NMLS

**JAMAICA**

**IN THE COURT OF APPEAL**
**SUPREME COURT CIVIL APPEAL NO. 133/99**

**BEFORE:** **THE HON. MR. JUSTICE LANGRIN, J.A.**
**THE HON. MR. JUSTICE PANTON, J.A.**
**THE HON. MR. JUSTICE COOKE, J.A. (AG.)**

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| **BETWEEN:** | **LEYMON STRACHAN** | **PLAINTIFF/APPELLANT** |
| **A N D** | **THE GLEANER CO. LTD.** | **1st DEFENDANT/ RESPONDENT** |
| **A N D** | **DUDLEY STOKES** | **2ND DEFENDANT/ RESPONDENT** |

**Earl Witter, Maurice Frankson and Mrs. Judy-Ann Gardner instructed by Gaynair & Fraser, for the Plaintiff/Appellant**

**Emil George, Q.C. and Richard Ashenheim instructed By Dunn, Cox, Orrett and Ashenheim for first Respondent**

**R.N.A. Henriques, Q.C. and Ms. Yolande Whitely instructed by Dunn Cox, Orrett and Ashenheim for second Respondent**

**July 3, 4, 5, 6, 7, 2000 and April 6, 2001**

**PANTON, J.A.**

This is an appeal from the judgment of Smith J, on May 15, 1997, dismissing a motion in which the applicant had sought certain orders in respect of a judgment of Walker, J. (as he then was) delivered on September 20, 1996. The orders sought of Smith, J. will be referred to in detail later.

By suit No. C.L. 1992/S025, the appellant issued a writ and statement of claim seeking damages for libel allegedly committed by the respondents. There was an entry of appearance, but no defence was filed. As a result of this failure to file a defence, interlocutory judgment in default of defence was entered on April 9, 1992. This procedure was in keeping with the provisions of Section 247 of the Judicature (Civil

Procedure Code) Law which allows such a plaintiff to enter interlocutory judgment against a defendant 'for damages to be assessed and costs.'

The damages were assessed before Bingham, J. (as he then was) and a jury. Although no defence had been filed, the respondents participated in the assessment as they were entitled to do. On May 16, 1995, at the conclusion of the assessment, the jury awarded substantial damages to the appellant. Thereupon, Bingham, J. ordered the entry of final judgment in favour of the appellant.

The formal filing of this judgment was done on July 12, 1995. This judgment was set aside by Walker, J.

In his submissions, Mr. Witter for the appellant, said that 'the final judgment swallowed up the interlocutory judgment' and so 'a Judge of the Supreme Court has no jurisdiction or power to set aside any final judgment on the ground that fresh evidence has been discovered.' The appellant cited **Mills v. Lawson and Skyers** (1990) 27 J.L.R. 196 and **Broad v. Port Services Ltd.** (1988) 25 J.L.R.273.I shall return to this later.

To continue the history of the matter, the record of appeal shows at pages 152 and 153 that the respondents filed Notice and Grounds of appeal on May 17, 1995. They appealed 'from the judgment entered by the Honourable Mr. Justice Bingham of an award made by the jury in this action on the 16th day of May 1995, whereby it was ordered that judgment be entered for the plaintiff/respondent against the defendants/appellants for special damages of $510,726.00 and general damages of $22,500,000.00..." The grounds of appeal, nine in all, challenged the quantum of the award and alleged that the learned trial judge misdirected the jury.

It is accurate to say that the appeal to the Court of Appeal was in respect of the jury's award and the trial judge's directions to the jury as to how to arrive at that award.

On May 22, 1995, Downer, J.A., granted a stay of execution of the judgment on condition that the respondents pay by May 24, 1995, the sum of $1 million into a commercial bank account in the joint names of the attorneys-at-law on the record.

The appeal was listed for hearing during the week commencing June 17, 1996, but **the parties** requested a change of date to the week commencing September 23, 1996.

Prior to the June 1996 listing of the matter for hearing, the respondents had filed a Notice of Motion in the Supreme Court on April 9, 1996. That Motion sought to have the judgment entered on May 16, 1995, against the respondents set aside. It also sought leave for the respondents to defend the action on the ground that fresh evidence had, since the judgment, become available to them, and that on the basis of such evidence, there was a good defence to the action. So, the appellant, being aware of this Notice of Motion, agreed to the postponement of the hearing in the Court of Appeal.

Walker, J., (as he then was), heard the contested motion over a period of seven days, at the end of which (September 20, 1996), he granted the request of the respondents. He ordered the setting aside of the default judgment and granted the respondents leave to defend the action on the following terms:

1. the defence to be filed and delivered within 14 days;

2. the costs thrown away and the costs of the proceedings to go to the appellant; and

3. the costs to be agreed or taxed and paid to the appellant within thirty days of the agreement or taxation.

This order of Walker, J. has not been appealed. In my view, this fact is important especially when it is realized that not only did the respondents file their defence as ordered, but also the appellant filed a reply within eight days of the filing of the defence. At the hearing of this appeal, when asked the reason for the failure of the

appellant to file an appeal against the decision of Walker, J., Mr. Witter replied that at one time the plaintiff was minded to acquiesce in the order. It seems that the appellant did indeed acquiesce in the order if his conduct over the next few months (that is after September 1996) is anything to go by. Two points are noteworthy. Firstly, the record of appeal does not indicate that the appellant took any positive action in relation to the respondents' appeal which was listed for hearing during the week commencing September 23, 1996. Indeed, if he thought that the judgment of Walker, J. was of no validity or consequence, his duty would have been to insist on the appellate hearing proceeding as scheduled. Secondly, the appellant participated in proceedings in the Court of Appeal in January and March, 1997, in respect of an application by the respondents to discharge an order of Downer, J.A. in which the latter on his own motion, there being no application to that effect, had set aside the order of Walker, J. Indeed, at page 4 of the report of the judgments of the Court of Appeal, comprising Rattray, P. Gordon and Patterson, JJA. the President made this clear note: **"It is to be noted that the plaintiff/respondent was not challenging the jurisdiction of Walker J to make the Order which he did."** [SCCA No. 44/1995]. Looking at the record of the proceedings up to that stage, it appears to me that the appellant was primarily concerned about the receipt of his costs – and his concern has been met.

To continue with the history of the matter: the Court of Appeal on January 22, 1997, discharged the order of Downer, J.A. and ordered the return of the $1 million deposit to the respondents' attorneys-at-law 'on the termination of the appeal.' In written reasons for judgment which were handed down on March 21, 1997, this Court repeatedly referred to the 'default judgment' which had been set aside by Walker, J. and noted that 'the decision of Walker J. has been acted on by both parties in the filing of the Defence by the appellant/defendants and in the filing of the Reply by the plaintiff/respondent' (see page 7 – SCCA 44 of 1995.

Up to the time of the hearing of the motion in this Court in January 1997, the appellant had been in perfect harmony with the order of Walker, J. It must have been this indication of harmony that prompted the respondents to announce then to the Court that it was their intention to withdraw the appeal against the jury's award. The parties were then clearly of the same mind, having complied with the judgment of Walker, J. by filing Defence and Reply. Their intention was to have the matter determined on its merits bearing in mind the availability of the fresh evidence. I am of the view that the appellant who had all along had the advice of no less than three attorneys-at-law, including Lord Gifford, Q.C. must have had in mind the words of Lord Oliver of Aylmerton in the Privy Council case of **Mason v. Desnoes and Geddes Ltd.** (1990) 2 A.C. 729 at 736 H:

> "... the application to set aside a default judgment is not the invocation of an appellate jurisdiction but of a specific rule enabling the court to set aside its own orders in certain circumstances **where the action has never been heard on the merits."**

It should be mentioned that **Mason v. Desnoes and Geddes** was a case on appeal from this Court. There is no doubt that the instant action had never been heard on the merits. That being so, if the affected party can satisfy the necessary criteria, a default judgment may be set aside. That is what occurred in this case.

As stated earlier, the appellant filed a Notice of Motion on March 4, 1997. That Notice which Smith, J. dismissed has given rise to the present appeal. These are the orders that were sought:

> "1. That the order made by Mr. Justice Walker, on the 20th day of September, 1996, whereby it was ordered that the default judgment herein against the defendants in the sum of $510,726 for special damages and $22,500,000 for general damages be set aside and the defendants be granted leave to defend on the following terms:
>
> (1) the defendants do file and deliver their defence within 14 days hereof

(2) the costs thrown away and of these proceedings go to the plaintiff in any event

(3) such costs to be agreed/taxed and paid within 30 days of agreement/taxation

be set aside on the ground that the Judge of the Supreme Court has no jurisdiction to set aside a final judgment where the parties have participated in the trial of the matter and that the order is therefore a nullity.

2. In the alternative, that pursuant to section 41 of the Judicature (Supreme Court) Act, this Honourable Court reserves for the consideration of the Court of Appeal, the question of the jurisdiction of a Judge of the Supreme Court to set aside a final judgment based on the verdict of a jury in circumstances where the defendants participated in the trial of the matter, an appeal was pending before the Court of Appeal; and where the Court of Appeal was already seized of the matter.

3. In the further alternative that leave be granted to the plaintiff to appeal to the Court of Appeal against the said Order of Mr. Justice Walker made on the 20th day of September, 1996.

4. The time for making this application be extended to the date of hearing of this Notice of Motion; and,

5. The costs of this notice of motion be provided for."

The words of the Notice of Motion clearly indicate that although the appellant chose not to file an appeal against the decision of Walker, J., he sought nevertheless to challenge the decision by putting the matter before Smith, J. a judge of equal jurisdiction. The latter dismissed the motion on a preliminary objection by the respondents that he had no jurisdiction to hear the motion. Smith, J., gave no written reasons for his decision. If he gave oral reasons, we are none the wiser as no record of such has been put before us.

At the hearing before us, the appellant by an amended Notice of Appeal dated July 5, 2000, has sought the following orders:

"1. that the order of Smith, J., dismissing the motion before him be set aside.

2. that the order of Walker, J. made on the 20th day of September, 1996, is a nullity and that the order be set aside

3. that the defendants/respondents pay to the plaintiff/appellant the costs of and incidental to this appeal."

In order to secure the making of these orders, the appellant advanced four grounds of appeal, namely:

1. that Smith, J., erred in law when he upheld the preliminary objection made by the defendants/respondents that he had no power and/or jurisdiction to entertain and hear the motion.

2. that Smith, J., erred in law when he failed and/or refused to hear the motion as there was evidence before the Court which clearly established on the face of the records that the said order of Walker, J., made on September 20, 1996, was a nullity.

3. that Smith, J., erred in law when he refused to set aside the order of Walker, J., made on September 20, 1996, as it was evident on the face of the records that the said order was a nullity as same was made without jurisdiction.

4. that Smith, J., failed in his duty when he refused to hear and/or act on his own volition to set aside the order of Walker, J., which said order was made without jurisdiction and amounted to a nullity."

An examination of the grounds of appeal reveals that it is being said by the appellant that the order of Walker, J. was a nullity in that he had no jurisdiction; and that Smith, J. had jurisdiction to set it aside and erred when he declined to exercise that jurisdiction.

A significant feature of this appeal and the arguments advanced in support thereof is the concentration by the appellant on the judgment of Walker, J., although we

do not have before us any appeal from that judgment. Mr. Witter's submissions may be summarised thus:

1. A judge of the Supreme Court has no jurisdiction to set aside a final judgment on the ground that fresh evidence has been discovered.

2. Since Walker, J., purported to exercise a jurisdiction which he did not have, the order is null and void; any of his brethren may exercise an inherent jurisdiction to set aside that order.

3. Judicial interference with any final judgment on the basis of fresh evidence resides in the Court of Appeal.

4. The powers of a judge of the Supreme Court to set aside default judgments are prescribed in the Judicature (Civil Procedure Code) Law sections 77, 258 and 354.

5. Walker, J. applied the principles which are applicable in respect of judgment in default of pleadings. In so doing, he fell into grave error. In the circumstances of the case, the respondents could not have moved the Court under section 258 because by the time the application came before Walker, J., there had been a trial which was vigorously contested by the respondents. Nor was it open to the respondents to apply under section 354 as they had participated in the trial. The plaintiff appellant at all times was entitled to have the order of Walker, J., set aside by a judge of co-ordinate jurisdiction ex debito justitiae as he had acted without jurisdiction and the order was null and void.

6. Smith, J., abdicated his function in declining jurisdiction. It is now open to the Court of Appeal to set aside Walker, J's order ex debito justitiae.

In making these submissions, Mr. Witter placed great reliance on two decisions of the English Court of Appeal: **Shocked and Another v. Goldschmidt and others** (1998) 1 All ER 372 and **Craig v Kanseen** (1943) 1 All ER 108.

Mr. Henriques, Q.C., submitted that the issue before this Court is whether Smith, J. had jurisdiction to adjudicate on the motion and grant the relief sought. He said that the following principles may be distilled from the authorities:

1. A judge of the Supreme Court has jurisdiction to set aside an order which is a nullity or which has been irregularly obtained.

2. Where an order is a nullity, it is incapable of being cured or corrected. On the other hand, if it is an irregularity, it is capable of being waived, and the Court has jurisdiction to cure the irregularity.

3. The question arises as to what constitutes a nullity as distinct from an irregularity. For this distinction, guidance is to be had from the cases.

4. What Smith, J. had before him was neither a nullity nor an irregularity. Consequently, he had no jurisdiction to set aside.

5. A judge of co-ordinate jurisdiction cannot set aside a judgment such as that entered by Walker, J. The only course open is by way of appeal. The decision of Walker, J., was regularly obtained. Consequently, it can only be challenged by way of an appeal.

Reference was made to **In re Pritchard Dec'd** (1963) 1 Cr.App. R 502.

Mr. Henriques pointed out that the appellant had not cited any case in which it has been held that an order given by a judge is a nullity – where the judge had held that he had jurisdiction to hear and determine the matter. There is, he said, a fundamental difference between a decision of a judge and a nullity. The order of a judge, he said, cannot be dealt with as a nullity. Until it is set aside, it has to be obeyed. For it to be set aside, it has to be taken to the Court of Appeal.

According to Mr. Henriques, this Court is being asked to do something which is unsupported by precedent or statute and which has no basis in law in that we are being asked to set aside a judgment of a judge of the Supreme Court who has held that he has no jurisdiction to set aside an order of another judge on the basis of nullity.

If the judge (Smith, J.) had acceded to the request, he would not only have constituted himself as a Court of Appeal but also he would have been setting a most

dangerous precedent. This, he said, was contrary to all established law and practice, and would make a mockery of decisions of judges of the Supreme Court.

There is no case, Mr. Henriques submitted, that states that when there has been an assessment of damages, the default judgment cannot be set aside. If one appears at the assessment, that does not mean that one cannot apply to set aside the default judgment. Once there has been no adjudication of an action on the merits, the Court may set aside any judgment entered in default.

Mr. George, Q.C., made his submissions in writing. It would be more helpful, I feel, if more attorneys made their submissions in writing. It would certainly result in speedier disposal of appeals as it is not an easy task to wade through tortuous, lengthy, repetitive oral submissions made over several days or weeks by attorneys. Written submissions assist the Court in crystallizing and appreciating the issues. In our country, sensible ideas seem to take a long time to come to fruition. It is hoped that the Bar will quickly appreciate that the days of **lengthy** oral submissions ought to be regarded as a matter of history. We need to work towards speedier disposal of matters, and one sure way of assisting in that regard is for attorneys to make their submissions **mostly** in writing

In his written submission, Mr. George placed reliance on **In re Pritchard Dec'd.** (1963) 1 Ch. 502, particularly the judgment of Upjohn LJ. He supported Mr. Henriques' submission that Walker, J. had set aside a default judgment and that Smith, J. had no jurisdiction to disturb the judgment of Walker,J. He also referred to the judgment of the Court of Appeal delivered on March 21, 1997, on which I have already commented. His references were to the fact that the Court itself has categorized the judgment that was set aside as a default judgment and that the President of the Court had noted that the appellant was not challenging the jurisdiction of Walker, J.

In considering whether the judgment of Smith, J. was correct, I have noted that the appellant's attack has been aimed primarily at the judgment of Walker, J. although that judgment has not been appealed. In my view, the great emphasis placed by the appellant on attacking Walker J's judgment ought to be secondary to an analysis of the decision of Smith, J.

The correct approach ought to be for the appellant to show with clarity that Smith, J., did indeed have jurisdiction. It is cowardly for the appellant to simply speak of the "inherent jurisdiction" of the Court.

The appellant, for him to succeed, must show either that there is some statutory provision or some rule of common law which supports the submission that Smith, J., had jurisdiction to set aside the judgment of a judge of equal jurisdiction who had himself set aside another judgment. If Smith, J. had jurisdiction, does that mean that the appellant could have gone to yet another judge of the Supreme Court to do what Smith, J. failed to do?

Mr. Witter was not in a position to point to any statutory provision to support his submission. The reason for his failure is simple- there is none. A careful look at the Judicature (Civil Procedure Code) Law shows that the Legislature made no such provision. As a result of this absence of legislative authority on which he could rely, Mr. Witter sought sanctuary in the English cases of **Shocked and Another v. Goldschmidt and others** (1998) 1 All ER 372 and **Craig v. Kanseen** (1943) 1 All ER 108. To a lesser extent, he also looked to the cases **Preston Banking Company v. William Allsup and Sons** (1895) 1 Ch. 141 and **Mayor of Norwich v Norwich Electric Tramways Company** (1906) The Law Times, Vol.XCV 12 for help.

Before taking a closer look at these cases to see whether they are of any assistance to the appellant's cause, I wish to make a brief observation. It has been said in argument that there is no jurisdiction for a judge of the Supreme Court to

entertain an application to set aside a default judgment that had been entered prior to the assessment of damages. If this is the law, and I am of the view that it is not, it is clearly not the practice as there have been many cases in our Supreme Court in which there have been assessments of damages by Judges after the entry of default judgments and such judgments and related assessments have been subsequently set aside by the Supreme Court. The fact that the assessment in the instant case was done by a jury does not, in my view, alter the nature of the judgment; nor does that fact operate as a bar to an application to set aside the default judgment. **Mills v Lawson and Skyers** (1990) 27 J.L.R. 196, a case relied on by the appellant, makes interesting reading. In his judgment, Carey J.A. noted at page 197 to 198:

> "Interlocutory judgment in **default of appearance or pleadings** was entered on the 8th April, 1988. Mr. Mills' attorneys-at-law filed a summons to proceed to assessment of damages on 2nd May, 1988... Damages were assessed on 25th January, 1989, and **final judgment entered**"

Incidentally, it was Walker, J. who did the assessment and ordered the entry of final judgment. A summons to set aside the default judgment was dismissed by the Master on June 28, 1989. The next step was the filing of a Notice of Motion to set aside the final judgment. Chester Orr, J. dismissed that motion on September 21, 1989. On the very next day, another notice of Motion was filed to set aside the final judgment and all intervening and subsequent orders. That motion was heard by Theobalds, J., who granted the request. Downer, J.A. at pages 202 and 203, referring to the dismissal of the motion by Chester Orr, J. after a summons to the same effect had already been dismissed by the Master said:

> "In the face of this order, this certainly ought to have been the end of proceedings in the Supreme Court. No reasons were given for the dismissal and it does not seem that the appellant raised the matter of abuse of process."

The appeal against the judgment of Theobalds, J. was successful. The Court of Appeal held that the assessment of damages was a trial and that section 354 of the Judicature (Civil Procedure Code) Law was applicable, and the time limit for the application thereunder had passed. In addition, there was no basis for Theobalds, J. to have exercised his discretion in favour of the applicant before him.

It is readily appreciated that the application to set aside in the **Mills** case was governed by section 354 whereas in the instant case it is section 258 which was applicable. However, the interesting point to note is that although a **final judgment** was involved, neither Carey, J.A., nor Downer, J.A., with Morgan, J.A., agreeing with them, expressed any doubt whatsoever as to the propriety of the application before the **Master** to set aside that judgment. The reason for this lack of such expression is obvious- the procedure is indeed one that is permissible under the Judicature (Civil Procedure Code) Law.

Of further interest is the fact that when Theobalds, J. later set aside the judgment, there was no application made to another judge of the Supreme Court to set aside what Theobalds, J. had done. The affected party appealed – which indeed was the correct thing to do.

And now I wish to take a look at the cases on which the appellant relies. In looking at them, one needs to be reminded that the appellant is saying that they are authority for the proposition or submission that a judge of the Supreme Court has the jurisdiction to set aside the judgment of another judge of the Supreme Court who has set aside a judgment entered in default of defence, after damages have been assessed.

In **Shocked and Another v Goldschmidt and Others** (1998) 1 All ER 372, S claimed damages against G for breach of fiduciary duty; G counterclaimed for breach of contract against S. An order for security for costs was made in favour of G. The order was not complied with and S's action was dismissed for failure to comply. S, a

musician, was informed while on tour of the date for the hearing of the counter-claim. She tried unsuccessfully to get solicitors to represent her. S made no attempt to request an adjournment and the trial commenced in her absence. The defendants received judgment, and various orders were made with which S was late in complying. She subsequently applied to set aside the judgment. Her application was granted by the deputy judge who held that the principles relating to setting aside default judgments were applicable, that S had a reasonable prospect of making some impact by way of defence on the counterclaim, and that the inadequacy of her explanation for non-attendance at the hearing did not bar her from the relief that she sought. The defendant appealed to the Court of Appeal.

It was **held** that in an application to set aside a judgment given after a trial in the absence of the applicant, different considerations applied than in an application to set aside a default judgment. In particular, the predominant consideration for the Court was not whether there was a defence on the merits but the reason why the applicant had absented herself and if the absence was deliberate and not due to accident or mistake the Court would be unlikely to allow a rehearing. Other relevant considerations included the prospects of success of the applicant in a retrial, the delay in applying to set aside; the conduct of the applicant; whether the successful party would be prejudiced by the judgment being set aside; and, the public interest in there being an end to litigation. It followed in the instant case that in approaching the exercise of his discretion as he did, the deputy judge had erred in principle. Having regard to the fact that S's non-attendance had been deliberate, that she had no real prospects of success in a retrial, that she had delayed in applying to set aside, that her conduct before and after judgment had been undeserving, that G would be incommoded by a retrial, and that a retrial would require the Court to spend a further ten days hearing the

proceedings and so was contrary to the public interest, it would not be right to set aside the judgment. Accordingly, the appeal would be allowed.

In referring the Court to this case, the appellant was doing so clearly with reference to the judgment of Walker, J. It is necessary therefore to restate the fact that it is not the judgment of Walker, J., that is on appeal. So the cited case bears no relevance to what is before us for consideration.

Notwithstanding the lack of relevance to the immediate issue under consideration, no harm is done by referring to the judgment of Legatt, LJ as it contains a statement of the law on the setting aside of judgments.

In his judgment, Legatt LJ refers to two main categories of such cases:

> (1) those in which judgment is given in default of appearance or pleadings; and
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> (2) those in which judgment is given after a trial, albeit in the absence of the party who later applies to set it aside (page 377 J).

In respect of the first category, Legatt, LJ having reviewed **Evans v Bartlam**(1937) 2 All ER 646, **Vann v. Awford** (1986) 130 SJ 682, **The Saudi Eagle** (1986) 2 Lloyd's Rep. 221 and **Allen v Taylor** (1992) 1 PIQR page 255, continued thus:

> "The cases relating to default judgments are authority for the proposition that when considering whether to set aside a default judgment, the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation both for the default and for any delay, as well as against prejudice to the other party." (page 379 f)

So far as the second category is concerned Legatt, LJ concluded that "these authorities about setting aside judgment after a trial indicate that **each case depends on its own facts** and that the weight to be accorded to the relevant factors will alter accordingly."

He went on to list eight propositions governing this category (see page 381 e-f). It is clear however, that the propositions he listed concentrated on a situation **where the party chose not to attend the trial**. That situation existed neither before Walker, J. nor Smith, J. I am of the view that this case is of no assistance to the appellant's cause.

In **Craig v Kanseen** (supra), the appellant sought to have set aside an order giving the respondent leave to proceed to the enforcement of a judgment against the appellant. **The summons which formed the basis for the order was not served on the appellant.** Upon application to the Master, the latter set this order aside as irregular. On appeal to the Judge in Chambers, the Master's decision was reversed on the ground that the order should have been challenged by appeal, and not by an application to set it aside. The appellant contended on the appeal that the order was a nullity and that the Court in its inherent jurisdiction should set it aside *ex debito justitiae*. It was held by the Court of Appeal that:

> "(1) an order which is a nullity is something which the person affected by it is entitled to have set aside *ex debito justitiae*. The Court, in its inherent jurisdiction, can set aside its own order and an appeal is not necessary;
>
> (2) the failure to serve the summons upon which the order in the present case was made was not a mere irregularity, but a defect which made the order a nullity and therefore, the order must be set aside.

On the face of it, this case may seem to support the appellant before us. However, that is not so. **Craig v. Kanseen** dealt with the **non-service** of process and the consequent making of an order on the assumption of service. The fact of the matter is that the appellant Craig was not aware of the proceedings. The basis of the order was shown to be non-existent. Even if the English Court of Appeal was right in **Craig v.**

**Kanseen**,(supra), that case is distinguishable as the parties to the present appeal were fully aware of, and actively participated in the proceedings before Walker, J.

The appellant speaks boldly of Walker, J.'s order being a nullity. In **Craig v. Kanseen** on which the appellant so heavily relies, Lord Greene, M.R. at page 110H-111A, expressed himself in language which may best be described as cautious. He was dealing with nullity, and this is what he said:

> "Therefore, the substantial question with which we have to deal is whether the order was a nullity. Before I go more closely into that matter, it is desirable to examine the distinction between proceedings or orders which are nullities and proceedings or orders in respect of which there has been nothing worse than an irregularity. **No definition is to be found in the rules which draws a line between these two classes, and exactly where that line lies may not, in certain circumstances, be easy to discover.** The existence of the distinction is, however, one which has been recognized in the language of many authorities."

Incidentally, at page 112 of the judgment, reference is made to **Hamp-Adams v Hall** (1911) 2.K.B. 942 where "the plaintiff signed judgment in default of appearance and a verdict for damages was given by a sheriff's jury." In that case the plaintiff's non-compliance with the relevant rule requiring indorsement of the date of service on the writ was held to be an irregularity which could not be waived, and the plaintiff was therefore not entitled to proceed by default. Accordingly, the verdict and judgment were set aside. Vaughan Williams, LJ at page 943-944 of the judgment commented on the contention that too much hardship and inconvenience would result from the setting aside of the judgment in default of appearance and the verdict for damages given by the sheriff's jury. He said:

> "It is said that it is a very severe penalty to put on a mistake of this kind that all the subsequent proceedings should be set aside. I am not at all impressed by that argument."

This case, in my view, confirms the position that there is nothing unusual about the setting aside of a jury's award if the Court thinks that the default judgment ought to be set aside.

To go back to **Craig v. Kanseen,** it should not be forgotten that Lord Greene was speaking in December, 1942. Twenty years later, the English Court of Appeal returned to the matter of nullity. This was in the case **In re Pritchard, Dec'd.** (1963) 1 Ch. 502. Upjohn, L.J. classified the cases that in his view were nullities. At page 523, he said:

> "The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes.
>
> (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all. This, of course, does not include cases of substituted service, or service by filing in default, or cases where service has properly been dispensed with.
>
> (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings.
>
> (iii) Proceedings which appear to be duly issued but fail to comply with a statutory requirement."

This classification by Upjohn, LJ. does not describe as a nullity the making of an order such as that made by Walker, J. I am of the view that the approach suggested by Upjohn, LJ. Is one that can comfortably guide us today. I would accordingly be very hesitant to classify as a nullity an order made in the circumstance that faced Walker, J.

But I go back to the position that I stated at the outset- which is that it is the decision of Smith, J. that is to be focused on. As I said earlier, no statutory authority has been cited by the appellant to show that Smith, J. was empowered to deal with the motion. Furthermore, the cases relied on by the appellant bear no resemblance to the problem that was before Smith, J. Those cases provide no guidance in the

circumstances. It is clearly not without significance that the appellant has been unable to refer to a single instance anywhere within the Commonwealth where a judge at first instance has set aside a judgment of another judge similarly at first instance who had himself set aside a default judgment. It is my view that in such a situation the proper method of challenging the setting aside of the default judgment is by way of an appeal to the higher court. Every case of note that was cited by the appellant was a decision of a Court of Appeal; and nowhere in the various judgments has it been said that a Court at first instance has **done** that which the appellant sought of Smith, J.

In my view it would make for chaos in the Courts if a disgruntled party such as the appellant were allowed to do what he sought before Smith, J. There would be confusion in the minds of litigants as to when to invoke appellate jurisdiction. This Court cannot encourage such a situation.

In declaring that he had no jurisdiction, although there are no reasons to assist us, Smith, J. must have looked at the very clear and unrestricted language of section 258 of the Judicature (Civil Procedure Code) Law and concluded that if Walker, J. had erred in his decision-making, it was not open to him (Smith, J.) to exercise appellate jurisdiction in respect of that decision.

Section 258 reads:

> "**Any** judgment by default, **whether under this title or under any other provisions of this Law**, may be set aside by the Court or a Judge upon such terms as to costs or otherwise as such Court or Judge may think fit"

The "Title" referred to in this section is **Title 26** which specifically states that it is concerned with "default of pleading".

I cannot say that Smith, J. was wrong in his thinking and decision. That being the situation, I would dismiss this appeal with costs to the respondents to be agreed or taxed.

**COOKE, J.A. (Ag)**

This is yet another episode in the litigious odyssey of this case. Its genesis was the issuance of a writ of summons and statement of claim on 24th January, 1992 by the appellant against the respondents claiming damages for libel. This matter has already had the attention of the Court of Appeal on some six occasions. Here it is again. The amended grounds of appeal are set out below:

"**TAKE NOTICE** that the Court of Appeal will be moved as soon as Counsel can be heard on behalf of the above-named Plaintiff/Appellant on Appeal from the Order of the Honourable Mr. Justice Smith made on the 15th day of May, 1997.

**WHEREBY IT WAS ORDERED AS FOLLOWS**:-

1. That the Motion be dismissed.
2. That the Plaintiff pays the costs of the Defendants to be agreed or taxed.
3. Leave to Appeal refused.

**AND FOR AN ORDER:-**

1. That The Order of Mr. Justice Smith dismissing the Motion before him be set aside by this Honourable Court.
2. That the Order of Mr. Justice Walker made on the 20th day of September, 1996 is a nullity and that the said Order be set aside.
3. That the Defendants/Respondents pay to the Plaintiff/Appellant the costs of and incidental to the Appeal.

**AND TAKE FURTHER NOTICE** that the grounds of appeal are as follows:-

1. The Learned Mr. Justice Smith erred in law when he upheld the preliminary objection made by the Defendants/Respondents that he had no power and/or jurisdiction to entertain and hear the Motion.

2. The Learned Mr. Justice Smith erred in law when he failed and or refused to hear the Motion as there was evidence before the Court which clearly established on the face of the record that the said order of Mr. Justice Walker made on the 20th day of September, 1996 was a nullity.

3. The Learned Trial Judge erred in law when he refused to set aside the Order of Mr. Justice Walker made on the 20th day of September, 1996 as it was evident on the face of the record that the said Order was a nullity as same was made without jurisdiction.

4. The learned Mr. Justice Smith failed in his duty when he refused to hear and/or to act on his own volition to set aside the Order of Mr. Justice Walker which said Order was made without jurisdiction and amounted to a nullity".

I will now set out the relevant background that has given rise to this appeal. There was an entry of appearance on the 4th February, 1992 but no defence was filed. Interlocutory judgment in default of defence was entered on the 9th of April, 1992. On May 16, 1995 after a trial of the issue of the quantum of damages before Bingham J (as he then was) sitting with a jury, there was an award to the appellant of $510,726.00 in respect of special damages and $22,500,000.00 for general damages. The trial lasted six days and there was full participation by the respondents. Final judgment was duly entered on the 22nd of July, 1995. By a Notice of Motion dated 9th April, 1996 the respondents sought an order from the Supreme Court that:

> "1...the judgment entered... on the 16th day of May, 1995 in the sum of...($510,726,000.00) for special damages and...($22,000,000.00) for general damages be set aside and the (Respondents) be granted leave to defend... upon the grounds that fresh evidence has since the date of the said Judgment been made available... and that on the basis of such evidence, (the Respondents) have a good defence for (the) action."

This motion was heard by Walker J (as he then was) and on the 20th of September, 1996 the learned judge ordered that:

> "...the Default Judgment herein against the Defendants in the sum of $510,726 for special damages and $22,500,000.00 for general damages be set aside and the Defendants be granted leave to defend this action on the following terms:
>
> 1. the Defendants do file and deliver their Defence within 14 days of the date hereof;
>
> 2. the costs thrown away and the costs of these proceedings go to the Plaintiff in any event;
>
> 3. such costs to be agreed or taxed and paid within 30 days of agreement or taxation".

On the 19th November, 1996, Downer, J.A. sitting in Chambers, on his hearing of a respondents' summons seeking the discharge of an existing order in respect of a stay of execution whereby the respondents had as a condition of that stay to lodge $1,000,000.00 in an interest bearing account, set aside the order of Walker, J made on the 20th of September, 1996. On the 22nd of January,1997 the Court of Appeal discharged the order made by Downer, J.A. setting aside the order of Walker J. The discharge of the order of Downer J.A. was founded on a lack of jurisdiction. On the 15th of May, 1997, Smith J dismissed the motion dated 3rd of March, 1997 in which the appellant sought an order to set aside the order of Walker, J. The thrust of this motion was:

> "1... on the ground that a Judge of the Supreme Court has no jurisdiction to set aside a Final Judgment where the parties have participated in the trial of the matter and that the Order is therefore a nullity".

There are no recorded reasons for the dismissal of the motion by Smith J, but it seems sufficiently certain that the learned judge was of the view that he had no jurisdiction to adjudicate in respect of the order of Walker J.

In my opinion the resolution of this appeal rests with the answer to two questions:

(1) Did Walker J have jurisdiction to make the order he made?

(2) If Walker J had no jurisdiction should Smith J have declared that the order made by Walker J was a nullity and consequently set it aside. Obviously if the answer to question (1) is in the affirmative the answer to question (2) loses its significance.

During the hearing of this appeal there was much discussion on the distinction between an irregularity and nullity. The industry of counsel on both sides was evident. However, it is my view that the many cases cited in that regard are not helpful. The critical issue is a determination of the scope and effect of section 258 of the Judicature (Civil Procedure Code) Law (the "Code"). This section on which the respondents placed great reliance states as follows:

> "258. Any judgment by default, whether under this Title or under any other provisions of this Law, may be set aside by the Court or a Judge upon such terms as to costs or otherwise as such Court or Judge may think fit".

The words of this section set no limitation as to the time when applications to set aside may be made. Specifically it does not say that any such application cannot be made after an assessment of damages. It follows, therefore, that to preclude an application under section 258 there must be a demonstration that such a course is legally impermissible. The appellant contends it is so impermissible for the following reasons:

(i) Once there is an assessment of damages subsequent to the entry of an interlocutory judgment in default, and where the defendants participated fully in the assessment process, then the entry of the prior interlocutory judgment loses "its independence". Except, the argument continues, there was "fraud, accident or mistake", the final judgment properly entered is thereafter subject only to appeal. By this stage the respondents had been afforded an opportunity to contest issues of liability and quantum of damages and have admitted the one (liability) and vigorously contested the other (quantum). A judge of co-ordinate jurisdiction, it is said, is precluded from entertaining any application after final judgment following the assessment of damages. Mr. Witter speaks

of "participating fully" because he is no doubt mindful of section 354 of the Code which reads:

> "**354.** Any verdict or judgment obtained where any party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within ten days after the trial".

To support this submission ***Broad (Winston Alexander) v Port Services Ltd.*** 25 J.L.R 273 and ***Mills (Leroy) v Lawson and Skyers*** 27 J.L.R 196 were cited.

(ii) The Supreme Court has no jurisdiction to hear or alter an order after it has been passed and entered provided it accurately expresses the intention of the court.

Cited in support of this proposition was ***Preston Banking Company v William Allsup & Sons*** [1895] 1 Ch 141.

(iii) The consideration of fresh evidence was exclusively within the jurisdictional province of the Court of Appeal.

(iv) There was an appeal pending challenging the award by the jury. Accordingly, Walker, J acted improperly in exercising jurisdiction to hear the offending application.

The use of what I will term a descriptive designation "final judgment" is used in sections 245 and 366 of the Code. The former which is pertinent to "debt or liquidated demand" is stated thus:

> "245. If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, file a statement of defence, and deliver a copy thereof, the plaintiff may, subject to the provisions of section 258A of this Law at the expiration of such time, enter final judgment for the amount claimed, with costs."

The latter which is relevant to the assessment of damages is as follows:

> "366. Where in pursuance of this Title or otherwise damages are assessed by the Master or Registrar, he shall certify the amount of the damages, and upon the filing of the certificate the plaintiff may enter final judgment for the amount so assessed."

Under both sections a plaintiff is entitled to "enter final judgement" if the requisite antecedent factors have been satisfied. The epithet "final" is descriptive of the culmination of a procedural process which has been sanctioned by the Code. It would seem settled that final judgments entered pursuant to section 245 of the Code can be set aside. Applications to set aside such final judgments are commonplace in the Supreme Court. It should be noted that there is no specific provision dealing with setting aside of final judgments under Section 245. So now, is there a distinction between a final judgment entered in respect of section 245 of the Code and a final judgment entered under Section 366 of the Code? Mr. Witter contended that by full participation in the assessment process the interlocutory judgment entered in default of defence lost its independence. *Broad v Port Services Ltd* (supra) is a judgment of this court which was delivered extemporaneously. In that case during a trial in respect of an assessment of damages subsequent to an interlocutory judgment in default of defence, the plaintiff sought an amendment to the statement of claim. I will now set out the relevant part of this short judgment starting at p. 273:

> "During the assessment proceedings an application for amendment of the Statement of Claim was made. There was fullsome objection to the amendment and the learned trial judge after a keen contest made an order granting the application for amendment. Mr. Millingen submitted that the Master was acting as if it had appellate jurisdiction, when the principle of law is that a Court of co-ordinate jurisdiction has no appellate power over another such Court and that the Master has no jurisdiction either directly or indirectly, to overrule a decision made by a judge after a hearing of the merits. He was there referring to the hearing of the application to amend which he said was keenly contested.

> We thought that this point, if it was determined in the favour of the appellant, was sufficient to dispose of the appeal and therefore we called upon Mr. Gordon Robinson to see what answer he could make to the point raised by Mr. Millingen. Mr. Robinson has submitted that although steps were taken by the respondent after the interlocutory judgment was entered into, when at the hearing of the assessment, the application made and granted to amend the Statement of claim, which amendment was completely out of line with, and of much greater severity than that which was originally pleaded the trial judge adjourned the case so as to give the defendant an opportunity to put in whatever defence it wished whether challenging liability or damages or both. He said that the election whether or not to defend a liability rested with the respondent and was available to him right up until there was a final determination and judgment of the competent Court on the assessment of damages.
>
> We cannot agree with Mr. Gordon Robinson. This was a case in which the respondent, for reasons best known to itself, submitted to an interlocutory judgment, participated in the setting down of the case for assessment, attended Court at the hearing of the assessment, participated fully in the trial before the Judge who was hearing the case, and being dissatisfied with the way in which the assessment was going, sought as one of my brothers rightly put, to pull the judge from off his bench, by going before the Master and asking the Master to interfere with the conduct of the assessment by setting aside the interlocutory judgment.
>
> Mr. Gordon Robinson was unable to show any authority which would permit such a course and we are clearly of the view that having submitted to the assessment, and having entered upon it, if there was anything which was going wrong in the assessment, the only course open to the respondent was to appeal against the decision of the judge either then or when the matter had been finalized. It is impermissible in the circumstances of this case for a Master to embark upon any hearing which would disrupt the proceedings at trial before the judge.
>
> We therefore think that the Master had no jurisdiction in this particular case to set aside the interlocutory judgment and that the appeal ought to be allowed and the order of the Master set aside and that there be costs to the appellant to be agreed or taxed."

It cannot be said that that case is authority for the proposition that the conclusion of hearing on the assessment of damages is a bar to an application to set aside the

default judgment upon which the assessment had proceeded. Here it would seem to me the court was frowning on the manoeuvre calculated "to pull the judge from off his bench, by going before the Master and asking the Master to interfere with the conduct of the assessment by setting aside the interlocutory judgment". The court held:

> "it is impermissible in the circumstances of this case for a Master to embark upon any hearing which would disrupt the proceedings at the trial before the judge."

This case does not assist the appellant. Neither does ***Mills (Leroy) v Lawson*** (supra). That authority decided that an assessment of damages is a trial. Accordingly, any challenge to the quantum awarded had to be made in the Court of Appeal. It certainly did not decide that an interlocutory judgment in default of defence could not be set aside after there had been an assessment of damages.

A default judgment is, as Mr. Henriques Q.C. submitted one that has not been decided on its merits. As such he maintained, as I understand him, that an assessment of damages does not in any way detract from the essential characteristic of a default judgment which is that there has been no trial on the issue of liability. Accordingly, despite the concluded assessment, the instant case is still one involving a judgment in default. I hold that there is merit in these contentions. It is true that the respondents were afforded an opportunity to contest the issue of liability. However, when the word "afforded" is used it can only mean in this context that the respondents were not deprived of their rights within the time-frame prescribed by the Code for the filing of a defence. To say that the respondents admitted liability is true only in so far as they were submitting to the coercive power of the court within the procedural framework of the Code. In the circumstances as then existed, they had no choice but to submit to a trial to determine the quantum of damages to be awarded. It cannot be said that there was a consent judgment. The fact that the respondents participated fully in the assessment process and "vigorously contested" the quantum of damages to be awarded cannot, and

does not, deprive the judgment of its essential characteristic of being one in default of defence. The entry of interlocutory judgment for failure to deliver a defence under Section 247 of the Code and the assessment of damages are two separate and independent procedural steps. The only relationship between these steps is that the latter can only be taken after the first has been made. It follows, therefore, that if the entry of an interlocutory judgment in default of defence is successfully set aside then the award of damages which was grounded on that entry of interlocutory judgment is of no effect. In my opinion, Walker J had jurisdiction to hear the application to set aside the interlocutory judgment in default of defence. He is so empowered by section 258 of the Code. In *Evans v Bartlam* [1937] A.C. 473, Lord Atkin in his speech when discussing R.S.C Ord. 10 and R.S.C. Ord. 27 & 15 which are substantially similar to section 258 of the Code delivered himself thus at p.480:

> "I find myself in agreement with the reasoning of Greer, L.J. except on one point. I agree that both R.S.C. Ord. 13, r.10 and R.S.C. Ord. 27 r.15, give a discretionary power to the judge in chambers to set aside a default judgment. The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule, that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure".

I accept the approach enunciated by Lord Atkin as providing proper guidance. In the instant case since there was no pronouncement of a judgment upon the merits nor any consent it was open to Walker J to exercise his unconditional discretion as to whether or not the respondents should be allowed to put in a defence. The same principles apply to setting aside an interlocutory judgment in default of defence subsequent to which there has been an assessment of damages.

The *Preston Banking Company* case is, indeed, authority for the undoubted truth that the Supreme Court has no jurisdiction to re-hear or alter an order after it has been passed and entered provided that it accurately expresses the intention of the Court. This formulation is taken from the headnote of that case which accurately states the ratio decidendi thereof. However, Walker J did not re-hear or alter any order in respect of the assessment of damages. The wording of the entry of the final judgment remains intact in every particular. What Walker J did was to exercise his discretion as to whether or not the judgment in default of defence should be set aside.

In respect of the submission that the consideration of fresh evidence was exclusively within the jurisdictional province of the Court of Appeal, it is necessary to peruse the relevant section of the Court of Appeal rules which speaks to the reception of such fresh evidence. It is Rule 18 (2). It states:

> " (2). The Court shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner:
>
> Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."

It is clear that to invoke the jurisdiction of the Appellate Court in the particular case there would have to have been a "judgment after trial or hearing of any cause or

matter upon the merits". Neither of these two prerequisites obtained in this case. So on the issue of liability it was impossible for the respondents to seek to move the Appellate Court within the confines of Rule 18(2). In this case there has been no evidence at all given by the respondents. Consequently to describe the material which the respondents claim will provide a defence as "fresh evidence" is forensically inelegant. The respondents say they are now possessed of material which affords them a defence. If the appellant is correct it would mean that the respondents would never have an opportunity of putting this material before a court. The judicial door would be closed in their faces. In my view there should be no such peremptory closure. However, keeping the door open does not guarantee automatic entry. There will have to be the exercise of judicial discretion as to whether or not, according to established principles, there is any merit, in all the circumstances, that the respondents be given the opportunity to defend the action. In this case after such an exercise of judicial discretion, Walker J. found in favour of the respondents. I am fully aware that every court strives for an end to litigation in respect of each particular matter. At the same time litigants should not be lightly driven away from the judgment seat. I cannot perceive of any particular circumstances which could arise necessitating a different approach in dealing with an application to set aside a judgment in default whether made before or after an assessment of damages. I would think that the same principles apply. The judge would take into consideration all the relevant circumstances. It may well be that in a particular case the factor that there has already been an assessment could be of much significance, especially if there has been inordinate delay in the making of the application to set aside. I hold that despite the fact that there was a pending appeal in respect of the not inconsiderable award of damages this was no bar to the respondents making an application under section 258 of the Code. What else could they do?

So in respect of the first question posed as to whether Walker J had jurisdiction to hear the application of the respondents under section 258 of the Code my answer is that he did.

Accordingly, his order was not a nullity. Therefore, Smith J. was correct in dismissing the summons which sought to set aside the order made by Walker J. Smith J had no authority, as a judge of co-ordinate jurisdiction, to hear the application to set aside the order made by Walker J.

Having arrived at my conclusion in respect of question 1, it is unnecessary to deal with question 2. I would dismiss this appeal and award costs to the respondents.

**LANGRIN, J.A. (Dissenting)**

This is an appeal against the decision of Smith J, made on 15th May, 1997, whereby he dismissed a motion filed by the appellant seeking an order to set aside the Order of Walker, J. (as he then was) made on 20th September, 1996. At the outset, it should be pointed out that counsel for the respondents took a preliminary point that the order of Walker, J. was not before this Court and we unanimously overruled this motion and directed that the appeal should proceed.

The issue before the Court is whether or not Smith, J. had jurisdiction to adjudicate on that motion and grant the relief sought.

The historical background of the matter is that the appellant on January 27, 1992 filed a Writ of Summons and a Statement of Claim against the respondents claiming damages for libel. An appearance was entered on February 4, 1992, but no defence was filed.

On April 9, 1992, interlocutory judgment in default of defence was entered. On September 23, 1992 an order on a summons to proceed to assessment of damages was granted. At that time, the respondents were represented by counsel who advised the Master in Chambers that they would not put in any defence.

The assessment of damages lasted six days before Bingham J, (as he then was) and a jury. The respondents appeared and participated in the trial and then on May 16, 1995, Final Judgment was entered for the appellants in the sum of Five Hundred and Ten Thousand Seven Hundred and Twenty Six Dollars ($510,726.00) in Special Damages and Twenty Two Million Five Hundred Thousand Dollars ($22,500,000.00) for General Damages.

Bingham J, refused to grant to the respondents both leave to appeal, and an Order for Stay of Execution of the Final Judgment pending appeal.

On May 17, 1995, the respondents filed Notice and Grounds of Appeal against the judgment and on May 19, 1995 Downer, J.A. sitting in chambers granted a stay of execution with a condition that the respondents lodge into an interest bearing account the sum of One Million Dollars ($1,000,000.00). On July 22, 1995, Final Judgment was drawn up and entered in the Judgment Book.

The Registrar of the Court of Appeal notified the parties of the hearing of the appeal which was listed for June 17, 1996. However, on April 4, 1996, the respondents filed in the Supreme Court a Notice of Motion to set aside the judgment of May 16, 1995 where damages had been assessed, and, for leave to file a defence on the basis of the obtaining of fresh evidence.

When the said motion to set aside default judgment came on for hearing on May 28, 1996, before Walker, J (as he then was) counsel for the appellants objected in *limine* challenging the Court's jurisdiction to entertain the application. The learned judge overruled the objection. The substantive motion was heard on September 16 to 20, 1996 when the learned judge set aside the said Final Judgment of May 16, 1995, and granted leave to the respondents to file their defence. On the 3rd October, 1996, the respondents filed and delivered their defence and on the 11th October, 1996 the appellants filed a Reply to the Defence.

On November 17, 1996, upon the hearing of the respondent's Summons to Discharge the Stay of Execution of May 19, 1995, Downer, J.A. refused the application and discharged the Order of September 20, 1996, made by Walker, J. The Court of Appeal on January 22, 1997, discharged the Order of Downer, J.A. and ordered that the sum of one million dollars be paid out to the respondents, thus restoring the Order of Walker J. By Notice dated January 22, 1997 and filed January 24, 1997 the respondents withdrew their appeal filed on May 17, 1995.

On February 4, 1997, the appellant filed a notice of motion for leave to appeal the order of September 20, 1996, which was later withdrawn.

By Notice of Motion filed on March 4, 1997 the appellant sought an order of the Supreme Court of Judicature to set aside the Order of Walker, J. (as he then was) based on the following:

> (1) That a Judge of the Supreme Court has no jurisdiction to set aside a Final Judgment where the parties have participated in the trial of the matter and that the Order is therefore a nullity.
>
> (2) In the alternative, that pursuant to section 41 of the Judicature (Supreme Court) Act the Court reserves for the consideration of the Court of Appeal, the question of the jurisdiction of a Judge of the Supreme Court to set aside a Final Judgment based on the verdict of a Jury in circumstances where the Defendants participated in the trial of the matter, an appeal was pending before the Court of Appeal and where the Court of Appeal was already seized of the matter.

The Motion was heard by Smith J. on 15th May, 1997, and was dismissed on a preliminary objection by the respondents that the Judge had no jurisdiction to hear the Motion. He refused leave to appeal. The appellant by Motion dated May 28, 1997, appealed against the Order of Smith, J. and at the conclusion of the hearing on October 13, 1998, the Court of Appeal, by a majority, struck out the appeal on the preliminary objection of the respondents on the ground that the applicant had not sought leave to appeal the interlocutory order of Smith, J. Leave to Appeal the order of Smith J. on 15th May, 1997 was finally granted on December 6, 1999.

The grounds of appeal are:

> "(1) The Learned Mr. Justice Smith erred in law when he upheld the preliminary objection made by the Defendants/Respondents that he had no power and/or Jurisdiction to entertain and hear the Motion.
>
> (2) The Learned Mr. Justice Smith erred in law when he failed and/or refused to hear the Motion as there was evidence before the Court which clearly established on the face of the records that the said Order of Mr. Justice Walker made on the 20th day of September 1996 was a nullity.

(3) The learned trial Judge erred in law when he refused to set aside the Order of Mr. Justice Walker made on the 20th day of September, 1996, as it was evident on the face of the records that the said order was a nullity as same was made without jurisdiction.

(4) The Learned Mr. Justice Smith failed in his duty when he refused to hear and/or to act on his own volition to set aside the Order of Mr. Justice Walker which said Order was made without jurisdiction and amounted to a nullity."

Mr. Witter for the appellant submitted, that a judgment in default of pleadings followed by an assessment of damages, where the latter is conducted *inter partes* at a trial, and, before judge and jury, the final judgment drawn up, passed and entered in consequence, cannot be still treated as a default or interlocutory one. The only recourse open to that party thereafter is to proceed by way of appeal. The Motion before Smith, J. was a nullity and ought to have been set aside by him.

Mr. Henriques, Q.C, on behalf of the second respondent submitted that, where a judge has adjudicated on the question of jurisdiction and has made an order, such order cannot be a nullity. He further submitted that a judgment obtained by default still remains a default judgment even though a final judgment has been entered.

Mr. George, Q.C., for the first respondent, adopted the arguments of counsel for the second respondent and stated that a judgment by default which proceeded to assessment could not change the nature of the judgment which was in default of defence.

The appellant secured a judgment in default of defence against the respondents with respect to liability. The respondents did not move to set aside the default judgment as they were entitled to do pursuant to section 258 of the Judicature (Civil Procedure Code) Law. The section states:

"Any judgment by default, whether under this title or under any other provisions of this Law, may be set aside by the Court or a Judge upon such terms as to costs or otherwise as such Court or Judge may think fit."

A plaintiff who had entered a default judgment regularly would have had to commence proceedings by writ, delivered a statement of claim, and then when a search revealed that no defence was filed, he then would have entered a default judgment. The statement of claim would have alleged libel and a claim made for unliquidated damages. He now had a judgment in his favour with respect to liability for libel but the claim for damages still remained outstanding.

The next procedural step is governed by section 247 of the Code. It reads:

> "If the plaintiffs' claim is, as against any defendant, for unliquidated damages only, and that defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may enter interlocutory judgment against him for damages to be assessed and costs, and proceed with the action against the other defendants, if any."

Then section 254 is most significant:

> "In all actions, other than actions against the Crown and those mentioned in the preceding sections of this Title, the plaintiff may, if the defendant does not within the time allowed for that purpose deliver a defence, apply for judgment by motion or summons, and on the hearing of the application the Court or a Judge shall give such judgment as the plaintiff appears entitled to on the statement of claim."

Even where the judgment is regular the Court will set it aside as there has been no adjudication on the merits and judgment is due only to a failure to comply with the rules of procedure. However, in support of his summons, the defendant should file an Affidavit of Merits showing that he has an arguable defence. Reliance was placed on ***Evans v. Bartlam*** (1937) A.C. 473. This case deals with default judgments which were set aside before the plaintiff exercised his right to enter final judgment where unliquidated damage (s) are claimed.

The observations of Lord Atkin, in ***Evans v. Bartlam*** (supra) at p. 480 on the Court's approach to the exercise of the discretion, are helpful. He said:

> "The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning

> that the applicant must produce to the Court evidence that he has a prima facie defence.
> ... The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

Further he went on to say:

> "Appellate jurisdiction is always statutory: there is in the statute no restriction upon the jurisdiction of the Court of Appeal: and while the appellate Court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it." (Emphasis supplied)

Section 10 of the Judicature (Appellate Jurisdiction) Act provides that the only Court competent to upset the verdict of a jury is the Court of Appeal. Equally if there is a claim for adducing fresh evidence it must be done in the Court of Appeal. See ***Ladd v. Marshall*** (1954) 1 W.L.R. 1489. Rule 18(6) of the Court of Appeal Rules 1962 provides that a default judgment which is an interlocutory order can be challenged when the assessment of damages is under appeal.

In the case now under discussion Walker J. thought it proper, in the exercise of his discretion, to set aside the judgment of Bingham J and the jury. However, the critical issue is not whether there was a wrongful exercise of his discretion but whether he was precluded from exercising any discretion in light of the fact that it was only the Court of Appeal which had jurisdiction in the matter at that time. Indeed, there was at that time an appeal against the judgment of Bingham J. and the jury. In other words, was the respondent debarred from seeking relief from the Supreme Court; a court in which the learned judge had no jurisdiction?

It is now necessary to consider whether the Motion and the Order made by Walker J. was a nullity. The requirements for setting aside the judgment will vary depending on whether the judgment was irregular or regular. An irregular judgment is one which has been entered

otherwise than in strict compliance with the rules or some statute or is as a result of some impropriety which is regarded as so serious as to render the proceedings a nullity. Where the judgment is irregular, the defendant is entitled to have it set aside *ex debito justitiae*. I accept Mr. Henriques' Q.C. submission as correct, that a judge of the Supreme Court has jurisdiction to set aside an order which is a nullity.

In ***re Pritchard, Dec'd.*** (1963) 1 Ch. 502 (C.A.) Upjohn L.J. in dealing with the question of nullity, had this to say at p. 523:

> "... A fundamental defect will make it a nullity. The Court should not readily treat a defect as fundamental and so a nullity, and should be anxious to bring the matter within the umbrella of Order 70 when justice can be done as a matter of discretion, still bearing in mind that many cases must be decided in favour of the party entitled to complain of the defect ex debito justitiae...
>
> The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part, I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all...(ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings. (iii) Proceedings which appear to be duly issued but fail to comply with a statutory requirement..."(emphasis supplied)

Counsel for the respondents argue that the proceeding which came before Walker, J. do not fall within any of the abovementioned categories: while Mr. Witter, on behalf of the appellant contends that the motion before Walker J. falls under the third category.

Section 354 of the Civil Procedure Code provides:

> "354. Any verdict or judgment obtained where any party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within ten days after the trial."(emphasis supplied).

Under this section the defendant would not have appeared at the trial and participated, hence the judgment would have remained a default judgment.

In ***Mason v Desnoes & Geddes*** (1990) 38 W.I.R 214 it was clearly demonstrated that a Master or Judge in the Supreme Court has power to set aside a default judgment under section 354 of the Code.

In ***Mills v Lawson et al*** (1990) 27 JLR 196 the Court of Appeal held that a hearing for an assessment of damages by a judge or a judge with a jury is a trial and results in a verdict or judgment which cannot be regarded as a default judgment. The dissatisfied party can only proceed by way of appeal. This was the situation before Bingham J since the defendant appeared and participated.

In ***Brown v Port Services*** (1988) 25 JLR 273 (Rowe P, Wright and Forte JJA) at page 274, Rowe P had this to say:

> "... we are clearly of the view that having submitted to the assessment, and having entered upon it, if there was anything which was going wrong in the assessment, the only course open to the respondent was to appeal against the decisions of the judge either then or when the matter had been finalized."

It is in my view fallacious to contend that Walker J. purported to set aside a default judgment since at the time when he made his order the default judgment had changed its character to a final judgment by the assessment process culminating in the order of Bingham, J.

There has been a fundamental failure to comply with the requirements of the Statute relating to the issue of the proceedings challenging the order of Bingham J, and the jury It was not a mere irregularity. The proceedings complained of before Walker J, was issued from the Supreme Court and there is no procedure to transfer such proceedings to the Court of Appeal to cure the defect. Consequently, this is much more than a mere irregularity. In my view this is a nullity, and so it is not possible for the appellant to wave that defect.

The Notice of Motion filed on April 4, 1996, to set aside the judgment of Bingham J of May 16, 1995 is invalid, and has no effect. It follows that the Order of Walker J. made on

September 20, 1996 is a nullity. In those circumstances Smith J. had the jurisdiction to set aside an Order of a judge of coordinate jurisdiction. See ***Minister of Foreign Affairs v Vehicles and Supplies Ltd.*** (1989) 39 WIR 270 and ***White v Brunton*** (1984) 2 All E.R. 606 at 808 where Sir John Donaldson MR reiterates the well known rule that a jurisdictional point must be taken. He therefore fell into error when he declined jurisdiction. Indeed, Smith J, could have set the order aside *ex debito justitiae* since the order was made without jurisdiction. See ***Chief Kofe Forfie v Seifah*** [1958] 1 All E.R. 289 following ***Craig v Kanseen*** [1943] 1 All ER 108. Further in this jurisdiction Smith J was empowered by virtue of Section 41 of the Judicature ( Supreme Court) Act to refer the matter to this Court.

For the foregoing reasons I would allow the appeal with costs to the appellant to be taxed if not agreed.

**ORDER:**

**LANGRIN, J.A:**

By a majority appeal dismissed. Costs to the respondent to be taxed if not agreed.