement of claim was filed on April 1, 1982, and alleged negligence on the defendant's part arising out of an accident occurring on November 21, 1970. The defendant filed his defence denying negligence and alternatively pleading that the action was barred by the provisions of the Limitation of Actions Act.

At first instance it was held that the action was one of trespass upon the case, and as such was to have been brought within 6 years of the date of the act complained of, as per section 3 of the English Limitation Act of 1623, 2 James I, c. 16, which Act was expressly received by and incorporated in the Jamaican Limitations of Actions Act.

On appeal, it was contended that the action was one in trespass, and was within the meaning of section 7 of the English Limitation Act, which would entitle the plaintiff, as a person under disability to an extension under that section for the period of one year after he had ceased to be under disability.

Held: (i) That provisions of the English Act as received in Jamaican law did not specifically refer to the tort of negligence. However, the Jamaican Courts have over the years treated actions in negligence as actions upon the case to which the six year limitation period was applicable.

(ii) To maintain an action for trespass *vi et armis*, within the meaning of s. 7, the following tests must be applied :

i) If the injury were wilful and immediate, trespass alone would lie.
ii) If it were immediate, but not wilful, either trespass or case would lie.
iii) If it were not immediate, but only consequential, case alone would lie.
iv) If it were due to the negligence of the defendant's servants, case alone would lie against the defendant unless the harm followed upon or was comprised in his specific order to the servant, in which case trespass would lie against him, e.g. where he sits beside his servant while the latter is driving the master's gig.

Appeal dismissed.

Cases referred to:

(1) *Sharrod v. London and North Western Railway Co.* [1849] 4 Exch. 580; 154 E.R. 1345; 14 Jur. 23.
(2) *Martins Tours Ltd. v. Senta Gilmore* (1969) 11 J.L.R. 254.
(3) *Dawkins v. Lord Penrhyn* [1878] 4 App. Cas. 51; 48 L.J. Ch. 304; 39 L.T. 583.
(4) *Muir v. Morris* [1979] 28 W.I.R. 131; 17 J.L.R.
(5) *Letang v. Cooper* [1964] 2 All E.R. 929; [1965] 1 Q.B. 232; [1964] 3 W.L.R. 573.
(6) *Kruber v. Grzesiak* (1963) V.L.R. 621.

Appeal from judgement in the Supreme Court, (Orr, J.) in favour of the defendant that the plaintiff's action was statute-barred.

Hugh Small and *John Graham* for the appellant.

Carl Rattray, Q.C. and *John Vassell* for the respondent.

ROWE, P.: The statement of claim in this action served on the 24th November 1982, disclosed that Lance Melbourne was 10 years and 9 months old when he was injured in a motor vehicle accident along the Windward Road in the parish of Kingston on November

21, 1970; that he was rendered unconscious for nine days. That thereafter he was for a time totally unable to speak or to walk. That he suffered severe left cortical contusion, resulting in gross paralysis of the right upper and lower limbs with a right foot drop. Then there was sevre cerebral contusion resulting in:

(a) permanent brain damage
(b) liability to permanent post traumatic epilepsy
(c) extensive personality changes including marked and continuing tendencies to violent aggressive and anti-social behaviour
(d) inability to concentrate and greatly diminished attention span;
(e) inability to obtain remunerative employment.

That he has a permanent deformity of the right arm, right hand and right leg and his speech is permanently impaired. The statement of claim charges that at the time of the accident one Evan Burey was driving the motor car in which the appellant was a passenger as the servant or agent of the defendant/respondent Christine Wan.

On the 1st of April 1982 eleven years four months and nine days after the accident, the appellant filed an action alleging that on the 21st day of November 1970 Evan Burey "negligently drove the defendant's motor car . . . along Windward Road . . . that it collided with a light post, as a result of which the plaintiff, a passenger in the said vehicle, suffered injury and incurred expense". The statement of claim filed on the appellant's behalf on 24th November 1982 repeated the allegation of negligence on the part of the respondent's servant or agent and set out "particulars of negligence".

Within two weeks of the service of the statement of claim, a defence was filed denying negligence (the driver was trying to avoid another car that encroached on his side of the road) and setting up as a further and alternative ground of defence that the action was barred by virtue of the Limitation of Actions Act. If this latter defence was good in law, no useful purpose would be served in litigating the merits of the case and, as a consequence, the appellant sought and obtained the Court's leave to argue as a preliminary issue the point of law raised on the defence as to the applicability of the Limitation of Actions Act to the instant case. Orr J. held that on the pleadings the Act complained of was done by the servant or agent of the defendant and the action was therefore an action of trespass or the case and was statute barred. For three days we listened to arguments of Counsel for both parties and on July 4, we dismissed the appeal, promising them to give written reasons for our decision. To this task we now turn.

Prior, to the year 1728, a number of Statutes of England were "received" and acted upon in Jamaica as if they formed part of the Statute Law of Jamaica. On April 10 1728 an Act entitled "An Act for Granting a Revenue to His Majesty his heirs and successors for the support of the government of this Island and or reviving and perpetuating the Acts and Laws thereof "was passed by the Jamaican legislature which limited the automatic reception of the Laws and Statutes of England as part of the Law of Jamaica to "all such Laws and Statutes of England as were, prior to the commencement of 1 George II Cap. 1, esteemed, introduced, used, accepted, or received, as Laws in the Island save in so far as any such Laws or Statutes have been, or may be, repealed or amended by any Act of the Island."

The modern version of this declaration of automatic reception is to be found in section 14 of the Interpretation Act.

One such Statute of England which had been received into the Law of Jamaica was the Limitation of Actions Act of 1623, the full title of which was "An Act for the Limitation of Actions, and for the avoiding of such suits in law," 21 James I Cap. 16. Express statutory recognition of its reception is contained in section 46 of the Limitation of Actions Act which, in dealing with the requirement of writing to enable time to be extend·d in actions

of debt or upon the case grounded upon simple contract, declared that "the United Kingdom Statute 21 James I Cap. 16, . . . has been recognized and is now esteemed, used, accepted and received as one of the Statutes of this Island . . . ". Other sections of the Limitation of Actions Act reflect this acceptance and recognition: see sections 47, 49 and 53.

In 1881 the Jamaican legislature passed its own Limitation of Actions Statute. That was Law 12 of 1881 and was entitled "The Limitation of Actions (Land) Law." An earlier Statute Law 6 of 1873, the "Limitation of Actions (Crown)" was an Act for the General Quiet of subjects against all pretences of concealment whatsoever. Law 7 of 1888 amended the Limitation of Actions Law of 1881. A general revision of the Laws of Jamaica occurred in 1927 and a new Law, "The Prescription and Limitation of Actions Law" appeared as Chapter 390 with the long title, "A Law to Regulate Prescription and the Limitation of Actions with regard to Property." Part III of the Law dealt with Actions of Debt and Cases of Simple Contract. Section 52 had the marginal note (which summed up the effect of the section) which read:

> "In actions of debt or upon the case grounded upon simple contract, no acknowledgement or promise by words only to be deemed evidence of a new or continuing contract, unless such acknowledgment or promise be in writing."

No reference was made in that section to the Imperial Statute of 1623. However, section 47 of the Limitation of Actions Law Cap 395 of the Revised Laws of 1938 dealing with the same subject matter contained words expressly recognizing the Limitation Act of 1623, and these provisions and the other sections mentioned above have been repeated in all the later revisions of the Laws of Jamaica.

The present version of the Limitation of Actions Act is divided into four parts. Part I deals with limitation of actions in relation to land, Par II Crown Suits limitation, Part III with Boundaries and the fourth Part with limitations in relation to debt and contract.

Apparent on the face of the Statute, then, is the fact that the Limitation of Actions Act of Jamaica does not within its own four walls contain the detailed statutory provisions limiting the time within which actions in Tort may be bought. To find the applicable statutory provision for Jamaica in this regard one must have recourse to a Statute of the United Kingdom passed three hundred and sixty-two years ago. And it is fairly difficult to locate a copy of that Statute in any of the Libraries of Jamaica. As time continues to pass, the difficulty will increase.

Section 3 and 7 of the English Limitation Act of 1623, 21 James I Cap. 16 are relevant to the instant appeal and we will set them out hereunder:

> "3 And be it further enacted, that all actions of trespass quare clausum fregit, all actions of trespass, detinue, action sur trover, and replevin for taking aways of goods and cattle, all actions of account, and upon the case, other than such accounts as concern that trade of merchandize between merchant and merchant, their factors or servants, all actions of debt for arrears of rent and all actions of assault, menace, battery, wounding and imprisonment or any of them which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say)
>
> (2) The said actions upon the case (other than for slander) and the said actions for account and the said actions for trespass, debt, detinue and replevin for goods or cattle and the said action of trespass quare clausum fregit, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after:

(3) and the said actions of trespass, of assault, battery, wounding, imprisonment or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, and not after;

(4) and the said actions upon the case for words, within one year after the end of this present session of parliament, or within two years next after the words spoken and not after.

7. Provided nevertheless and be it further enacted that if any person or persons that is or shall be entitled to any such action of trespass, detinue, action sur torver, replevin, actions of accounts, actions of debts, actions of trespass for assault, menace, battery, wounding or imprisonment, *actions upon the case for words*, be or shall be at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, femme covert, non compos mentis, imprisoned or beyond the seas, then that such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as or before limited, after their coming to or being of full age, discover, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done."

No uniform period of limitation was prescribed for all forms of action. A distinction was drawn between "actions upon the case" on the one hand and "actions of trespass, assault, battery, wounding and imprisonment" on the other hand. In respect of actions upon the case the primary rule was that a six year period of limitations is created, whereas in assault the period was only four years. Actions upon the case was sub-divided into two groups, viz., "slander" and "other actions upon the case". For slander the limitation period was restricted to *two years* next after the words were spoken, as compared with six years for "other actions upon the case".

Statutes of limitations are said to be beneficial statutes and in the spirit of that philosophy the Act of 1623 made special provision enabling some persons who were under a legal disability to bring their actions outside of the limitation period but within a prescribed time after the removal of the disability. The disabilities referred to in section 7 of the 1623 Act are infancy, being a married woman, being of unsound mind, in prison or beyond the seas. However, the provisions of section 7 are enumerative and in them are set out the several causes of action in respect of which the disabilities would have the effect of enlarging time within which to file the specified actions. Remembering that a period of two years was the limitation relevant to slander and six years for other actions upon the case, one finds the curious provision in section 7, "actions upon the case for words" and no reference to "actions upon the case" generally contained in section 7. This raised the unanswerable argument expressio unius exclusio alterius.

Why was this omission made in respect of the other actions upon the case, except slander? The reason is lost in antiquity. Could there have been some error in the printing and promulgation of the statute? To so conclude would be to indulge in the most unhappy speculation.

Though we listened at length and were referred to several cases and learned authors as to the origin of the action for negligence and the distinction between trespass and case, in my view it is now too late to say that an action for negligence as a result of a motor vehicle accident on the public highway is not an action upon the case. All the authorities draw the distinction between trespass vi et armis, the direct injury and trespass upon the case, the indirect injury. Baron Parke in delivering judgement in *Sharrod v. London and North Western Railway Co.* [1849] Ex. Rep. 580 (154 E.R. 1345) said at p. 585:

"Now the law is well established on the one hand that whenever the injury done to the plaintiff results from the direct force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass; on the other, that if the act be that of the servant, and be negligent not willful, case is the only remedy against the master."

Professors Winfield and Goodhard writing in [1933] vol. 49 of the Law Quarterly Review at p. 359 in an article "Trespass and Negligence" set out at p. 366 in a neat fashion the distinction between trespass upon the case as it stood in the middle of the 19th century. They set out inter alia four propositions which have been renumbered:

"(a) If the injury were willful and immediate, trespass only would lie.

(b) If it were immediate, but not willful, either trespass or case would lie.

(c) If it were not immediate, but only consequential, case alone would lie.

(d) If it were due to the negligence of the defendant's servants, case alone would lie against the defendant unless the harm followed upon or was comprised in, his specific order to the servant in which case trespass would lie against him; e.g., where he sits beside his servant while the latter is driving the master's gig."

The pleadings in the instant case reveal that the action was founded in negligence, so said the endorsement on the writ, so said the statement of claim. Mr. Small lucidly argued that an action to recover compensation for injuries caused by a collision on the highway would have been maintainable as an action in trespass vi et armis on the analogy of the several decided cases in which the master being present in his carriage was held to be responsible to trespass for the driving of his servant which caused injury to one using the highway. This argument foundered on the lack of any factual basis for its support. There was absolutely no allegation in the statement of claim that the respondent was in the motor car at the time of the accident or that she gave any specific instructions to the driver of the motor car. Nor apparently was it possible to make such an allegation on the evidence known to the plaintiff.

The Jamaican courts have over the years treated actions for negligence as actions upon the case to which the six year period of limitation applies. *Martins Tours Ltd. v. Senta Gilmore* [1969] 11 J.L.R. proceeded on the basis that the six year limitation rule applied to a case of negligence, the issue there being whether although the writ was filed within the six year period, service outside that limit was defective and should be set aside. The court quoted with approval a passage from the judgement of Slesser, L.J., in *Dawkins v. Lord Penrhyn* [1938] 3 All E.R. 764 and in which there was a specific reference to the exception provisions of section 7 of the 1623 Limitations Act. Ten years after *Martin's Tours v. Gilmore* in giving the judgement in *Muir v. Morris* [1979] 28 W.I.R. 131 I said:

"On 9th March 1976 the respondent filed a writ of summons grounded in negligence alleging that the cause of action arose on March 1970. Actions on the case, (other than slander) were by the Imperial statute 21 Jac. 1 c. 16 s. 3 barred after six years. This statute is declared by s. 46 of the Limitation of Actions Act to be recognized and is now esteemed, used, accepted and received as one of the laws of this island. For no discernible reason the plaintiff delayed the commencement of his action until the very last day but one."

As the law now stands there is for Jamaica a rigid rule that actions for negligence must be brought within a period of six years from the time the cause of action arose and any failure so to do will render the action statute barred. Sections 3 and 7 of the 1622 Limitation Act were repealed in England by the Limitation Act 1939 (2 & 3 Geo 6 c. 21). A uniform limitation period of 6 years was prescribed for all actions founded on simple contract or on tort and that time could be extended, if the person against whom it was running was under a disability, to a date not exceeding one year from the date when the person ceased to be under disability (see sections 2 and 22 thereof). Modifications were made to the

Limitations Act of 1939 in England in 1954 and again in 1975 whereby new time limits were imposed for personal injury cases arising out of actions for negligence, nuisance or breach of duty. For these types of cases the time limit for bringing actions was reduced to three years with power to the court to disregard the time limit if it would be inequitable to prevent the actions from proceeding.

The Parliament of Jamaica has had previous opportunities to address itself to the necessity of providing a relevant time limit beyond which actions in tort ought not to be commenced in Jamaica. This is demonstrated by the earlier references herein to the occasions when the Limitation Act of 1882 has been amended. As far as I know it was not the fault of the appellant that an action was not brought in his name within time to obtain damages for his exceptionally severe injuries. No one protected him then and upon his coming of age, the law as it now stands has shut him out from ever raising the issue. This cannot be right. The Limitation of Actions Act ought to be amended as a matter of national priority to set an appropriate time limit in actions for tort and especially for personal injures and to give protection to those under disability by preserving their rights until a prescribed period has elapsed after the cessation of the disability.

CARBERRY, J.A.: I have had the opportunity of reading in draft the judgement of Rowe, P., (as he now is), setting out reasons for our dismissal of this appeal on the 4th July 1984.

I agree with his reasons and add a few words of my own out of deference to the arguments that were put before us, and by way of comment on the situation revealed in this case. The accident took place on the 21st November 1979, when the injured plaintiff, then a boy of 10 years old, was a passenger in a car, owned by the defendant Christina Wan and driven by Mr. Evan Burey; which crashed into a utility pole along the Windward Road. The plaintiff thereby received injures so severe that he will never recover from them for the balance of his life. The writ claiming damages for that injury was not filed until the 1st April 1982 nearly 12 years later. No explanation was ever offered before us to explain this delay though the course of the plaintiff for some eleven years of this period was an infant, and any action on his behalf would have had to be brought by "a next friend" i.e, parent or guardian.

Rowe, P., has commented on the hardship that has thus befallen the plaintiff in having his action statute barred, possibly through no fault of his own. It is however as well to bear in mind that there were also hardships that might have befallen the defendant had the action not been statute barred. In *Letang v .Cooper* (1964) 1 All E.R. 929; (1965) 1 Q.B. 232, Diplock, L.J., (as he then was) remarked at p. 936 c:

> "The mischief against which all limitation Acts are directed is delay in commencing legal proceedings; for delay may lead to injustice, particularly where the ascertainment of the relevant facts depends on oral testimony. This mischief the only mischief against which the section is directed, is the same in all actions in which damages are claimed in respect of personal injuries."

In this case, the defence alleged that the driver struck the utility pole in trying to avoid a car that came out suddenly onto his side of the road. There is no suggestion that the defendant was present in the car at the time of the accident. The defence would rest entirely on the availability or otherwise of the driver, and any chance of recourse against the car alleged to have been the real cause of the accident would long ago have died. The plaintiff also considering his handicaps due to the injuries he received, may of course have been similarly placed. It may not be inappropriate to remember that in England the various motor vehicle insurance companies have united in setting up a fund available for ex-gratia payments to persons injured in motor vehicle accidents for which no one is legally to blame.

As has been indicated by Rowe, P. we in Jamaica are still affected by the English Statute of Limitations of 1623, 21 James I.C. 16. It is a statute "received" into our own Statute of Limitations: see sections 46, 47, 49 and 53. What has happened in the past is that we have from time to time reenacted in Jamaica various Limitation of Actions statutes passed in England, dealing with real property, mercantile law, etcetera, but have failed to keep up to date, and in particular to adopt legislation comparable to the English Limitation Act of 1929 or the Law Reform (Limitation of Actions & C) Act, 1954.

The consequence of this is that in 1984 the argument before us became one as to which was the appropriate form of action available to the plaintiff, trespass or case? Could the plaintiff bring his action as one of *trespass* so as to get the benefit of an extension due to disability, which applied to trespass but not to case? In construing this statute we were dealing with English law at a period in which the forms of action themselves had not fully developed, and which antedated by several hundred years the emergence of negligence as an independent tort. Professor Maitland in the latter part of the nineteenth century, even after the passage of the Common Law Procedure Act, remarked "the forms of action we have buried but they still rule us from their graves". In construing the act of 1623 this was alas true and it was unavoidable. In my opinion the plaintiff's action in this case was on the authorities, correctly construed as an action on the case. To take a second quotation from the judgement of Baron Park in *Sharrod v. London and North Western Railway Co.* (1849) 4 Exch 580; (154 E.R. 1345) at p. 586:

> "Our opinion is that in all cases where a master gives the direction and control over a carriage or animal, or chattel, to another rational agent *the master is only responsible in an action on the case, for want of skill or care of the agent*—no more; consequently, this action (of trespass) cannot be supported" (emphasis supplied)

Baron Parke had remarked earlier:

> "Trespass will not lie against him . . . unless . . . the act was done 'by his command', that is, unless either the particular act which constitutes the trespass is ordered to be done, by the principal, or some fact which comprises it; or some act which leads by a physical necessity to the act complained of . . ."

There was of course no suggestion of this in the statement of claim, nor was the plaintiff in any position to make such an allegation.

One further word: Rowe, P., in his judgement has remarked of the 1623 Act that "no uniform period of limitation was prescribed for all forms of action". Our own law Reform Committee, as long ago as 1966 under the chairmanship of the then attorney general and Minister of Justice, the late V.B. Grant Q.C. devoted a considerable period of time to consideration of our own Limitation of Actions act and the English Act of 1939 and went so far as to submit recommendations for the enactment of a new statute of limitations based on the 1939 Act. That no further action has been taken on it since then is a matter for some regret. It might be noted that the amendment to the 1939 Act made in England in 1954, to cut down the period of limitation for bringing personal injury actions from six years to three years, has led on occasion to attempts to revive the forms of action and plaintiffs in negligence actions, barred by the three year period, have attempted to present their case as a case of trespass, to which the six year period still applied. The courts have been faced with a problem similar to that raised in our instant case, but have found it possible to so interpret the new wording of the Limitation of Actions Act as to defeat the attempt to evade it, see *Kruber v. Crzesiak* (1963) V.L.R. 621 (an Australian case on a similar statute) followed by the Court of Appeal in England in *Letang v. Cooper* (1964) 2 all E.R. 929; (1965) 1 Q.B. 232; a case in which a lady sunbathing in Cornwall on a piece of grass where cars parked, was run over by a driver parking his Jaguar motor car who did not expect or

see her. She brought her action more than three years after the accident and argued that she was suing in trespass to which a six year limitation applied. The attempt to evade the limitation period did not succeed. The court there was able to avoid the invitation to go back to the old forms of action, and Lord Denning M.R. found himself able to say "the truth is that the distinction between trespass and case is obsolete. We have a different division altogether."

For the reasons given by Rowe, P., and above, the courts in Jamaica are not able to ignore that distinction in these cases and the need to revise our Statute of Limitations and to bring it into the twentieth century remains a current problem for our legislature though whether we update it to 1939 or to 1954 must be a matter for their anxious consideration.

WHITE, J.A.: I am in total agreement with the reasoning expressed by both Roee, P., and Carberry J.A. in this case. I share their sentiments. It is indeed lamentable that in this day and age the law should be in this sorry state. And I join in expressing the hope that Parliament will speedily amend the law.

THE COMMISSIONER OF INCOME TAX *v.* CHELSEA RENT-A-CAR LIMITED

[COURT OF APPEAL (Kerr, White and Campbell, JJ.A.) July 9-11, 1984 and February 28, 1985]

Revenue Law—Income Tax—Meaning of trade vehicle—Rental of cars—Carriage of the public—Income Tax Act, First Schedule Part III, 6 (2) (b).

The respondent was in the business of renting passenger motor vehicles "with or without drivers". The appellant assessed the respondent to tax for the year 1975 without the grant of capital allowance on its motor vehicles. The refusal was made on the basis that the motor vehicles did not fall within the meaning of "trade vehicle" in the Income Tax Act, First Schedule Part III paragraph 6 (2) (b). This provided that no capital allowance was applicable in respect of motor vehicles unless the vehicle is a "trade vehicle" as defined in sub-paragraphs 6 (2) (a) to 6 (2) (d) including vehicles used "wholly or mainly for the carriage of members of the public at large . . ."

The respondent appealed to the Revenue Court contending that its vehicles were hired for the carriage of members of the public. The Judge of the Revenue Court upheld this submission, finding that the vehicles were used for carriage of the public at large and that the rental system was merely a question of methodology. From this judgment, the appellant appealed to the Court of Appeal.

Held: (i) that there was no evidence that the respondent was engaged in the business of carriage of members of the public at large as distinct from operating a car rental business.

(ii) that the "public" must include anyone who brings his money and applies in due form;

(iii) that the offer of hire of the respondent's vehicles is limited to drivers who satisfied the respondent's conditions;

(iv) that there is a reasonable inference that the origin of paragraph 6 (2) was section 16 (3) of the U.K. Finance Act 1954 and that the legislators were aware of case law interpreting that section. Thus, the omission of the words "or hire to" from paragraph 6 (2) (b) manifested a deliberate act of policy to exclude motor vehicles used for hiring to the public.

(v) It is the respondent who has to show that it clearly falls within the exemption claimed.

Appeal allowed.

Cases referred to:

(1) *In Re South of England National Gas and Petroleum Company Limited* [1911] 1 Ch.D. 573; 80 L.J. Ch. 358; 104 L.T. 378.

(2) *Nash v. Lynde* (1929] A.C. 158; 98 L.J.K.B. 127; 140 L.T. 146.

(3) *Bourne v. Auto School of Motoring (Norwich) Ltd; Frazer v. Trebilcock (trading as Vernons School of Motoring); Coghlin v. Tobin (trading as Thanet School of Motoring)* (1964) 42 Tax Cas. 217.

(4) *Maughan v. Free Church of Scotland* (1893) 3 Tax Cas. 207; 28 Digest (Reissue) 20.

Appeal to the Court of Appeal against the judgment of the Revenue Court that the rental of cars is carriage of members of the public within the meaning of the Income Tax Act First Schedule Part III paragraph 6(2)(b).

H. A. Hamilton and *W. Alder* for the appellant.
Enos Grant for the respondent.

CAMPBELL, J.A.: The respondent was incorporated with a detailed and elaborate objects clause containing objects, some repetitive, spanning almost the entire spectrum of economic activities. These objects included inter alia the following which have relevance to this appeal, namely:

"3a.(1) To carry on all or any of the business of . . . carriers of goods and passengers by road.

(2) To own, use and licence others to use a plan or system for conducting the business of renting passenger motor vehicles with or without drivers.

(3) To carry on the business of renting passenger vehicles with or without drivers.

4. To carry on the business of taxicab, omnibus, motor car, lorry and other public and private conveyance proprietors."

The above objects clause concluded with an express declaration that each object was to be construed independently of the others and was not to be deemed subsidiary to any other object. The respondent however admitted that despite the wide range of its objects, it was at the time material to this appeal, pursuing only the business of "renting passenger vehicles with or without drivers". It was asserted by the respondent and conceded by the appellant that in the course of and for purposes of this business it had acquired 67 motor vehicles. Thus far, both parties are in agreement.

The respondent was assessed to tax in the 1975 year of assessment on a chargeable income of $60,053.00 without the grant of capital allowance described as initial allowance on the motor vehicles. In denying the respondent the capital allowance, the view of the appellant was that the motor vehicles did not qualify for this capital allowance because they did not fall within the meaning and intendment of the term "trade vehicle" as used in paragraph 6 (2) (b) of Part III of the First Schedule to the Income Tax Act. Part III of the First Schedule to the Income Tax Act is so far as is relevant hereunder: