

NMLS

**JAMAICA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATE'S PLAINT NO. 477/89**

**MOTION NO. 15/97**

**COR: THE HON MR JUSTICE DOWNER JA  
THE HON MR JUSTICE BINGHAM JA  
THE HON MR JUSTICE WALKER JA (AG)**

<b>BETWEEN</b>	<b>CHARLES STEWART</b>	<b>APPLICANT</b>
<b>A N D</b>	<b>GLENNIS ROSE</b>	<b>RESPONDENT</b>

**Anthony Pearson instructed by Playfair  
Junor Pearson & Co for the applicant**

**Nancy Anderson instructed by Dorrell Wilcott  
for respondent**

**May 20 & June 17 1997**

**DOWNER JA**

Miss Nancy Anderson has raised an important jurisdictional point as to the powers of this court to grant leave to file an appeal out of time and grant a stay of execution in proceedings emanating from the Resident Magistrate's Court in Trelawny. It arose because Mr. Anthony Pearson moved this court in respect of two specific prayers. Here is how it was stated in his Motion:

"... for an Order that:

1. Leave be granted to file Appeal out of time.
2. There be a Stay of Execution pending outcome of the Appeal.
3. Such further and other relief as this Court may deem fit."

Miss Anderson submitted that this court was incompetent to grant the prayers while Mr. Pearson held we could. The affidavit by Mr. Pearson in support of the motion disclosed how the matter arose in the court below namely:

"4. That on or about the 9th November, 1989, Glennis Rose lodged a Plaint against the Defendant Charles Stewart in the Resident Magistrate's Court for the Parish of Trelawny under Plaint #477/89.

5. That the Particulars of Claim was in the following terms

'(1) The Plaintiff's claim is to recover possession of One Room situated at 89 Falmouth Street, Trelawny, which the Defendant occupies as a Tenant at Will.

(2) The Defendant's 'agency' expired on the death of John Henry Campbell in August 1982.

(3) This action is being brought by the Plaintiff in his capacity as Executor of the Estate of John Henry Campbell.' "

It is well known that Resident Magistrates have heavy hearing schedules. Even so the hearings in this case seem somewhat prolonged. Here is the relevant account:

"9. That the matter first came before Her Honour Ms. Marlene Harrison Resident Magistrate for the Parish of Trelawny on the 14th March, 1995, and a trial commenced on the 12th September, 1995.

10. That the matter was part heard on the 12th September, 1995, 10th October, 1995, 12th December, 1995 and 9th January, 1996."

Then judgment was reserved and eventually delivered on 7th January 1997.

That information emerged thus:

"11. That Judgment was reserved to the 12th March, 1996, and subsequently to the 14th May, 1996, 9th July, 1996, 10th December, 1996, and 7th January, 1997.

12. That on the 7th January, 1997, the Judgment delivered was in the following terms-

'Judgment for the Plaintiff. Defendant to Quit and Deliver up possession on or before 30th April, 1997. Defendant further ordered to cease collecting rent from tenants at the premises with immediate effect. To cease to perform any acts in relation to premises which are not authorized by Plaintiff. Formal Order to be drawn. Costs to be agreed or taxed.' "

These brief reasons do not demonstrate that the claims of the defence were considered. Nor do these brief reasons indicate if there was any evidence led by the defence and, if there was, the manner of its assessment. The defence as adumbrated in the affidavit supporting the motion ran thus:

"(1) The Defendant denies that he is or was the Plaintiff's agent in respect of premises #9 Falmouth Street, Trelawny.

(2) The Defendant denies that he was the agent of the Plaintiff's precursor in title John Henry Campbell at the time of Campbell's death in August, 1982.

(3) That Defendant asserts that at the date of his death John Henry Campbell through whom the Plaintiff claims as the executor of his Estate was an undischarged bankrupt incapable of holding property in his own name.

(4) The Defendant asserts that prior to his death and while the land was unregistered

land John Henry Campbell disposed of all his interest in the land to the Defendant.

(5) The Defendant asserts that he has been in quiet open undisturbed possession of the land for more than twelve years prior to the commencement of the claim and as a consequence the Plaintiff's claim is barred pursuant to the provisions of the Limitations of Actions Act.

(6) The Defendant asserts that both John Henry Campbell and his wife before him Ethel Maud Campbell recognized the Defendant's right to undisturbed possession of the land, and gave instructions that he be not molested in his ownership, and occupation."

Counsel admitted that he was not without fault when it came to instituting appeal proceedings. His account ran thus:

"14. That I prepared Notice of Appeal on the 20th January, 1997, but inadvertently it was not lodged with the Clerk of Courts for the Parish of Trelawny until the 30th April, 1997 when an application for a Stay of Execution was filed.

15. That the relevant fees for the lodging of the Appeal was paid, and the Application for a Stay of Execution came on for hearing on the 6th May, 1997.

16. That Her Honour Ms Marlene Harrison made the following Order -

'Application for Stay of Execution refused, Costs to the Plaintiff..'

17. That I have been advised by the Defendant, and do verily believe that on the 6th May, 1997, a Formal Order confirming the Judgment of the 7th January, 1997 was served on him."

Then the circumstances of the applicant were stated thus:

"18. That the Defendant is a blind man aged upwards of ninety (90), and has been in occupation of the premises since 1962.

19. That the Defendant is anxious to pursue his appeal, and is prepared to pursue it with diligence as a matter of expedition."

As to the specific circumstances of the relief sought at this stage. They are as follows:

"20. That the inadvertence in not filing his Notice of Appeal on time rests squarely with his Attorneys.

21. That the Appeal gives rise to some important points and if the Defendant were to be evicted under a Warrant of Possession issued to the Plaintiff his right in pursuing the appeal would thereby be lost.

22. That having regard to the Magistrate's refusal to grant a Stay of Execution, the Defendant prays that this Honourable Court will grant him Leave to Appeal out of time as well as a Stay of Execution of the Judgment in order that his Appeal might be pursued."

The instructing Attorney-at-Law for the respondent Glennis Rose, Mr. Wilcott, in response stated:

"3. That I am told by my client, Glennis Rose, and verily believe that up to today, May 14, 1997, he has not been served with the Notice of appeal referred to in paragraph 14 of the Affidavit deposed to by Mr. Anthony Pearson in support of this Motion.

4. That I have not been served with the said Notice of Appeal as required by Section 256 of the Judicature (Resident Magistrates) Act.

The gist of opposition is contained in paragraph 5 which reads:

"5. That at the hearing of this Motion I will rely on this Honourable Court's decision in EDWARDS vs GAREL, RMCA, Motion No.

6/94, May 24, 1994 (unreported) to submit that this Honourable Court has no jurisdiction to (a) grant a Stay of Execution, nor (b) grant leave to file an appeal out of time."

In considering this issue, it is important to bear in mind that this court is a superior court of record by virtue of section 103 (5) of the Constitution. Further, by legislative references in section 9 and 10 of the Judicature (Appellate Jurisdiction) Act it acquired the historic inherent, common law, equity and procedural powers of the former Appeal Court which was part of the Supreme Court prior to 1962. Further, the Supreme Court prior to 1962 and continuing to this day, has inherited all the powers of the courts which were consolidated to form one Supreme Court. See section 4 of the Judicature (Supreme Court) Act. This section reads:

"4. On the commencement of this Act, the several Courts of this Island hereinafter mentioned, that is to say -

The Supreme Court of Judicature,  
The High Court of Chancery,  
The Incumbered Estates' Court,  
The Court of Ordinary,  
The Court for Divorce and Matrimonial Causes,  
The Chief Court of Bankruptcy, and  
The Circuit Courts,  
shall be consolidated together, and shall constitute one Supreme Court of Judicature in Jamaica, under the name of "the Supreme Court of Judicature of Jamaica", hereinafter called "the Supreme Court'."

#### **The relevant law**

##### **(a) Stay of Execution**

Section 251 of the Judicature (Resident Magistrate's) Act (the Act) pertaining to appeals reads:

**"251.** Subject to the provisions of the following sections, an appeal shall lie from the judgment, decree, or order of a Court in all civil proceedings, upon any point of law, or upon the admission or rejection of evidence, or upon the question of the judgment, decree, or order being founded upon legal evidence or legal presumption, or upon the question of the insufficiency of the facts found to support the judgment, decree, or order; and also upon any ground upon which an appeal may now be had to the Court of Appeal from the verdict of a jury, or from the judgment of a Judge of the Supreme Court sitting without a jury."

It should also be noted that by section 10 of the Act every court is a court of record. Then referring specifically to the powers of this court the section continues:

" And the Court of Appeal may either affirm reverse, or amend the judgment, decree, or order of the Court; or order a nonsuit to be entered; or order the judgment, decree, or order to be entered for either party as the case may require; may assess damages and enter judgment for the amount which a party is entitled to, or increase or reduce the amount directed to be paid by the judgment, decree or order; or remit the cause to the Court with instructions, or for rehearing generally; and may also make such order as to costs in the Court, and as to costs of the appeal, as the Court of Appeal shall think proper, and such order shall be final:

Provided always, that no judgment, decree, or order of a Court shall be altered, reversed, or remitted, where the effect of the judgment shall be to do substantial justice between the parties to the cause."

Section 256 of The Act is important. It reads in part:

**"256.** 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 Courts, 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 twenty dollars 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 two hundred 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.

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 Courts with an appeal to the Magistrate. No stamp duty shall be payable on such bond."

Then comes the important provision relating to this case:

" 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."

This subsection contemplates that if the appellant pays into court the whole sum found by the judgment he should be granted a stay of execution pending the appeal. Also, the agreed or taxed costs must be paid and if this is done, the appellant should be granted a stay pending the appeal. The third aspect is that the Magistrate is given a discretion if cause be shown to grant a stay pending appeal even if the whole sum if any or costs is not paid into court.



Be it noted, in this case there was no order which obliged the applicant to pay any sum.

Since by section 251 of the Act this court is empowered to affirm, reverse or amend the judgment or decree of the Resident Magistrate, and by section 256 judgment includes a stay or refusal to stay proceedings on a judgment, the necessary implication is that as a superior court of record with inherent jurisdiction this court can grant a stay so as to determine if leave to appeal is granted, whether the refusal of the Magistrate to grant a stay will be affirmed or reversed. The historical origins of the inherent jurisdiction of this court was explained in **Berry and Morris v Kingston & St. Andrew Corporation**[1972] WIR 351. The headnote accurately expresses the established principle that in the absence of a rule of law or procedure, a superior court of record has jurisdiction to regulate its own procedure. It was expressed thus at p. 351:

" **Held:** that the Court of Appeal had acquired the jurisdiction and powers of the former Court of Appeal which itself formed part of the Supreme Court of Judicature established under the Judicature Law 1879 [J.]. The Supreme Court, by the combined effect of ss. 20, 21, and 28 of the 1879 Law (now ss. 24, 25, and 26 of Cap. 180 [J.], was vested with the jurisdiction and powers exercised by the old High Court of Chancery in Jamaica which, in such matters as it tried, adopted the practice and procedure of the High Court of Chancery in England. It followed that, there being no enactment or rule regulating the practice or procedure in respect of the matter in issue, the court had jurisdiction in a proper case to relist an appeal which had been struck out or dismissed for non-appearance of an appellant there having been no hearing on the merits. The application was clearly one which should be granted." [Emphasis supplied]

Perhaps by way of explanation, it is necessary to state that the High Court and Court of Appeal was the Supreme Court. Further section 6 (5) of the Judicature (Supreme Court) Law states:

"6.-(5) Every Judge of the Supreme Court-

- (a) shall be a Judge of and shall have and exercise jurisdiction in both the Court of Appeal and the High Court; ..."

Again there is a specific legislative reference in the Judicature (Appellate Jurisdiction) Act to the former Court of Appeal. It is as follows:

"9. There shall be vested in the Court of Appeal-

- (a) subject to the provisions of this Act the jurisdiction and powers of the former Court of Appeal immediately prior to the appointed day;
- (b) such other jurisdiction and powers as may be conferred upon them by this or any other enactment."

Section 9 (a) is a classic instance of retrospective legislation reviving sections of repealed legislation. Such an effect is in conformity with section 4 (1) of the First Schedule of the Constitution pertaining to existing Laws, section 24 of the Interpretation Act and **Lemm v Mitchell** [1912] AC 400. The section refers to provisions in the old Civil Procedure Code which stipulated the powers of the former Court of Appeal. Section 576 of the old Code refers to extension of time. The relevant section in this context is, however, Title 45 Appeals Section 576. It is of such importance to the solution of this case that it must be cited:

"576. An appeal shall not operate as a stay of execution, or of proceedings, under the decision appealed from, except so far as the Court below or the Court of Appeal may so

order; and no intermediate act or proceeding shall be invalidated except so far as the Court below may direct."

This procedural provision in the previous Civil Procedure Code must be read against the background of the law governing the former Court of Appeal.

Section 3 (1) of the Judicature (Court of Appeal) Law reads:

"3.-(1) There shall be a Court of Appeal (in this Law referred to as 'the Court of Appeal') which is hereby declared to form part of the Supreme Court of Judicature established by the Judicature (Supreme Court) Law, and which shall have jurisdiction and power to hear and determine appeals from the Courts of the Colony specified in this Law, subject however to the provisions of this Law and to Rules of Court made under this Law."

Section 11 of this Law specifically provides for appeals from the Resident Magistrate's Court to the former Court of appeal. "... the provisions of this Law and rules of Court made under this Law..." include section 576 of the Civil Procedure Code regulating the procedure of the old Court of Appeal. It is still applicable to this court.

The case of **Valrie Edwards v Douglas Garel** RMCA Motion No. 6/94 delivered May 24 1994, relied on by Miss Anderson turns on whether an appeal court judge in chambers had the power to grant a stay in the circumstances of that case. It has no bearing on the issue of whether the court of three judges has power to grant a stay of execution if leave is granted to hear an appeal. I find that this court can order a stay. So the stay ought to be granted. We were told that the taxed costs were in excess of \$17,000. This should be paid into the Resident Magistrate's Court as stipulated by section 256 of the Act.

(b) Application to extend time

The other prayer is whether this court has the power to extend time. It is necessary to advert to the remaining subsections of section 256 of the Act.

They read:

“ Such statement shall be lodged with the Clerk of the Courts, who shall give notice thereof to the parties, and allow them to peruse and keep a copy of the same.

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 Courts, the grounds of appeal, and on his failure to do so his right to appeal shall, subject to the provisions of section 266, cease and determine.

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 twenty dollars 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 twenty dollars whatever may be the event of the appeal.”

Since there is a legislative reference in section 256 above to the wide ranging powers of section 266 of The Act, it must now be brought into play. It provides:

“266, The provisions of this Act 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 Act 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 salutary effect of this section was adverted to by Duffus P., in **Wright v Salmon** [1984] 7 WIR 50 at p. 52.

If extension of time is appropriate, terms would be necessary. The subject matter of the written judgment concerns ownership of 89 Falmouth Street, Trelawny and may fall within section 84 of the Act which deals with adverse possession. It also concerns agency for collection of rent. The respondent has a judgment in his favour to recover possession since January 1997, and therefore, the right to collect rent from that period. It would be a proper term for the applicant to pay \$10,000 into an interest bearing account in the joint names of the Attorneys-at-Law on record pending the determination of the appeal.

Apart from the inherent powers flowing from the former Supreme Court, and the general powers relating to extension of time in section 567 of the previous Civil Procedure Code there is now specific statutory provision in the Judicature (Appellate Jurisdiction) Act relating to Resident Magistrates appeals.

Section 12 seems to cover the application for extension of time. It reads:

"12.-(1) Subject to the provisions of this Act, to the provisions of the Judicature (Resident Magistrates) Act, regulating appeals from Resident Magistrates' Courts in civil proceedings, and to rules made under that Act, an appeal shall lie to the Court from any judgment, decree or order of a Resident Magistrate's Court in all civil proceedings."

Then section 12 (2) states:

"(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."

All these direct statutory provisions make it clear that this court has always been empowered to grant extension of time as prayed. Because even without this statutory provision, section 4 of the Judicature (Supreme Court) Act and section 9 of the Judicature (Appellate Jurisdiction) Act by necessary implication and section 576 of the old Civil Procedure Code expressly accorded this court the power to extend time.

The applicant ought to be given fourteen (14) days hereof to complete the formalities required by law so as to perfect his appeal.

### **Conclusion**

Having regard to the applicant's case made out on the affidavit the order of the court ought to be:

- (1) Leave granted to file appeal within fourteen (14) days hereof.
- (2) That there be a stay of execution pending the outcome of the appeal.
- (3) That the applicant pays the taxed or agreed costs in the Resident Magistrate Court.

- (4) That the applicant pays \$10,000 in a joint interest bearing account in the name of the Attorneys-at-Law on the record pending the determination of the appeal.
- (5) That the applicant undertakes steps to have an expedited hearing of this appeal.
- (6) That the costs of this application be costs in the cause.

**BINGHAM JA**

Having read in draft the judgments prepared by Downer JA and Walker JA (Ag) in this matter, I wish to state that I am in agreement with the reasoning and the conclusion reached that the motion be granted in terms of the order as proposed by Downer JA. The judgments have both fully addressed the issues raised in this motion granted and there is nothing further that I can usefully add.

**WALKER JA (AG)**

In these proceedings Mr. Pearson for the defendant/applicant moves the court for an order that:

- "1. Leave be granted to file Appeal out of time.
2. There be a Stay of Execution pending outcome of the Appeal.
3. Such further and other relief as this Court may deem fit."

The motion is prompted by an order made on January 7, 1997 by the learned Resident Magistrate for the parish of Trelawny whereby she gave a judgment for the plaintiff in the following terms:

" 'Judgment for the Plaintiff. Defendant to Quit and Deliver up possession on or before 30th April, 1997. Defendant further ordered to cease collecting rent from tenants at the premises with immediate effect. To cease to perform any acts in relation to premises which are not authorized by Plaintiff. Formal Order to be drawn. Costs to be agreed or taxed.' "

Two jurisdictional questions are immediately raised by the present application, namely:

1. whether this court has the jurisdiction to extend time for appealing the order made by the Resident Magistrate;
2. whether this court has the jurisdiction to stay execution of the order of the Resident Magistrate pending the determination of such an appeal.

**The first question**

In essence the submissions of Miss Anderson for the plaintiff/respondent were simple enough. Following the decision of this court [Cools-Lartigue,



Semper and Duffus JJ.] in **Rochester v Chin and Matthews** (1961) 4 WIR 40 she submitted that this court had no jurisdiction to entertain an application of this nature. In that case which emanated from the Resident Magistrate's Court the notice of appeal, though served upon the clerk of the courts, was received by the respondent after the expiry of fourteen days after the date of the judgment. There the court was referred to sections 256 and 266 of the Judicature (Resident Magistrates) Law, Cap. 179 (now sections 256 and 266 of the Judicature (Resident Magistrates) Act which read as follows:

**"256.** 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 Courts, 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 twenty dollars 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 two hundred 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.

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 Courts with an appeal to the Magistrate. No stamp duty shall be payable on such bond.

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.

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.

Such statement shall be lodged with the Clerk of the Courts, who shall give notice thereof to the parties, and allow them to peruse and keep a copy of the same.

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 Courts, the grounds of appeal, and on his failure to do so his right to appeal shall, subject to the provisions of section 266, cease and determine.

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 twenty dollars 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 twenty dollars whatever may be the event of the appeal."

**"266.** The provisions of this Act 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 Act 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."

Having considered these statutory provisions the court held that it had no power to enlarge the time for service of the notice of appeal, the giving of such a

notice being a condition precedent founding the jurisdiction of the Court of Appeal and not, in itself, a formality to the hearing of the appeal. For his part, Mr. Pearson was content to rely solely on section 266 (supra).

In my judgment the answer to this question is to be found in section 12 of the Judicature (Appellate Jurisdiction) Act which provides as follows:

“12.-(1) Subject to the provisions of this Act, to the provisions of the Judicature (Resident Magistrates) Act, regulating appeals from Resident Magistrates' Courts in civil proceedings, and to rules made under that Act, an appeal shall lie to the Court from any judgment, decree or order of a Resident Magistrate's Court in all civil proceedings.

(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.”

These statutory provisions seem to me to make it clear that this court does, indeed, have jurisdiction to extend the time for filing a notice of appeal in civil proceedings heard and determined in the Resident Magistrates Court.

### **The second question**

Since the Court of Appeal has no inherent jurisdiction, the answer to this question depends on whether the court is empowered by the Constitution of

Jamaica or the provisions of Statute Law or the Court of Appeal Rules, 1962, to entertain this application for a stay of execution. Section 9 of the Judicature (Appellate Jurisdiction) Act defines the jurisdiction of the Court of Appeal. Section 9 reads as follows:

"9. There shall be vested in the Court of Appeal -

- (a) subject to the provisions of this Act the jurisdiction and powers of the former Court of Appeal immediately prior to the appointed day;
- (b) such other jurisdiction and powers as may be conferred upon them by this or any other enactment."

The former Court of Appeal mentioned in paragraph 9 (a) above ceased to exist on August 5, 1962, that being the appointed day (see paragraph 2 of the Act). Immediately thereafter the present Court of Appeal came into being and by virtue of section 9 (a) inherited "the jurisdiction and powers of the former Court of Appeal immediately prior to the appointed day" subject to the provisions of that Act. To take the matter to the next step, prior to the appointed day (i.e. August 5, 1962) the powers of the former Court of Appeal were partially contained in the Civil Procedure Code which was in force at that time. Section 576 of that Code bears directly upon the present situation. True enough it was repealed in 1962. However, although repealed, the importance of the section will immediately become self-evident. Section 576 reads as follows:

"576. An appeal shall not operate as a stay of execution, or of proceedings, under the decision appealed from, except so far as the Court below or the Court of Appeal may so order; and no intermediate act or proceeding shall be invalidated except so far as the Court below may direct."

It is clear, therefore, that prior to the repeal of section 576 in 1962, the Court of Appeal was invested with jurisdiction to adjudicate upon an application for a stay of execution or of proceedings in civil matters emanating from the Resident Magistrate's Court. Equally clear is the fact that that jurisdiction has been preserved by section 9 (a) of the Judicature (Appellate Jurisdiction) Act (*supra*).

Miss Anderson relied heavily on the recent decision of this Court (Rattray P., Forte and Wolfe JJ.A.) in **Edwards v Garel** RMCA Motion No. 6/94 (unreported) delivered May 24, 1994. That decision should be read against the background of the fact that there the Full Court was addressing a situation where the application for a stay of execution had been made to a single judge sitting in chambers. Furthermore, it appears that section 576 of the old Civil Procedure Code was never brought to the attention of the court. In the circumstances, it seems to me that the decision in **Edwards** must now be read as having been made *per incuriam*.

I would grant this motion on the terms proposed by my brother  
Downer JA.