JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL No. 18/1973

BEFORE: The Hon. Mr. Justice Luckhoo, J.A. (Presiding).
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Robinson, J.A.

VINCENT PATTERSON & CHARLES NICELY - DEFENDANTS/APPELLANTS

vs.

SAMUEL LYNCH - PLAINTIFF/RESPONDENT

Mrs. S. Playfair and Carl Dundas for the appellants.

W. Bentley Brown for the respondent.

July 26, November 30, 1973

LUCKHOO, J.A.:

When this appeal was called on for hearing Mr. Bentley Brown for the respondent submitted in limine that it was not competent for the Court to hear the appeal there having been deposited in the resident magistrate's court for the parish of St. Andrew on the part of the two appellants at the time of lodging the appeal on May 17, 1972, the sum of one dollar only as security for the due prosecution of the appeal whereas under the provisions of s.256 of the Judicature (Resident Magistrates) Law, Cap. 179 the sum of two dollars was required to be deposited in that regard.

Mrs. Playfair for the appellants, while conceding that the provisions of s.256 of Cap. 179 required the deposit by the appellants of two dollars as security for the due prosecution of the appeal at the time the appeal was lodged, contended that it was nevertheless competent for the Court by virtue of the provisions of s.266 of Cap. 179 to admit the appellants to impeach the judgment of the learned resident magistrate, the deposit required by s.256 to be made as security for the due prosecution of the appeal being a formality prescribed by that section of the Law, the omission on the part of the appellants to deposit the full amount at the time of lodging the appeal having arisen from inadvertence on their part, and the justice of the case appearing to require that the appellants be allowed to impeach the resident

magistrate's judgment. We were informed by Mrs. Playfair that the remaining sum of one dollar was deposited in the resident magistrate's court for the parish of St. Andrew on July 4, 1973. Section 256 of the Judicature (Resident Magistrates) Law, Cap. 179 provides as follows:-

> "The appeal may be taken and minuted in open Court at the time of pronouncing judgment, but if not so taken then a written notice of appeal shall be lodged with the Clerk of the Court, and a copy of it shall be served upon the opposite party personally, or at his place of dwelling or upon his solicitor, within fourteen days after the date of the judgment; and the party appealing shall, at the time of taking or lodging the appeal, deposit in the Court the sum of one dollar as security for the due prosecution of the appeal, and shall further within fourteen days after the taking or lodging of the appeal give security, to the extent of twenty-four dollars for the payment of any costs that may be awarded against the appellant, and for the due and faithful performance of the judgment and orders of the Court of Appeal.
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> Such last-mentioned security shall be given either by deposit of money in the Court, or by the party appealing entering into a bond, with two sureties to be approved by the respondent, or, in case of dispute, by the Clerk of the Court with an appeal to the Magistrate. No stamp duty shall be payable on such bond.
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> There shall be no stay of proceedings on any judgment except upon payment into Court of the whole sum, if any, found by the judgment, and costs if any, or unless the Magistrate, on cause shown, shall see fit to order a stay of proceedings.
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> On the appellant complying with the foregoing requirements, the Magistrate shall draw up, for the information of the Court of Appeal, a statement of his reasons for the judgment, decree, or order appealed against.
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> Such statement shall be lodged with the Clerk of the Court, who shall give notice thereof to the parties, and allow them to peruse and keep a copy of the same.
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> The appellant shall, within twenty-one days after the day on which he received such notice as aforesaid, draw up and serve on the respondent, and file with the Clerk of the Court, the grounds of appeal, and on his failure to do so his right to appeal shall, subject to the provisions of section 266 of this Law, cease and determine.
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> If the appellant after giving notice of appeal and giving security as aforesaid, fails duly to prosecute the appeal, he shall forfeit as a court fee the sum of one dollar deposited as aforesaid.

If he appears in person or by counsel before the Court of Appeal in support of his appeal, he shall be entitled to a return of the said sum of one dollar, whatever may be the event of the appeal."

Section 266 of that Law provides as follows:-

"The provisions of this Law conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such right; and in case any of the formalities prescribed by this Law shall have been inadvertently, or from ignorance or necessity omitted to be observed it shall be lawful for the Court of Appeal, if it appear that such omission has arisen from inadvertence, ignorance, or necessity, and if the justice of the case shall appear to so require, with or without terms, to admit the appellant to impeach the judgment, order or proceedings appealed from."

The question for our determination in limine is whether the giving of security for the due prosecution of an appeal is a formality within the contemplation of s.266 of Cap. 179. That question was raised in Christian v. Brown R.M.C.A. No. 46 of 1972 (unreported) and answered in the negative by the Court on February 2, 1973, acting by analogy with Welds v. Montego Bay Ice Co., Ltd., and Smith (1962) 5 W.I.R. 56, also a decision of the Court, where it was held that the giving of security for costs in accordance with s.256 of Cap. 179 was a condition precedent to the founding of the jurisdiction of the Court of Appeal and that there was no power to treat it as a formality under s.266 of Cap. 179. The Court in Christian v. Brown said:-

"The answer to that question seems to lay in the case of Welds v. Montego Bay Ice Co., Ltd., and Smith which is to be found at p.56 of 5 W.I.R. It is only necessary to refer to the head note to that case in order to arrive at the principle upon which it was decided:

'On a preliminary objection being taken by counsel for the respondent that a condition precedent to establish the jurisdiction of the court had not been complied with in that, there being two appellants, security for costs had only been given for one sum of £10, instead of for two such sums as required by the provisions of s. 256 of the Judicature (Resident Magistrates) Law, Cap. 179 /J./ - HELD:

(i) that s. 11 (2) of the Judicature (Appellate Jurisdiction) Law, 1962 /J./, only gave the court power to extend the time for giving notice of appeal and filing grounds of appeal. The giving of security

for costs in accordance with the provisions of s.256 of the Judicature (Resident Magistrates) Law, Cap. 179 [J.], was still a condition precedent to the founding of the jurisdiction of the court and there was no power to treat it as a formality under s.266 of the said law;

(ii) that s.256 of the said law expressly required "the party appealing" to give security and as there were two parties appealing the security was required to be given by each party.'

The principle in that case would apply to the instant case. It seems to us, therefore, that this particular omission cannot be treated as a formality."

The Court then went on to refer to s. 11 (2) of the Judicature (Appellate Jurisdiction) Law, 1962 (No. 15) in its original form and to that section as repealed and re-enacted by the Judicature (Appellate Jurisdiction) (Amendment) Act, 1970 (No. 12), the former empowering the Court to extend the time within which notice of appeal may be given or the grounds of appeal may be filed and the latter amplifying the powers of the Court to enable the Court to grant an extension of time within which security for the costs of an appeal and for the due and faithful performance of the judgment and orders of the Court may be furnished. The Court took the view that the absence of any provision in the amending Act of 1970 empowering the Court to extend the time within which security for the due prosecution of an appeal may be deposited might have been an omission on the part of the Legislature which omission ought to be remedied. In the result the Court declined to allow the appellant to impeach the judgment in respect of which that appeal was brought.

Mrs. Playfair has attracted our attention to the case of Aarons v. Lindo (1953) 6 J.L.R. 205 where precisely the same question was raised before the then Court of Appeal of Jamaica and answered by that Court in the affirmative. No reasons were given by that Court for so holding. It is conceded that the decisions of that Court - a court of co-ordinate jurisdiction - do not bind this Court though they are of course entitled to great respect. In a short oral judgment O'Connor, C.J. (speaking also on behalf of Cluer and MacGregor, JJ.) said:-

"We are of the opinion that the requirement that the payment of the sum of ten shillings shall be made at the same time of the lodging of the appeal is a formality and that this Court has power under s.269 to allow the appeal to be heard.

> In the circumstances of the case, we are of opinion that the appellant should be allowed to proceed with his appeal."

Section 269 of the Resident Magistrates Law, Cap. 432 (1938 Edition of the Laws of Jamaica) appears as s. 266 of Cap. 179 (1953 Renewed Edition of the Laws of Jamaica). The view of the Court of Appeal in Aarons v. Lindo was not brought to the attention of the Court in Christian v. Brown and was not adverted to in the judgment of Welds v. Montego Bay Ice Co., Ltd., and Smith (which formed the basis of the decision in Christian v. Brown). It also does not appear that the Court in Christian v. Brown was referred to Rochester v. Chin and Matthews (1961) 4 W.I.R. 40 where the former Court of Appeal (at p.40) in holding that the giving of notice of appeal to a respondent is not a formality referred to Aarons v. Lindo without dissent in observing that the provisions of s.266 of Cap. 179 have been applied "in all cases where the omissions have been shown to be formalities, e.g. when the sum of ten shillings to be deposited as security for the due prosecution of the appeal was not deposited at the time of taking or lodging the appeal, but some two days later; see Aarons v. Lindo."

It would appear that at least since Aarons v. Lindo was decided in 1953 such a requirement has been treated by the Court of Appeal as a formality. However, the Court in Christian v. Brown took the view that the judgment of the Court in Welds v. Montego Bay Ice Co. Ltd. and Smith in effect should lead to a different conclusion. The pith of the judgment in Welds' case is to be found in the following passage which appears at page 58 (5 W.I.R.) -

> "We have carefully examined the previous decisions of the court, which were reviewed in Rochester v. Chin and Matthews, and also the consequential statutory amendments, and we have come to the conclusion that s. 11 (2) of Law 15 of 1962 only gives the Court power to extend the time for giving notice of appeal and filing grounds of appeal. The giving of security for costs in accordance with the provisions of s.256 of Cap. 179 is still a condition precedent to the founding of the jurisdiction of the Court and there is no power to treat it as a formality under s. 266."

It was as a result of the decision in that case that s.11 (2) of the Judicature (Appellate Jurisdiction) Law, 1962 was amended by s.17 of the Judicature (Appellate Jurisdiction) (Amendment) Law, 1965 (No. 33) to empower the Court to extend the time within which security for the costs of an appeal

may be given. Then five years later as already mentioned s.3 of the Judicature (Appellate Jurisdiction) (Amendment) Act, 1970 repealed and re-enacted s.11(2) of the principal Act. The Court was thereby additionally empowered to extend the time within which:

(i) notice of appeal may be served;
(ii) grounds of appeal may be served.

In my view the omission in both of the amending Acts of a provision empowering the Court to extend the time within which security for the due prosecution of appeal may be furnished was not an oversight on the part of the Legislature as the Court in Christian v. Brown thought it was but rather a recognition of the ruling given by the former Court of Appeal in Aarons v. Lindo which as that Court in Rochester v. Chin and Matthews observed was thereafter acted upon. However that may be it cannot affect the proper interpretation to be put upon the provisions of ss. 256, 266 of Cap. 179 should it be considered that the ruling in Aarons v. Lindo was wrong.

At first sight support for Mrs. Playfair's contention would appear to come not only from Aarons v. Lindo and the observation of the former Court of Appeal in Rochester v. Chin and Matthews but also from the fact that it is provided by s. 256 of Cap. 179 itself, that the appellant in the event of his appearance in person or by his legal representative before the Court in support of his appeal shall be entitled to a return of the amount deposited as security for the due prosecution of the appeal whatever may be the result of the appeal. However, it is necessary to consider what consequences would flow should there be a failure to make the required deposit. It is only upon the requirements mentioned in the first paragraph of s. 256 being complied with, and these include the deposit of the sum of one dollar by each party appealing, that the trial magistrate is obliged to draw up for the information of the Court of Appeal a statement of his reasons for the judgment, decision, or order appealed against. Thereafter such statement must be lodged with the clerk of court who is required to give notice thereof to the parties. The next step in the proceedings is that the appellant is required within 21 days after the day he receives such notice to draw up and serve on the respondent and file with the clerk of the court the grounds of appeal and on his failure so to do his right of

appeal shall, subject to the powers given the Court by s.266, cease and determine. It will readily be seen that the fourth, fifth and sixth paragraphs of s. 256 provide a time table regulating the conduct of the appeal proceedings and that due compliance with each of the requirements prescribed in the first paragraph of that section is a condition precedent to the appeal proceeding eventually being lawfully perfected. It can hardly, therefore, be said that any of those requirements is a formality whereby the Court may admit the appellant to impeach the judgment order or proceedings appealed from. It is only by virtue of the provisions of s. 11 (2) of the Judicature (Appellate Jurisdiction) Law, 1962 as repealed and re-enacted by s.3 of the Amending Act of 1970 that the Court of Appeal may reset the time table regulating the conduct of the appeal proceedings and unfortunately no provision is made therein in the case of failure to comply with the requirement that a deposit be made for the due prosecution of the appeal.

I would hold that the ruling given in Aarons v. Lindo is wrong and that the Court in Christian v. Brown came to the right conclusion.

FOX, J.A.:

By virtue of the provisions of section 251 of the Judicature (Resident Magistrates) Law, Cap. 179 (hereinafter called "the Law") an appeal lies from "the judgment, decree or order of a (Resident Magistrates') Court in all civil proceedings, upon any point of law," or upon any question of fact or evidence. The section also vests the Court of Appeal with wide powers in determining appeals. In fifteen sections following section 251, provisions are made for various matters relating to appeals. Very well known, and of critical importance, are the provisions of section 256 describing the steps which must be taken to initiate and to perfect an appeal. Equally familiar are the provisions of section 266 which direct a liberal construction in favour of the right of appeal, and concludes:

> " ..... in case any of the formalities prescribed by this Law shall have been inadvertently, or from ignorance or necessity omitted to be observed it shall be lawful for the Court of Appeal, if it appear that such omission has arisen from inadvertence, ignorance, or necessity, and if the justice of the case shall appear to so require, with or without terms, to admit the appellant to impeach the judgment, order or proceedings appealed from."

There is ample room for the view that by way of the provisions of section 266, the legislature intended to vest the Court of Appeal with a wide and a wise discretion to overlook and to disregard all faults, mistakes, shortcomings and omissions in proceedings on appeal from a decision of a Resident Magistrate's Court so as to carry out a central purpose which is plainly discernible in other provisions of the law, and has been well recognized by several decisions of this court, namely, a quick and summary determination of real questions in controversy, and the doing of substantial justice between the parties to a cause. In eschewing rules of pleading, by permitting modification of procedure, and simplification of form, and by striving to give everyone his due, however rough or ready, the Resident Magistrates' Court well deserves its sobriquet "the poor man's tribunal."

Over the years, however, the decisions of the Court of Appeal have not vindicated this view of the legislature's intention. Neither have these decisions supported the pragmatic image of the Resident Magistrate's Court

which the law has sought to project. To the contrary, despite the encouragement of successive amendments of the law, the Court of Appeal has persisted in an objective construction of the provisions of section 256, and by making the right of appeal dependent upon strict compliance by the appellant with all the obligations placed upon him by section 256 has aborted the direction in section 266 for a liberal construction of the right of appeal and would have effectively confined exercise of judicial discretion in favour of that right to matters largely extrinsic, were it not for the timely correctives administered by the legislature following upon successive status quo decisions of the Court.

The first reported case which marks the inception of this rigid approach is Jamaica Mineral Waters Co., Ltd. v. The K.S.A.C. (1936) 3 J.L.R. 10. As the provisions corresponding to those in section 256 of the law then stood "an appellant shall within 10 days after he received notice from the clerk of courts" that the Resident Magistrate had lodged his reasons for judgment, serve on the respondent and file with the clerk of courts the grounds of his appeal "and on his failure to do so his right of appeal shall cease and determine." The grounds of appeal were filed three days late. In upholding the respondent's preliminary objection to the hearing of the appeal, the court noticed the absence of relevant English or local authority, and considered that the point should therefore be determined "in accordance with legal principles applying to the construction of statutes." The argument that the provisions corresponding to those in the present section 266 of the law were intended to give the court "very wide powers to cure any informality or irregularity in regard to the omission of any formality prescribed by law" was rejected on the ground that the provisions contemplated "an existing right." The court went on to hold "that where no such right exists, having ceased and determined, the opportunity to construe a right liberally is not available."

In Willocks v. Wilson (1944) 4 J.L.R. 217 a preliminary objection was taken to the hearing of the appeal on the ground that the bond for the security for costs was given out of time. In rejecting the contentions that, (1) the giving of security for costs of the appeal was an irregularity which the court could overlook; and (2), even if it was a condition precedent to the hearing of the appeal the Court was empowered (by provisions

corresponding to those in the present section 266) to allow the appeal to be heard as the giving of the bond was a formality; Savary, Ag. C.J., said,

> "In our opinion both contentions are unsound. The point has never been expressly decided but Mr. Evelyn very properly called our attention to several decisions of the local Court in which opinions were expressed in support of the view that the giving of the bond is a condition precedent to the jurisdiction of the Court to hear an appeal, in other words, it is one of the conditions which have to be satisfied within the period fixed by law before a right exists in an appellant to have his appeal heard. In our opinion that is a correct view of the position based on the wording of section 261. .....
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> If we have come to a correct decision on the first contention it appears difficult to maintain that the giving of the bond within the period fixed by law is a formality within the meaning of section 269. A condition, the performance of which founds the jurisdiction of the Court, can hardly be described as a formality, and this opinion is to some extent supported by the case of R. v. Hunter previously cited. Sherwood v. Miller 4 J.L.R. 10 may be said to appear to be inconsistent with this opinion, but considering, the course the hearing of the appeal took in that case, it cannot be regarded as a binding decision.
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> For these reasons the preliminary objection is upheld and the appeal is dismissed."

R. v. Hunter (1938) 3 J.L.R. 111 dealt with a preliminary objection to the hearing of a case stated by a resident magistrate under his petty sessions jurisdiction on the ground that notice of appeal had not been served on the respondent. On the basis of provisions analogous to those of section 266, the appellant submitted that notice of appeal was a mere formality which could be waived. In delivering the judgment of the court Furness C.J. said, at p.115,

> "The giving of notice of appeal is in our view not a mere formality but is a condition precedent to the hearing of the appeal. The preliminary point must therefore prevail."

In Aarons v. Lindo (1953) 6 J.L.R. 205 a preliminary objection to the hearing of the appeal was taken on the ground that the sum of ten shillings was not deposited in court as security for the due prosecution of the appeal "at the time of taking or lodging the appeal" as required by provisions corresponding to section 256. The court (O'Connor, C.J., Cluer

and MacGregor J.J.) held that the requirement was a formality and not a condition precedent, and that by virtue of provisions corresponding to section 266 it had power to allow the appeal to be heard. The point was apparently regarded as being so plain as not to require a statement of the reasons in justification therefor.

In Rochester v. Chin and Matthews (1961) 4 W.I.R. 40 a preliminary objection to the hearing of the appeal was sustained on the ground that the notice of appeal was not served on the respondent or his solicitor "within fourteen days after the date of the judgment" as provided by section 256 of the law. The Court of Appeal held that the giving of notice of appeal is a condition precedent to the hearing of the appeal, the performance of which founded the jurisdiction of the court to hear the appeal. It was not a formality within the meaning of that word in section 266, and the court held further therefore that it had no power to enlarge the time for the service of the notice of appeal.

Rochester v. Chin and Matthews is of importance because of the careful examination of all the relevant decisions up to the date of the judgment in July 1961. It was an examination which enabled the court to notice that subsequent to the judgment in the Jamaica Mineral Waters case the law was amended by s.3 of Law 8 of 1936 which inserted the words "subject to the provisions of section 268 (now section 266) of this law," in the sixth paragraph of provisions corresponding to those in section 256. The judgment then continued at p.42,

> "Since the passing of Law 8 of 1936 it has been the practice of this court to apply the provisions of s. 266 of Cap. 179 when there have been omissions regarding the preparation and service of the grounds of appeal if it has been shown that the conditions laid down in that section should be applied. This has been done in all cases where the omissions have been shown to be formalities, e.g., when the sum of ten shillings to be deposited as security for the due prosecution of the appeal was not deposited at the time of taking or lodging the appeal, but some two days later; see Aarons v. Lindo."

It should be observed that the court was careful to refrain from stating that the filing of grounds of appeal was not a condition precedent, and nothing was said from which it might have been possible to understand that the significance of the distinction between a condition precedent and a formality

had been eliminated.

The decisions referred to so far are those of the former court of appeal. They describe the position which existed prior to the 5th August, 1962, when the Judicature (Appellate Jurisdiction) Law, 1962, Law 15 of 1962 came into operation. This Law created and made provisions for the jurisdiction and powers of the present court of appeal. Of direct relevance to the problem being considered are the provisions of section 11 of that law:

> "11 - (1) Subject to the provisions of this Law, to the provisions of the Judicature (Resident Magistrates) Law, regulating appeals from Resident Magistrates' Courts in civil proceedings, and to rules made under that Law, an appeal shall lie to the Court from any judgment, decree or order of a Resident Magistrate's Court in all civil proceedings.
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> (2) The time within which notice of appeal may be given or grounds of appeal may be filed in relation to appeals under this Section may be extended at any time by the Court."

It is obvious that by way of the original provisions of section 11 (2), the legislature intended to effect two major reforms:-

(a) to deliver the quietus to any doubts which, as a consequence of the decision in Jamaica Mineral Waters case may have lingered concerning the discretionary power of the court to permit grounds of appeal to be filed out of time, and,

(b) to reverse the ratio decidendi in Rochester v. Chin and Matthews.

But old patterns are not willingly relinquished, and in Wright v. Salmon (1964) 7 W.I.R. 50 and in Forbes v. Bonnick R.M. Civil Appeal 20/68 - 29th July, 1968 (unreported), on the basis of the thinking of Lyall-Grant C.J. in the Jamaica Mineral Waters case, respondents strenuously opposed application for leave to file grounds of appeal out of time. Both respondents failed in their objections. Both cases recognize and affirm the undoubted power of the court to grant relief to appellants who are late in filing grounds of appeal. In the latter case I ventured the view that "since the passing of the amending law in 1936, it really does not matter by what label the serving and filing of grounds of appeal is categorized. The consequence of any failure in this respect is "subject to the provisions of s. 266."

But in 1962 when Law 15 of 1962 came into operation the draftsman overlooked the decision in Willocks v. Wilson. Section 11 (2) of that law was silent as to the power of the court to extend time for payment of security for costs. Consequently, when in 1962 insufficient security for costs was given in an appeal the court of appeal was left with an authority which enabled it to hold in Welds v. Montego Bay Ice Co. Ltd., and Smith (1962) 5 W.I.R. 56 that the giving of security for costs was still a condition precedent to the founding of the jurisdiction of the court, and that there was no power to treat it as a formality under section 266 of the law.

It is interesting to notice the argument of counsel for the appellant in Welds which the court of appeal rejected in favour of the pre-1962 thinking. After tracing the history of corresponding sections of the existing law by detailed references to previous relevant enactments and the timely amendments made by the legislature with the object of clarifying its intention where the decisions of the Court of Appeal had made that course necessary, counsel submitted: (at p.58)

> "S. 11 (1) of Law 15 of 1962 was in terms similar to s. 11 of the former Judicature (Court of Appeal) Law, Cap. 178, and that the addition of sub-s. (2) to s.11 of Law 15 of 1962 indicated the further intention of the legislature to liberalise the provisions of s. 256 of Cap.179 by giving the court power to extend the time for giving notice of appeal and filing grounds of appeal, thereby treating as mere formalities matters which were, previous to this enactment, held to be conditions precedent to the jurisdiction of the court. He submitted that the greater included the less, and that if the court now had power to extend the time for giving notice of appeal, it also impliedly had the power to treat the giving of security for costs as a formality, and to exercise its powers under s. 266."

The court did not give a specific answer to this submission. It said merely (at p.58)

> "We have carefully examined the previous decisions of the court, which were reviewed in Rochester v. Chin and Matthews, and also the consequential statutory amendments, and we have come to the conclusion that s.11 (2) of Law 15 of 1962 only gives the court power to extend the time for giving notice of appeal and filing grounds of appeal. The giving of security for costs in accordance with the provisions of s. 256 of Cap.179 is still a condition precedent to the founding of the jurisdiction of the court and there is no power to treat it as a formality

under s. 266. Of course, if in any case the court extended the time for giving notice of appeal, it would follow as a necessary result, that the time for giving security for costs would automatically be extended to 14 days from the time limited for giving notice of appeal."

Three years after Welds, in August, 1965, the process of Law reform caught up with the plainly unsatisfactory condition of the Law created by that decision. On the 24th of August, 1965, assent was given to the Judicature (Resident Magistrates) (Miscellaneous Provisions) Act, 1965, Law 33 of 1965, section 17 of which amended section 11 (2) of Law 15 of 1962, so as to empower the court of appeal to extend the time for giving security for the costs of appeal. But it was not until 12th of September, 1967, that Law 33 of 1965 was brought into operation. In the five years intervening since Welds, it is sad to speculate as to the number of meritorious appeals which may have been unjustly defeated in limine by excusable failures to pay security or sufficient security for costs in time.

In 1970, section 11 (2) of Law 15 of 1962 was repealed by section 3 of the Judicature (Appellate Jurisdiction) (Amendment) Act, 1970, (No. 12) which substitutes therefor the following:-

"(2) Notwithstanding anything to the contrary the time within which -

(a) notice of appeal may be given, or served;

(b) security for the costs of the appeal and for the due and faithful performance of the judgment and orders of the Court of Appeal may be given;

(c) grounds of appeal may be filed or served,

in relation to appeals under this section may, upon application made in such manner as may be prescribed by rules of court, be extended by the Court at any time."

Bearing in mind the decision of Aarons v. Lindo which had been in existence for over 17 years, had never been dissented from, but to the contrary had been consistently treated as a correct statement of the law, there is every justification for the view that with the passing of Law 12 of 1970 the legislature believed that the 4 obligations of notice and grounds of appeal, and the giving of security for costs and due prosecution of the appeal placed upon an appellant by section 256 of the law were now safely secured once and for all time within the discretionary power of the court of appeal, and that for the purpose of the exercise of this power, the distinction between

"formality" and "condition precedent" which had been first adumbrated in the Jamaica Mineral Waters case would no longer bedevil judicial endeavour to do substantial justice between the parties to a cause.

This is the critical consideration with which the judgment in Christian v. Brown (R.M. Civil appeal No. 40 of 1972 2nd February 1973) should be approached. This judgment is mistaken in four fundamental particulars, namely,

(a) it altogether overlooked the amendment made to section 11(2) of Law 15 of 1962 by section 17 of Law 33 of 1965;
(b) it wrongly assumed that the legislative corrective made necessary by the misapprehension in Welds of the legislature's intention was administered by Act 12 of 1970;
(c) it overlooked the decision in Aarons v. Lindo, and
(d) it wrongly assumed that the omission from Act 12 of 1970 of a provision for extending the time within which security for the due prosecution of an appeal may be deposited was an omission on the part of the legislature which ought to be remedied.

I have had the benefit of reading the draft judgment of Luckhoo J.A. and I agree with his view that the omission in the amending Acts of 1965 and 1970 of provisions empowering the extension of time for giving security for the due prosecution of an appeal was deliberate and in recognition of the decision in Aarons v. Lindo and not the result of an oversight. Reluctantly, and with great respect however, I am constrained to differ from the further view of Luckhoo J.A. that the decision in Aarons v. Lindo is wrong and should not be followed. In my view that decision is right for the following reasons:

(1) Section 256 of the law does not expressly make the right of appeal dependent upon the steps required of an appellant by its provisions.
(2) For the purpose of construing the provisions of section 256, the judicial distinction which was initially made in the Jamaica Mineral Waters case between 'formalities' and 'conditions precedent' was unnecessary and at no time within the contemplation of the legislature as the history of the relevant amending legislation shows.
(3) In appeals from decisions of a resident magistrate, there is no compulsion of urgency such as exists for example with respect to the presentation and service of an election petition under the Election Petitions Law, Cap. 107, (vide Allen v. Wright No.2 (1960) 2 W.I.R. 102;

Stewart v. Newland and Edman, Supreme Court Civil Appeal 18/72, May 18, 1973 (unreported)), or any other compulsion which demanded that the right of appeal should be made dependent upon a strict compliance of conditions as to time.

(4) The deposit of security for due prosecution of an appeal can have no effect on the substantive rights of the parties. It is returnable in any event if the appellant appears before the court of appeal, and by being merely a penalty for failure duly to prosecute the appeal is entirely a matter of procedure.

In the light of the foregoing, I hold that the decision in Christian v. Brown was given per incuriam and should therefore not be treated as a precedent which is binding upon the court.

There is one further point which shows conclusively that extension of time for the deposit of security for the due prosecution of the appeal was intended by the legislature to be within the discretionary power of the Court. The deposit is to be made "at the time of taking and lodging the appeal," and since the Court is empowered to extend this latter time, it follows, a fortiori, that the Court must also have the power to extend the time for the deposit of security.

On the face of the record of appeal, it is clear that the deposit in Court of One Dollar instead of Two Dollars as security for the due prosecution of this appeal, there being two appellants, was due to an inadvertence on the part of the appellants' legal advisers. It is also obvious from the record on appeal that the appellants have a good arguable appeal on the ground that the action is barred by statute of limitation. There is room for the view that there may have been an 'erroneous adjudication,' and on the basis of the judgment of this Court in Forbes v. Bonnick, this is a good and sufficient ground for the exercise of the Court's discretion to allow the appellants an extension of time within which to deposit the additional sum of one dollar for the due prosecution of the appeal.

I would overrule the preliminary objection and allow the appeal to be heard.

ROBINSON, J.A. (ag.).:

I concur in the judgment delivered by Luckhoo, J.A.

LUCKHOO, J.A.:

In the result the appeal is struck out with costs to the respondent fixed at $50.