In the Supreme Court

Suit No. C.L. 1976/R.004

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| Between | Revere Jamaica Alumina Ltd. | Plaintiff |
| And | The Attorney General for Jamaica<br>Honourable Horace Clarke<br>Reginald A. Irvine | Defendants |

Richard Mahfood, Q.C. and
Angela Hudson-Phillips for Plaintiff

Kenneth Rattray, Q.C. (Solicitor General),
A.B. Edwards, Lloyd Ellis and R. Langrin for Defendants

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| 1976 - | May | 25, 26, 27, 28, 31 |
| | June | 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, 30 |
| | July | 1, 2 |
| | November | 8, 9, 10, 11, 12, 15, 16, 17, 18, 19 |
| 1977 - | February | 15, 16, 17, 18. May 30. |

Smith, C.J. :

This action results from the enactment by Parliament, in June, 1974, of the Bauxite (Production Levy) Act, 1974 (No. 29) and the Mining (Amendment) (No. 2) Act, 1974 (No. 30). These were companion measures. The former provided for the imposition of "a tax to be known as a production levy" on all bauxite or laterite extracted or won in Jamaica on or after January 1, 1974 and the latter, which was supportive of the former, inter alia, empowered the Minister to prescribe minimum amounts of minerals to be extracted during prescribed periods by holders of mining or special mining leases.

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At the time the Acts were passed, the plaintiff company was one of several companies engaged in this Country in the mining of bauxite. The plaintiff contends that the provisions of the Acts of 1974 violated its rights under an agreement dated March 10, 1967 made between the plaintiff and the Government in which the plaintiff agreed, upon terms and conditions stated therein, to engage in the mining of bauxite and the production of alumina therefrom and to construct a plant in Jamaica for this purpose.

In the action, filed on January 13, 1976, the plaintiff claims against the Government for a number of declarations and for damages, including declarations that the Acts of 1974 are ultra vires and in breach of the Constitution. The Minister of Mining and Natural Resources and the Collector General were joined as defendants with the Government, but in their personal capacities for the sole purpose of claiming injunctions against them. At the end of the plaintiff's case judgment was given in their favour against the plaintiff with costs on the ground that no evidence had been adduced against them.

The agreement of March 10, 1967 (hereafter "the 1967 agreement") is an elaborate document of 33 pages and 38 clauses. It was signed for the Government by the Minister of Trade and Industry, who was the Minister then responsible for the subject of mining. The President of the plaintiff company signed for the company. The agreement was preceded by a "Heads of Agreement" dated January 26, 1967 in which the parties were Revere Copper and Brass Incorporated, parent company of the plaintiff, and the Government. The clauses of the 1967 agreement are divided into seven parts, preceded by a preamble.

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Part I is headed "General" and contains, inter alia, the interpretation clause and the clause providing for the duration of the agreement. Part II contains clauses dealing with the payment of taxes and royalties. Part III is headed "Operating and Administrative Requirements" and deals, inter alia, with rights over Government lands, licences and permits, personnel and prospecting programme. Part IV contains clauses dealing, inter alia, with shipping, reserves, mining leases and exchange control. Part V deals with the construction of the alumina plant and Part VI with the establishment of an aluminum reduction plant in Jamaica in the future, if it is considered feasible. The final part, Part VII, deals with miscellaneous matters, including the company's right to assign, financing and the giving of notice of default.

The document has all the essentials of a contract with legally binding rights and obligations but the Government challenges its validity on several grounds, one factual and the rest legal. The issue of fact is raised by paragraph 27 of the defence, in which it is contended that "the purported agreement was not intended to create and could not and did not create any enforceable legal relation as to future taxation." The provisions regarding future taxation are contained in Part II, Clause 12, of the 1967 agreement and, so far as is relevant, are as follows :

> " No further taxes (including any income tax .....), burdens, levies, excises, customs or imposts will be imposed on bauxite, bauxite reserves, or bauxite operations or on alumina or the production of alumina or any operations carried on in relation to or incidental thereto or on any raw materials, supplies, property or other assets used in connection therewith in Jamaica .....; including but not limited to any additional royalty under the Mining Law, any other royalty whatsoever, any tax, burden or impost on severance, manufacture, processing, ....., or prepayment of taxes

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> or any other impost EXCEPT as specifically provided elsewhere in this agreement and except normal licence duties of general application, ..... but not any duty which would be a tax, burden or impost of the nature of any of those enumerated above. "

Clause 13 provides that for the purpose of taxation and royalties the provisions of the agreement shall remain in force "until the expiry of twenty five years" from the earlier of two dates stated in the clause.

On behalf of the Government, it was sought to prove that during the negotiation of the detailed terms of the 1967 agreement the stand taken by those representing the Government was that clause 12 could not create enforceable legal relations and that this was brought to the attention of the plaintiff company through its negotiating team. The contention for the Government is that with this knowledge the parties could not have intended the clause to have any legally binding effect. The plaintiff's witnesses denied any knowledge of the stand taken by the Government negotiators and maintained that they intended the 1967 agreement to be a legally binding and enforceable contract in every respect. The main witness for the Government on this issue was Mr. Herbert S. Walker, who, in 1967, was Permanent Secretary in the Ministry of Trade and Industry and participated, as a representative of the Government, in the negotiation of the 1967 agreement. Mr. Walker said that it was explained to the "Revere negotiators", in particular the Jamaican representatives on the team, that clause 12 could not create a legally binding obligation insofar as it purported to fetter the legislative powers of Parliament to impose future taxation. The Jamaican representatives on the plaintiff's negotiating team were the plaintiff's Jamaican lawyers. Mr.

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Walker said that they were the principal representatives of the plaintiff at the negotiations. Mr. William F. Collins, then a Vice-President, Secretary and General Counsel of the parent company, was head of the plaintiff's negotiating team. In cross-examination, he could not recall that the constitutional position regarding the power to fetter Parliament's power of taxation was raised in the course of the negotiations. Mr. Collins, however, became ill during the negotiations and it is clear that much of the negotiations took place in his absence. Mr. Albert Molowa, who replaced Mr. Collins, said that he never met directly with the Government's representatives.

I have not the slightest doubt that, as Mr. Walker said, the view of the Government's representatives regarding clause 12 was made clear to, at least, the plaintiff company's Jamaican lawyers. It is extremely unlikely that the lawyers did not communicate this view to their clients. But this, in my view, is not conclusive of the issue being considered. Mr. Walker said in cross-examination that the Government agreed to include clause 12 in bauxite agreements because of the insistence of bauxite companies. He supposed the companies felt that "it would give some aid and comfort"; that even though the clause would not fetter Parliament "it had some value to them." He had said earlier, however, that he regarded the whole of the 1967 agreement as legally binding "except insofar as there is in it any clause which seeks or purports in any manner to restrict or fetter or limit the legislative power of Parliament to impose future taxation." This answer, it seems to me, indicates that the true issue here is one of law, not of fact. The question is not whether the parties intended the agreement to create legally enforceable

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relations as to future taxation but whether, as a matter of law, clause 12 is capable of creating such relations. On the available evidence, the parties to the 1967 agreement regarded it as a legally binding contract up to the enactment of the Acts of 1974. It is inconsistent with that conduct to plead now a lack of intention to create legal relations in order to upset the agreement. I agree with the submission of learned counsel for the plaintiff that a plea of rectification would have been a more appropriate defence in the circumstances. I find that the defence based on lack of intention has not been established.

Section 3 of the Bauxite (Production Levy) Act, 1974 provided :

> " 3. - (1) Notwithstanding anything in any law, enactment or agreement, a tax to be known as a production levy shall be paid on all bauxite or laterite extracted or won in Jamaica on or after the 1st January, 1974, and accordingly nothing in any such law, enactment or agreement shall be construed as derogating from the provisions of this Act or any obligations arising thereunder, or give rise to any cause of action in respect of any act done in accordance with this Act or regulations made thereunder.
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> (2) The production levy shall be calculated at the current rate.
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> (3) The production levy payable under this Act shall be paid to the Collector General or, at his direction, to the Bank of Jamaica, by the bauxite producers who extracted or won the bauxite or laterite in respect of which such levy is payable. "

Section 4 of the Mining (Amendment)(No. 2) Act, 1974 amended s. 95 of the principal Law by deleting sub-s. (1) and substituting therefor the following :

> " (1) Notwithstanding anything in any Law enactment or agreement, the Minister may make regulations generally for giving effect to the provisions of this Law, and accordingly nothing in any such law, enactment or agreement shall be construed as derogating from regulations made under this Law or any obligations arising under such regulations, or give rise to any cause of action in respect of any act done in accordance with this Law or regulations made thereunder. "

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A new sub-section, sub-s. (3), was added to the section as follows :

> " (3) Regulations made under this section may provide that those regulations shall come into force on such date, which may be earlier than the date of publication of those regulations in the Gazette but shall not be earlier than the 1st day of January, 1974, as shall be specified in those regulations. "

These amendments to the Mining Law came into force on June 17, 1974 and on June 21, 1974, in exercise of the power conferred by s. 95, the Minister of Mining and Natural Resources made the Mining (Amendment) Regulations, 1974 increasing the rate of royalty payable on all bauxite mined on and after January 1, 1974. In paragraph 21 of the statement of claim the plaintiff raised the issue that "the Bauxite (Production Levy) Act, 1974 and the regulations made thereunder are ultra vires and in breach of section 18 of the Jamaican Constitution in that (inter alia) they : (a) deprive the plaintiff of its abovementioned contractual and proprietary rights under the said Agreement including its cause of action for breach thereof." A similar contention is raised in paragraph 25 in respect of the amendments to the Mining Law.

The Government answered these and other contentions by impugning the validity of the 1967 agreement or the relevant clauses thereof, in particular clause 12. Insofar as the entire agreement is concerned, it was submitted that in the light of the background, nature and scope of the matters covered by the agreement, being matters relating essentially to the exercise of governmental powers, it is clear that the agreement, or those areas of it, could not, or were not intended to, create enforceable legal relations. Reference was made to the several clauses of the agreement and it was contended that,

substantially, all the areas of importance related to matters the inherent nature of which were not those of ordinary commercial contracts capable of subsisting between private citizens, but were essentially concerned with the exercise of a wide range of governmental powers and matters falling within statutory regulations relating to the conduct of the affairs of the nation and the exploitation of one of the nation's natural resources. It was said that the nature, scope and language of the agreement show that the framework of the assurances or promises therein contained did not, could not and were not intended to create binding contractual obligations; that they relate to obligations with a political content which lack the vinculum juris, although binding in moral equity and conscience. These submissions were based mainly on Gibson v The East India Company, (1839) 5 Bing. (N.C.) 262 and The State of South Australia v The Commonwealth of Australia (1961-62) 108 C.L.R. 130.

While there are several clauses in the 1967 agreement whose provisions, undoubtedly, relate to the exercise of governmental powers, in my opinion, it cannot be said, as was held by some of the judges in the South Australia case (supra), that the agreement gives rise to political obligations only and not to legal obligations enforceable by a court. It is only in that event that the entire agreement could be held, on this ground, not to be a legally enforceable contract. I would say, as was said by Dixon, C.J. in the same case (at p. 141), that to generalize about the operation of the agreement must be unsafe. The much safer course, in my view, is to examine the clauses which the plaintiff claims have been breached in order to determine their validity.

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Clause 12 is the main clause which it is contended was breached by the passage of the Acts of 1974. As will be seen from the extracts set out above, the provisions of this clause, when read with those of clause 13, purported to protect the plaintiff from increases in taxation and royalties for a period of 25 years. The plaintiff does not deny the right of Parliament to pass legislation increasing taxation and royalties in breach of clause 12. What is said is that the Acts of 1974 deprive the plaintiff of its contractual and proprietary rights under the 1967 agreement as well as its cause of action for breach thereof; that this amounts to the compulsory acquisition of the plaintiff's interest in, or right over, property within the meaning of s. 18(1) of the Constitution; that the Acts should, therefore, have been passed in conformity with s. 18(1)(a); and that not having been so passed they are unconstitutional and void and the plaintiff is entitled to a declaration to this effect and to damages for breach of the agreement, which is still valid and subsisting.

It was submitted for the Government, firstly, that no rights were, or were capable of being, created in relation to taxation because the parties to the 1967 agreement did not have the competence or capacity to create such rights. Competence in the field of taxation, it was said, is vested in Parliament, not the Executive, and requires express parliamentary authorisation for its exercise. Secondly, it was submitted that insofar as the agreement purported to fetter future governmental action in matters affecting the welfare of the State, no contractual rights could be created in respect of such matters as were sought to be fettered as this would be ultra vires or contrary to public policy. This second submission is based on the principle

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enunciated by Rowlatt, J. in Rederiaktiebolaget Amphitrite v R (1921) 3 K.B. 500, (1921) All E.R. Rep. 542 when, at pp. 503 and 544 of the respective reports, the learned judge said :

> " No doubt the Government can bind itself through its officers by a commercial contract, and if it does so it must perform it like anybody else or pay damages for the breach. But this was not a commercial contract; it was an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future ..... And that is, to my mind, not a contract for the breach of which damages can be sued for in a Court of law ..... My main reason for so thinking is that it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State. "

There is no doubt that this principle, called the doctrine of executive necessity, is still valid today, though it has been criticised and questions have been raised regarding its precise scope and effect. It is acknowledged by text-book writers. In Wade and Phillips' Constitutional Law (8th edn.) the learned authors, basing themselves on the Amphitrite case, said (at p. 680): "There is, moreover, a rule of law, the exact extent of which it is not easy to determine, that the Crown cannot bind itself so as to fetter its future executive action." It is also acknowledged in the cases. Devlin, L.J. (as he was then) cited the Amphitrite case, among others, in support of his statement in Commissioner of Crown Lands v Page, (1960), 2 Q.B. 274, 291, that :

> " When the Crown, or any other person, is entrusted, whether by virtue of the prerogative or by statute, with discretionary powers to be exercised for the public good, it does not, when making a private contract in general terms, undertake (and it may be that it could not even with the use of specific language validly undertake) to fetter itself in the use of those powers, and in the exercise of its discretion. "

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Whatever doubts exist as to the precise limits of the principle, it is clear that, on grounds of public policy, it allows freedom of executive action in matters fundamental for effective government and for the general welfare of the community (see J.D.B. Mitchell's Contracts of Public Authorities (1954), p. 56). It is also clear on the authorities that when the principle applies it overrides existing, and conflicting, contractual rights and renders them unenforceable in an action against the government for their breach.

The plaintiff does not deny the existence and the validity, within certain limits, of the Amphitrite principle but contends that it is in-applicable in this action as the 1967 agreement was sanctioned and confirmed pursuant to express parliamentary authority. It was submitted that the agreement made by Government was within the scope of the authority conferred by Parliament on the Executive by the Bauxite and Alumina Industries (Encouragement)(Amendment) Act, 1967; that the principle relied on by Government cannot relieve it from liability under a contract made by it under express parliamentary authority and within the scope of that authority and cannot be invoked by the Executive to defeat or frustrate the legislative powers of Parliament. It was argued that the circumstances surrounding the enactment of the Act of 1967, as well as the express terms of that enactment, establish that the 1967 agreement is a valid contract creating valid contractual rights.

Clause 4 of the agreement provided as follows :

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" Government will use its best endeavours to secure the enactment of such legislation as shall be necessary to give effect to this agreement and in particular to secure that the Bauxite and Alumina Industries (Encouragement) Law (herein referred to as the "Encouragement Law") shall be amended to give effect to the modification to the Income Tax Law hereinafter appearing and to enable the Minister -

(a) to direct that the gross revenue from the disposal of alumina by a recognised alumina producer shall be such sum, being the fair and reasonable price based on market conditions, as may be specified in any such direction, &

(b) on behalf of Government to make such agreements and arrangements as may to him seem expedient for the encouragement and expansion of the alumina industry in Jamaica, and when such legislation has been enacted the Minister will ratify this agreement. "

In December, 1967 Parliament passed the Bauxite and Alumina Industries (Encouragement)(Amendment) Act, 1967. This Act added a new section, as section 2A, to the principal Law in the following terms :

" 2A - It is hereby declared that the Minister may, on behalf of the Government, make or confirm such agreements and arrangements as he may think expedient for the encouragement and expansion of the alumina industry in Jamaica." (These provisions appear as s. 3 in the current revised Act).

The amending Act also contained provisions which gave effect to provisions in the 1967 agreement relating to excise duty and income tax. In pursuance of clause 4(b) of the agreement, the Minister then responsible for mining confirmed the agreement in a letter dated January 25, 1968 to the plaintiff's Jamaican solicitors.

It was submitted for the plaintiff that the power conferred by s. 2A to make or confirm a contract was unlimited in scope and clearly contemplated a contractual provision such as that contained in clause 12 of the 1967 agreement as the

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language of the Act of 1967 and, in particular, the words used in s. 2A follow closely and precisely the language and terminology of clause 4(b) of the 1967 agreement. It was said that this was not a coincidence of language but the express enactment of amending legislation clearly purporting to give the Minister power to confirm, inter alia, the 1967 agreement so that that agreement would constitute a valid contract between the parties to it for the encouragement and expansion of the alumina industry in Jamaica, especially in the area of tax concessions. It was contended that the Minister having confirmed the agreement under the express power granted by s. 2A, and within the scope of that section, the validity of the agreement as a contract cannot be denied by the Government invoking the doctrine of executive necessity or allied doctrines as this would defeat the purpose and object of the Act of 1967.

There can be no doubt that the Act of 1967 was passed in fulfilment of the obligation contained in clause 4 of the 1967 agreement. There was, however, no specific reference in the Act to that agreement. Indeed, s. 2(2) provided that the new s. 2A "shall be deemed to have come into operation on the 12th day of June, 1950", which is the date on which the principal Law came into force, thereby indicating that its provisions were to be of general application. There was evidence before me that the 1967 agrement was, in all material respects, in similar terms to those of an earlier agreement - called the Alpart agreement - between the Government and a consortium. The Act would, therefore, apply to that agreement as well.

The real question is whether or not the contention of the plaintiff is valid, that the power conferred by s. 2A was unlimited in scope and clearly contemplated a contractual

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provision such as that contained in clause 12. In other words, did the Minister have the authority to undertake that no further taxes or royalties would be imposed in respect of the plaintiff's operations for 25 years ? It was submitted for the plaintiff that the question is not whether s. 2A granted the Minister statutory authority to impose, repeal or regulate taxation but, rather, whether s. 2A gave him authority to make a valid contract which included a valid contractual provision whereby the Government agreed that the plaintiff should be exempt from further taxation. With great respect, I do not see any difference in substance between the two questions. It is the Minister who, under s. 2A, is authorised to make or confirm agreements, albeit he does so on behalf of the Government. Therefore, to determine the validity of a contractual provision whereby, on behalf of Government, he agreed that the plaintiff should be exempt from further taxation, one has to look to his statutory authority, which is what, in my view, the first question says.

In my opinion, a comparison of the provisions of clause 4 of the 1967 agreement with those of the Act of 1967 will show that s. 2A did not confer unlimited powers on the Minister. "Minister" is defined in clause 1(1) of the agreement as "the Minister of Government for the time being charged with responsibility for the subject of mining" and in s. 2A that word bears the same meaning (see s. 3 of the Interpretation Act). It was contemplated by the agreement that the powers described in clause 4(a) should be conferred by Parliament on the Minister as defined in the agreement. Those powers were conferred by s. 7(b) of the Act of 1967, by amendment of s. 7 of the principal Law, not on that Minister, but on the Minister responsible for finance, the Minister usually charged with responsibility for the subject of taxation. This, on the f[illegible]

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is a contrary indication that Parliament intended to place powers relating to taxation in the hands of the Minister responsible for mining by the provisions of s. 2A.

It is settled law that only Parliament has the power to impose, regulate, or grant exemption or any relief from, taxation and that when this power is exercised, or is delegated to the Executive, it must be done by clear and express statutory language (see Attorney General v Wilts United Dairies, (1921) 37 T.L.R. 884 and The Nova Scotia Car Works v The City of Halifax, (1913) S.C.R. 406, 415). In my opinion, the provisions in clause 12 of the 1967 agreement, that no further taxes would be imposed except as specifically provided in the agreement, purport to exempt the plaintiff's operations from additional taxation for the period of 25 years stated in clause 13. The plaintiff contends that the clause does not purport to grant any general exemption from taxation. But whether it does or not, neither the Executive nor the Minister, acting on its behalf, can validly give such an undertaking as was given in clause 12 without express parliamentary authority. No such authority is given in s. 2A or elsewhere in the Act of 1967. Learned counsel for the plaintiff said that the fact that under the provisions of s. 7(3) (as added by s. 7(b) of the Act of 1967) (s. 9(3) of the current revised Act) the Minister, in making orders or directions in respect of income tax, must have regard to agreements referred to in s. 2A, this shows that the Minister is obliged to have regard to "taxation provisions" in those agreements and that the Act of 1967, therefore, expressly contemplated that the agreements confirmed or made under s. 2A would contain provisions relating to taxation. Even if this argument is right, and I am not convinced that it is, it would not, in my opinion, even be

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sufficient to confer implied authority on the Minister, and implied authority is itself not sufficient. It was said, further, that the 1967 agreement did not conflict with any existing law and did not involve the relinquishing of any specially conferred taxing power, consequently, it did not require specific legislation giving it the force of law to enable it to operate as a valid contractual provision between Government and the plaintiff. As I have said, clause 12 certainly purported to limit the taxing power of Parliament in areas which would result in the payment of increased taxes by the plaintiff company and required express parliamentary sanction to give it validity. I agree with the submission for the Government that the Minister, acting on behalf of the Government, was not competent to give the undertaking in respect of further taxation. In my judgment, the undertaking was invalid and, therefore, created no valid contractual right in favour of the plaintiff.

It is possible to construe the provisions of clause 12, not as an attempt by the Executive to assume the powers of Parliament in respect of taxation but, as an undertaking by the Executive not to initiate any action which would result in Parliament imposing further taxes. This construction of the clause is met squarely by the Amphitrite principle. There was undisputed evidence led before me that immediately prior to the enactment of the Acts of 1974 the Country had very serious balance of payment problems. Towards the end of 1973 moving into 1974 there were increases of approximately 300% in the import prices of basic commodities, which have to be paid for on importation from foreign exchange earnings of the Country. The evidence is that in 1973, for foreign exchange purposes,

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the Country's current account had a deficit of $164 million. If capital inflow is added, the deficit would have been $27 million. Bauxite is a foreign exchange earner. Evidence was given that the Country earned less from bauxite in 1973 than in 1971, approximately $10 million less, though the total amount of bauxite produced increased over the period. In 1974, without the bauxite production levy imposed by the Act of 1974, the Country's current account for foreign exchange purposes would have had a deficit of approximately $295 million. With the production levy and capital inflow there was a surplus of $54 million in 1974. Clearly, in initiating the process which resulted in the passage of the Acts of 1974, in order to increase foreign exchange earnings, the Executive was taking action which was essential for the general welfare of the community. As I have said, the plaintiff's answer to the Government's reliance on the Amphitrite principle is that it does not apply in the case of a contract made by the Executive within the scope of express parliamentary authority. I have held that clause 12 has not been shown to be within the scope of such authority. I hold that on this construction of clause 12, as respects further taxation, the plaintiff also has no enforceable right.

By s. 3 of the Minerals (Vesting) Act, all minerals, which include bauxite, are vested in and are subject to the control of the Crown. S. 4 of the Act provides for payment of royalties to the Government in respect of minerals mined, the royalties to be prescribed by the law and regulations governing mines and mining. S. 7 of the Mining Act provides that all minerals obtained in the course of prospecting or mining operations shall be liable to such royalties as may be prescribed. S. 99(1) of that Act empowers the Minister to make regulations generally for giving effect to the provisions of the Act and

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s. 99(2)(k) gives him power, specifically, by regulations to provide for "the rates of royalties to be paid to Government, the method of calculation of the amount of such royalties, and the manner and time of payment thereof." S. 99 is the section which, as s. 95, was amended by s. 4 of Act 30 of 1974. As stated above, in exercise of his powers under this section, by the Mining (Amendment) Regulations, 1974, the Minister increased the rate of royalty payable on all bauxite mined in Jamaica with effect from January 1, 1974. The plaintiff claims this exercise of the Minister's powers to be in breach of the undertaking in clause 12 of the 1967 agreement as the rates payable under clause 8 of the agreement were thereby increased.

In my opinion, it is clear on the authorities that the Amphitrite principle applies in this case as well. As I understand the authorities, the principle is not limited to the fettering of prerogative powers of the Executive, as the argument for the plaintiff seems to suggest, but extends also to statutory powers (see the statement of Devlin, L.J. cited supra from Commissioner of Crown Lands v Page). The right to be paid royalties is a right vested in the Executive for public purposes. The power to fix the rates was delegated to the Minister, who must remain free to exercise the power from time to time as the public interest demands He cannot, therefore, validly undertake not to exercise it. It is obvious that in increasing the rate the Minister was motivated by the same considerations that caused the production levy to be imposed. The undertaking in clause 12 in respect of royalties, therefore, conferred no enforceable right on the plaintiff and I so hold.

Since, as I have held, clause 12 conferred no valid contractual rights with respect to taxes or royalties, the plaintiff had no rights which were protected by s. 18(1) of the

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Constitution. The Acts of 1974 are, therefore, not ultra vires and unconstitutional on this ground, as contended. However, it is contended, in the alternative, that the imposition of the production levy was nevertheless unconstitutional and in breach of s. 18(1) because it involved the compulsory acquisition of the plaintiff's proprietary rights, including money, and did not come within the excepting provisions of s. 18(2)(a) of the Constitution, not being a tax, rate or due.

S. 3(1) of the Act of 1974 imposes a tax in express terms - "a tax to be known as a production levy shall be paid on all bauxite ..... " S. 3(3) and subsequent sections of the Act contain provisions characteristic of a taxing statute. The production levy is payable to the Collector General, the Chief Officer of Revenue; bauxite producers must make returns to the Collector General, must keep records and allow inspection of them and must submit statements showing assessments of the true amount of the levy; a bauxite producer may object to the amount of an assessment and may appeal to the Revenue Court if dissatisfied with the Collector General's decision on the objection, unpaid amounts are recoverable under the Tax Collection Act; there are provisions for waiver, remission or refund in the discretion of the Minister and refund of overpayments by the Collector General. In spite of these provisions it was submitted, on four grounds, that the production levy is not a tax.

The first ground is that there is no legislative limitation on the purposes for which the money collected may be used. Reference was made to the three main elements of a tax - it must be imposed by the State or other public authority, must be compelled and the imposition must be for public purposes (see Inland Revenue Commissioner and Attorney General v Lilleyman and others, (1964) 7 W.I.R. 496, 504; Matthews v

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Chicory Marketing Board, (1938) 60 C.L.R. 263, 276, 290). It was submitted that the levy, although purporting to be a tax, is not a tax as it was imposed by a law which failed to provide that the sums exacted should be paid into a treasury fund for public purposes. The first two elements of a tax are not in dispute. This submission results from the provisions of s. 12 of the Act of 1974 which established "a fund, to be called the Capital Development Fund" (s. 12(1)), into which "all sums received as payment of production levy under this Act and all other income from the assets of the Fund shall be paid." (s. 12(3)). S. 12(5) provides as follows :

> " The Minister may from time to time by order direct that such sum as shall be specified in the order shall be drawn from the Fund for such purposes and subject to such conditions as shall be so specified."

It was argued that this provision is legislative authority for expenditure from the fund for any purpose whatsoever. Since Parliament has imposed no limit on those purposes, it was said, it cannot be contended that the purposes must be public purposes within the meaning of that concept, however widely defined.

The cases cited on this point show the different situations which can arise in determining whether or not an exaction of money is for public purposes. A statute may state the purposes for which the payments exacted are to be applied. The court has then to decide whether the purposes stated are public purposes (see the Chicory Marketing Board case, supra). Another statute may provide for payment into a fund and a decision has to be made whether the purpose for which the fund is established has been stated in the statute and, if so, whether it is a public purpose (see Mootoo v Attorney General (unreported) a decision in April 1976 of the Court of Appeal of Trinidad and Tobago). Others may provide for payment into a

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Consolidated Fund. When this is done, the requirement that the exaction must be for public purposes is regarded, prima facie, as satisfied. In Moore v The Commonwealth, (1951) 82 C.L.R. 547 Latham, C.J., said, at p. 562 :

> " The money which is collected under the Act goes into Consolidated Revenue and is available for expenditure in the same manner as any other money. The Commonwealth, however, is bound to make out of Consolidated Revenue what in the Acts are described as payments or refunds to producers. The acceptance of this liability by the Commonwealth does not affect the character of the original imposition of the liability as an exaction made from the subject by the Government under legislative authority for public purposes. "

and, at p. 572, McTiernan, J. said :

> " This liability is, in my opinion, a direct tax on the persons upon whom it is imposed, because the money is exacted from them by law, is payable to the Executive Government of the Commonwealth, and forms part of the Consolidated Revenue of the Commonwealth. "

It is conceded for the plaintiff that if the Act of 1974 had provided that the production levy should be paid into the Consolidated Fund established by s. 114 of the Constitution the element of public purposes would be satisfied. Why is this so ?

The origin of the term "Consolidated Fund" is to be found in the statutes of Great Britain when all revenue from various sources were consolidated and paid into a general fund called, in the statutes, "the Consolidated Fund". The term is used in current statutes of the United Kingdom and it is, therefore, not surprising that it appears in our Constitution, which is contained in the second schedule to an Order in Council made as a result of provisions of an Act of the United Kingdom Parliament. Apart from the convenience, for checking, of having all the revenue in a central fund, the Consolidated Fund, whether Jamaican or of the United Kingdom, enables Parliament to exercise control over the expenditure of public

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revenue as it does over the raising of revenue. No payment may be made out of the fund without legislative authority and this principle is enforced by making the fund subject to control by an Auditor General, who is independent of the executive government and reports directly to the House of Representatives or, in the United Kingdom, the House of Commons (see Halsbury's Laws of England (3rd edn.) Vol. 28 p. 442 & Vol.33 p. 12). In my opinion, payment of an exaction into the Consolidated Fund satisfies the public purpose element of a tax because of the control which Parliament exercises over expenditure from the fund. In other words, it must be presumed that Parliament will not approve of any payment from the fund for a purpose which is not a public purpose.

Provisions have been made in the Act of 1974 to ensure the same measure of parliamentary control over payments from the fund established by the Act as exists in respect of payments from the Consolidated Fund. The order by the Minister under s. 12(5) directing withdrawal from the fund must specify the purposes for which the sum being withdrawn are to be applied. S. 12(6) makes the order subject to affirmative resolution of the House of Representatives. The accounts of the fund must be audited by the Auditor General, who reports thereon to the House of Representatives (see s. 12(7)). In addition, s. 12(8) requires the Minister to make annual reports on the operations of the fund to the House of Representatives. The point is made on behalf of the plaintiff that an affirmative resolution is not an Act of Parliament and, of course, it is not. It is a means whereby Parliament retains control over certain types of delegated legislation. For the purposes under discussion, however, it has the same effect as an Act of Parliament. By this means the House of Representatives gives its positive vote of approval to

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the Minister's order, including the purposes stated therein. This is sufficient to raise the presumption that the purposes specified in the order are public purposes. This case differs from the Mootoo case in that the advances made by the Minister from the fund in that case were not subject to parliamentary control. It was, therefore, necessary that the statute should state the purposes for which the fund was established. In my opinion, the production levy, exacted from the bauxite and alumina companies by the Act of 1974 and paid into a fund over which the House of Representatives exercises full control, fulfils all the requirements of a tax. Subject to my decision on the other grounds, I hold that it is a tax for the purposes of s. 18(2)(a) of the Constitution.

The second ground on which it was contended that the production levy is not a tax is that, although called a tax, it is in pith and substance a royalty and is part of a legislative scheme to increase the royalties paid by the bauxite companies. It was submitted that the scheme of legislation involving the Acts of 1974 reveals, in substance, a legislative plan to compel the bauxite producers to pay a larger rent for the minerals extracted or won under their mining leases through the medium of legislation purporting to be taxation in order to escape the wide protective provisions contained in s. 18(1) of the Constitution. This submission was said to be based on the fact that the amount of the production levy is linked to the value of bauxite extracted not only in terms of amount and price but by applying a formula for varying the royalty price contained in clauses 8 and 9 of the 1967 agreement. Further, failure to pay the production levy has been given consequences existing under the Mining Act for failure to pay royalties under a mining lease. It was said that, in substance, the levy is a price

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paid by the lessee for the amount of bauxite extracted and is, in substance, a royalty called by a different name.

In evidence called on behalf of the Government it was stated that one of the principles of taxation which was sought to be applied in the legislation of 1974 was that the contribution of the bauxite industry should not rest on the profits shown in the accounts of subsidiaries but should rather be related to the value of the resource which is being extracted from the land. It was the accepted principle which, it was said, now governs taxation internationally in the mineral industry. It was admitted, in this evidence given on behalf of the Government, that, conceptually and in the manner in which they affect a company's financial operations, a royalty and a production levy are the same - they are both charges that are not measured by the profits of the subsidiary companies' operations. Reliance is placed on these extracts from the evidence in support of the argument that the production levy is, in pith and substance, a massive royalty.

The rate of royalty payable under the 1967 agreement was two shillings and six pence per long dry ton of bauxite on the first million tons mined in any calendar year, two shillings on the second million and one shilling and six pence in excess of two millions. The evidence is that those rates were fixed arbitrarily. From April 1, 1982 the rates were to be "adjusted upwards or downwards in direct proportion to any increases or reductions of the New York published price for aluminum ingot of standard commercial grade above or below the price of 24.5 cents U.S. per lb.". The rate of the production levy is prescribed in the first schedule to the Act of 1974 in these terms:

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"The current rate per ton of bauxite or laterite shall be 7.5 per cent of the average realized price per short ton for primary aluminum (as prescribed under subsection (4) of section 4 of the Act) divided by 4.3." Evidence given on behalf of the Government is that the formula for increased royalties after April 1, 1982 is fundamentally different from that for calculating the rate of the production levy. It was said that except to the extent that there is a link with movements in the ingot price, the taxation principles involved are radically and fundamentally different; the movement in the ingot price after 1982 would affect the base royalty, which was in no way derived from the price of ingot - it was an arbitrary figure, but the production levy will fluctuate with the price of ingot. I was invited to reject this evidence as, it was argued, the production levy is, in fact, computed on a base just as arbitrarily arrived at as the basic royalty rate. The 7.5% figure used to calculate the current rate, it was said, is neither more nor less arbitrary than the 24.5 cents figure contained in the formula from the 1967 agreement.

I am able to see, from the evidence, a fundamental difference in the formula for calculating the rate of the production levy as against that for the royalty after 1982. I suspect that if questions were asked to determine how the percentage of 7.5 and the figure 4.3 were arrived at the answers would show that the 7.5% is not as arbitrary a figure as is suggested. As royalties are usually calculated either in respect of the quantity or value of the minerals taken, the formula for the royalty could well have been similar to that used for the production levy with, perhaps, a lower percentage.

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So, it seemsto me, if the similarity in the formulae is decisive of this issue the plaintiff's contention is right. I am, however, of the view that the issue is decided on a consideration of the power of our Parliament in respect of taxation.

The power of Parliament to impose taxes is unlimited in extent. No restriction on this power has been suggested. What is contended is that the production levy is not a tax at all but a royalty. Once, therefore, the levy fulfils the normal requirements of a tax, as I have held it does, the plaintiff's contention on this ground is bound to fail because it then becomes irrelevant whether or not the tax has the characteristics of a royalty. So is the motive of the Government in imposing the levy. In discussing the power of the Commonwealth Parliament of Australia with respect to taxation, Griffiths, C.J., in delivering the majority judgment in The King v Barger, (1908) 6 C.L.R. 41, said, at p. 67 :

> " Again, the motive which actuates the legislature, and the ultimate end desired to be attained, are equally irrelevant. A Statute is only a means to an end, and its validity depends upon whether the legislature is or is not authorised to enact the particular provisions in question, entirely without regard to their ultimate indirect consequences. "

And at pp. 68 and 69 :

> " In a State possessing plenary powers of legislation any condition whatever may be imposed as a basis of selection for taxation purposes, and it is immaterial whether the differentiation should properly be regarded as an exercise of the power of taxation or of some other power. "

The "pith and substance" principle is inapplicable in a case where, as here, the legislative power which is challenged is unrestricted. The cases relied on by the plaintiff in support of this principle are, therefore, of no assistance.

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The third ground for contending that the production levy is not a tax is alternative to the first two. It was submitted that the levy is not a tax but is the arbitrary confiscation of property since, insofar as it is based on actual production, it is part of a scheme of legislation empowering the Minister to fix minimum quantities of production which then become a condition of the mining lease for breach of which the Minister can revoke the mining lease although the lease is a valid proprietary right protected by s. 18(1) of the Constitution. In the further alternative, it was submitted, as the fourth ground, that if, on a proper interpretation of the Act of 1974, the production levy is payable during any quarterly or annual period during which the bauxite producer is not in actual production, the levy is arbitrary and confiscatory and constitutes the compulsory acquisition of property without compensation in breach of s. 18(1) of the Constitution.

The submissions in respect of these two grounds were supported by authorities from Courts of the United States of America. No Commonwealth case was cited. This is not surprising as the decisions cited show that they were based on violation of the due process clause of the Fifth Amendment of the Federal Constitution in that although there was a seeming exercise of a taxing power, the Act complained of was so arbitrary as to lead to the conclusion that it was not the exertion of taxation but a confiscation of property. The authorities cited state that the party attacking a tax has the burden of proving it to be confiscatory. I find and hold that the plaintiff has not discharged this burden. As regards the third ground, it is sufficient to state that the evidence establishes that the minimum quantity of production prescribed for the plaintiff's

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plant was well within its capacity. As regards the fourth ground, the levy does not become arbitrary and confiscatory merely because it may be payable where there is no actual production. Once the liability is imposed on persons or companies with the means and capacity to produce, the levy cannot be said to be arbitrary and confiscatory. A company cannot validly complain if it can produce but, for reasons peculiar to that company, it does not. Where it does not produce for reasons beyond its control, the Act has given the power to the Minister, in s. 6, to waive, remit or refund payment of the production levy if he is satisfied that it is just and equitable to do so. I hold that there is no merit in the third and fourth grounds.

It was contended for the plaintiff, as a pure matter of interpretation of the relevant provisions of the Act of 1974, that the production levy is not payable during any quarterly or annual period during which the bauxite producer is not in actual production. Reliance was placed on the well known rule of interpretation of taxing statutes, that the subject cannot be taxed by implication or by ambiguous words; that liability can only be imposed by clear language (see F.L. Smidth & Co. v F. Greenwood, (1922) 8 Tax Cas. 193, 206 & Scott v Russell, (1946) 30 Tax Cas. 394, 424). For the Government, it was submitted that the levy is imposed on "bauxite producers," meaning, as defined in the Act, holders of mining leases or special mining leases under the Mining Law; that the production or "deemed production" is merely the measure by which the quantum of the tax is determined; and that the language of the legislation and the whole scheme of it establishes that the levy is payable on the basis that there is a minimum

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production or a "deemed production" and a deemed production does not by any ordinary use of language depend upon actual production. It was said that the Act must be viewed against its language and clear purpose and intent, namely, to establish a minimum base for stable revenue and to induce bauxite producers to maintain bona fide mining operations.

The production levy is imposed by s. 3(1) of the Act, the terms of which have already been set out. Sub-s. (2) of that section states the rate at which the levy is to be calculated and sub-s. (3) states to whom it is to be paid and by whom. Sub-s. (1) provides that the levy "shall be paid on all bauxite or laterite extracted or won in Jamaica." The words "bauxite producer" do not appear in the subsection. Contrary to the contention of the Government, it is plain, in my opinion, that the imposition is upon bauxite or laterite extracted or won and not upon the bauxite producer. This is confirmed by sub-s. (3), which states that the levy is payable by the bauxite producers "who extracted or won the bauxite or laterite in respect of which such levy is payable."

For the purpose stated above in the argument for the Government, s. 4(1)(b) provides for a provisional quarterly payment "on account of the true amount of the production levy payable ..... for that quarterly period." This provisional quarterly payment is arrived at by multiplying a specified minimum tonnage for each bauxite producer (see second schedule to the Act) by a basic rate, the amount of which is prescribed in the first schedule to the Act. The specified minimum tonnage is the amount of bauxite or laterite which, by s. 4(1)(a), each bauxite producer is "deemed to have extracted or won ..... during each quarterly period." S. 4 then goes on to make

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provisions whereby the true amount of the production levy payable may be ascertained. Every bauxite producer must make quarterly returns in writing to the Collector General showing the number of tons of bauxite or laterite extracted or won by him and must state the prices (in U.S. currency) received by him or any associate for primary aluminium (s. 4(2)). He must also after the end of each year supply such further information to the Minister as may be prescribed in order to enable the Minister to determine "the average realized price" for primary aluminium (s. 4(3)). By s. 4(4), after April 30 in each year, the Minister must by order prescribe (in currency of the U.S.A.) the average realized price for primary aluminium for the last preceding year. The amount prescribed is then used in the formula stated in paragraph 2 of the first schedule to the Act to arrive at the rate, called "the current rate", at which the true amount of the production levy is to be calculated. S. 4(6) now requires every bauxite producer to prepare a statement showing an assessment, based on "the current rate", of the true amount of the production levy payable by him for each of the quarterly periods in the last preceding year, the statement to be submitted to the Collector General. When the Collector General receives the statement he determines the true amount of the production levy payable for the last preceding year by the bauxite producer who submitted the statement (s. 4(8)). Where the amount determined by the Collector General is greater than the total of the provisional quarterly payments paid, the bauxite producer must pay the difference to the Collector General (s. 4(9)). Where it is less, the difference must be refunded (s. 4(10)).

Thus far, it is plain that, consistent with the terms of the imposition in s. 3(1), the true amount of the production

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imposition of the levy, could be rendered nugatory. But the deeming provisions in sub-s. (7) are subject to the conditions specified in the provisions of the subsection which precede them and, therefore, do not come into operation unless those conditions are satisfied. There must have been bauxite or laterite actually extracted or won during the year in question before the deeming provisions can take effect. It is not without significance that the word "actually", used to qualify "extracted or won", appears only in this sub-section. I find it impossible to interpret the provisions of the subsection or any other part of the Act to accommodate the contention of learned counsel for the Government. I hold that the production levy is not payable in any year in which no bauxite or laterite is actually extracted or won by a bauxite producer. But the non-production has to be for an entire year. I do not agree with the plaintiff's contention that the levy is not payable for a quarter if there is no production in that quarter. It is quite clear that the true amount of the production levy is determined on an annual basis.

S. 42(1)(b) of the Mining Act provides that the Minister may revoke a mining lease under the Act :

> " if the holder wholly ceases work in, on or under the land the subject of the lease during a continuous period of six months, without the written consent of the Minister :
>
> Provided that such consent shall not unreasonably be withheld. "

Where the holder of a mining lease has ceased to work the land, the subject of the lease, and applies for the Minister's consent before the expiration of six months, the Minister's discretion to revoke the lease at or after the expiration of that period cannot, in my opinion, be validly exercised unless

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and until he has given due consideration to the application for consent and has refused it. There is a duty imposed on him to consider the application and the proviso to s. 42(1)(b) makes his decision refusing consent subject to review by the court.

In or about the year 1973, the Minister responsible for the subject of mining established a body called the National Bauxite Commission (hereafter "the Commission") to advise him on all matters relating to the bauxite industry. The Commission had no statutory authority. On May 22, 1975, the Vice-President of the parent company of the plaintiff, in the name of his company, wrote to the chairman of the Commission confirming oral information, which had been given to him the day before, of the decision of the parent company to "temporarily shut-down" their operations in Jamaica. The chairman had, at the meeting with officials of the parent company the day before, asked for additional information, apparently affecting the shut-down, and this information was supplied in the letter of May 22. The fourth paragraph of the letter stated :

> " You have requested our estimate of the likely duration of the shut-down. The changing economic picture of the aluminum industry and Revere in particular would obviously be determinative. We see no short-term improvement in the adversities which have rendered the shut-down necessary. Therefore, the minium (sic) shut-down period, unless unforeseen developments intervene is likely to be six months. There is a definite possibility that the shut-down could run from 1 to 2 years. "

The letter went on to indicate that an application for the Minister's consent under s. 42(1)(b) would be made and solicited "the good offices of the Bauxite Commission in supporting the request". The chairman was asked to state whether the Commission

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was prepared to give the required support. In his reply, by letter dated June 2, 1975, the chairman said that the Commission had considered the application "and cannot grant an application to shut down the plant on the basis of the submission made to (them)". This was an unfortunate reply as no such application as was refused was made to the Commission and, in any event, they had no power to do what they purported to do.

The President of the parent company wrote to the Prime Minister on July 2, 1975 referring to previous correspondence with the Prime Minister and meetings with the Commission regarding the economic status of the plaintiff company, sent him a copy of the chairman's letter of June 2 and went on to state, inter alia :

> " We have reached the end of our credit lines with our banks, are unable to finance any more inventory and are required to close the Jamaica operation in order to reverse or reduce our negative cash flow. This has been strongly enjoined upon us by our banks as a condition of their willingness to enter into an additional credit facility which this Company must have in order to survive. "

The letter informed the Prime Minister that, "with great reluctance and regret", the parent company "must proceed to close the plant temporarily". It stated that "the timing of the re-opening of the plant will, of course, depend on general economic conditions and the economic health of the aluminum industry, of Revere (the parent company) and Revere Jamaica (the plaintiff company)." The President asked that the Prime Minister assist in the obtaining of the consent of the Minister to the cessation of mining for a period in excess of six months. On August 19, 1975 the plaintiff company commenced the shutting down of its mining operations. Between May 21 and this date there had been discussions and communications between officers of the parent and plaintiff companies on the

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one hand, and Ministers of Government and members of the Commission, on the other, with a view to avoiding the shutting down of the operations of the plaintiff company. This included a proposal to keep the operations going until the end of 1975 and the possibility of Government acquiring the company's plant.

By letter dated October 10, 1975, the plaintiff applied to the Minister for his consent to the cessation of mining activities. The penultimate paragraph of the letter is in these terms :

> " Revere and RJA deem the decision to temporarily shut down mining operations when they can no longer be economically justified to be the exercise of a fundamental right inherent in the ownership of any business enterprise. Revere and RJA believe that no reasonable basis for with-holding the requested consent exists and that recognition of their fundamental rights with respect to their Jamaican activities as well as of the statutory mandate of Section 42(1)(b) of the Mining Act require that the consent request be granted."

When no reply was received from the Minister by November 5, 1975, the parent and plaintiff companies wrote a joint letter of that date to the Minister asserting their right under the terms of the 1967 agreement to cease mining operations without the consent of any official of the Government. In the penultimate paragraph they said :

> " While RJA does not withdraw its October 10, 1975 request for your consent to its temporary cessation of bauxite mining activities, RJA hereby notifies you that it does not consider such consent necessary for it to cease bauxite mining for a period which may exceed six months. RJA further notifies you that any action taken pursuant to the Mining Law, 1947, or any amendments thereto, which would interfere with RJA's rights under its mining lease and in connection with its other Jamaican activities, would be expropriatory. "

Up to the time of the filing of the action on January 13, 1976 the Minister had not replied and there had been no other indication whether or not the application for consent had been granted.

It is on the above premise that it was contended in paragraph 32 of the statement of claim that the plaintiff is entitled to the consent of the Minister and that it is unreasonable for him to with-hold his consent having regard to the circumstances causing the cessation of mining. A declaration to this effect is claimed. It was submitted that the facts indicate that the Minister has misused his power and exceeded his statutory authority under s. 42(1)(b) by : (a) failing to respond to the application of October 10 or to exercise his discretion at all; (b) imposing conditions for the granting of his consent or even the consideration of the application, which are not warranted by the terms of his statutory authority; and (c) unlawfully delegating his authority to the Commission. There is nothing either in the affidavit evidence, in the correspondence put in evidence or in the oral evidence given at the trial to substantiate the allegations at (b) and (c). On the contrary, one of the plaintiff's complaint is that there has been no response whatever to the application of October 10 and there is no evidence of anything said or done by the Commission since that date in respect of the application for consent from which any inference regarding the Minister's conduct can properly be drawn.

There is evidence of a meeting with the chairman of the Commission on October 30, 1975 by two officials of the plaintiff company, the purpose of which was to inform the chairman that the plaintiff was trying to develop a formal proposal in connection with the disposal of its plant for submission to Government as well as to renew the previous request for relief from the bauxite levy and to obtain the Minister's consent to the cessation of mining activities.

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The evidence is that the chairman's response was that he would be interested in seeing the proposal when developed but, on the request for relief, he pointed to a box under his desk and said that all the letters from the plaintiff company requesting relief were in the box and would remain there unanswered until the plaintiff came forth with a positive proposal for the disposition of the plant. A copy of the letter of October 10 applying for consent had been sent to the chairman and so was a copy of a letter of the same date to the Minister of Finance applying for relief from the production levy. This evidence was given by the Vice-President of the plaintiff company and he said he understood the chairman to be saying that the plaintiff would not receive the relief it was seeking if it did not come forth with a proposal. In cross-examination of the chairman, who was called for the Government, it was suggested that he was using the possible liability of the plaintiff to have its mining lease revoked as a lever for acquiring the plaintiff's plant. This was denied. There was other evidence from the chairman during cross-examination, related mainly to his reply of June 2 in which he purported to refuse the plaintiff's application, which showed his attitude towards the plaintiff's applications but which can only fairly be regarded as indicating that the plaintiff was unlikely to receive the support of the Commission for its applications; the chairman insisted that the final decision was the Minister's. In my opinion, the conduct and views of the chairman disclosed by all this evidence cannot be attributed to the Minister in the absence of evidence that the Minister had authorised him or the Commission to act on his behalf in respect of the plaintiff's application of October 10. The chairman's conduct on October 30 obviously had reference to the copy letters which he had received. In any event, the Minister cannot be

bound by the actions of the Commission, a non-statutory body with purely advisory functions. Evidence was given at the trial, on June 30, 1976, by the acting permanent secretary in the Ministry of Mining and Natural Resources that his understanding of the present status of the application for consent is that it is still pending. I have no reason to doubt the truth of this evidence.

It was argued for the plaintiff that by using language in the proviso to s. 42(1)(b) which has been judicially interpreted in relation to leases, the legislature must be assumed to have used that language in the sense in which it has been judicially interpreted. It was submitted that, applying the principles to be derived from the cases and general standards of reasonableness, the consent of the Minister has been unreasonably with-held and the plaintiff is, therefore, entitled to the consent. Alternatively, that in all the circumstances relating to the plaintiff's cessation of mining, the Minister is not entitled to revoke the plaintiff's mining lease.

In my judgment, the evidence in the case does not establish that the Minister has unreasonably with-held his consent. The acting permanent secretary said in evidence that when the plaintiff's letter of November 5 was received the Ministry sought the advice of the Attorney General regarding the assertion of the plaintiff's right to cease mining operations without consent of the Minister. He did not say how long it took for this advice to be given. This was the only evidence of action actually taken on the application. However, the date at which it must be determined whether the consent was unreasonably with-held is the date the action was filed.

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There was then still five weeks to run before the expiration of six months since mining operations ceased. There was no obligation on the Minister to give his decision at any particular time before the expiration of six months, though it may be said that he should do so within that period. The filing of the action, in which the Minister's conduct is challenged, has, of course, suspended action on the application pending the decision of the court. If the plaintiff was being prejudiced by the dilatoriness of the Minister then, in my view, the proper course was to apply by mandamus to compel him to consider the application promptly. It has not been suggested that between the making of the application and the filing of the action the plaintiff was prejudiced by the failure of the Minister to give his decision. If I am right in my opinion that until the Minister refuses consent he may not validly revoke the mining lease, the plaintiff should suffer no prejudice because the Minister's decision was not given within the six months period.

As regards the alternative submission, I hold that it is premature. On the view I have expressed, before the question of revocation of the mining lease can arise the Minister must first refuse his consent. His refusal can then be challenged on the ground of unreasonableness based on the circumstances relating to the plaintiff's cessation of mining activities. The contention in paragraph 32 of the statement of claim, however, as stated above, is that it is unreasonable for the Minister to withhold his consent having regard to the circumstances, set out in particulars in the paragraph, causing the cessation of mining. The allegations in the first nine paragraphs of the particulars have not been controverted. Assuming that paragraph 10 is decided in the plaintiff's favour, it would not be right, in my opinion, for me to make a declaration on the basis of the

amount paid by the plaintiff for production levy in respect of the year 1976 be refunded. On all other issues in the action, there will be judgment for the first defendant. The question of costs is reserved for argument.

levy is payable only in respect of bauxite or laterite actually extracted or won in any one year. I must now consider the provisions of s. 4(7) on which the plaintiff's contention is founded. They are as follows :

> " (7) Where the total number of tons of bauxite or laterite actually extracted or won in Jamaica by any bauxite producer in any year is less than four times the minimum tonnage specified for that bauxite producer, he shall, for the purpose of determining the true amount of the production levy payable by him for that year be deemed to have actually extracted or won four times the minimum tonnage so specified. "

The provisions of s. 4(13), showing how the true amount of the levy is calculated, may now be stated :

> " (13)For the purposes of this section, the true amount of the production levy is the sum of money arrived at by multiplying the number of tons of bauxite or laterite extracted or won (or deemed under subsection (7) to have been so extracted or won) by the bauxite producer during the last preceding year by the current rate. "

It was submitted for the plaintiff that the words "total number of tons ..... actually extracted or won" and "less than four times the minimum tonnage" in sub-s. (7) can only apply to a bauxite producer in actual production who produces a certain number of tons. Where this situation does not prevail, it was said, the words cannot possibly apply; thus the deeming provision only applies to a bauxite producer in actual production. It was submitted for the Government that, by virtue of the provisions of the Act as a whole, the levy is clearly payable on the basis of deemed production when there is no actual production.

In my judgment, the contention of the plaintiff is clearly right. Without the deeming provisions in s. 4(7), the provisions of s. 4(1), designed to prevent or discourage a cut back in production in order to defeat the purposes of the

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contention in paragraph 32. On the evidence produced, it is uncertain when, if ever during the remaining period of at least fifteen years that the plaintiff's mining lease has to run, the plaintiff will be able to resume mining operations. The period of shut down is quite indefinite. In these circumstances, the prejudice to the plaintiff in being compelled to continue the operations to its financial detriment or the loss of its rights under the lease must be weighed against the public interest in having the bauxite ore covered by the plaintiff's mining lease exploited continuously during the currency of the lease, as provided in s. 36 of the Mining Act. This is essentially a matter of policy for the Minister in the first instance. He may wish to consent to a shut down for a specified period or to impose conditions, which it is conceded he is entitled to do. Those are not decisions that a court should make when the Minister can be compelled to make them.

There are contentions in the statement of claim which were not argued. On the conclusions at which I have arrived on the issues raised and argued, I hold that the plaintiff is not entitled to damages or to the declarations claimed, except a declaration that no production levy is payable by the plaintiff for any annual period during which no bauxite or laterite is actually extracted or won by the plaintiff. That declaration is hereby made. As bauxite was actually extracted or won during 1975 up to the time of the shut down, the plaintiff is not entitled to a refund of the production levy for the last quarter of 1975, but is so entitled in respect of any amount paid for 1976.

There will, therefore, be judgment for the plaintiff in respect of the declaration made and it is ordered that any

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