IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 2/90

COR: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

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| BETWEEN | HELEN MALCOLM-RILEY | PLAINTIFF/APPELLANT |
| A N D | DEMPSTER LLOYD RILEY | DEFENDANT/RESPONDENT |

R.D. Codlin & Alexander Williams for Appellant

Crafton Miller & Miss Nancy Anderson for Respondent

26th November, 1990

ROWE, P.: [Oral Judgment Faired 11. 9. 91]

This is an appeal from the judgment of Morris, J. (Ag.) whereby he dismissed with costs the originating summons brought by the appellant seeking declarations that:-

> "(a) On a true construction of the judgment of the Circuit Court of the 11th Judicial District, Dade County, Florida, in the United States of America dated the 2nd day of November, 1984 the sum of U.S. $100.00 per week payable to the plaintiff by the defendant constitute a debt so payable and the plaintiff is entitled to recover same, and -
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> (b) The amount outstanding as of the 30th June, 1989 is $24,000 U.S. currency, and an order that the defendant pay over to the plaintiff the equivalent of United States Dollars $24,000.00."

The grounds of appeal filed by the appellant complained that:-

> "(1) The trial judge fell into error when he held that the Court had no jurisdiction to hear the originating summons; and
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> (2) That there having been no hearing on the merits the trial judge erred in stating in his judgment:
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> > 'That submission is based on a misconception as this is a question of substantive law and not procedural law;' and

> (3) That the filing of unconditional appearance by the defendant and taking steps pursuant to the prosecution of the suit amounted to a submission to the jurisdiction of the Court."

A final judgment of dissolution of marriage - case No. 84-26140 F.C. 06 was entered in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, Family Division, on 2nd November, 1984 with Helen Malcolm-Riley as Wife/Petitioner and Dempster Riley as Husband/Respondent. In paragraph 3 of that "Final judgment of Dissolution of Marriage" the Husband/Respondent was ordered to pay to the Wife/Petitioner for the support and maintenance of Karen Riley, the minor child of the parties, the sum of $100 per week beginning seven days from the date of the order. Paragraph 5 of that same judgment recited that:-

> "The Court retains jurisdiction of this cause to determine the issue of visitation as it might arise and to enforce or modify the terms of this Final Judgment as may from time to time become necessary."

Mr. Codlin submitted that this is a foreign judgment which may be enforced in Jamaica if four conditions were met, viz.:-

> (i) The judgment debtor must be in Jamaica at the time when the judgment is sought to be enforced;
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> (ii) At the time when the judgment is sought to be enforced in Jamaica it must be enforceable by the lex loci;
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> (iii) If the judgment relates to money the amount must be ascertained or be ascertainable; and
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> (iv) There must be evidence of the validity of the judgment in the lex loci.

These four conditions, he said, were met in the instant case and relied on the affidavit of Jack L. Weitzman, an attorney-at-law with offices in Miami, Florida, United States of America as also on **Beatty v. Beatty** [1924] All E.R. Reprint 314 in support of his submissions.

It was common ground that a maintenance order made in Jamaica cannot be enforced as a debt but only by the special statutory provisions of the Maintenance Act. It was also common ground that under

the Maintenance Orders (Facilities for Enforcement) Act 1987, maintenance orders made in specified foreign judicial jurisdictions could be enforced under the special statutory provisions of that Act. The Maintenance Orders (Declaration of Reciprocating States) Orders do not apply to the State of Florida, U.S.A.

In a note on p. 837 of **Rayden & Jackson** on Divorce, 15th edition the learned authors say:-

> "There was no right to alimony at common law: **Bailey v. Bailey** [1884] 13 Q.B.D. 855 at 859, and in accordance with the principle that where new rights are given with specific remedies, the remedy is confined to those specifically given an order of the Family Division, of which the jurisdiction is purely statutory, must be enforced by the methods prescribed in the Matrimonial Causes Rules (**Ivimey v. Ivimey** [1908] 2 K.B. 260) and not otherwise."

This was the view expressed by Bankes, L.J. in **Beatty v. Beatty** (supra) at p. 316:-

> " By the law of this country, an order for payment of alimony can be varied at anytime at the discretion of the Court which made it, not only with regard to future payments, but also with regard to past instalments which have accrued due. For this reason, Grove, J. refused to allow judgment to be signed for arrears of alimony under Order 14 in **Bailey v. Bailey**."

**Beatty v. Beatty** was decided upon the basis of the expert evidence of an American lawyer together with the powerfully persuasive authority of a decision of the Supreme Court of the United States in **Sistare v. Sistare** [1910] 218 U.S.1, that, by the law of the State of New York, it is not permissible for the Court to interfere with accrued instalments of alimony, though it may vary its order with respect to future claims.

With the greatest of respect to the arguments of Mr. Codlin, the affidavit of Mr. Jack Weitzman is vague, it does not refer to any specific State of the United States, in particular it does not refer to the State of Florida, it does not state in what sense the judgment is final, and does not say whether or not having regard to the terms of the judgment and the law of the State of Florida a Court in Florida has the power to vary a maintenance order in respect of accrued instalments.

We find the affidavit defective and unhelpful.

Notwithstanding the decision of the Privy Council in **Eldemire v. Eldemire** P.C. Appeal 33/89, we do not consider that proceeding by originating summons was the appropriate process for what is in substance the enforcement of a judgment. The action should have been begun by writ. However, following the decision in **Eldemire v. Eldemire** (supra), we are of the view that the learned trial judge ought not to have dismissed the summons but ought to have treated the originating summons as a statement of claim and to have given directions for the continuation of the action.

We are not prepared to accept the invitation of counsel for the appellant to hear further evidence and to dispose of the case in this Court. We allow the appeal, set aside the judgment in the Court below and remit the case to the Supreme Court for a hearing. Costs to the appellant both here and in the Court below to be agreed or taxed.

Before parting with the appeal, we make the comment that it is unfortunate that a matter touching the maintenance of a child should be part of contentious proceedings.