JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 11/97

BEFORE: THE HON. MR. JUSTICE FORTE JA
THE HON. MR. JUSTICE DOWNER JA
THE HON. MR. JUSTICE BINGHAM JA

REGINA
vs
ICYLINE LINDSAY
MAXINE LINDSAY

Ian Ramsay. for Icyline Lindsay

Jacqueline Samuels- Brown for Maxine Lindsay
both counsel instructed by Rattrav, Patterson Rattrav

Huah Small Q.C., Lisa Palmer, Crown Counsel, and

Paul Fisher for the Crown:

(The First and Third counsel were instructed by Stephen Shelton of Myers, Fletcher & Gordon)

29, 30, September, 2, 21,22,23,24 October and 19 December, 1997

FORTE. JA (dissenting)

I have read in draft the judgments of my brothers Downer and Bingham, JJA, but regretfully, I am unable to agree with their reasons and conclusions. Consequently, I offer below my opinion on the issues joined in this appeal.

The appellants were tried and convicted in the Resident Magistrate's Court for the Corporate Area on two Counts in an indictment, both of which charged them with

conspiracy to defraud contrary to the common law. Because of the issues in this appeal the particulars of offence in respect of both Counts are set out hereunder:

Count I

> "Maxine Lindsay and Icilyn Lindsay on diverse days between the 10th day of February. 1992 and the 17th day of May, 1994, conspired together and with Aneita Grant and other persons unknown to defraud the Registrar of Titles by requesting that Aneita Grant, Maxine Lindsay and Icilyn Lindsay were the proprietors of an estate as Joint Tenants and as such were entitled to be registered as the proprietors of an estate as joint Tenants in fee simple of the same parcels of land at Volume 1269 Folio 915 and 916.

Count II

> Maxine Lindsay and Icilyn Lindsay on diverse dates between the 18th day of February, 1992 and the 17th day of May, 1994 conspired together and with Aneita Grant and with persons unknown to defraud Crystal Coast Development Co. Ltd of their right to be registered as the proprietors of an estate in fee simple of a parcel of land registered at Volume 1035 Folio 298 by procuring the registration of Aneita Grant, Maxine Lindsay and Icilyn Lindsay as proprietors of an estate as Joint tenants in fee simple of the lands in a Certificate of Title registered at Volume 1265 and Folio 253".

Both appellants were sentenced to periods of twelve (12) months imprisonment on each count, the sentences being suspended for a period of two years. From these convictions, the appellants now appeal. In the first ground of appeal the appellants complained as follows:

> 1. That the indictment was bad in law in that:
>
> a) The offences particularized in Count I is the Statutory offence provided for in Section 178 of the Registration of Titles Act: That Accordingly it is submitted that it is not permissible to charge a statutory offence - as an offence at Common Law to the clear prejudice of the defendants:-

That further:

b) The defect cannot/is not cured by charging conspiracy to defraud at Common Law in order to circumvent the statute: "That a charge of conspiracy to contravene the statute would have been competent but improper since the substantive statutory offence should be charged".

In order to determine the validity of the complaint made, it is necessary to examine firstly, the provisions of **Section 178** of the Registration of Titles Act which states as follows:

> **178.** If any person wilfully makes any false statement or declaration in any application to bring land under the operation of this Act, or in any application to be registered as proprietor, whether in possession, remainder, reversion or otherwise, on a transmission, or in any other application to be registered under this Act as proprietor of any land , lease, mortgage or charge; or suppresses, withholds, or conceals, or assist or joins in or is privy to the suppressing, withholding or concealing from the Registrar or a Referee, any material document, fact or matter of information, or wilfully makes any false statutory declaration required under the authority or made in pursuance of this Act; or if any person in the course of his examination before the Registrar or a Referee, wilfully and corruptly gives false evidence; or if any person fraudulently procures, assists in fraudulently procuring, or is privy to the fraudulent procurement of any certificate of title or instrument, or of any entry in the Register Book, or of any erasure or alteration in any entry in the Register Book; or knowingly misleads or deceives any person hereinbefore authorized to require information or explanation in respect to any land, or the title to any land under the operation of this Act, or in respect to which any dealing or transmission is proposed to be registered, such person shall be guilty of a misdemeanour, and shall incur a penalty not exceeding one thousand dollars, or may at the discretion of the Court by which he is convicted, be imprisoned with or without hard labour for a period not exceeding two years; and any certificate of title, entry, erasure or alteration so procured or made by fraud shall be void as against all parties or privies to such fraud.".

It should be noted that in developing his arguments on this ground, Mr. Ramsay for the appellant Icyline Lindsay also made reference to **Section 180** of the Registration of Titles Act, which he submitted placed the jurisdiction for the trial of offences under the Act, in the Supreme Court.

> **Section 180** states:
>
> "Unless in any case herein otherwise expressly provided, all offences against the provisions of this Act may be prosecuted by the Director of Public Prosecutions, and all penalties or sums of money imposed or declared to be due or owing by or under the provisions of the same may be sued for and recovered in the name of the Attorney General in the Supreme Court."

Mr. Ramsay asked this Court to interpret **Section 180** as providing that the jurisdiction for trials of offences against the provision of the Act, to be in the Supreme Court and not in the Resident Magistrate's Court where this trial took place. If he is correct, then the trial would have been a nullity.

In determining the validity of this submission, it has to be remembered that the offence charged in Count I was not any of the substantive offences created by Section 178, but a common law conspiracy to defraud. Before dealing therefore with this latter contention, it may be better to determine whether the charge in Count I was permissible in the circumstances.

The conspiracy charged involved a plan to make false representation to the Registrar of Titles that persons named were the proprietors of the real estate as joint tenants. The earlier part of Section 178, does make it an offence to

> **178. "....** wilfully makes any false statement or declaration in any application to bring land under the operation of this Act, or in any application to be registered as proprietor, whether in possession, remainder, reversion or otherwise, on a transmission, or in any other application to be registered under this Act as proprietor of any land , lease, mortgage or charge;....'

In support of Ground 1 (a) Mr. Ramsay relied on certain words of Cockburn, C.J in his summing up to the jury in **Reg v Boulton** 12 Cox Criminal Law Cases 87 at p 93 which follows:

> "With regard to the general nature of the indictment for conspiracy, and the mode in which it had been attempted to support it, the Lord Chief Justice said: [The case is one which requires the utmost discrimination and care, not only on account of the interests of the accused but of the interest of public justice , and especially with reference to the form in which it is presented to you. We are trying the defendants for conspiring to commit felonious crime, and the proof of it, if it amounts to anything, amounts to proof of the actual commission of crime. Now I must say that this is not a course which commends itself to my approval. I am clearly of opinion that where the proof intended to be snhmittnri to _9_ jury is proof of thA nottiAl commission of the crime, it is not the proper course to charge the parties with conspiring to commit it".

The learned Chief Justice, then cited to the jury in support, words which had previously fallen from Lord Cranworth ' one of the ablest of our judges He Stated:

> "I do not say this merely on my own authority, I have the authority of the late Lord Cranworth - one of the ablest of our judges - for the view I have expressed. In a case before him, in which the parties had been indicted, not for the offence they had committed, but for conspiracy to commit it, that eminent judge said that such a course was no doubt legal, but that it would have been more satisfactory if they had been indicted for that which they had done, and not for conspiring to do it. I entirely adopt that view, and think that it would have been far better if thaw parties who are brought before you on one common indictment, for offences essentially several and distinct, had *been* respectively indicted and put upon their defence for the offences they had respectively committed, but as it is, we can only consider the case, as it is now presented to us, on one indictment."

These words of Cockburn J, though critical of the prosecutor's decision to charge conspiracy, where there is proof of the substantive offence in respect of each

accused, nevertheless recognizes the legality of so doing. Nevertheless, Mr. Ramsay was not content to rest his submission on that case wholly, but enlarged his argument to contend, that where an Act creates an offence, and lays down the procedure by which offenders of its provision must be tried then that procedure ought to be followed. For this proposition he relied on the case of **Barnett et al v Reg** (1951) Cr. App. R 37, the headnote of which sets out sufficient details for easy understanding of the issues and the resolution of these issues. It reads:

> "The appellants were convicted of conspiring together and with other persons unknown to contravene the provisions of Section 1 of the Auction (Bidding Agreements) Act 1927, by being dealers agreeing to offer and accept consideration as an inducements or reward for abstaining from bidding at sales by auction.
>
> Held : "That as the offence under Section I of the Act of 1927 was created for the first time by that section, and a definite procedure for the trial namely, summary trial only, with the consent of one of the law officers was prescribed by the Act, and on the particulars of the conspiracy alleged were in terms or in substance the offence prescribed by the Act, the offence was not triable on indictment and the indictment - should have been quashed at the outset. The convictions therefore must be quashed".

In that case, the Act specifically made an agreement between the dealers an offence, such agreement not having before been an offence. At p 39 Sellers J sets out the provision of Section 1 (1) of the Act of 1927 as follows:

> "If any dealer agrees to give, or gives, or offers any gift or consideration to other persons as an inducement or reward for abstaining, or having abstained from bidding at a sale by auction either generally or for any particular lot, or if any person agrees to accept, or accepts or attempts to obtain from any dealer any such gift or consideration as aforesaid he shall be guilty of an offence under this Act, and shall be liable on summary conviction, to a fine not exceeding L100 or to a term of imprisonment, for any period not exceeding six months or to both such fines with such imprisonment".

He then sets out the facts of the case as follows:

> ..... the eight appellants are all interested, in one capacity or another, in businesses - seven limited companies and one firm - which deal in scrap metal. Some perhaps, the majority, of the appellants' companies or businesses are in a big way to trade and the appellants themselves hold high offices in those companies or businesses. The offence charged alleges, and the evidence was directed to establish, that the appellants met together and agreed to form a ring and attended at sales where Ministry of Supply commodities, mainly cable and other similar commodities, were being sold, and that some representatives on behalf for this ring bid there on behalf of all; that goods were acquired and subsequently there was what has been described as "knock-out", whereby the purchased goods were put up for auction and then, on a system of bidding whereby the various parties bid up to a sum which they thought was safe and was within their power, finally reached the top knock-out price; then the difference between the two prices, as I understand it, was split up by some agreement between the parties, so that each got a proportion of that profit in relation to the extent of their bids".

He then opined the following:

> " In the opinion of this Court, it is clear that the forming of a ring in order to bid at an auction in the way indicated was not an offence at law up to the time of the Act of 1927. That being so, it is submitted that there is a well-known principle of law which requires that the procedure laid down by the Act making it an offence should be followed. That principle is to be found very clearly enunciated in the judgment of Williams, J., in **Eastern Archipelago Co. v Reg** (1853), 2 E. & B. 856. In the course of judgment he said this (at p. 879): "For example: it is a familiar doctrine that, though, where a statute makes unlawful that which was lawful before and appoints a specific remedy, that remedy must be pursued and no other , yet, where an offence was antecedently punishable by a common law proceeding as by indictment, and a statute prescribes a particular remedy in case of disobedience, that such particular remedy is cumulative, and proceedings may be had either at common law or under the statute".

The learned judge then came to the following conclusion:

> "That being, in our opinion, clearly the law applicable to this matter, the question then arises whether this second count of the indictment does allege the very offence which is contained in the Act of 1927, which is triable only according to the terms of the Act as a summary offence. The submission on behalf of the prosecution by Mr. Seaton was that it alleges a conspiracy, which is something different from the offences which the Act prescribes.
>
> But whilst it is quite clear that it may be possible to frame a conspiracy to contravene this Act in any given set of circumstances, the Court has to look to see **what** is in fact alleged. In alleging the conspiracy to contravene the Act particulars are given, and those particulars, "by, being dealers, agreeing to offer and accept consideration as an inducement or reward for abstaining from bidding at sales by auction". This Court is of opinion that those particulars of this particular conspiracy which is alleged are in terms the offences which the Act prescribes, or are substantially the same. In those circumstances the well-known principle of law applies and this indictment did not lie; it should have been quashed at the outset of the trial, and on those grounds the Court allows each of these appeals".

The dicta of Sellers J clearly indicate that the ratio decidendi of his decision was based on the court's conclusion that the agreement charged in the conspiracy was in fact, the very agreement made unlawful by the Act of 1927, and consequently the procedure laid down in the statute for the trial of such matters had to be followed. Sellers J also recognised, following the dictum of Williams J in **Eastern Archipelago Co.** (supra) that:

> " where an offence was antecedently punishable by a common law proceeding, and a statute prescribes a particular remedy in case of disobedience, that such particular remedy is cumulative, and proceedings may be had either at common law or under the statute".

The issue therefore arising in the instant case, is whether the Registration of Titles Act makes it an offence to conspire to do the things alleged in Count I that is

representing (falsely) that the appellant were proprietors of an estate as joint tenants and as such were entitled to be registered .

Though the Act makes it a substantive offence to "wilfully make false statements or declarations in an application to be registered as proprietors", in this aspect, if not in all aspects, as we shall come to examine, it is silent as to "conspiracy to do those acts."

Consequently, it cannot be said that the Act created an offence of conspiracy in relation to those acts. Indeed, it is also obvious from the statute that one individual could be charged for the substantive charge of making false statements, a point recognised by Fenton Atkinson J in delivering judgment in **Simmonds et al** 51 Cr App. R 316 when in distinguishing that case from that of **Barnett and others** (supra) at p. 334 he said:

> "In our opinion, the decision has no relevance in the present case where the conspiracy charged is to cheat and defraud H.M. The Queen and the Commissioner of Customs and Excise. The offence under Section 17 of the Act of 1944 can be committed by one man and this is not a case where the agreement between one or more persons to do certain things is itself made a specific offence by statute".

Given the above principles, was it correct in the instant case to charge the appellants for conspiracy to defraud at common law. It is beyond debate that, the offence exists at common law. Also, it must be accepted that conspiring to defraud a person responsible for a public duty has long been recognized as a common law conspiracy. Though the case of **Welham v DPP** (1960) 1 All E.R.804 dealt with the offence of forgery, the words of Lord Radcliffe in his speech in the House of Lords are of relevance to the question of the meaning of "defraud" and hence the issues in the

instant case. It is sufficient for the purposes of this appeal to make reference to two short passages. At p 808 Letter G, he stated:

> "But in that special line of cases where the person deceived is a public authority or a person holding a public office, deceit may secure an advantage for the deceiver without causing anything that can fairly be called either a pecuniary or an economic injury to the person deceived. If there could be no intent to inflict a pecuniary or economic injury, such cases as these could not have been punished as forgeries at common law, in which an intent to defraud is an essential element of the offence, yet I am satisfied that they were regularly so treated".

Then again at p. 809:

> "In my opinion, it is clear that, in connexion with this offence, the intent to defraud existed when the false document was brought into existence for no other purpose than that of deceiving a person responsible for a public day Aitpst ould not have done but for the deceit or not doing something that but for it he would have done". (emphasis added)

That this principle is equally applicable to cases of conspiracy to defraud, was expressly stated in the House of Lords by Lord Reid in delivering his speech in the case of Scott **v Commissioner of Police** (1974) 3 All ER 1032 at p 1038. He stated:

> "In **Welham v Director of Public Prosecutions** Lord Radcliffe referred to a special line of cases where the person deceived is a person holding public office or a public authority and where the person deceived was not caused pecuniary or economic loss. Forgery whereby the deceit has been accomplished, had, he pointed out, been in a number of cases treated as having been done with intent to defraud despite the absence of pecuniary or economic loss. In this case it is not necessary to decide that a conspiracy to defraud may exist even though its object was not to secure a financial advantage by inflicting an economic loss on the person at whom the conspiracy was directed. But for myself I see no reason why what was ictial ad Radclifte in rei n to forge should not equally apply in relation to conspiracy to defraud." (emphasis added)

And by Lord Diplock at page 1039:

> "Although at common law no clear distinction was originally drawn between conspiracies to "cheat" and conspiracies to "defraud", these terms being frequently used in combination, by the early years of the nineteenth century 'conspiracy to defraud' had become a distinct specie of criminal agreement independent of the old common substantive offence of 'cheating'.

And again at p1040 letter B stated:-

> "Where the intended victim of a 'conspiracy to defraud' is a person performing public duties as distinct from a private individual it is sufficient if the purpose is to cause him to act contrary to his public duty, and the intended means of achieving this purpose are dishonest. The purpose need not involve causing economic loss to anyone".

The case of **Board of Trade v Owen** (1951) 1 All ER 411 is a case which dealt with defrauding a public authority. It is sufficient to cite a short passage from the speech of Lord Tucker at p 414 which states:

> "It is a conspiracy by unlawful means viz. by making representation known to be false, to procure from a department of Government an export licence which but for such representations could not have been unlawfully obtained".

I have cited these cases to illustrate that it has long been recognized that a conspiracy to defraud a person performing public duties is a common law offence. It follows that a conspiracy to defraud the Registrar of Titles, is a conspiracy to defraud a person charged with performing public duties, and consequently such an offence could be charged as in Count I.

Two questions remain on this issue:

> 1)Did the Registration of Titles Act exclude the common law offence of conspiracy to defraud a public official in so far as it relates to the Registrar of Titles?
>
> 2)If not, was it fair in the circumstances of this case

to have so indicted?

A repeal of a common law offence must be either stated clearly and explicitly in the Act, or the wording of the Statute must be such that it can be implied that the common law has been so repealed. There is no express provision in Section 178 of the Registration of Titles Act which repeals the common law offence of conspiracy to defraud a person charged with the performance of a public duty in so far as it relates to the Registrar of Titles..

In considering whether, a repeal has taken place by implication, the following words which fell from Lord Roskill in the House of Lords in **Jennings v United States Government** (1982) 3 All ER 104 at 116 are very appropriate :

> "Until comparatively late in the last century statutes were not drafted with the same skill as today. In the field so complex as the criminal law as it exists today, frequently changing in an ever changing society, a crucial change of this kind was, if counsel's submission is right, left only to implication. The 1977 Act, s 50 of which counsel relied so strongly as giving rise to an implied repeal of the relevant part of the common law of manslaughter, itself contains an express repeal of the common law offence of conspiracy in clear and explicit language. I refer to Sec. 5 which provides that the offence of conspiracy at common law is hereby abolished. If Parliament had in the 1977 Act intended to abolish the relevant part of the common law offence of manslaughter I should have expected to find a similar provision somewhere in the legislation between 1956 and 1977. My Lords, there is none. On the contrary there are, as I have shown, plenty of indications of an intention that the common law offence should remain fully intact after 1956 and after 1977 as it had before the successive statutory offences had ever been created. The fact that Parliament made it possible in those years for prosecuting authorities to choose to prosecute for a lesser offence carrying a lesser penalty does not seem to me to militate against the correctness of the view I have formed".

In my view there are no provisions in Section 178, from which it can be concluded that the section excludes the common law offence of conspiracy to defraud

a person charged with the performance of a public duty. The section makes it an offence to make a false statement or declaration in an application to be registered as proprietor of real estate. Any such application, as the evidence revealed must be made to the Registrar of Titles, and so the 'false statement' or 'declaration' would be made to the Registrar. While the section makes it an offence so to do, it does not either expressly or by implication repeal the common law offence of conspiring to defraud. At common law it was an offence to conspire to defraud a public officer; the Registrar being a person charged with the performance of public duty, would in my view after the statutory creation of that office, come under the umbrella of that common law offence. I would therefore answer this question in the negative.

Was the Indictment for Common Law Conspiracy to defraud, fair in the circumstances of this case?

The answer to the question can be easily answered by reference to Section 49 (1) of the Interpretation Act which reads:-

> "Where any act or omission constitutes an offence under two or more Acts, or both under an Act and under the common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either of any of those Acts or under the common law. but shall not be liable to be punished twice for the same offence".

This section gives to the prosecution, the election to determine what process he will undertake, if the offence is one which is not only statutory, but which is also an offence at common law. The circumstances of this case, however, as we have seen before,

discloses that the statutory provision of Section 178 creates the substantive offence but the common law offence relates to a conspiracy to defraud the Registrar of Titles by the

same conduct which amounts to the substantive offence. Consequently, the prosecution would be entitled to proceed on the conspiracy charge. This opinion receives some support from the case of **Simmonds et at** (Supra) where the charge was a conspiracy to commit a statutory offence outside of the limitation period which had been placed on bringing a prosecution of the statutory offence. In dealing with this issue Fenton Atkinson J at p 331 stated:-

> "In our view, there is no substance whatever in the point. First, the accused were not charged with the statutory offence, but with a common law conspiracy to cheat and defraud for which no limitation period is laid down. It is to be observed that common law conspiracies to cheat and defraud the Crown of revenue has now been current for more than 100 years (see **Blake (1844) 6 Q.B. 126)** But even if the conspiracy charged had been a conspiracy to commit the statutory offence, it is well settled that such a charge lies even though the accused thereby loses the protection of a time limit applicable to the statutory offence, and becomes liable to a penalty which may far exceed the maximum for a statutory offence (see **Blamires Transport Services Ltd and Ors.** (1963) 47 Cr. App. R 272 (1963)1 Q.B 278 and cases therein cited)".(emphasis added).

In my view as a matter of law, it is permissible to charge a conspiracy to commit a statutory offence.

It is convenient at this stage to state briefly the facts in the case, as Mr. Small for the Crown contended that in the absence of evidence to prove conduct in each of the appellant which amounts to a commission of the substantive offence, the prosecutor had to charge the offence of conspiracy to defraud.

It is a matter of record that in 1985, Aneita Grant, the mother of the two appellants, by Statement of Claim dated 11th December , 1985 sought a declaration in the Supreme Court that she had acquired title as fee simple owner in three acres of land at Negril in the parish of Westmoreland. She also sought an order directed to the

Registrar of Titles that she be registered in the relevant Certificate of Title as fee simple owner. The application for declaration, as also request for an order to the Registrar of Titles were refused. She thereafter appealed to this Court. Her claim was dependent upon a finding that she had acquired title by virtue of adverse possession. This Court, however, found that as her possession could be referred to a lawful title, sufficient time had not run to allow a declaration of proprietorship of the land by adverse possession. In the words of Downer J.A in the appeal the reference to which is **Aneita Grant v Crystal Coast Development Co. Ltd & ORS** SCCA 77/89 delivered 28th November, 1991 (unreported):

> "...Theobalds J found on good evidence that the applicant was a caretaker of the property and continued this until she was served with a notice to quit. In these circumstances, she could never have proved that the true owners, the Shaws were dispossessed or had discontinued possession".

Aneita Grant, thereafter, applied to Her Majesty's Privy Council and was refused leave to appeal against the judgment of the Court of Appeal.

Thereafter a series of incidents occurred which led to the charges being brought against the appellants. The evidence came in the main from Constance Trowers, the Registrar of Titles who at the relevant time was the Senior Deputy Registrar. As the contention of the appellants, is that they were entitled to *be* registered as proprietors, through the adverse possession of Aneita Grant, Ms Trowers set out the procedures to be registered by that method. Having examined the relevant documents which were available she concluded that from what she had seen:

> "These would not be consistent with an application for adverse possession".

Produced in evidence were four (4) titles all relating to the disputed land.

Exhibit 4: is Certificate of Title showing the land registered in the names of Simeon Alexander Shaw, Henry Uriah Shaw, Constantine Anthony Shaw and Mabel Adina Shaw at Volume 1265 Folio 253.

Exhibits 2 and 3: Certificates of Title showing the same land subdivided and registered in the names of Aneita Grant, Maxine Lindsay and Icilyn Lindsay at Volume 1269 Folio 915 and 916.

Exhibit 1:

The original duplicate Certificate registered at Volume 1035 Folio 298 originally in the names of Simeon Alexander Shaw and Henry Uriah Shaw. Through a series of transfers the land became registered in the names of members of the Shaw family and thereafter to Crystal Coast Development Co Ltd on 9th September, 1994.

Exhibits 2 and 3: were issued as a result of subdivision of the land comprised in Volume 1265 Folio 253 which is Exhibit 4.

Exhibit 1: was the original duplicate Certificate of Title ,but the evidence reveals that someone applied for the issue of a new title on the basis that Exhibit 1 was lost. Section 82 (1) of the Act states inter alia:-

> **82 (1)** "Where a duplicate Certificate of Title is lost the registered proprietor of the land or someone darning this land may apply to the Registrar of Titles to cancel the Certificate of Title and to register a new certificate or duplicate in name of the registered proprietor or his or her transferee in place of such Certificate".

Ms. Trowers referred to the section, and stated as follows:

> "The Certificate of Title alleged to have been lost would be located from our records (original) and the information stated in application compared with that of the original. If the legal officer is satisfied of the statement on application, a notice would be prepared and sent to the applicant with a direction to advertise it in one of the daily newspapers. Visual advertisements are two. It would run consecutively of two weeks. This is to provide notice to the world at large so that if any one is holding the duplicate Certificate of Title as lien or security, they would be notified and also in the event that someone has the duplicate then they would communicate with the officer. If after advertisement there is no response the applicant would then be requested to submit to the office proof of such advertisement in the form of tier sheet with the date on it and pay a final fee for the Certificate of Title to be issued".

In keeping with the correct procedure, advertisements were placed in newspapers. The prosecution produced copies of two such advertisements in the Star Newspaper of the 15th and 22nd September , 1993. It is necessary only to set out the contents of one:

"Re: Miscellaneous No. 777674
UNDER THE REGISTRATION
OF TITLES ACT
Office of Titles
P.O. Box 494
Kingston

1st September, 1993

WHEREAS I have been satisfied by statutory declaration and that the duplicate of the Certificate of Title for **ALL THAT** parcel of land part of **LONG BAY** situate at **NEGRIL** in the parish of **WESTMORELAND** containing by survey Three Acres two Roods and Nineteen Perches of the shape and dimensions and butting as appears by the plan thereof hereunto annexed and being the land registered at Volume 1035 Folio 298 of the Register Book of Titles in the name of **-HENRY URIAH SHAW, SIMEON ALEXANDER SHAW, CONSTANTINE ANTHONY SHAW and MABEL ADINA SHAW -HAS BEEN LOST:**

I HEREBY GIVE NOTICE that I intend at or after the expiration of **FOURTEEN** days from last appearance of this advertisement to cancel the said Certificate of Title and register a new Certificate in duplicate thereof.

C.M. TROWERS
Snr. Deputy Registrar of Titles

There being no response to the advertisement the duplicate Certificate of Title alleged lost, was cancelled and Exhibit 4 issued in its place. Subsequently to that, an application was made for the cancellation of Exhibit 4, and thereafter Exhibits 2 and 3 were issued showing Aneita Grant, Maxine Lindsay and Icilyn Lindsay as proprietors of the land. Miss Trowers testified that a change of registered proprietor would not result in the surrender of Exhibit 4 unless a transfer was submitted with it and entered before the surrender application. The evidence revealed that all the supporting documents in which the applications for lost title and for surrender were based, have been lost, and

cannot be found in the Office of the Registrar of Titles. However, the evidence of Miss Annette Francis, Attorney-at-law is of great relevance. The legal firm with which Miss Francis was an associate at the time were the Attorneys for the Shaws who in 1988 were the registered proprietors of the land. As a result , Miss Francis at the relevant time in 1988 had in her custody the duplicate Certificate of Title registered at Volume 1035 Folio 298 (Exhibit 1) and was in possession of it until sometime in 1994 when she sent it in a letter to another firm of attorneys. In 1993 when the advertisements appeared the Registered Certificate of Title alleged lost was in her possession, but the advertisements were never brought to her attention. Indeed Miss. Francis took credit for preparing four transmissions in Exhibit I.- entries 828065-8, all dated in September, 1994 subsequent to the issuing of Exhibits 2 and 3 on 17th May, 1994. It is obvious then that the representations made in respect of the application for lost title were false, as the Certificate of Title was in the proper custody of the proprietor's attorney who made no such application and was not aware of any statutory declaration made in that regard. There were also no supporting documents to be found in respect of the application for surrender of Exhibit 4 which had been issued as a result of the application of lost title in respect of Exhibit 1. At some later time Exhibit 2 and 3 were issued as a result of the surrender of Exhibit 4 the former now showing the appellants as the registered proprietors.

This evidence is strong evidence that the issuing of Exhibit 4 was based on false representation, that Exhibit 1 had been lost and discloses the scheme of the perpetrators, having had Exhibit 4 issued, to cancel it, thereafter, and by false transfers, obtaining the registration of the appellants as proprietors.

Because the documents have mysteriously disappeared from the Office of the Registrar of Titles, there is no hard evidence in relation to any particular act done by the

appellants, or any specific representation made by either of them to the Registrar. In those circumstances, the prosecution would have been hard put to establish that the statutory offence had been committed by any of the appellants. Nevertheless, the prosecution had evidence that the appellants were parties to a plan to make false representations to the Registrar with the intent to defraud that officer. To begin with, their names are on the falsely obtained titles Exhibit 2 and 3, which could only have been issued on the basis of false representation of lost Titles, that firstly were made in order to obtain Exhibit 4 and thereafter other false representations that resulted in the registration of the appellants as proprietors of the land: (Exhibits 2 and 3). These other Certificates of Title could not have come into existence without some collaboration between the appellants themselves, and the unknown person, or persons who had the facility to execute the fraud.

In addition the appellant, Icyline Lindsay gave a statement, in which she admitted going to the Registrar of Titles office from where she got forms which were signed by both of them. Icyline Lindsay acknowledges in her statement that she knew of the advertisement in the **Star Newspaper,** which we have seen could only have come about on the basis of false representations being made as to the loss of the Title which neither appellant had any right to possess, and which at the time was in the possession of the Shaws` Attorney, Ms. Annette Francis.

Both appellants also admit in their statements that they went again at a later date to the office of the Registrar of Titles where they received Exhibits 2 and 3 for which the appellant Maine Lindsay signed.

In the event, in my judgment, this was a case in which the prosecution took the right course by charging the appellants with the offence stated in Count I and for that,

and the above reasons I would conclude that Ground I which relates to Count I of the indictment must fail.

I would however, address one other matter before leaving this ground. In the course of his submissions, Mr. Ramsay for Icily Lindsay submitted that the latter part of Section 178 creates the offence of conspiracy, and that being so, the contentions already dealt with would hold in so far as they relate to that part of the section .

For convenience reference is made thereunder to the relevant words of the section:

> "...or if any person fraudulently procures, assists in fraudulently procuring or is privy to the fraudulent procurement of any Certificate of Title or instrument; or of any entry in the Register Book..."

It is contended that the words "privy to" refers to a conspiracy. With this contention, I cannot agree. In my judgment the word privy suggests an intimate knowledge of something or perhaps even a participation in the doing of that thing but cannot be the same as a conspiracy which is an agreement by two or more to do an unlawful act or to do a lawful act in an unlawful manner. The former refers to knowledge and participation in the act, the latter concerns the agreement to do the act.. The case of **Throne v Heard 63 U. Ch. 360** affirmed by the House of Lords [1895 AC 495] gives some understanding of the use of the word "privy".

In his judgment at p 360 Lindley L.J. opined:-

> "It is only by a misuse of language that a person who in fact knows absolutely nothing of the fraudulent conduct of another, who in no way benefits by it or ratifies it, can be said to be party or privy to it. One person may be, and often is liable in law for frauds which he has not committed; but to say that he is Party or privy to them is quite another matter, and is only true when he has personally in some way participated in them".(emphasis added).

Kay L J also addressed it at p. 361:

> " It has been argued that they were party or privy to Searle's fraud. Even if it could be said that they were liable for his fraud, it is another thing to say that they were party or privy to it. I think that those words in the statute indicate moral complicity, which is not suggested in this case".

In the event, it is my view that the arguments advanced on Ground I, would also fail if the conspiracy to defraud, charged in Count I related to the procurement of the Certificate of Title.

Having regard to the above, it is unnecessary to deal with the submission by counsel for the appellant that Section 180 having fixed the jurisdiction in the Supreme Court, the charge at common law defeats that provision of the Act, However, 1 offer some comments.

Section 180 states:

> "180. Unless in any case herein otherwise expressly provided, all offences against the provisions of this Act may be prosecuted by the Director of Public Prosecutions, and all penalties or sums of money imposed or declared to be due or owing by or under the provisions of the same may be sued for and recovered, in the name of the Attorney - General, in the Supreme Court".

On the face of the section, as it now stands, a simple interpretation would suggest that offences against the provision of the Act may be prosecuted by the Director of Public Prosecutions and makes no provision for the jurisdiction, and that the reference to the Supreme Court relates to recovery of all penalties or sums of money etc.

Mr. Ramsay, in an effort to give a different interpretation to the Section referred us to the original act - the Registrar of Titles Law - Law 21/1888 in which the section then stated:

> "Unless in any case herein otherwise expressly provided, all offences against the Provisions of this Law may be prosecuted, and all penalties or sums of money imposed or declared to be owing by or under the Provisions of the same may be sued for and recovered, in the name of the Attorney General, in the Supreme Court, pursuant to the Provisions of the Civil Procedure Code".

Mr. Ramsay contends that with the intervention in 1962 of Jamaica's Independence and the creation of the office of Director of Public Prosecutions in whom the responsibility for prosecutions by virtue of the Constitution, now resides, the Act had to be amended to indicate that prosecution under the Act, thereafter was for the Director of Public Prosecutions. As a result, with the insertion of those words "by the Director of Public Prosecutions" the section on the face of it must now readily be interpreted in the way in which he contends. He maintains, however, that the original Act without the amended words clearly demonstrates that the words "in the Supreme Court" relate back to the words "may be prosecuted" - thereby declaring that the jurisdiction is in the Supreme Court. There is however, a difficulty with this argument. Section 149 of the original law which is Section 180 of the present Act has at the end of the section the words "pursuant to the Civil Procedure Code" which could only be a reference to the recovery of penalties and all sums of money etc. If Mr. Ramsay's contention is to be accepted, it would have the ridiculous result that the section would be providing that offences may be prosecuted in the Supreme Court pursuant to the provisions of the Civil Procedure Code.

In my view, the Legislature could not have intended such an absurd result and consequently I would conclude that the jurisdiction given to the Supreme Court is confined to the recovery of penalties etc in the name of the Attorney General.

Of greater persuasion however, is the fact that at the time of the original legislation in 1888 the sentence was fixed at two years, a sentence which the

Resident Magistrates would not have had the jurisdiction to inflict at that time. On that basis alone, it appears that any such prosecution would have had to be in the Circuit Court. Because it is unnecessary for my conclusion I would reserve an opinion as to whether with the increase of the Resident Magistrate jurisdiction in sentencing, such an offence would now be within his/her jurisdiction.

I turn now to Ground 2, which relates to the conviction in respect of Count II i.e. the conspiracy to defraud Crystal Coast Development Ltd.

Ground 2

> "That Count II of the aforesaid indictment was also bad in law in that :
>
> > a) A conspiracy to defraud could not be at the instance of Crystal Coast Development Co. Ltd. in the circumstances;
> >
> > b)No representation whatever was ever made to the said company by the defendants.
> >
> > c) At the time of the alleged conspiracy Crystal Coast Development Co. Ltd had no right to be registered as the proprietors of an estate in fee simple.
> >
> > d) Crystal Coast Development Co Ltd was neither deceived or defrauded nor could it have been assuming it had a legitimate registerable right.

In developing this ground, Mr. Ramsay whose submissions, Mrs. Samuels -Brown adopted put forward the following propositions:

1. The gist of Count II is the offence of procuring in Section 178.
2. The entity stated in the indictment as Crystal Coast Development Ltd was never proved to exist.

3. Assuming it did exist, it had no registerable right to an estate in fee simple within the period delineated in Count II as the period of conspiracy.

4. Lands in Certificate of Title (Exhibit 4) were registered on the 7th September, 1994 and therefore completely outside the period of conspiracy that is 18th February , 1992 to 17th May, 1994.

5. The averment that they procured registration as proprietor of an estate as joint tenants in fee simple of lands in Certificate of Title registered - at Volume 1265 Folio 253 would be incorrect as the Certificate of Title is in the name of the Shaws.

The evidence relating to these complaints came, in part from Mr. Patrick Moo Young, a Director of Crystal Coast Development Co. Ltd. He testified that the Company is registered under the Companies Act and that it had offices at 14 Ruthven Road Kingston 10. In early 1974 he entered into an agreement with Dr. Uriah Shaw, one of the registered proprietors of the land for the purchase of the land- registered at Volume 1035 Folio 298 - about three acres of land. The agreement he made with Dr. Shaw was on behalf of the Company - Crystal Coast Development Ltd. He also testified of the suit brought by Aneita Grant asking for declaration that she was entitled to be registered as proprietor of the land. That suit was brought against Crystal Coast Development Co Ltd. [the company], the Registrar of Titles; and members of the Shaw family. It appears that Aneita Grant envisaged at the time of bringing that action, that the company might have had some interest in the ownership of the land.

In my view, that would be sufficient to establish for the purposes of this case, that the company was in existence, and had through its director , Mr. Moo Young, entered into an agreement with Dr. Shaw for the purchase of the land. Counsel for

the appellant contends that the company had no registerable right to the property within the period of the conspiracy. He concluded this because there was no transfer of title registered until 7th September 1994. But in any event is it necessary to have a registerable right?

In this regard, the following words of Viscount Dilhorne **Reg vs Scott** (1975) AC 819, 840 as taken from the speech of Lord Bridge of Harwich in **R v Ayres** (1984) A.C. **447,** 454) are of assistance:-

> "...in my opinion it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement between two or more by dishonesty to injure some Proprietary right of his, suffices to constitute the offence of conspiracy to defraud". (emphasis added).

In my opinion, applying the above dicta, with which I agree, the prosecution need only prove that the company had entered into the agreement, and consequently had acquired an entitlement to the ownership of the land, in the event that it had performed the acts it is required to do under the agreement. Mr. Moo Young testified that when Dr. Shaw died in 1974, the sale of the land to the company had not been completed; and was not completed until sometime in 1994. He testified however, that the purchase price had been paid long time ago. It is to be remembered that at the time when Exhibits 2 and 3 (Titles in the appellants' name) were issued, the accepted evidence by the learned Resident Magistrate is that the original duplicate copy of Certificate of Title was in the custody of Ms Annette Francis, at the bequest of her clients- the persons who were then the registered proprietors. On that evidence the learned Resident Magistrate was entitled to conclude that Exhibits 2 and 3 were fraudulently procured. In **Welham v DPP** (1966) 1 All ER 805 it was reiterated that the

law does not require an indictment to specify the persons intended to be defrauded or to prove intent to defraud a particular person. Lord Radcliffe in his speech in the House of Lords said:

> "Now I think that there are one or two things that can be said with confidence about the meaning of this word "defraud". It requires a person as its object; that is defrauding involves doing somethings to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits a fraud, it is the effect on the person who is the object of the fraud that ultimately determines its meaning. This is none the less true because, since the middle of the last century, the law has not required an indictment to specify the person intended to be defrauded or to prove intent to deprive a particular person. Secondly, popular speech does not give, and I do not think ever has given, any sure guide as to the limit of what is meant by "to defraud". It may mean to cheat someone. It may mean to practise a fraud on someone. It may mean to deprive someone by deceit of something which is his regarded as belonging to him or ,though not belonging to him as due to him or his right". (Emphasis added)

The evidence in the instant case established an intent in the procurer of the Titles (Exhibits 2 and 3) to deprive the true registered owners of the property - whether it was the Shaws or the company. It follows then that the conspirators in the agreement to defraud must necessarily have intended to enter into conduct either by themselves or through others - to accomplish the issuing of the fraudulent Titles and by so doing defraud the company of its right under the agreement with the Shaws to purchase the property or at any rate defraud the registered owners at the relevant time of their legal interest in the property. As there is no legal requirement to name the person defrauded, the court would be entitled to come to the conclusion, even if the contentions re the company are correct, that there was an intention to defraud someone, or that some one was in fact defrauded , and nevertheless come to a determination of guilt.

Mr. Ramsay also contended (para 1 supra) that the 'gist' of Count II is the offence of procuring. It is correct that the substantive or statutory offence is one of fraudulently procuring. What however is charged in the indictment is the offence of conspiracy to defraud by the fraudulent procurement. The allegations are not that the appellants themselves fraudulently procured the Titles . Indeed as Mr. Small for the Crown contended , the missing documents would have defeated any attempts, the Crown might have made to charge the appellants with the substantive offence. In all the circumstances and for the above reasons I would hold that the charge of conspiracy to defraud as charged in Count II is allowable and correct .

Ground 3 - speaks to the findings of fact made by the learned Resident Magistrate and in my view is without merit , as in my opinion there was adequate evidence upon which the learned Resident Magistrate could have come to his conclusions.

Ground 4

This ground was argued by Mrs. Samuels -Brown who though appearing for Maxine Lindsay, nevertheless with the agreement of Mr. Ramsay, applied her submissions, also to the appeal of Icilyn Lindsay.

The ground reads:

> **"(4) (a)** 'The fundamental right to silence when a person is suspected of a crime was violated in the instant case in respect of both Icilyn Lindsay and Maxine Lindsay in that no caution or warning against self-incrimination was given to them by the Police before taking statements from them".

> (b) that the learned Resident Magistrate failed to advert to the aforesaid issue at all and dealt only with the issue of the voluntariness of the Related Discord.
>
> (c) that the learned Resident Magistrate had a duty to apply his mind to the exercise of his discretion to exclude the statements either on the ground of the absence of a caution or on the basis of his residual discretion to exclude evidence in order to ensure a fair trial.
>
> (d) that by failing to recognise the aforesaid duty, the learned Resident Magistrate fell in serious error which vitiated the convictions herein".

The effect of these allegations are :

> 1) That the Police Officers who took the statements from the appellants were in breach of the judge's rules in that they did not caution the appellants in circumstances where the Rules required them so to do; and
>
> 2) That if that were so the learned Resident Magistrate did not address his mind to the exercise of his discretion whether to admit the statements in these circumstances.

These submissions are based on the judge's rules which direct that where the Police Officer has evidence which afford reasonable grounds for suspecting that the accused has committed the offence, he ought to caution the accused before taking a statement from him.

Before examining the evidence in this regard, it is useful to look at certain dicta of Lawton LJ in **R v Osbourne** (1973) 1 All E.R. 649 at p 655.

> "It is important for the court to remind itself that the Judge's Rules are intended for the guidance of police officers. They have to comply with the rules, ...[But] a police officer when carrying out an investigation meets a stage in between the mere gathering of information and getting of enough evidence to prefer the charge. He reaches a state where he has got the beginnings of evidence. It is at that stage that that he must caution. In the judgment of this court, he is not bound to caution until he has got some information which he can put before the court as the beginning of a case".

It is agreed on both sides that there was no caution administered by the Police Officers who took the statements from the appellants. The issue is whether the Police Officer, had sufficient evidence which he could put before the court as the beginnings of the case. Significantly there was no objection taken as to the admissibility of the statements on the basis of a breach of this particular rule. Objections were in fact taken and a voir dire held on the question of whether the statements were voluntarily given or not. Although there seems to have been no objection to the admission of the statement taken from the appellant, Maxine Lindsay, submissions have been made before us as to the correctness of its admission into evidence on the same ground complained of in respect of that taken from the appellant Icilyn Lindsay.

The question of the omission to caution the appellants, before taking the statements was never made an issue at the trial. It is fair to say, however, that counsel, who appeared for the appellants at the trial did in his address on the voir dire make a statement which suggests that he had that in mind, but without specifically taking the point.

He said:-

> "The officer admitted to this Court in chief that he had come to the conclusion of culpability in this matter. These conclusions were arrived at prior to the Director of Public Prosecution's ruling".

The reference made by counsel at the trial comes from the evidence of Detective Sgt. Alwyn Cochrane in which he said:

> "I saw Icilyn Lindsay when I went there on May 12, 1995. 1 spoke to her. I was investigating this matter at the time. I came to conclusions. I had not yet received advice from Director of Public Prosecutions while interviewing Icilyn Lindsay, Maxine Lindsay was also present".

In that statement there is nothing to suggest that the conclusions arrived at by the Sgt. were conclusions of culpability as proposed by counsel at trial, nor for that matter, that his conclusions were based on evidence. The officer said that at the time he took the statements from Icilyn he was investigating the matter. His evidence reveals that he had got a report in 1995 as a result of which he visited the questioned property and also spoke to the Registrar of Titles. After the statements were taken he submitted the file to the Director of Public Prosecutions for advice. The officer did not reveal the substance of the information he had at the time of the taking of the statement, and in my view his evidence that he had come to a conclusion cannot be taken to indicate that the officer had sufficient evidence at that stage to put before the court as the beginnings of a case. Mrs. Samuels-Brown of course is quite correct when she submits that the learned Resident Magistrates did not address his mind to that issue, but as there was no evidence to suggest that the investigations had reached the stage of the beginnings of case , there would have been no necessity to caution the appellant and therefore the exercise of the discretion of the learned Resident Magistrate was not necessary.

For those reasons, I found no merit in this ground.

I would dismiss the appeal.

DOWNER, J.A.

The important jurisdictional point raised by Mr. Ramsay and Mrs.Samuels-Brown on behalf of the appellants, the Lindsay ladies, was whether the Resident Magistrate His Honour Mr. M.J. Dukharan was competent to grant an order for indictment and to proceed to trial and conviction of the appellants. The charges were for conspiracy to defraud the Registrar of Titles on the first count of the indictment and conspiracy to defraud Crystal Coast Development Limited on the second count. It was contended on behalf of the appellants that if the convictions recorded were affirmed the appellants would have been deprived of their right to trial by jury in the Supreme Court as provided for by Section 180 of the Registration of Titles Act (The Act). So considered the issue is of exceptional public importance to the legal system.

The jurisdiction of the Resident Magistrate to try indictable misdemeanours at common law

Section 268 (1) (f) of the Judicattire (Resident Magistrates) Act reads:

> " It shall be lawful for the Courts to hear and determine the offences hereinafter mentioned, that is to say - :
>
> > (f) the offences of forcible entry and detainer of land, whether at common law or by statute, and all common law offences (not being felonies) unspecified in this section, whether the punishment of such common law offences has or has not been provided for by any statute or law;

Conspiracy to defraud is an inchoate common law misdeamour, so at first blush His Honour was acting within his jurisdiction when he exercised his power to

make an order pursuant to Sec. 272 of the Judicature (Resident Magistrates) Act which reads:

> **" On a person being brought or appearing before a Magistrate in Court or in Chambers, charged on information and complaint with any indictable offence, the Magistrate shall, after such enquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction, and can be adequately punished by him under his powers, make an order, which shall be endorsed on the information and signed by the Magistrate, that the accused person shall be tried, on a day to be named in the order, in the Court or that a preliminary investigation shall be held with a view to a committal to the Circuit Court."**

The time honoured procedure is for Counsel for the Crown to address His Honour on the proposed indictment, and on that basis an enquiry is made. So it is pertinent to examine that address to ascertain how the matter was presented, so as to infer the scope of the inquiry.

Before examining the Crown's address it is necessary to emphasise the importance of the enquiry and the Resident Magistrate's obligations. Section 273 is pertinent. It reads:

> **"273. It shall be lawful for any Magistrate, in making any order under section 272 directing that any accused person be tried in the Court, by such order to direct the presentation of an indictment for any offence disclosed in the information, or for any other offence or offences with which, as the result of an enquiry under the said section, it shall appear to the Magistrate the accused person ought to be charged and may also direct the addition of a count or counts to such indictment. And, upon any such enquiry, it shall be lawful for the Magistrate to order the accused person to be tried for the offence stated in the information, or for any other offence or offences, although not specified in the information, and whether any such information in either case did not strictly disclose any offence."**

Then to demonstrate if the enquiry was incomplete, there may not have been a valid trial, Section 274 is relevant. It reads:

> **"274. The trial of any person before a Resident Magistrate's Court for an indictable offence, shall be commenced by the Clerk of the Courts preferring an indictment against such person and there shall be no preliminary examination."**

It was contended on behalf of the Lindsay ladies that there was not a trial in respect of them before the Resident Magistrate. The opening commenced thus:

> **"Mr. Hugh Small (with Fiat) for Prosecution along with Steve Shelton, Mr. Paul Fisher and Miss Small Dr. Paul Ashley for both accused."**

Here is how the Crown's address was noted by the Resident Magistrate:

> **Openina of Crown's Case**
>
> **Four titles involved here Registered at Volume 1035 Folio 298 Registered in the name of Simeon Alexander Shaw Henry and Muriel Shaw. Title Registered at Volume 1265 Folio 253 Application made to the Registrar in September 1993 for replacement of Volume 1035 Folio 298 which was reported lost.**
>
> **Registrar of Titles will say that all documents of Volume 1265 Folio 253 are missing from Registrar of Titles office. Two other titles Volume 1269 Folio 915 and 916 are titles derived from Volume 1265 and Folio 253. All these lands are the same piece of land which is split in two by the Norman Manley Boulevard. [Emphasis supplied]**

It is important to pause at this point to elucidate what the Crown was alleging. The missing documents relates to titles in Volume 1265, Folio 253. Volume 1269 Folios 915 and 916 represents land which was derived from Volume 1265 Folio 253, so it would be an important issue to ascertain how titles at

Volume 1269 Folio 915 and 916 were derived, since the inference is that the obtaining of these titles would involve criminal activity.

Returning to the opening, Counsel for the Crown said:

> " Shaw's through Henry Shaw was one of the last surviving children entered into a contract to sell land to Crystal Coast Development Company Limited in the 1970's. Aneita Grant who was a relative of the Shaws brought an action in the Supreme Court in 1983 against Crystal Coast Development Company Limited. This action was unsuccessful. Aneita Grant was also unsuccessful in the Court of Appeal as well as the Privy Council In 1992."

For ease of reference these judgments ought to be cited. They are **Aneita Grant v Crystal Coast Development Ltd. & qrs.** unreported S.C.C.A. No. 77/89 delivered November 28, 1991. This judgment affirmed the order of Theobalds J. There was an application to the Privy Council by way of special leave which was dismissed on 18th February 1992, and embodied in order of Privy Council dated 16th March, 1992. These proceedings were concerned with a claim by Aneita Grant on the basis of adverse possession of land which was embodied in the Certificate of Title registered in Volume 1035 Folio 298.

Continuing with the opening address, it reads as follows:

> As a result steps were taken by Crystal Coast Development Company Limited to enter into possession of land. Defendants produced two titles for land.
>
> Crystal Coast Development Company Limited had in possession a title registered at Vol. 1035 F. 298 which was the original title of the Shaws which transferred to Crystal Coast Development Company Limited on September 7, 1994."

Then what must have been the highlight of his opening address, Counsel for the Crown said:

> **" The two titles registered at Vol. 1269 Folio 915-916 were dated May 17, 1994.**
>
> **Prosecution will lead evidence that Mr. Robert Paisley, Commissioned Land Surveyor went to the land as a result of measurements he made came to the conclusion that the lands in Vol. 1035 F. 298 are identical to the land in Vol. 1269 Fol. 915-916.**
>
> **Registrar of Titles discovered that all the documents in relation to these have disappeared from Titles Office"**

The issue therefore as presented by the Crown was to obtain an indictment which would particularise how the appellants, the Lindsay ladies fraudently obtained registered titles in Vol. 1269 Fol. 915-916 dated May 17, 1994 when those lands were registered in Vol. 1035 Fol. 298 in the names of Simeon Alexander Shaw, Henry and Muriel Shaw from 1967 and transferred to Crystal Coast Development Company Limited 7th September, 1994. There was the direct evidence of the titles Volume 1269 Folios 915 and 916. Based on the allegations the inference must be that they were obtained by fraud. Having regard to the system which was in operation at the Titles Office the manner of obtaining these titles would have to be proved by circumstantial evidence since the Crown stated in its opening address that the documentation relating to these titles had disappeared from the Titles Office. A further and important comment is that as outlined by the Crown, the allegations were that a substantive offence had been committed by the appellants, the Lindsay ladies. On that basis it would be pertinent to enquire if there were any statutory provisions to cover the allegations outlined. That course did not seem to have engaged the attention of the court.

Counsel for the Crown continued thus:

> " Registrar publications in 'Star' on the 15th to the 22nd of September, 1993 of advertisement that she had a Statutory Declaration that title registered at Vol. 1035 Folio 298 had been lost.
>
> Police called in and made investigation. Police interviewed Aneita Grant and other accused.
>
> Both Icyline and Maxine Lindsay gave statements to the police as to how they obtained titles for the land.
>
> Mr. Patrick Moo Young will give evidence as Director of Crystal Coast Development Company Limited.
>
> Detective Sergeant Cochrane and Sergeant Brown will also give evidence.
>
> Asking Court to look at cases
>
> **Scott vs. Commissioner of Police 1974 2 AER 1032**
>
> **R vs. Anthony Allsop C.A. - 1977 (641 C.A.R. 29 Mens Rea of Conspiracy to Defraud.**
>
> **Wai-Yu-Tsana vs. R. - 1992 (941 C.A.R. 264"**

At this point counsel for the Crown stated his prayer thus:

> " Asking Court for Order of indictment for two counts of Conspiracy to defraud the Registrar of Titles and Crystal Coast Development Company Limited.
>
> The prosecution will not proceed against Grant because of age and illness.
>
> Order for Indictment granted against accused Icyline and Maxine Lindsay."

If Mr. Ramsay was correct, then the failure of the Crown to mention or the Resident Magistrate to examine the provisions of Section 178 of the Registration

of Titles Act was fatal. It was necessary, he continued, to ascertain whether on the facts outlined, the indictible offences contrary to Section 178 of The Act were within the exclusive jurisdiction of the Supreme Court. He added that even if unwittingly the Crown had asked for an indictment with two counts for conspiracy to defraud, by so doing the manifest intention of the Act for jury trials in the Supreme Court was evaded. So considered he held that the convictions cannot be affirmed however cogent the evidence. Even if such a conclusion might have been regrettable to lawyers on the Crown side, the appellants, the Lindsay ladies have sought the protection of the law in this court, and if the highly technical submissions made on their behalf are correct, then the convictions and sentences of twelve (12) months imprisonment suspended for two (2) years were nullities and must be set aside as such. It would not be the first time that the Crown was embarrassed even when there was a plea of guilty, in circumstances, where this jurisdictional issue was raised for the first time on appeal from the Resident Magistrate's Court. See R.v. Monica Stewart [1971]17 W.I.R. 381. The conviction and sentence was set aside because they were nullities. Since the appellant succeeded, this Court, pursuant to Section 305 of The Judicature (Resident Magistrates) Act, was obliged to allow the appeal and quashed the conviction. To order a new trial would not have been in the interests of justice having regard to the time the appellant had spent in prison.

Were the offences adumbrated in the Crown's opening address contrary to Sec. 178 of the Act and therefore cognisable only in the Supreme Court pursuant to Sec. 180 of the Act ?

Perhaps an appropriate way of answering this question is to demonstrate that the allegations outlined in the Crown's address were not the inchoate common law offence of conspiracy to defraud, but inchoate or substantive offences contrary to Sec. 178 of the Act. That being so, it will be necessary to show that in such circumstances there is a rule of procedure not to charge an inchoate common law offence when the allegations constitute a statutory offence. Further if the relevant statute provides for a Supreme Court trial with a jury for the statutory offence, then the Resident Magistrate had no jurisdiction to embark on a trial and the indictment must be quashed and the convictions and sentences set aside as being nullities.

Be it noted even on the civil side of the Supreme Court if the allegations against the defendant embodies fraud, the plaintiff has a right to ask for trial by jury. See section 45(1) of the Judicature (Supreme Court) Act which reads:

> "45.(1) Subject as hereinafter provided, if, in relation to a civil cause or matter to be tried in the Supreme Court, an application is made by a party thereto, before the mode of trial is first determined, for the cause or matter to be tried with a jury, and the Court or a Judge is satisfied that -
>
> a) an allegation of fraud against that party; or
>
> b) a claim in respect of slander, libel, false imprisonment, malicious prosecution, seduction or breach of promise of marriage,
>
> is an issue, the cause or matter shall be ordered to be tried with a jury, unless the Court or Judge is of the opinion that the trial thereof requires any prolonged examination of documents or accounts

> or any scientific or local investigation which cannot conveniently be made with a jury, but, save as aforesaid, any civil cause or matter to be tried in the Supreme Court, may, in the discretion of the Court or a Judge, be ordered to be tried either with or without a jury."

On the civil side the applicant has a right to trial by jury if an application is made at the summons for directions or earlier in the specific instances mentioned in section 45(1)(a) and *(b)* and in any event the Supreme Court has a discretion to order trial by jury in any civil cause or matter.

Where the statute specifies the tribunal as in these proceedings, the Supreme Court, then there are authorities such as **Barraclouah** v **Brown & others** [1895-9] All E.R. Rep. 239 on the civil side and **R.v. Hall** [1891] 1 Q.B. 747 on the criminal side where the principle adumbrated is that if a specific tribunal is named in the relevant section of the statute then that tribunal, and that tribunal alone has cognisance of the relevant causes or offences. Perhaps Section 180 of the Act should now be cited although its construction will be attempted hereafter. It reads :

> " 180. Unless in any case herein otherwise expressly provided, all offences against the provisions of this Act may be prosecuted by the Director of Public Prosecutions, and all penalties or sums of money imposed or declared to be due or owing by or under the provisions of the same may be sued for and recovered, in the name of the Attorney-General, in the Supreme Court."

The Supreme Court is the appropriate tribunal both for criminal proceedings instituted by the Director of Public Prosecutions and civil proceedings instituted by the Attorney-General.

Section 178 of The Act was drafted in the Victorian style where a number of offences were set out in a single paragraph all carrying the same sentence. There are authoritative decisions from this court as **R.v. Barbar** (1973) 22 W.I.R. 343 and the Privy Council which have demonstrated how such statutes ought to be construed. **Patel v. Comptroller of Customs** [1966] A.C. 356 and **Simmonds v. The Queen** unreported Privy Council Appeal No. 30 of 1996 delivered 13th. October, 1997 which approved of the approach in **R.v. Barbar** are the relevant cases.

Paragraphed below in modern drafting style is section 178 of The Act to demonstrate the range of offences for which a preliminary enquiry could have been held having regard to the Crown's opening.

> "178 - If any person
>
> (i) wilfully makes any false statement or declaration in any application to_bring land under the operation of this Act, or in any application to be registered as proprietor, whether in possession, remainder, reversion or otherwise on a transmission, or in any other application to be registered under this Act as proprietor of any land, lease, mortgage or charge;
>
> or
>
> (ii) supresses, witholds or conceals, or assists or joins in or is privy to the supressing: witholding or concealing, from the Registrar or a Referee, any material document, fact or matter of information, or wilfully makes any false statutory declaration required under the authority or made in pursuance of this Act;
>
> or
>
> (iii) in the course of his examination before the Registrar or a Referee, wilfully and corruptly gives false evidence;

Or

(iv fraudulently procures or is privy to the fraudulent procurement of any certificate of title or instrument, or of any entry in the Register Book, or of any erasure or alteration in any entry in the Register Book;

Or

(v) knowingly misleads or deceives any person hereinbefore authorized to require information or explanation in respect to any land, or the title to any land under the operation of this Act, or in respect to which any dealing or transmission is proposed to be registered,

such person shall be guilty of a misdemeanour, and shall incur a penalty not exceeding one thousand dollars, or may at the discretion of the Court by which he is convicted, be imprisoned with or without hard labour for a period not exceeding two years; and any certificate of title, entry, erasure or alteration so procured or made by fraud shall be void as against all parties or privies to such fraud."

To my mind the offences in Section 178 would be appropriate for the institution of criminal proceedings in the Supreme Court. It would seem that the Crown was alleging that the Lindsay ladies were persons who would have *been* caught by Section 178 (iv). The proposed indictment would read:

Statement of Offence

Contrary to Section 178 of the Registration of Titles Act
Fraudulently procured registered certificates of title.

Particulars of Offence

Maxine Lindsay and Icyline Lindsay sometime in May 1994, in the Parish of Kingston fraudulently procured certificates of titles registered in Vol. 1269 at Fol. 915 and 916 of the Register Book of Titles

Note the charge is joint and several see D.P.P. v. Merriman (1973) A.0 584. In the alternative an inchoate charge could be preferred which would read thus:

Statement of Offence

> Contrary to Section 178 of the Registration of Titles Act
> Being privy to the fraudulent procuring of registered certificates of title.

Particulars of Offence

> Maxine Lindsay, and Icyline Lindsay, sometime in May, 1994, conspired together and with others unknown in the parishes of Westmoreland and Kingston to fraudulently procure titles registered in Vol. 1269 at Folios 915 and 916 of the Register Book of Titles.

R. v. Boulton & Others X11 Cox C.C. 87 is useful to show how the word privy was used in law reports in connection with charges of conspiracy. The headnote reads:

> " On an indictment for conspiracy, it is not proper to include defendants who have not been privy to the acts relied upon as proof of the alleged conspiracy, and whose offences, whatever they may have been, are wholly separate and distinct. And if the proof of the alleged conspiracy consists of proof that the substantive crime has been committed, however legal such a course may be, it is not satisfactory (following the opinion of Lord Cranworth in Rea. v. Rowlands (5 Cox C.C. 497.)" [Emphasis supplied]

Since these proposed charges were for a substantive offence and in the alternative an inchoate offence which should have been raised in the Resident Magistrate's enquiry, then a further enquiry would have revealed that a preliminary enquiry should have been held with a view for committal to the Circuit Court. It is now necessary to refer to Section 180 of the Act again with its predecessor before

1962 to demonstrate its true construction in the light of the constitutional imperatives in Sec. 4 (1) of the First Schedule of the Constitution. Section 176 of the Registration of Titles Law Cap. 353 reads:

> "176. Unless in any case herein otherwise expressly provided, all Offences against the Provisions of this Law may be prosecuted, and all penalties or sums of money imposed or declared to be due or owing by or under the Provisions of the same may be sued forand recovered, in the name of the Attorney-General, in the Supreme Court, pursuant to the Provisions of the Civil Procedure Code"

There is also Cap. 340 in the 1953 edition of the Laws of Jamaica where in section 174 the words High Court instead of Supreme Court were used. The earliest version should also be cited. Section 149 of The Registration of Titles Law 188 is identical to Section 176 supra.

Then when the Constitution came into force on the appointed day August 6, 1962, section 4 (1) of the First Schedule became operative. It reads:

> "4,-(1) All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order."

Then section 4 (5)(a) reads:

> " The Governor -General may, by Order made at any time within a period of two years commencing with the appointed day and published in the

> *Gazette,* make such adaptations and modifications in any law which continues in force in Jamaica on and after the appointed day, or which having been made before that day, is brought into force on or after that day, as appear to him to be necessary or expedient by reason of anything contained in this Order"

This generous period of two years was granted to effect by decree such adaptations and modifications as were necessary or expedient by decree.

Then further, 5 (b) (c) reads:

> "(b) Without prejudice to the generality of paragraph (a) of this subsection any Order made thereunder may transfer to the Director of Public Prosecutions any function by any such law vested in the Attorney-General*
>
> (c) An Order made by the Governor-General under this subsection shall have effect from such date, not earlier than the appointed day, as may be specified therein."

There is another pertinent provision in the First Schedule. It is section 13 (1) which reads:

> "13.-(1) The Supreme Court in existence immediately before the commencement of this Order shall be the Supreme Court for the purposes of the Constitution, and the Chief Justice and other Judges of the Supreme Court holding office immediately before the commencement of this Order shall, as from that time, continue to hold the like offices as if they had been appointed thereto under the provisions of Chapter VII of the Constitution"

How was the relevant modification and adaptation made? The Jamaica Gazette Supplement Proclamations, Rules and Regulations dated Monday, August 6, 1962, reads:

"THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL, 1962

THE CONSTITUTION (TRANSFER OF FUNCTIONS) ATTORNEY-GENERAL, TO DIRECTOR OF PUBLIC PROSECUTIONS) ORDER. 1962

WHEREAS by paragraph (a) of subsection (5) of section 4 of the Jamaica (Constitution) Order in Council, 1962 (hereinafter referred to as the Order in Council) it is provided that the Governor-General may, by Order made at any time within a period of two years commencing with the appointed day and published in the ***Gazette,*** make such adaptations and modifications in any law (as hereinafter defined) which continues in force in Jamaica as from the appointed day, or which, having been made before that day, is brought into force on or after that day as appear to him to be necessary or expedient by reason of anything contained in the Order in Council:

AND WHEREAS by paragraph (b) of the said subsection it is further provided that any Order made as aforesaid may transfer to the Director of Public Prosecutions any function by any such law vested in the Attorney-General:

AND WHEREAS it appears to me to be expedient so to do:

NOW, THEREFORE, I, KENNETH WILLIAM BLACKBURNE, Knight Grand Cross of the Most Excellent Order of the British Empire, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Governor-General of Jamaica, DO HEREBY ORDER as follows:-

1. This Order may be cited as the Constitution (Transfer of Functions) Attorney-General to Director of Public Prosecutions) Order. 1962, and shall come into operation on'the appointed day."

Then paragraph 3 reads in part:

"3. (1) The provisions of this paragraph shall have effect subject to the provisions of paragraph 4 of this Order.

(2) The enactments specified in the First Schedule to this Order are hereby amended by deleting the word "Attorney-General" wherever it appears and substituting therefor the words "Director of Public Prosecutions.

(3)

Then the Second Schedule reads:

"SECOND SCHEDULE

Enactments specifically amended

	First Column	Second Column
7.	The Registration of Titles Law (Cap. 340) Section 174	a) Insert immediately after the word 'prosecuted' the words `by the Director of Public Prosecutions'; b) delete from the marginal note the words 'in the name of the Attorney-General'."

It is in the light of these constitutional imperatives that section 174 of the Registration of Titles Law when adapted and modified as section 180 of the Act now reads:

" Unless in any case herein otherwise expressly provided, all offences against the provisions of this Act may be prosecuted by the Director of Public Prosecutions, and all penalties or sums of money imposed or declared to be due or owing by or under the provisions of the same may be sued for and recovered, in the name of the Attorney-General, in the Supreme Court."

Effect must be given to the adaptation and modification in the light of the supremacy clause of the Constitution. section 2 reads:

> " Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

Somehow section 26 (8) in Chapter 3 of the Constitution which ought to be regarded in some instance as a temporary exception to the supremacy clause has been unwittingly regarded as the supremacy clause and sec. 2 regarded as the exception. There is a reference in section 26(9) to sec. 4 of the Order in Council which reads:

> "(9) For the purposes of subsection (8) of this section a law in force immediately before the appointed day shall be deemed not to have ceased to be such a law by reason only of -
>
> (a) any adaptations or modifications made thereto by or under section 4 of the Jamaica (Constitution) Order in Council, 1962, or
>
> (b) its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision."

Section 26(8) ought to be cited to put it in perspective. It reads:

> " Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

To my mind the exception stipulated in Section 26(8) of Chapter 111 was meant to be temporary so as to allow Parliament ample time to repeal or amend statutes and the judiciary to review authorities which embody provisions repugnant to the Fundamental Rights provisions enshrined in Chapter III. Support for this interpretation comes from the oft quoted passage of Lord Devlin in **Nasralla v Director of Public Prosecutions** [1967] 2 A.C. 238 at 247 which reads:

> " Whereas the general rule, as is to be expected in a Constitution and as is here embodied in section 2, is that the provisions of the Constitution should prevail over other law, an exception is made in Chapter lll. This chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed."

His Lordship was careful to state that it was a presumption that the pre-existing laws conformed to Chapter lll provisions. Where the presumption was rebutted and there was no conformity the framers of the Constitution anticipated that Parliament would repeal the pre-existing laws and where appropriate the judiciary would overrule in necessary circumstances repugnant common law authorities.

To its credit Parliament has recognised its duty by repealing pre-1962 legislation as the Vagrancy Act and the Unlawful Possession Act which offended Chapter III provisions relating to Fundamental Rights and Freedom. If the adaptation and modification envisaged in Section 4 (1) of the First Schedule

were not made within the two year period by Governor-General's decree then Parliament would have *had* to intervene as was done in the amendment of section 210 of the Customs Act. Section 54 of the Criminal Justice Administration Act requires similar treatment to preclude the sentence of being detained during the Governor-General's pleasure, which is out of harmony with the separation of powers. See **Hinds v. The Queen** 1997 A.C. 195.

It is now necessary to cite section 180 of The Act again with the modification and adaptation for easy reference:

> "180. Unless in any case herein otherwise expressly provided, all offences against the provisions of this Act may be prosecuted by the Director of Public Prosecutions, and all penalties or sums of money imposed or declared to be due or owing by or under the provisions of the same may be sued for and recovered, in the name of the Attorney-General, in the Supreme Court."

The interpretation of this section is pertinent to the issue in this case. Where the D.P.P. and the D.P.P. alone or those to whom he has given his fiat can prosecute we are obliged to interpret the section so as to ensure the primacy of the Supreme Court thus:

> " 180. Unless in any case herein otherwise expressly provided, all offences against the provisions of this Act may be prosecuted by the Director of Public Prosecutions... in the Supreme Court."

It is obligatory to return to section 178 and refer specifically to the provisions which states:

> ".... and any certificate of title, entry, erasure or alteration so procurred or made by fraud shall be void as against all parties or privies to such fraud."

The significance of this provision is that Crystal Coast Development would have no need to institute Civil proceedings to ensure that the titles obtained by the Lindsay ladies would be cancelled if a proper prosecution in the Supreme Court were successful. In any event their rights to institute civil proceedings was preserved by section 179 of The Act which reads:

> " No proceeding or conviction for any act hereby declared to be a misdemeanour shall affect any remedy which any person aggrieved or injured by such act may be entitled to at law or in equity against the person who has committed such act, or against his estate."

Why the Resident Magistrate erred in granting an indictment for conspiracy to defraud on the basis of the Crown's Opening Speech

It should be reiterated, if to grant an indictment for conspiracy to defraud in his court the Resident Magistrate had no jurisdiction, that ought to be the end of the proceedings. Also, no point could properly be taken or was taken in this court that the jurisdiction point was not raised in the court below. Since his Honour had no jurisdiction then the trial was a nullity. See **Chief Koffie Forfie v. Barima Kwabena Seifah** (1958) 1 All E.R. 289 and **Craig v Kanssen** (1943) 1 All E.R 108. As the trial was a nullity the point could have been taken at any stage of the proceedings see **Norwich Corporation v. Norwich Tramways Co. Ltd.** (1906) 1.K.B. 129 and **Westminister Bank Ltd. v. Edwards** (1942) A.C. 529 or (1942) 1 All E.R. 470. The principle has been applied in criminal proceedings. See **Benson v. Northern Ireland R.T.B.[1942]** 1 All E.R. 465 at 469 where Lord Simon said:

> " The circumstances that no objection on the score that no appeal lay was ever taken at any stage until it was taken by the House itself does not mend matters from the respondent's point of view at all. In **Norwich Caron. v. Norwich Electric**

> **Tramways Co., Ltd.,11 9061 2 K.B. 119; 38 Diciest 57 337; 75 L.J.K.B. 636; 95 L.T. 12.** where an objection to the jurisdiction of the High Court was successfully taken in the Court of Appeal, though it had not been raised at an earlier stage, Vaughan Williams, L.J., laid down the true rule when he said at p. 125:
>
> 'If the court in any case is itself satisfied that it has no jurisdiction to entertain the application made, it is its duty, in my opinion, to give effect to that view, taking, if necessary, the initiative upon itself.' "

It is also necessary to say that the Lindsay ladies could have gone to His Honour to have his judgment set aside. The following passage from **Chief Kofie's** case at p. 290 is instructive. The' Privy Council said :

> " Lord Greene, M.R. in Craig **v. Kanssen** ([1943] 1 All E.R. 108 at p. 113), after referring to several decisions, had said:
>
> > 'Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary,' "

Conspiracy to defraud is an offence at common law. It was submitted firstly on behalf of the Lindsay ladies that as a rule of practice, that conspiracy should not be charged where the substantive offence has been committed. Secondly, it was submitted that it was a rule of law that conspiracy to defraud should not be charged where the allegations were contrary to statutory provisions which specified either the inchoate offence of conspiracy or a substantive offence. Thirdly, to reiterate, it was impossible to charge conspiracies to defraud

cognisable by the Resident Magistrate so as to evade the mandatory provisions ordering trial by jury. On the virtues of jury trial **Ward v. James** (1966) 1 Q.B. 273, [1965] 2 W.L.R. 455 [1965] 1 All E.R. 563 at 571 Lord Denning, M.R. said:

> " Let it not be supposed that this court is in any way opposed to trial by jury. It has been the bulwark of our liberties too long for any of us to seek to alter it. Whenever a man is on trial for serious crime, or when in a civil case a man's honour or integrity is at stake, or when one or other party must be deliberately lying, then trial by jury has no equal."

As for the authorities, in **Verrier v. D.P.P.** [1966] 3 All E.R. 568 at p. 575 Lord Pearson said:

> " I think that it is desirable to add some words of caution -
>
> (i) Normally it is not right to pass a higher sentence for conspiracy than could be passed for the substantive offence; it can be justified only in very exceptional cases.
>
> (ii) Although it must follow logically from what has been said previously that it could in a very exceptional case be right to charge conspiracy even when the substantive offence had been committed and was charged, it should undoubtedly remain the general rule that, when there is an effective and sufficient charge of a substantive offence, the addition of a charge for conspiracy is undesirable because it will tend to prolong and complicate the trial. See **R.v. Dawson. R.v. Wenlock** [1960] 1 All E.R 558 at p. 564 and **R.v. Davey. R. v. Davey** [1960] 3 All E.R. 533 at p. 540"

Because of the primacy of statute law Mr.Ramsay contended that there should be no resort to the common law where statute law occupies the field. In this context **R. v. Cooke** [1986] 2 All E.R. 985 cited by Mr. Small, Q.C. is helpful and with the necessary modifications and adaptations it is pertinent to the

jurisdictional problem posed in this case. The problem being whether it is permissible to rely on the common law offence of conspiracy to defraud when the relevant statute covers the allegations in the Crown's case as well as in the Particulars of Offence. Lord Bridge, at p. 988 said:

> `... It is in the context of this problem that the language I used in **R v Ayres** [1984] 1 All ER 619 at 625 - 626, [1984] AC 447 at 459 - 460, must be understood. I said:
>
> > '... I conclude that the phrase "conspiracy to defraud" in s 5 (2) of the 1977 Act must be construed as limited to an agreement which,if carried into effect, would not necessarily involve the commission of any substantive criminal offence by any of the conspirators... In the overwhelming majority of conspiracy cases it will be obvious that performance of the agreement which constitutes conspiracy would necessarily involve, and frequently will in fact have already involved, the commission of one or more substantive offences by one or more of the conspirators. In such cases one or more counts of conspiracy, as appropriate, should be charged under s 1 of the 1977 Act. Only the exceptional fraudulent agreements will need to be charged as common law conspiracies to defraud, when either it is clear that performance of the agreement constituting the conspiracy would not have involved the commission by any conspirator of any substantive offence or it is uncertain whether or not it would do so. In case of doubt, it may be appropriate to include two counts in the indictment in the alternative. It would then be for the judge to decide how to leave the case to the jury at the conclusion of the evidence, bearing always in mind that the crucial issue is whether performance of the agreement constituting the conspiracy would

> necessarily involve the commission of a substantive offence, by a conspirator. If it would, it is a s 1 conspiracy. If it would not, it is a common law conspiracy to defraud.' "
>
> It will be apparent, I hope, that in these passages I was seeking to identify by reference to the language used in s 1 (1) of the 1977 Act itself, `which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement', the characteristics distinguishing a conspiracy which must be charged under s 1 as a conspiracy to commit that offence or those offences from a conspiracy to defraud which may still be charged at common law."

Since the word `privy' embraces conspiracy then Section 1 of the 1977 United Kingdom Act corresponds to section 178(ii) and (iv) of The Act as paragraphed supra. Statutory conspiracies are specified in both Acts. At common law in the instant case and by construction of Section 1 of the 1977 United Kingdom Act, if the allegations are within the ambit of the statutory conspiracies then it is not permissible to resort to the common law conspiracy to defraud.

Turning to the indictment granted by His **Honour, it reads:**

> " **IT IS HEREBY CHARGED ON** behalf of Our Sovereign Lady the Queen that Maxine Lindsay and Icilyn Lindsay are charged with the offence of: Conspiracy to Defraud contrary to Common Law.
>
> **PARTICULARS OF OFFENCE**
> **(COUNT 1)**
>
> Maxine Lindsay and Icilyn Lindsay on diverse days between the 18th day of February 1992 and the 17th day of May 1994, conspired together and with Aneita Grant and other persons unknown to

defraud the Registrar of Titles by representing that Aneita Grant, Maxine Lindsay and Icilyn Lindsay were the proprietors of an estate as Joint Tenants and as such were entitled to be registered as the proprietors of an estate as Joint Tenants in fee simple of the same parcel of land at Volume 1269 Folios 915 and 916.

STATEMENT OF OFFENCE (COUNT 2)

Conspiracy to Defraud contrary to Common Law.

PARTICULARS OF OFFENCE (COUNT 2)

Maxine Lindsay and Icilyn Lindsay on diverse dates between the 18th day of February 1992 and the 17th day of May, 1994 conspired together and with Aneita Grant and with person(s) unknown to defraud Crystal Coast Development Company Limited of their right to be registered as the proprietors of an estate in fee simple of a parcel of land registered at Volume 1035 Folio 298 by procuring the registration of Aneita Grant, Maxine Lindsay and Icilyn Lindsay as properietors of an estate as Joint Tenants in fee simple of the lands in a Certificate of Title registered at Volume 1265 Folio 253 .

PLEA; Not Guilty - both counts

Sgd. D. Parkinson
Clerk of Courts"

Although in both counts the Statement of Offence reads Conspiracy to Defraud an examination of the Particulars of Offence reveals that there was an allegation that the substantive offence was committed . That averment was that Certificates of Title at Volume 1269 Folios 915 and 916 were procured fraudulentlly. The second count was superfluous as the pleader assumed it was necessary to defraud Crystal Coast Development Company in charging an

inchoate offence where the gist of the offence is the agreement. See **Scott v. Commissioner of Police for the Metropolis** [1974] 3 All E.R. 1032. The citation of The Indictments Act is relevant at this point. Perhaps section 3 of that Act ought to be the first citation. It reads:

> "3. The Rules contained in the Schedule with respect to indictments shall have effect as if enacted in this Act, but those rules may be added to, varied, or annulled by further rules made by the Rules Committee of the Supreme Court pursuant to section 4 of the Judicature (Rules of Courts) Act"

Then Section 4 (1) of the Judicature (Rules of Court) Act reads:

> "4.- (1) It shall be the function of the Committee to make rules (in this Act referred to as "rules of court") for the purposes of the Judicature (Civil Procedure Code) Law, the Judicature (Appellate Jurisdiction) Act, the Judicature (Supreme Court) Act, the Judicature (Supreme Court) (Additional Powers of Registrar) Act, the Justices of the Peace (Appeals) Act, the Indictments Act and any other law or enactment for the time being in force relating to or affecting the jurisdiction of the Supreme Court, or the Court of Appeal or any Judge or officer of such respective Court"

In the Schedule to the Indictment Act paragraph 10 reads:

> "10. Statement of intent - It shall not be necessary in stating any intent to defraud, deceive or injure to state an intent to defraud, deceive or injure any particular person where the statute creating the offence does not make an intent to defraud, deceive or injure a particular person an essential ingredient of the offence."

Then in the Appendix to the Rules Specimen 13 reads:

> "Statement of Offence
>
> Conspiracy to defraud.

Particulars of Offence

> A.B. and C.D., on the day of ,and on divers days between that day and the day of at conspired together with intent to defraud by means of an advertisement inserted by them, the said A.B., and C.D., in the H.S,. newspaper, falsely representing that A.B. and C.D. were then carrying on a genuine business as jewellers at
>
> and that they were then able to supply certain articles of jewellery to whomsoever would remit to them the sum of four dollars."

Be it noted that from the Particulars of Offence in the indictment before His Honour it could be inferred that a substantive offence was committed while in the draft indictment above no such inference could be drawn. As for the mandatory provision for a jury trial in the Supreme Court Lord Watson in elegant language expressed the principle thus in **Barraclouoh v Brown** [1895] All E.R. Rep. 238 at 243:

> I am content to rest my opinion of the merits of the case upon the reasons assigned by MATHEW, J., and the learned judges of the Court of Appeal. As already indicated, I am of opinion that the claim founded upon s. 47 of the Act of 1889 was not competently brought before the court in this suit. The only right which the undertakers had to recover from an owner is conferred by these words:
>
> > Or the undertakers may, if they think fit, recover such expenses from the owner of such boat, barge, or vessell, in a court of summary jurisdiction.'
>
> The right and the remedy are given uno flatu, and the one cannot be dissociated from the other. By these words the legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable, and has, therefore, by plain'implication, enacted that no

> other court has any authority to entertain or decide these matters. The objection is one which, in my opinion, it is pars judicis to notice, because it arises on the fact of the enactment which your Lordships are asked to enforce in this appeal. It cannot be the duty of any court to pronounce an order which will have that effect when it plainly appears that in doing so the court is using a jurisdiction which the legislature has forbidden it to exercise."

On the criminal side the principle was stated by Sellers J., in **R. v. Barnett** 35 Cr. App. R. 37 at p. 42 thus:

> " That principle is to be found very clearly enunciated in the judgment of Williams, J., in **EASTERN ARCHIPELAGO Co. v. REG.** (1853), 2 E. & B. 856. In the course of the judgment he said this (at p. 879): 'For example: it is a familiar doctrine that, though, where a statute makes unlawful that which was lawful before and appoints a specific remedy, that remedy must be pursued and no other, yet, where an offence was antecedently punishable by a common law proceeding as by indictment, and a statute prescribes a particular remedy in case of disobedience, that such particular remedy is cumulative, and proceedings may be had either at common law or under the statute.' "

The learned judge continues thus:

> " That principle has been followed and applied in a number of cases, and, as far as we know, has never been dissented from. It has been applied in **Hall.** [1891] 1 Q.B. 747, at p. 753, in a decision of Charles, J., and more recently in this Court in KAKELO, 17 Cr. App. R. 149; [1923] 2 K.B. 793. That case was concerned with offences under the Alliens Restriction Act, 1914 and the Aliens restriction (Amendment) Act, 1919, which offences were punishable only in the manner prescribed by the statutes, namely, on summary conviction `unless the person charged with the offence claims the right under section 17 of the Summary Jurisdiction Act, 1879, to be tried with a jury '."

Then in his conclusion on thiS aspect of jurisdiction the learned judge said:

> " In giving the judgment of the Court in that case, Sankey, J., said (at pp. 152 and 795 of the respective reports): 'It was contended, thirdly, that the offence under the Aliens Order was punishable by summary conviction, and that sessions had no jurisdiction to entertain the indictment. This depends upon the Aliens Restriction Act, 1914, s. 1 (2), and the Aliens Restriction (Amendment) Act, 1919, s. 13 (4). The law upon the subject is elaborately dealt with in Hall (supra), which was a motion to quash an indictment charging one Hall, an overseer of the poor for the parish of St. Mary, Whitechapel, with a misdemeanour. The motion succeeded upon the ground that an offence by an overseer within the meaning of section 51 of the Parliamentary Registration Act, 1843, was not an indictable misdemeanour. Charles, J., went at length through the cases bearing on the matter and referred to the passage in **Hawkins' Pleas of the Crown, Book 2, ch. 25, s. 4,** which is as follows: 'Where a statute makes a new offence which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information, etc., without mentioning an indictment, it seems to be settled at this day, that it will not maintain an indictment, because the mentioning the other methods of proceeding only, seems impliedly to exclude that of indictment.' " In the judgement of Charles J. in **Hall** (supra), reference was made to the judgment of Williams, J., in the **EASTERN ARCHIPELAGO** case (supra)."

The application of the principle when the named tribunal is the Supreme Court is even more compelling.

Conclusion

In the light of the foregoing I find that His Honour had no jurisdiction to grant an order for indictment in this case. It follows that the trial was a nullity, in

the sense of being void ab initio. The convictions must be quashed and the concurrent sentences of twelve (12) months imprisonment at hard labour suspended for two (2) years set aside. I was of the opinion at one stage that **Reid v. The Queen** [1979] 2 All E.R. 904 or **D.P.P. v. White** 26 W. I. R. 462 was applicable pursuant to section 305 of the Judicature (Resident Magistrates) Act which reads:

> "305.-(1) The Court of Appeal may dismiss the appeal or may allow the appeal and quash the conviction, or may allow the appeal and order a new trial."

But in **Reid v The Queen** and, **White** there were valid trials in the Supreme Court. In this case there was a mistrial in the Resident Magistrate's Court and the power of this court pursuant to Section 305 supra is to order a new trial in the Resident Magistrate's Court. In this case there was no trial in the Supreme Court. Goddard J. as he was then said this in **R. v. Gee Bibby and Dunscombe** 25 Cr. App. R. 198 at 203:

> " The result is that there has been what is sometimes called a mistrial, though it would be more accurate to say that there had been no trial at all. Under the decision in **CRANE v. DIRECTOR OF PUBLIC PROSECUTIONS** (15 CR. APP. R. 183; [1921] 2 A. C. 299) this Court has power to order that a proper trial should take place, and in that case the proceedings would recommence from the point where they broke down. This Court also has power in such circumstances, and has acted on it on several occasions in cases where it was held that the interests of justice so required, to quash the conviction and allow an appellant to be discharged."

This was the approach of Lord Simon in **D.P.P. White** where at 485 he said:

> " If the words "new trial" can extend to cover venire de novo, they should therefore be so

> construed. In their Lordships' view they can. In the instant case there was a valid trial up to the time the jury returned a premature verdict. In such circumstances it is perfectly appropriate to speak of a "new trial". As Lord Atkinson said in **Crane v. D.P.P.** ([1921] 2 A.C. at p. 329):
>
> > ... where there has been a mis-trial, and relief is demanded as a matter of strict legal right on a point of law, no appeal being made to the discretion of the Court, there is little if any difference between the two [venire de novo and new trial]."

But in this case there is another feature. Section 179 of The Act gives the appellant a safeguard. Prosecutions are to be instituted by the Director of Public Prosecutions on the complaint of an aggrieved party and the Registrar of Titles. It is for the Director of Public Prosecutions taking into consideration all the circumstances so far including Section 20 (1) of the Constitution and **Bell v The Director of Public Prosecutions** [1985] A.G. 937 [1985] 3 W.L.R. 73 to decide whether at this stage a fair trial in the Supreme Court can be instituted against the Lindsay ladies in the interests of justice. So the Order of this Court ought to read:

ORDER

Appeals allowed, convictions and sentences set aside being nullities.

BINGHAM. J.A.:

The appellants, following a hearing before His Honour Mr. M. K. Dukharan, Senior Resident Magistrate, which lasted over several days, were convicted on two counts of an indictment charging them with conspiracy to defraud, committed between 18th February, 1992, and 17th May, 1994. They were sentenced to serve concurrent terms of twelve months imprisonment on each count. The sentences were suspended for two years.

Given the argument raised by learned counsel in the matter in so far as they relate to ground 1, going as it does to the question of the jurisdiction of the court below to hear the matter and the conclusion reached, no comment will be made as to the merits or otherwise in relation to the other grounds of appeal and the submissions advanced touching on same.

Ground 1 reads:

> "1. That the Indictment was bad in law in that (a) The offence particularized in Count (1) is the Statutory Offence provided for in S. 178 of the Registration of Titles Act: That accordingly it is submitted that it is not permissible to charge a statutory offence as an offence at Common Law to clear prejudice of the defendant: That further (b) the defect cannot/is not cured by charging Conspiracy to defraud at Common Law in order to circumvent the Statute: That (c) a charge of conspiracy to contravene the Statute would have been competent but improper since the substantive statutory offence should be charged."

It is sufficient to state that once it is recognised that there was merit in this ground, it follows that this would have had the effect of determining the

entire appeal as it would have meant that the exercise embarked upon below would have amounted to a nullity.

The indictment, in so far as is relevant to a determination of the matter, reads as follows:

"INDICTMENT

The Queen vs Maxine Lindsay and Icylin Lindsay

In the Resident Magistrate's Court for the Corporate Area

Holden at Half Way Tree On the 15th day of October 1996

IT IS HEREBY CHARGED ON behalf of Our Sovereign Lady the Queen that Maxine Lindsay and Icylin Lindsay are charged with the offence of:

Conspiracy to Defraud contrary to Common Law.

PARTICULARS OF OFFENCE (COUNT 1)

Maxine Lindsay and Icylin Lindsay on diverse days between the 18th day of February 1992 and the 17th day of May 1994 conspired together and with Anita Grant and other persons unknown to defraud the Registrar of Titles by representing that Anita Grant, Maxine Lindsay and Icylin Lindsay were the proprietors of an estate as Joint Tenants and as such were entitled to be registered as the proprietors of an estate as Joint Tenants in fee simple of the same parcel of land at Volume 1269 Folios 915 and 916.

STATEMENT OF OFFENCE (COUNT 2)

Conspiracy to Defraud contrary to Common Law.

PARTICULARS OF OFFENCE (COUNT 2)

Maxine Lindsay and Icylin Lindsay on diverse dates between the 18th day of February 1992 and

> the 17th day of May 1994 conspired together and with Anita Grant and with person(s) unknown to defraud Crystal Coast Development Company Limited of fhoir right to be_ rwON41w0 05 the proprietors of an estate in fee simple of a parcel of kind registered of Volume 1035 Folio 298 by procuring the registration of Anita Grant, Maxine Lindsay and Icylin Lindsay as proprietors of an estate as Joint Tenants in fee simple of the lands in a Certificate of Title registered at Volume 1265 Folio 253."

The court's attention was directed to sections 178-180 of the Registration of Titles Act, a colonial statute which came into operation in Jamaica for the first time in 1888. These sections read as follows:

> "178. If any person wilfully makes any false statement or declaration in any application to bring land under the operation of this Act, or in griy cii-ppk:cition to be regi5tGred a raprictor, whether in possession, remainder, reversion or otherwise, on a transmission, or in any other application to be registered under this Act as proprietor of any land, lease, mortgage or charge; or suppresses, withholds or conceals, or assists or joins in or is privy to the suppressing, withholding or concealing, from the Registrar or a Referee, any material document, fact or matter of information, or wilfully makes any false statutory declaration required under the authority or made in pursuance of this Act; or if any person in the course of his examination before the Registrar or a Referee, wilfully and corruptly gives false evidence; or if any person fraudulently procures, assists in fraudulently procuring, or is privy to the fraudulent procurement of any certificate of title or instrument, or of any entry in the Register Book, or of any erasure or alteration in any entry in the Register Book; or knowingly misleads or deceives any person hereinbefore authorized to require information or explanation in respect to any land, or the title to any land under the operation of this Act, or in respect to which any dealing or transmission is proposed to be registered, such

> person shall be guilty of a misdemeanour, and shall incur a penalty not exceeding one thousand dollars, or may at the discretion of the Court by which he is convicted, be imprisoned with or without hard labour for a period not exceeding two years; and any certificate of title, entry, erasure or alteration so procured or made by fraud shall be void as against all parties or privies to such fraud.
>
> 179. No proceeding or conviction for any act hereby declared to be a misdemeanour shall affect any remedy which any person aggrieved or injured by such an act may be entitled to at law or in equity against the person who has committed such act, or against his estate.
>
> 180. Unless in any case herein otherwise expressly provided, all offences against the provisions of this Act may be prosecuted by the Director of Public Prosecutions, and all penalties or sums of money imposed or declared to be due or owing by or under the provisions of the same may be sued for and recovered, in the name of the Attorney-General, in the Supreme Court."

Learned counsel for the appellants, Mr. Ramsay, submitted that the sections of the Act referred to seek to protect the Office of Titles from frauds of the widest description, whether committed individually or in combination, by the creation of the penalties as set out in section 178. These offences operate solely in relation to the Titles Office. Any person injured thereby has a civil remedy against the wrongdoer. Mr. Ramsay contends that section 180 not only names the officer to be responsible for instituting prosecutions for those offences, being the Director of Public Prosecutions, but it goes further and names the forum, this being the Supreme Court.

Given the regime set up by the State by the enactment, learned counsel submitted that where a statute for the first time creates offences in relation to an entity that did not exist before, and sets out the parameters both individually and collectively, and names the officers responsible for prosecuting persons, and provides the procedure for the matter to be dealt with, then it would not be permissible to allow charges of conspiracy to defraud covering the same ground where the proof offered is the same statutory offences to be proceeded with.

Mr. Small, Q.C., for the Crown, while arguing that section 178 of the Act created kindred offences which could have been resorted to, this was not possible due to the absence of the documentary evidence resulting from a total disappearance of the documents on which to mount these charges.

Learned counsel conceded, however, that the same inferences relied upon in this indictment to prove the charges of a conspiracy at common law, could also be relied on had the appellants been charged with offences under section 178 of the Registration of Titles Act.

An examination of this section of the Act supports Mr. Ramsay's contention that a definition of a conspiracy, when applied to the wording of the section, would include "any person who... suppresses, withholds or conceals or assists or joins in or is privy to the suppressing, withholding or concealing from the Registrar or a Referee any material document etc."

[Emphasis supplied]

This would by its very nature amount to a conspiracy as it would presuppose "the advancement of the intention which each (co-conspirator) has conceived in his mind which passes from the secret information to the overt acts of mutual consultation and agreement." (Vide *Mulcahy v. R.* [1868] L.R. 3 H.L. 328).

Mr. Ramsay cited several authorities in support of his arguments. In disposing of the matter, however, it is only necessary to refer to that of *Sidney Joseph Barnett et at v. R.* [1952] 35 Cr. App. R. 37. The headnote reads as follows:

> "The appellants were convicted of conspiring together and with other persons unknown to contravene the provisions of section 1 of the Auction (Bidding Agreements) Act, 1927, by, being dealers, agreeing to offer and accept consideration as an inducement or reward for abstaining from bidding at sales by auction.
>
> *Held,* that as the offence under section 1 of the Act of 1927 was created for the first time by that section, and a definite procedure for its trial, namely summary trial only, with the consent of one of the Law Officers, was prescribed by the Act, and as the particulars of the conspiracy alleged were in terms or in substance the offence prescribed by the Act, the offence was not triable on indictment and the indictment should have been quashed at the outset. The convictions, therefore, must be quashed."

In delivering the judgment of the Court of Criminal Appeal, Sellers, J. (as he then was), having referred to the relevant section of the Act under which the indictment had been laid, said:

> "It has been submitted that the offence with which the opp&lants were charged and of which

> they have been convicted was not an indictable offence, but was in substance or in terms no more than an offence framed for the first time under this Act of 1927, and only triable summarily with the consent of one or other of the Law Officers, and that, being an offence which was triable summarily, it was only triable in any event within six months of the date of its alleged commission."

The Court also referred to **Hawkins Pleas of the Crown,** Book 2 Ch. 25. s. 4 which states:

> "Where a statute makes a new offence which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender... without mentioning an Indictment it seems to be settled at this day, that it will not maintain an Indictment because mentioning the other methods of procuring only seems impliedly to exclude that of (an) indictment."

Although the matter which falls for our determination does not relate to the mode of trial, it touches on a question of no lesser import being that of the forum. Here the legislature has mandated, by section 180 of the Registration of Titles Act, by directing that "the prosecution etc. shall take place in the Supreme Court." Such proceedings in the Supreme Court in the absence of an express contrary intention prescribed by Parliament ordinarily takes place before a Supreme Court judge sitting with a jury.

Apart from the procedural requirement laid down in section 180 of the Act, the appellants could also rely on the protective provisions of section 20 of the Constitution by contending that their right to a fair trial by a jury had been breached. By proceeding to a trial in the Magistrate's Court,

therefore, this would amount to a procedural irregularity, given the express words of the section of the Act, thereby rendering the entire proceedings a nullity.

In coming to this conclusion, one does not overlook the very serious implications which the allegations made against the appellants, raised in an arena calling for the greatest degree of scrutiny, having regard to the nature of the tasks which are undertaken there.

When the particulars of the conspiracies which are alleged in the two counts of the indictment are examined, however, they in terms both fall within the ambit of the offences prescribed in section 178, or are at least substantially the same.

Also supporting the argument of the appellants is the judgment of the House of Lords in *Barraclough v. Brown and others* [1895-99] All E.R. (Reprints) 239. Although the appeal turns on a jurisdictional question in relation to a civil claim, in my view, it is of general application. In his opinion, Lord Watson said:

> "I am content to rest my opinion of the merits of the case upon the reasons assigned by MATHEW, J., and the learned judges of the Court of Appeal. As already indicated, I am of opinion that the claim founded upon s. 47 of the Act of 1889 was not competently brought before the court in this suit. The only right which the undertakers had to recover from an owner is conferred by these words:
>
> > 'Or the undertakers may, if they think fit, recover such expenses from the owner of such boat, barge, or vessel, in a court of summary jurisdiction.'

The right and the remedy are given uno flatu, and the one cannot be dissociated from the other. By these words the legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable, and has, therefore, by plain implication, enacted that no other court has any authority to entertain or decide these matters. The objection is one which, in my opinion, it is pars judicis to notice, because it arises on the fact of the enactment which your Lordships are asked to enforce in this appeal. It cannot be the duty of any court to pronounce an order which will have that effect when it plainly appears that in so doing the court is using a jurisdiction which the legislature has forbidden it to exercise. The appellant's counsel maintain that your Lordships ought to substitute for a debt decree, which is the only remedy claimed under s. 47, and a declaration that, under that section, he has a right to recover from the respondents, who were admittedly the owners of the *J. M. Lennard* at the time when she sank. It is possible that your Lordships might accede to such a suggestion if it were necessary in order to do justice. But the matter as to which a declaration is sought is one of those exclusively submitted to the jurisdiction of the summary court. In the absence of authority I am not prepared to hold that the High Court had any power to make declaration of right with respect to any matter from which its jurisdiction is excluded by any Act of the legislature, and, were such an authority produced, I should be inclined to overrule it. The declaration which we were invited to make would be of no practical utility, and it would be an interference by a court having no jurisdiction in the matter with the plenary and exclusive jurisdiction conferred by the legislature upon another tribunal." [Emphasis supplied]

In the result, the convictions cannot stand, going as they do to a clear procedural irregularity rendering the proceedings below null and void.

I hold, therefore, that the appeal be allowed, the convictions quashed and the sentences set aside.

This result does not leave the parties affected thereby without any remedy. The result here means in effect that being a nullity there never was a proper hearing. This can now be resorted to before the proper forum. As to the persons affected by the issuance of the "Titles" (exhibits 2 and 3) their claim to cancel same, hopefully can now proceed in earnest.

FORTE, J.A.

By a majority appeals allowed, convictions and sentences set aside being nullities.