37/82

IN THE PRIVY COUNCIL No. 4 of 1982

ON APPEAL

FROM THE FIJI COURT OF APPEAL

B E T W E E N :

THE COMMISSIONER OF ESTATE AND GIFT DUTIES — APPELLANT (Original Plaintiff)

- and -

FIJI RESORTS LIMITED — RESPONDENT (Original Defendant)

RECORD OF PROCEEDINGS

Messrs Charles Russell & Company
Hale Court
Lincolns Inn
LONDON WC2A 3UL

Solicitors for the Appellant

COWARD CHANCE & CO.,
Royex House,
Aldermanbury Square,
London EC2V 7LD

Solicitors for the Respondent

IN THE PRIVY COUNCIL No. of 1982

ON APPEAL

FROM THE FIJI COURT OF APPEAL

BETWEEN:

THE COMMISSIONER OF ESTATE AND GIFT DUTIES — APPELLANT (Original Plaintiff)

- and -

FIJI RESORTS LIMITED — RESPONDENT (Original Defendant)

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

No.	Description of Document	Date	Page
	PREVIOUS RELEVANT PROCEEDINGS		
1.	Statement required by Section 28(1), Estate and Gift Duties Act, filed by Respondent	[illegible]th December 1977	1
2.	Assessment made by the Appellant consequent upon receipt of statement filed by Respondent	18th April 1978	6
	IN THE SUPREME COURT		
3.	Originating Summons, Supreme Court, Lautoka, Civil Action 205 of 197[illegible], as amended pursuant to statement filed by Respondent, and assessment made by Appellant	4th December 197[illegible]	[illegible]
4.	Ruling of Mr. Justice Williams re Burden of Proof (Supreme Court, [illegible])	24th August 1979	[illegible]

No.	Description of Document	Date	Page
5.	Judgment of Mr. Justice Williams (Supreme Court, Lautoka)	15th November 1979	12
6.	Sealed Order of the Supreme Court, Lautoka	15th November 1979	34
	PLAINTIFF'S EVIDENCE		
7.	Marital Agreement, Alan Emmett Davis/ Doris Anita Davis	6th October 1961	35
8.	Affidavit of G.A. Strader	11th April 1977	37
9.	Further affidavit of G.A. Strader	23rd January 1979	46
	DEFENDANT'S EVIDENCE		
10.	Affidavit of Martin A. Schainbaum	8th November 1978	50
11.	Affidavit of Francis Chuah Hock Hai	8th November 1978	57
12.	Affidavit of Adam Dickson	17th November 1978	59
13.	Further affidavit of Adam Dickson	23rd August 1979	60
	IN THE FIJI COURT OF APPEAL		
14.	Notice of Motion of Appeal to Fiji Court of Appeal, filed by Respondent	18th December 1979	61
15.	Respondent's Notice filed by Appellant	8th January 1980	64
16.	Notice of Amendment to Respondent's Notice of Motion to Fiji Court of Appeal, filed by Respondent	23rd September 1980	66
17.	Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA)	3rd October 1980	67
18.	Sealed Order of the Fiji Court of Appeal	3rd October 1980	93
19.	Order of the Court of Appeal granting final leave to appeal to Her Majesty in Council	4th May 1981	94

No.	Description of Document	Date	Page
	PROCEEDINGS SUBSEQUENT TO GRANT OF LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL		
20.	Summons under Section 8(1) of the Fiji (Procedure in Appeals to Privy Council) Order, taken out by Appellant	11th September 1981	95
21.	Affidavit of Michael John Scott in support of summons under Section 8(1), the Fiji (Procedure in Appeals to Privy Council) Order 1970	11th September 1981	97
22.	Judgment of Marsack JA re contents of Record	28th September 1981	126
23.	Sealed Order of Marsack JA re contents of Record	28th September 1981	129
24.	Judgment of the Full Fiji Court of Appeal re contents of Record	11th November 1981	130
25.	Sealed Order of the Full Fiji Court of Appeal re contents of Record	11th November 1981	131
	EXHIBITS		
26.	Cheque from Alan E. Davis to Fiji Holdings Limited (Exhibit 1)	5th September 1961	133
27.	Cheque from Alan E. Davis to Clodfelter and Dempsey (Exhibit 5)	5th January 1965	134
28.	Cheque from Allan E. Davis to Peter Slimmer and John Falvey (Exhibit 6)	3rd June 1964	135
29.	Share Certificate, Fiji Holdings Limited, Nos. 16276 - 18729 (Exhibit 12, part of)	23rd October 1961	136
30.	Share Certificate, Fiji Holdings Limited, Nos. 19615 - 19838 (Exhibit 12, part of)	5th April 1965	137
31.	Share Certificate, Fiji Resorts Limited, for 6,295 shares (Exhibit 12, part of)	22nd October 1967	138
32.	Share Certificate, Fiji Mocambo Holdings Limited, for 37,354 shares (Exhibit 12, part of)	14th January 1970	139
33.	Cheque from Alan E. Davis to Peter Slimmer (Exhibit P1, part of)	17th June [illegible]	140

No.	Description of Document	Date	Page
34.	Cheque from Alan E. Davis to Adam Dickson (Exhibit P1, part of)	2nd February 1968	141
35.	Cheque from Doris A. Davis to George Wilson (Exhibit P1, part of)	17th July 1969	142

DOCUMENTS TRANSMITTED BUT NOT REPRODUCED

IN THE SUPREME COURT

Description of Document	Date
Affidavit of Ross Thomas Holmes	27th August 1976
Affidavit of Nanu Bhai s/o Ranchord Bhai Patel	30th August 1976
Affidavit of Doris A. Davis	10th November 1978
Affidavit of Elton H. Suhrke	10th November 1978
Affidavit of Michael G. Hales	13th November 1978
Affidavit of Siteri Matata	31st January 1979
Affidavit of Michael John Scott	31st January 1979
Further Affidavit of Doris A. Davis	10th August 1979
Affidavit of P.I. Knight	27th August 1979
Affidavit of Michael John Scott	21st September 1976
Application for Abridgement of time for Service of Further Affidavit of R.T. Holmes	15th August 1977
Further Affidavit of R.T. Holmes	12th August 1977
Affidavit of Michael John Scott in support of Application for Abridgement of time (supra)	15th August 1977
Summons for obtaining leave for amendments to originating summons	14th July 1978
Affidavit in support of above summons	13th July 1978

No.	Description of Document	Date	Page
	Notice of cross-examination of deponents at trial	16th February 1979	
	Order granting leave to amend originating summons	15th September 1978	
	Summons by Respondent for leave to file affidavits out of time	20th November 1978	
	Affidavit of P.I. Knight in support of last-mentioned summons	20th November 1978	
	Affidavit of M.J. Scott in response	22nd November 1978	
	Summons for directions as to manner of service of notice to attend	25th January 1979	
	Affidavit in support of last-mentioned summons	25th January 1979	
	Summons for extension of time for filing affidavits in reply, and for adjournement of hearing	29th November 1978	
	Affidavit in support of last-mentioned summons	29th November 1978	
	Order upon last-mentioned summons	4th December 1978	
	Summons by defendant as to necessity for attendance of witnesses for cross-examination	20th April 1979	
	Affidavit of M.J. Scott in relation to last-mentioned summons	27th April 1979	
	Further Affidavit of M.J. Scott in relation to last-mentioned summons	1st May 1979	
	Notice of motion for order for attendance for cross-examination of Elton H. Suhrke	8th June 1979	
	Affidavit in support of last-mentioned notice of motion	8th June 1979	
	Order for attendance for cross-examination of Elton H. Suhrke	15th June 1979	
	Summons for trial of question of law before trial of cause	20th August 1979	
	Affidavit in support of last-mentioned summons	20th August 1979	

EXHIBITS

Exhibit Mark	Description of Document	Date
2	Promissory Note	25th August 1961
3	Promissory Note	25th August 1961
4	Certificate of receipt of shares	25th August 1961
7,8	Promissory Notes	7th October 1965 20th January 1966
9,10	Statement of account, Bank of America	21st January 1965 22nd August 1966
11	Advice of charge	19th August 1966
13	Order, Superior Court of State of California	18th October 1972
14	A.E. Davis: United States Estate Tax return	27th November 1972
15	Order, Superior Court of State of California	30th November 1972
16	Handwritten notes re Davis assets	date unknown
17	Letter, Elton Suhrke to Cromptons	24th October 1978
18	Check, $18,000, Tropical Pool Service	10th February 1971
19	Letter, First National Bank, San Jose, to Cromptons	18th May 1972
20	Letter, Irvin Frasse to Cromptons	23rd May 1972
21	Letter, Frasse to Cromptons	17th September 1974
22	Letter, Cromptons to Frasse	20th June 1974
23	Letter, Cromptons to Frasse	[illegible]th September 1974
24	Letter, Frasse to Cromptons	7th February 1974
25	Letter, Cromptons to Frasse	[illegible]th March 1974
26	Letter, Cromptons to Frasse	4th April 1974
27	Marital Property Declaration, D.A. Davis	[illegible] October 1972
28(i)	Letter, P.I. Knight to Frasse	[illegible] January 1978
28(ii)	Letter, Frasse to Cromptons	2nd February 1978

Exhibit Mark	Description of Document	Date
28(iii)	Letter, Cromptons to Frasse	25th April 1978
28(iv)	Letter, Frasse to Cromptons	2nd May 1978
28(v)	Letter, Knight to Frasse	28th June 1978
28(vi)	Letter, Frasse to Knight	28th July 1978
29	Letter, Cromptons to Plaintiff	14th August 1979
	Letter, Plaintiff to Cromptons	22nd August 1979
30	Letter, Plaintiff to Cromptons	31st July 1979
P1	U.S. Internal Revenue Service: Computation of Federal Tax liability, Estate of A.E. Davis	14th March 1975
P1	Statement of account, Bank of America, A.E. Davis	12th March 1968
	Statement of account	11th April 1968
	U.S. Corporation tax return, Tropical Pool Service Inc.	30th June 1967
	Certificate of Amendment of Articles of Association, Tropical Pool Service Inc.	19th January 1971
	Minutes of special meeting, Board of Directors, Tropical Pools Service Inc.	19th January 1971
	Letter, Seattle First National Bank to First National Bank of San Jose, annexing stockholder ledger cards re D.A. Davis account, and copy page from commerce clearing house capital change reporter	9th June 1972
K	Five copy receipts, Tropical Pool Service Inc., A.E. Davis	One dated 8th March 1971 (Tropical Pool Service Inc.), remainder undated
L	One copy transaction confirmation	28th June 1971
M	One copy receipt	1st July 1971
N1	Promissory Note	4th May 1966
N2	Promissory Note	undated
N3,N4, N5,N6	Letter, Pan Am Credit Union to First National Bank San Jose, plus annexures (Loan account statements, share account statements, cash received vouchers, member statements(A.E.Davis))	8th May 1972

Exhibit Mark	Description of Document	Date
O	Deed of Trust	4th January, 1966
P2	Letter, Elton Suhrke to Cromptons	6th January 1978
P3	Correspondence, Cromptons/ Plaintiff	5th October 1976 to 22nd August 1979

IN THE PRIVY COUNCIL

No. of 198

ON APPEAL

FROM THE FIJI COURT OF APPEAL

BETWEEN:

THE COMMISSIONER OF ESTATE AND GIFT DUTIES — APPELLANT (Original Plaintiff)

- A N D -

FIJI RESORTS LIMITED — RESPONDENT (Original Defendant)

RECORD OF PROCEEDINGS

No. 1

STATEMENT REQUIRED BY SECTION 28(1), ESTATE AND GIFT DUTIES ACT, FILED BY RESPONDENT, DATED 16TH DECEMBER 1977

No. 1
Statement required by Section 28(1), Estate and Gift Duties Act, filed by Respondent, dated 16th December 1977

ADMINISTRATOR'S STATEMENT

and filed pursuant to the Order of the Honourable Mr. Justice Stuart made at Lautoka on the 8th day of November 1977

DECEASED'S full name: Alan Emmett Davis

DECEASED'S last residential address: San Mateo County, California, U.S.A.

DECEASED'S occupation: Airline Executive

Full name and address of person filing statement: Fiji Resorts Limited, a limited liability company having its registered office at Nadi.

I, JOSEPH THURAIRATNAM NALLAIAH of Nadi, Fiji do solemnly and sincerely declare

1. That I am the Managing Director of Fiji Resorts Limited and am duly authorised to make this declaration on its behalf.

2. That the said deceased died on or about the 28th day of February 1972 at Lautoka, Fiji.

No. 1
Statement required by Section 28(1), Estate and Gift Duties Act, filed by Respondent, dated 16th December 1977

3. That the said deceased was at the time of his death domiciled in California, United States of America.

4. That to the best of my knowledge and belief the following Statement 'A' is a true and complete statement of the assets of the said deceased which the said Fiji Resorts Limited has been deemed to have taken possession of.

5. That the successor of the deceased, the age and the degree of relationship of the said successors to the deceased are to the best of my knowledge and belief set out in Statement'B' herein written.

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declarations Ordinance 1970

Declared at Suva)
this 16th day of December 1977) (Sgd.) J. Nallaiah
before me)

(Signed)

A Commissioner for Oaths

STATEMENT 'A'

	Value
Shares, stock, debentures, bonds	$116,533.04

STATEMENT 'B'

Full names of successors	Age last birthday	Relationship
Doris Anita Davis	60	Wife
Laurie Peters	32	Daughter
Nicholas Peters	10	Grandson
Jan Davis	29	Son
Deborah Davis	9	Granddaughter
Scott Davis	26	Son

No. 1
Statement required by Section 28(1), Estate and Gift Duties Act, filed by Respondent, dated 16th December 1977

SCHEDULE 7

FIJI INLAND REVENUE DEPARTMENT

ESTATE DUTY

SHARES IN COMPANIES

FIJI GOVERNMENT AND CORPORATION STOCK; BONDS,ETC.,IN FIJI

Estate of ...ALAN EMMETT DAVIS.....deceased.

Date of death 28/2/1972..

A certificate of the number of shares held by the deceased under the hand of the manager, secretary, or other responsible officer of each company or corporation must be attached.

A certificate by the Chief Accountant in support of Government Stock must be supplied.

CERTIFICATE

I ......ADAM DICKSON..............certify that this schedule
(Type full name)
sets out a true valuation of the securities mentioned here as at date of death of deceased and that the total value is
$ .....233,066.00.........

(Signed)
....

Name of Company or Corporation	Number of Shares,etc., or Nominal Value of Shares or Stock	Class	Amount Called up per Share $	c	Value per Share, Unit,etc. $	c	Total Value $	c
Yanuca Island Limited	25180	ORD	2	00	5.2288	-	131,661	18
Fiji Mocambo Holdings Limited	37,354	ORD	1	00	2.7147	-	101,404	90
							233,066	08
		Deceased's one-half interest					116,533	04

No. 1
Statement required by Section 28(1), Estate and Gift Duties Act, filed by Respondent, dated 16th December 1977

FIJI INLAND REVENUE DEPARTMENT

ESTATE DUTY

Certificate to be annexed to SCHEDULE 7

Estate of ALAN EMMETT DAVIS deceased. Date of death: 28/2/1972

Any amounts shown in the second part of the certificate below must be brought to account on the schedules indicated.

I, JOSEPH THURAIRATNAM NALLAIAH, of Nadi, Managing Director of the FIJI RESORTS LIMITED.............................
(Company or corporation)

........................being a ..PUBLIC..................company
(Registered name in full) (Public or Private)

and having its registered office at ...Nadi.....................
........................,do hereby certify that the above-named deceased at the time of his death held in the FIJI MOCAMBO HOLDINGS LIMITED (Full particulars to be inserted) in his own right or with other persons the undermentioned shares, stocks, and debentures:

.....37354.............stock units of $1 each, paid up to $1 each
(Number)

jointly with his wife Doris Anita Davis ordinary shares of each, paid up to each
(Number)

........................( )preference shares of each, paid up to each
(Number) class

........................( )preference shares of each, paid up to each
(Number) class

.... deferred shares of each, paid up to each
(Number)

..............................shares of each, paid up to each

$......................stock at ....per centum, maturing on

the .... debentures, each securing the sum of
(Number)

$......................at..... per centum, maturing on the.........

..............debentures, each securing the sum of $.................
(Number)
at ....per centum, maturing on the ....

And I DO FURTHER CERTIFY that the following sums were due to him:

Accrued dividends (Schedule 9) .. .. $............
Moneys on deposit or current account (including interest) (Schedule 1) .. .. $............
Calls on shares paid in advance (Schedule 9) .. .. $............
Directors fees (Schedule 9) .. .. $............
Other moneys (state nature) Schedule 9) .. .. .. $............

Dated at ....this........day of ....19..

(Sgd.) J. Nallaiah

Manager

No. 1
Statement required by Section 28(1), Estate and Gift Duties Act, filed by Respondent, dated 16th December 1977

FIJI INLAND REVENUE DEPARTMENT

ESTATE DUTY — Certificate to be annexed to SCHEDULE 7

Estate of ALAN EMMETT DAVIS deceased. Date of death 28/2/1972

Any amounts shown in the second part of the certificate below must be brought to account on the schedules indicated.

I, JOSEPH THURAIRATNAM NALLAIAH , of Nadi, Managing Director of the FIJI RESORTS LIMITED..........................
(Company or corporation)

........................being a PUBLIC.................company
(Registered name in full) (Public or private)

and having its registered office at....NADI.....................
...................., do hereby certify that the above-named deceased at the time of his death held in YANUCA ISLAND LIMITED
(Full particulars to be inserted)
in his own right or with other persons the undermentioned shares, stocks, and debentures:

....25180.........stock units of $2 each,paid up to $2 each
(Number)

....................ordinary shares of each,paid up to each
(Number)

..............( )preference shares of each,paid up to each
(Number) class

..............( )preference shares of each,paid up to each

....................deferred shares of each,paid up to each
(Number)

........................shares of each,paid up to each
(Number)

$................stock at ....per centum, maturing on
(class)
the .... debentures, each securing the sum
(Number)
of $...............at.......per centum, maturing on the........

.................debentures, each securing the sum of..........
(Number)
at ....per centum, maturing on the ....

And I DO FURTHER CERTIFY that the following sums were due to him:

Accrued dividends (Schedule 9) .. .. $...........

Moneys on deposit or current account (including interest) (Schedule 1) .. .. $...........

Calls on shares paid in advance (Schedule 9) .. $...........

Directors fees (Schedule 9) .. .. $...........

Other moneys (state nature) (Schedule 9) .. .. $...........

Dated at ....this ....day of ....19..

sgd. J. Nallaiah
Secretary or Manager

No. 2

ASSESSMENT DATED 18TH APRIL 1978
MADE BY THE APPELLANT CONSEQUENT
UPON RECEIPT OF STATEMENT FILED
BY RESPONDENT

No. 2
Assessment dated 18th April 1978 made by the Appellant consequent upon receipt of statement filed by Respondent

ORIGINAL

FORM M

FIJI INLAND REVENUE DEPARTMENT

NOTICE OF ASSESSMENT OF ESTATE DUTY
PURSUANT TO SECTION 29 OF THE ESTATE AND GIFT DUTIES ACT

Private Bag
Suva

Messrs Cromptons
G.P.O. Box 300
SUVA.

In the Estate of ALAN EMMETT DAVIS

NOTICE is hereby given that, subject to section 63 of the above Act, ESTATE DUTY has this day been assessed to the Estate of the abovenamed Deceased, as detailed overleaf, at -

$53,303.59

INTEREST at 10 per cent. per annum is payable on all Duty unpaid from 28/2/1973 to date of payment.

PENALTY of 5 per cent. accrues without further notice on the amount of this assessment unpaid on 18/10/1978, unless a prior extension of time has been granted.

Dated this 18th day of April 1978

sgd. S. Singh
Commissioner of Estate and Gift Duties

RECEIVED the sum here stated in printed figures

COMMISSIONER

Receipt by Cash Register only is valid

No. 2
Assessment dated 18th April 1978 made by the Appellant consequent upon receipt of statement filed by Respondent

COMPUTATION OF ESTATE DUTY

INDEBTEDNESS OF FIJI RESORTS LIMITED

Value of Estate of Alan Emmett Davis

	$
Bank of New South Wales - Suva	2699.59
Bank of New South Wales - Lautoka	608.97
100 $2 shares in Marlin Investments Ltd.	100.00
25180 $2 shares in Yanuca Island Ltd.	131661.28
37354 $1 shares in Fiji Mocambo Holdings Ltd.	101404.90
Income Tax Credit	39.83
Declared and unpaid dividends	3492.60
Yacht - "Rebel"	40000.00

A TOTAL OF $280,007.07 (Two hundred and eighty thousand and seven dollars seven cents)

ESTATE DUTY upon $280007.07 (Two hundred and eighty thousand and seven dollars seven cents) = $86,802.17 (Eighty six thousand eight hundred and two dollars seventeen cents)

Less $23,708.20 (Twenty three thousand seven hundred and eight dollars twenty cents) = $63,093.97 (Sixty three thousand and ninety three dollars ninety seven cents)

PAID 22/10/73 — Duty remaining due and payable.

PLUS INTEREST upon $86,802.17 (Eighty six thousand eight hundred and two dollars seventeen cents) for period 28/2/73 to 22/10/73 - 237 (Two hundred and thirty seven) days. = $5,642.14

PLUS INTEREST upon $63,093.97 (Sixty three thousand and ninety three dollars ninety seven cents) for period 23/10/73 to 12/4/78 four years 172 (One hundred and seventy two) days = $28,215.63

T O T A L

Duty of	$63,093.97	(Sixty three thousand and ninety three dollars ninety seven cents)
Interest of	$5,642.14	(Five thousand six hundred and forty two dollars fourteen cents)
Interest of	$28,215.63	(Twenty eight thousand two hundred and fifteen dollars sixty three cents)
A TOTAL OF	$96,951.74	(Ninety six thousand nine hundred and fifty one dollars seventy four cents).

No. 2
Assessment dated 18th April 1978 made by the Appellant consequent upon receipt of statement filed by Respondent

AMOUNT DUE BY FIJI RESORTS LTD.

VALUE OF PROPERTY TRANSFERRED OR DEALT WITH:

Yanuca Island Limited shares	$131,661.18	
Fiji Mocambo Holdings Limited shares	$101,404.90	
Dividends	3,492.60	$236,558.68
TOTAL VALUE OF ESTATE		$280,007.07

PROPORTION OF DUTY

$\frac{236,568}{280,007}$ of $63,093.97 = $53,303.59

Proportion of Interest

$\frac{236,558}{280,007}$ of $33,857.77 = $28,604

A TOTAL OF $81,907.59 (Eighty one thousand nine hundred and seven dollars fifty nine cents) due by Fiji Resorts Ltd. as at 12/4/78.

(NOTE: Further interest at 10% per annum is accruing on $53,303.59 from 13 April 1978).

No. 3

ORIGINATING SUMMONS,
SUPREME COURT, LAUTOKA,
CIVIL ACTION 205 OF 1976,
AS AMENDED PURSUANT TO STATEMENT
FILED BY RESPONDENT, AND ASSESSMENT
BY APPELLANT

No. 3
Originating summons, Supreme Court, Lautoka, Civil Action 205 of 1976, as amended pursuant to statement filed by Respondent, and assessment made by Appellant

APPLICATION AMENDED THE 4TH DAY OF DECEMBER 1978, PURSUANT TO LEAVE GRANTED BY THE HONOURABLE MR. JUSTICE WILLIAMS UPON 4TH DECEMBER 1978.

IN THE SUPREME COURT OF FIJI, LAUTOKA

WESTERN DIVISION

NO. 205 OF 1976

BETWEEN: THE COMMISSIONER OF ESTATE AND GIFT DUTIES — Plaintiff

A N D : FIJI RESORTS LIMITED (a limited liability company incorporated in Fiji upon 25th June 1971) — Defendant

APPLICATION FOR ORDER FOR PAYMENT OF ESTATE DUTY AND DELIVERY OF STATEMENT (SECTION 31, ESTATE AND GIFT DUTIES ORDINANCE, CHAPTER 178 OF THE LAWS OF FIJI)

LET all parties attend a Judge in Chambers at the Supreme Court Western Division Lautoka on the ___ day of __________ 197__ at ______ o'clock in the _____noon on the hearing of an application by the Commissioner of Estate and Gift Duties :-

Order made on 4.12.78

FOR AN ORDER under Section 31 of the Estate and Gift Duties Ordinance Chapter 178 that Fiji Resorts Limited do

(1) DELIVER TO THE COMMISSIONER OF ESTATE AND GIFT DUTIES WITHIN THIRTY DAYS OF THE SAME BEING ORDERED the Administrator's statement required by subsection (1) of section 28 of the Estate and Gift Duties Ordinance in respect of the estate of one Alan Emmett Davis, deceased, (hereinafter referred to as "the deceased") who died at Lautoka, Fiji on 28th February 1972, being at that time domiciled in California.

(2) PAY TO THE COMMISSIONER OF ESTATE AND GIFT DUTIES such duty payable as provided for by the Estate and Gift Duties Ordinance together with interest thereon, namely the principal sum of $53,303.59 (fifty three thousand three hundred and three dollars and fifty nine cents) together with interest thereon payable in accordance with section 21 of the Estate and Gift Duties Ordinance until payment or Judgment herein, as would have been payable had Fiji Resorts Limited obtained

No. 3
Originating summons, Supreme Court, Lautoka, Civil Action 205 of 1976, as amended pursuant to statement filed by Respondent, and assessment made by Appellant

administration of the estate of the deceased prior to :

(i) registering the transfers of certain shares forming part of the said estate, particulars of the said shares and the said transfers being as follows:

(a) 187,942 (one hundred and eighty seven thousand nine hundred and forty two) shares in Fiji Resorts Limited sold to Qantas Airways Limited on the 26th September, 1973 (of the said shares a quantity totalling 131,661 (one hundred and thirty one thousand six hundred and sixty one) were formerly, and at the date of death of the deceased, two dollar stock units in Yanuca Island Limited, numbering 25,180 (twenty five thousand one hundred and eighty) of a value of $131,661.18 (one hundred and thirty one thousand six hundred and sixty one dollars and eighteen cents).

(b) 95,123 (ninety five thousand one hundred and twenty three) shares in Fiji Resorts Limited sold to Qantas Airways Limited on the 26th September, 1973 and a further 1,500 (one thousand five hundred) Fiji Resorts Limited shares sold to McClintock Metal Fabricators Inc. on the 18th April, 1974 (the said shares were formerly, and at the date of death of the deceased, part of a quantity of one dollar stock units in Fiji Mocambo Holdings Limited numbering 37,354 (thirty seven thousand three hundred and fifty four) and of a value of $101,404.90 (one hundred and one thousand four hundred and four dollars and ninety cents).

(c) 4,781 (four thousand seven hundred and eighty one) shares in Fiji Resorts Limited sold to Fango & Company on or about the 25th February 1977 (the said shares were formerly, and at the date of death of the deceased, part of a quantity of one dollar stock units in Fiji Mocambo Holdings Limited numbering 37,354 (thirty seven thousand three hundred and fifty four) and of a value of $101,404.90 (one hundred and one thousand four hundred and four dollars and ninety cents).

(ii) Paying of dividends declared but unpaid as at the date of death of the deceased, such dividends being declared in January 1972, and paid in March 1972, such dividends totalling $3,492.60.

AND FOR AN ORDER that the Defendant do pay to the Plaintiff the costs of this application.

No. 3
Originating summons, Supreme Court, Lautoka, Civil Action 205 of 1976, as amended pursuant to statement filed by Respondent, and assessment made by Appellant

AND FURTHER TAKE NOTICE that the grounds of this application are as follows, namely that Fiji Resorts Limited dealt with part of the estate of the deceased, namely the above described shares and dividends, without first obtaining administration of the said estate, as shown by the affidavits of Ross Thomas Holmes and Nanu Bhai s/o Ranchord Bhai Patel filed herewith.

AND TAKE FURTHER NOTICE that at the hearing of this application the Plaintiff will, inter alia, seek in support of his claim to refer to and rely upon relevant provisions of the Californian Civil Code pertaining to marital relations, and upon the Rule of Estoppel, as precluding the Defendant from now averring that property the subject of this Application was, at material times, of any character other than that of community property, according to the law of California.

Dated the 20th day of December 1978

(Sgd.) M.J. Scott
Solicitor Acting for the Commissioner of Estate and Gift Duties

---

No. 4

RULING OF MR. JUSTICE WILLIAMS RE BURDEN OF PROOF, (SUPREME COURT, LAUTOKA) DATED 24TH AUGUST, 1979

No. 4
Ruling of Mr. Justice Williams re burden of proof, (Supreme Court, Lautoka) dated 24th August, 1979

2.30 P.M.

Court

This is an action for payment of estate duty. The amount has been assessed by the Commissioner and the defendant has to show cause why he should not pay.

Mr. Scott, for the Commissioner asks for an order stating upon whom the burden of proof lies.

I am not sure that I understand his request.

I know nothing of the background of the case which by now is what can only be described as a grossly thick file in the midst of which one may find something to convey what the issues in the proceedings are.

No. 4

Ruling of Mr. Justice Williams re burden of proof, (Supreme Court, Lautoka) dated 24th August, 1979

The order of the Court is that the defendant has to show cause why he should not pay the sum assessed. He may produce a variety of reasons such as the absence of any liability on the defendant to pay, even if the money claimed is due to the Commissioner i.e. that he is wrongly sued, or it may be that the assessment is erroneous in parts in that the estate is not liable to some or all of the total sum claimed.

Whatever objections may be raised they are surely raised by the defendant. The person raising them must prove them.

It is clear from the order of the court that it is not for the Commissioner in the first instance to show cause why the sum assessed should be paid.

There is simply the Order to show cause and I consider that it does not need enlarging further by way of an application of this nature.

(Sgd.) J.T. Williams

No. 5

JUDGMENT OF MR. JUSTICE WILLIAMS (SUPREME COURT, LAUTOKA), DATED 15TH NOVEMBER, 1979

No. 5
Judgment of Mr. Justice Williams (Supreme Court, Lautoka), dated 15th November, 1979

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Civil Jurisdiction
Action No. 205 of 1976

BETWEEN:

THE COMMISSIONER OF ESTATE AND GIFT DUTIES — Plaintiff

- and -

FIJI RESORTS LIMITED — Defendant

Mr. M. Scott, Counsel for the Plaintiff
Mr. K.R. Handley & Mr. P. Knight, Counsel for the Defendant.

No. 5
Judgment of Mr. Justice Williams (Supreme Court, Lautoka), dated 15th November 1979

JUDGMENT

The Commissioner for Estate Duties sues Fiji Resorts Ltd. as "executors de son tort" in relation to the estate of Alan Davis who died in Fiji on 28.2.72. I shall refer to him as the deceased.

He was married, domiciled in California and had property in the U.S.A. and Fiji when he died. This action only concerns the deceased's property in Fiji.

The deceased's wife Doris Davis makes claims to the deceased's Fiji estate under the Californian law governing marital property. It is agreed that under the Californian Code property acquired by a couple during marriage otherwise than by gift, devise or descent is held in common as community property. Property owned before marriage, or received by gift, devise or descent during the marriage is that spouse's separate property. There can be his and her separate property apart from community property.

It is agreed by the parties that the term "separate property" means that property which is held both in its use and title for the exclusive benefit of the husband or wife.

Community property includes the earnings of the husband and wife.

The husband has management and control of that community property which comprises personal property with absolute power of disposition, other than testamentary. But at any given instant the rights of the spouses to the community property are equal subject of course to the husband's management and control.

It is not essential that separate property shall be kept rigidly apart from community property although if it becomes commingled with community funds it will be absorbed into them unless it can be realistically traced back to its source.

On the death in California of one spouse estate duty is payable on his (her) separate estate and on his half of the community property. By agreement they can regulate common and separate ownership of property to the exclusion of the Code and the deceased and Mrs. Davis entered into such an agreement in October 1961. It is accepted that their agreement did not alter the effect of the Californian Code on their rights to community property and separate property in so far as it relates to this action. The agreement is annex RTH 4-9 in the affidavit of Mr. R.T. Holmes, The Fiji Commissioner.

It is agreed that at the time of his death the deceased held in Fiji in his own name 25,180 x $2.00 units or shares in Yanuca Island Ltd., and in the joint names of himself and his wife 37,354 units or shares of $1.00 each in Fiji Mocambo Holdings Ltd. All the shares were converted to Fiji Resorts shares but the conversion does not affect the outcome of this case. After his death a further 56,281 units were acquired in Fiji Resorts Ltd.

No. 5
Judgment of
Mr. Justice
Williams
(Supreme Court
Lautoka),
dated 15th
November 1979

The defendants sold all the shares held in the deceased's own name plus the shares acquired after his death, plus the bulk of the shares held in the names of the deceased and his wife although probate had not issued in Fiji.

Following that sale the Commissioner demanded death duties from the defendants on the whole of the shares and bank balances held by the deceased in his own name and in the joint names of his wife and the deceased. That demand is annex RTH 14 in the affidavit, dated 27.8.76, of Ross Thomas Holmes (above). References to R.T.H. are to annexures to his said affidavit.

On the application of the Commissioner, an Order of the Supreme Court dated 22/11/77 directed the defendants under S.31(1) of the Estate and Gift Duties Act, Cap. 178 to deliver to the Commissioner a statement containing details of the deceased's property dealt with by the defendants, and to show cause why they should not pay the duty assessed thereon. These proceedings follow on from that Order.

The Commissioner amended the assessment on 14/7/78 to inlcude a ship called "the Rebel" valued at $40,000 as part of the deceased's estate.

Since the action is not based on pleadings there are no specific allegations pleaded by the Commissioner and the defendants. Thus the facts upon which the defendant relies in reduction of the Commissioner's claim are not set out and have to be gleaned from the affidavits and evidence of witnesses and submissions by counsel. The latter have been helpful in tendering written submissions on the evidence and the law in addition to oral submissions.

The defendants mode of showing cause is to say that they are not liable on all the shares sold because a substantial quantity were the separate property of Mrs. Doris Davis,which under Californian law does not form part of the deceased's estate. The defendants also allege that the remainder of the shares were community property under Californian law entitling each spouse to one undivided half thereof and, on the death of one spouse only the value of his half is included in his estate. That exposition of the Californian law is accepted by both parties.

In order to establish that the shares held in their joint names were Mrs. Davis's separate property and that the shares held in the deceased's name alone were community property the defendant under Californian law has to trace the purchase back so as to show that they were purchased from the community funds or from Mrs. Doris Davis's separate funds.

During correspondence with the Commissioner, Messrs. Cromptons, (Solicitors & Barristers), acting for the defendants, stated in a letter of 25/9/73, annex. RTH 4-3, that all the Fiji shares were purchased with community funds but that the ship, "the Rebel", was purchased with Mrs. Doris Davis's separate money. They did not allege in 1973 that some of the Fiji shares had been purchased from Mrs. Doris Davis's separate funds, nor did they allege this in their later letter of 30/4/75 RTH 4-17. The San Jose Bank in California, the deceased's executors, submitted returns to the Californian State and the U.S. Federal tax authorities (see RTH 5) stating that the deceased held as his own estate only one half of the Fiji shares as community property. The defendants

now allege that at least half were Mrs. Davis's separate property and that less than half were community property. In other words the deceased's estate in Fiji included less than one quarter of the shares.

Mr. Scott submitted on behalf of the Commissioner that the defendants having repeatedly stated that all the shares were community property, are estopped from alleging that at least half were Mrs. Doris Davis's separate property. He revealed no actual loss of revenue or other detriment caused to the Commissioner by reason of the change in allegations as to ownership. The Commissioner maintains as he has done for several years that the deceased's separate estate includes all the Yanuca Island shares and half the rest as his share of the community property. Thus the Commissioner has not acted on the defendant's earlier representations that all the shares were community property.

Spencer Bower & Turner's Estoppel by Representations, 2nd Edn. at p. 88 clause 98, states that the representee must prove that he was induced by the representation to act upon it. I have not been shown any statement in the Commissioner's affidavits alleging that he has been misled and caused to alter his position to his detriment. In fact the only changes made by the Commissioner, notwithstanding the defendant's representations, have been to enhance the sum claimed. Thus at a late stage, as I have already indicated, the value of the ship "the Rebel" was included in the final assessment.

An estoppel ensures that something which was probably not true shall be regarded as true because someone has been caused to rely upon it as true. If the Commissioner insists on it being accepted as true that all the shares were community property then he cannot allege that half of them were the sole property of the deceased.

In any event, the amount of duty payable has not yet been decided, let alone paid and accepted as a true and final account. Until then the Commissioner cannot have acted to his detriment.

I take the view that the defendants are not estopped.

It is agreed that separate property remains separate although its form may be changed. The defendants submit that under Californian law if separate property is used as security for a loan, the proceeds of the loan and any property purchased with it is the separate property of the spouse who provided the security even though the loan is repaid from community property. The defendants rely upon opinions and cases cited in the affidavits of Californian lawyers Martin A. Schainbaum and G.A. Strader. Their affidavits as expert witnesses on Californian law seldom quote actual passages from the cases cited but often refer to a particular part of a judgment. Photostat copies of the relevant sections of the Californian Code were annexed to Strader's affidavit but there is no need for me to quote them, because as I have indicated their broad effect is not disputed.

Mr. Scott submitted that the experts' approach in relying at times upon the entire judgment in a Californian case instead of upon a particular portion was erroneous. He argued that for an expert to simply state that the principles of tracing property are set out in decided cases such as Mix v. Mix, Hicks v. Hicks, and other quoted cases is insufficient. He contends that the expert should state his views on the law and then refer to the actual portion of any judgment on which he relies. He drew attention to "The Conflict of Laws," by Dicey, 8th Edn." (supra), Rule 185, which deals with proof of foreign law. R.185(ii) at p. 1115 points out that if the expert witness cites a passage from a foreign decision the court may not look at other parts of the decision without the aid of the witness.

Nowhere in their affidavits have either of the experts on Californian law categorically stated the defendants' proposition that where the separate property of one spouse is security for a loan then the proceeds of the loan are that spouse's separate property even though the other spouse signs as obligor and even though it is repaid from community property. Schainbaum's affidavit refers to the judgment in "In Re the Marriage of Mix" 14 Cal. 3d. 604, 122 Cal. Reporter 79, 536 p. 2d. 479 along with 2 other cases, photostats of which were tendered, setting out the principles of tracing separate property which has become mingled with community property. He refers to p.610-611 and quotes a passage to show that where separate and community property are commingled the spouse's rights to his (her) separate property are not affected as long as it can be traced to its source. No portion of that judgment refers to the effect of using separate property as security for loans. Nothing in Mix (supra) supports the defendants' contention.

Schainbaum referred to Hicks v. Hicks 211 Cal.App. 2d. 144, 152-157, 27 Cal. Reporter 307 where the Court of Appeal held that the separate property of one spouse can be traced through community accounts in order to show that it has not changed its identity although it may have changed in character. To support his evidence Schainbaum referred to p.p.312-315 of the judgment in Hick's case. If Mr. Scott's submission is that Schainbaum should have quoted p.p.312-315 verbatim before this Court could rely upon that passage, I do not, with respect, concur. I see no difference between quoting a passage verbatim and referring to its location in the judgment. I accept Schainbaum's references to p.p.312-315 of Hicks (supra) in support of his testimony regarding the unmingling of community and separate property. The judgment covers pages 307 to 320 but it is only p.312-315 which the witness Schainbaum relies on to explain the unmingling of community property by tracing the separate property to its source. The entire case is not placed before this Court for the Judge to make of it what he can but only p.p.312-315. However, I must peruse it all so as to understand the portion to which I am referred.

At p. 315 [9-11] Hicks, (supra), the California Court of Appeal stated that the proceeds of a loan obtained upon the security of the husband's separate property are his separate funds and the fact that the wife joined in signing a promissory note as additional security did not cause the proceeds of the loan to become community property. It seems that in Hick's case the

wife did not contribute to repayment of the loan nor was it repaid from community property but it was paid off from the husband's separate income. Therefore Hicks case does not show that the proceeds of a loan are the separate property of the spouse who provided the security for it although the loan was repaid from community property.

The defendant also relied upon See v. See 64 Cal. 2nd. 778. Schainbaum drew attention to pages 778 and 783 but they do not refer to borrowing on the security of separate property.

Reference was made to In Re Lissener's estate 27 Cal. App. 2d. 570, 81 P.2d. 448 in which Schainbaum drew attention to p.p.449-451. In that case the husband received, from a third party, a gift of mortgaged property and he promised to repay the mortgage. The Court of Appeal held that even if the mortgage had been repaid from community funds its separate character would not be changed because it will not be inferred from such expenditure alone that there was an agreement to change the separate character of the property. That expression of opinion appears to be obiter but in any event it does not indicate that the proceeds of a loan guaranteed by the husband's separate property are his separate property although the loan is repaid from community funds. In Lissener's case no loan was made to the husband but had been made to a third party who retained the proceeds thereof. If the community had repaid the mortgage debt of the third party they would not have been entitled to claim the proceeds of the loan from him. Lissener's case is not unlike that of a husband whose separate property is mortgaged to provide funds for a third party. Although the loan may be paid off from community property the proceeds of the loan were never in the husband's possession and he would receive no benefit from the community property being used to pay the third party's loan. It is clear that in such circumstances the community could not lay a claim to the proceeds of the loan any more than the husband could. The judgment leaves undecided whether the husband or the community would become the third party's creditor. It is also worth noting that the intention of the parties is referred to in Lissener's case as having a bearing on whether a gift to one spouse of mortgaged property becomes community property if the latter is used to redeem the mortgage.

The foregoing Californian authorities, reveal that the proceeds of a loan raised on the security of one spouse's separate property which is repaid from his separate property is separate property although the other spouse has given a promissory note for all or part of the loan. There is no evidence that the proceeds of a loan raised under such circumstances continue to be separate property if it is repaid from community property, although one may get that impression on a first perusal of Lissener's case. However, it seems from Lissener's case that in any event one has to have regard to the intention of the parties when community funds are used to repay loans. I reject the defendant's contention that the proceeds of a loan which has been secured by one spouse's separate property become part of his separate property even though the loan is repaid from community property.

I turn now to consider the evidence tendered by the defence in tracing the financial sources from which the shares were purchased.

The Mocambo shares held in the joint names of the deceased and Mrs. Davis were purchased with a cheque dated 5/9/61 for U.S. $25,000 payable to Fiji Holdings, Annex.B, to Mrs. Davis's first affidavit. It is signed by the deceased but it bears the printed names of both spouses showing that the account can be drawn on by either party. Mrs. Davis says that $20,000 of that $25,000 was a loan from the PAN AM. Credit Union, San Francisco, under 2 promissory notes for $10,000 each of which was signed by the deceased and Mrs. Davis. No doubt the loan was taken from Pan Am. because the deceased was employed by them as a pilot officer. Para 6 of her affidavit states that she deposited 591 Seattle Bank shares as security for the $20,000 loan and in para 10 she says that she sold 150 of the shares for $10,050. The promissory notes, Exs. C & D, show the security for the $20,000 loan as "Stock". Mrs. Davis held a considerable amount of stock in the Seattle Bank, as her separate property. Sale of some of the stock is verified by an Income Tax return for 1961, annex L, to her affidavit. Para 7 of her first affidavit, as amended by para 5 of her second affidavit, says "We borrowed the $20,000 so that my husband and I could obtain shares" in Mocambo Investments. Those are not the words of a person making a "separate" investment. She also says that the $20,000 borrowed was paid into their joint banking account but corrects this in her second affidavit by reference to a bank statement, annex.G, for January 1965 which suggests that it was her own account. But the $25,000 cheque (annex B) was made out in 1961 on which date that account may have been a joint account. The bank statement for September 1961 referring to the $25,000 cheque was not tendered. There is no doubt from examining the cheque (annex.B) that it was used to purchase Mocambo stock. She says the proceeds of one hundred of the aforesaid sale of shares was paid into the bank to meet the $US25,000 cheque. Had the bank statement for that period been produced the statement of Mrs. Davis that the $25,000 cheque came from her own bank account may or may not have been verified.

In cross-examination Mrs. Davis said that the Pan Am. loan was repaid in part from deceased's salary in monthly instalments. She never suggested that any part of the Pan Am. $20,000 loan was re-paid from her separate property. It appears from Ex.P. 1 (N1, N2 & N3) that the $20,000 Pan Am. loan was renewed twice; once on 4/5/66 and again on 13/7/71 or thereabouts in which stock was again the security. Ex.P.1 (N4) & (N5), are two portions of the Pan Am. loan repayment account relating to the $20,000 loan. They are isolated accounts in the name of the deceased although two other similar loan repayment accounts each marked Ex.P.N6. show $10,000 under the deceased's name and $10,000 under Mrs. Davis's name. Exs. P1 (N4, N5 & N6) show repayments of the $20,000 loans from April 1971 to March, 1972. They indicate that the second $20,000 loan and the third loan including 'Mrs. Davis's portion' was being repaid out of the deceased's monthly salary from Pan Am. Why were the loan statements for the period 1961 to 1972 not tendered? Was it because they would show that the first loan was also repaid by monthly deductions from the deceased's Pan Am. salary? Mrs. Davis said in cross-examination that the Pan Am. loan had been originally made with the San Francisco branch but the loan was transferred to the Seattle branch which gave better terms and Seattle did not require her stock as collateral. Ex.P.1 N.6 are two Pan Am. records showing repayments of the loan to the

San Francisco branch. Even the interest on those loans came from the deceased's salary. The conclusion I come to is that the first $20,000 loan and the second loan for the same amount and the interest thereon were repaid by the deceased from his monthly salary and as is indicated later he was repaying the third $20,000 loan at the time of his death. Moreover, I am not satisfied that the additional $5000 added to the first loan to make it up to $25,000 was provided from the sale of Mrs. Davis's bank shares. There is no evidence that the additional $5000 was paid into the account in 1961 from which the cheque was drawn or that in 1961 it was not a joint account. Even if it was Mrs. Davis's sole account in 1961, there is nothing to suggest that community funds were not paid into it and used for community purposes. Mrs. Davis's statement that the deceased had little opportunity for saving because of his domestic commitments reflects upon her credibility in the face of the above finding that the deceased in paying off 2 x $20,000 loans from his salary saved substantially more than $40,000 in the 10 years 1961 - 1971 when the interest thereon is included. In her evidence Mrs. Davis stated that she and the deceased entered into a marriage agreement annex RTH 4-9 dated 6/10/61 because the deceased and she were going to invest in Fiji. Her evidence conveyed the impression that it was not she alone nor the deceased alone but both of them who were investing together. Had Mrs. Davis alone been investing in the Mocambo I think she would have automatically said so, but she frequently said "we" and not "I". She referred to a trip (or trips) made by the deceased to Hawaii to discuss the Fijian projects with architects showing that he was very much involved in them. She is a business woman and was the sole owner in California of Tropical Pools Ltd. which she purchased by realising some other Seattle Bank stock. I think that if she were purchasing the Mocambo shares for herself they would have been entered in her name alone as was done in her purchase and personal management of Tropical Pools Ltd. But she never sold the 596 shares which were used as security and when that $20,000 loan was renewed for the third time her shares were not required as security. To conclude the saga of the Pan Am. loan there was about $18,349 owing on it when deceased died. Letter Ex.P.1 (N3) dated 8/5/72 from Pan Am. shows that the loan was insured for $10,000 which Pan Am. collected on the death of the deceased leaving a balance of $8,349 which was no doubt paid from the community fund. Yet Mrs. Davis proclaims that the deceased's domestic commitments left him with little opportunity for saving.

In para 16 Mrs. Davis says "My husband and I" made further investments in Fiji during 1965". She does not say that she alone made them. She says 224 shares and 672 debenture shares in Fiji Holdings (Mocambo) were purchased with cheque 229 of 5/1/65 for $3,153.92. The cheque, Ex.5, is drawn by deceased on what appears to be his own account 01314 with the Bank of America. It would seem on the face of it that the shares were community property since they were registered in both names. But Mrs. Davis says she provided the money for them by selling more Seattle Bank shares and depositing the money in the bank as shown in the bank statement annex G of January 1965. The sums realised from the sale were $2,917 on 7/1/65 and

No. 5
Judgment of Mr. Justice Williams (Supreme Court, Lautoka), dated 15th November 1979

$2,207.13 on 15/1/65. However, Ex.G is allegedly Mrs. Davis's own bank statement but the above cheque 229 of 5/1/65 was drawn not on Mrs. Davis's alleged bank account but on the deceased's bank account which for some reason is not exhibited. There is nothing to support her testimony that cheque 229 drawn on the deceased's account was met by funds from her separate property i.e. from the sale of her Seattle Bank shares.

A problem arises in that the Mocambo share certificates show the shares to be the joint property of Mr. and Mrs. Davis with a right of survivorship. However, I think the problem is dispelled by the marital agreement of 6/10/61 which states in clause 3 that property acquired by the husband and wife during marriage shall become and remain community property. (Except property acquired by gift, bequest, or descent). My conclusion that the Mocambo shares were acquired from community funds makes them community property under clause 3 of the marital agreement. For the husband or wife to register them as jointly owned with a right to survivorship would constitute a breach of that agreement.

Turning now to Fiji Resorts Shares (Yanuca Island) which were in the sole name of the deceased. In paragraph 18 of her affidavit Mrs. Davis again says "My husband and I paid for our initial investment in Fiji Resorts with cheque No. 247 for $12,500." The cheque, annexe H, dated 3.6.64, is signed by the deceased alone and comes from an account which she says was hers but which was operated as a joint account. A study of cheques and bank statements does not show that the account which is No. 701314 was her separate liability and asset. She states that the $12,500 cheque (which is also tendered as Ex.6) was not met until 7.10.75 when the Bank of America took the promissory note, annex 'J', for $12,500 which is dated 7.10.65 and jointly signed by the deceased and Mrs. Davis. No loan statement or bank record has been produced showing when and how that promissory note was paid.

The $12,500 loan was re-newed on 20.1.66 by Mrs. Davis's personal promissory note for the same amount. There is nothing to show how much was owing on the promissory note when it was renewed, or the purpose for which it was renewed. I have no doubt on the evidence that the Bank of America looked to Mrs. Davis as well as to deceased for repayment of the $12,500. It was finally repaid on 19.8.66 from the account 701314 (supra) as reveled by the bank statement annex M & L, which records a credit item of $24,384, a sum which was received from the sale on 11.8.66 of the Davis's home at Woodside, California. (Para 20 of her affidavit).

The house at Woodside and the other real estate owned by them was community property but in spite of that the proceeds were paid into account 701314 which Mrs. Davis says was her separate account.

It is apparent that the account No. 701314 although in Mrs. Davis's name, was operated by them as a joint account and received community funds and was not reserved for her separate property. Shortly before the above mentioned sale of the Woodside house they had mortgaged it for

$58,000 under a deed of trust dated 24.1.66 Ex.P.1 (O).

Mrs. Davis said in evidence that the amount of the existing mortgage was $24,000. The balance left for their use would be $34,000. Where did that money go? It is not reflected in the account No. 701314. Apparently when the $12,500 promissory note was re-newed on 20.1.66 the deceased and Mrs Davis knew substantial community funds were at hand. There is nothing to indicate that she used any of her Seattle Bank stock as security for the $12,500.

The defence argue that a further sum of $2,377 paid to (Yanuca Island) Fiji Resorts by the deceased's own cheque Ex.P.1(D) dated 2.2.68 drawn on his account No. 3484 was really funded by Mrs. Davis. The deceased's cheque Ex.P.1(D) is reflected in his bank statement Ex.P1(E), dated 12.3.68, showing that it increased his overdraft to $3,256. His next bank statement dated 11.4.68 Ex.P.1(F) shows a deposit of $2,600 which put the account in credit. The $2,600 came from a cheque Ex.P1(G) dated 3.2.68, drawn on Mrs. Davis's purported separate account 701314, and paid in to the deceased's account on 21.3.68. I do not accept that those documents show or provide a reasonable inference that Mrs. Davis in effect paid the aforesaid sum of $2377 to Fiji Resorts. There could have been substantial community funds in account 701314 as for example the monies received from a sale of the Woodside house, and I am not satisfied that it operated solely as her own account. The statements Exs. P.1 (E & F) show a payment in to the deceased's account of $959.87 on 1.3.68 and $826.97 on 15.3.68 apart from Mrs. Davis's cheque for $2,600. The deceased at the time was receiving $35,000 per year as a pilot but it is not reflected in any bank statements before the court. Which account, I wonder, was his salary paid into? It does not appear to go to his account (Ex.P.1 E & F) (supra) yet his salary seems to have been paid monthly. There has been no endeavour to show what happened to that substantial salary. He appears to have had more than one account with the Redwood City branch of the Bank of America.

The affidavit of Francis Chua Hock Hai, Secretary of the defendant company, shows that two lots of Yanuca Island (Fiji Resorts) shares were acquired by the deceased in his own name between 23rd October 1967 and 1st July 1968 i.e. a period of 8 months. In that time he purchased 25,180 shares at £1.0.0 each. They were later converted to $2 shares. It is submitted by the defence that the bulk of these shares were paid for from the proceeds of sale of the house at Woodside. By way of mortgage and sale the sums of $34,000 and $24,000 were realised in 1966 i.e. a total of $58,000. That sum coupled with the $2,377 and $12,500 loan would go a long way towards the purchase of 25,180 x £1 shares in 1967. But it would have to lie dormant for 18 months or so before being used to purchase the Yanuca shares in October 1967 and July 1968.

During 1967 and 1968 the deceased and Mrs. Davis lived at two different addresses according to their income tax returns, annexed to her affidavit. They purchased an apartment for $41,500 which was, according to her evidence, paid for from joint income. In February 1971 they sold it for $42,500.00.

Another house in Menlo Park, California was sold for $32,000 in October, 1971. It had originally cost $26,500. That information does not help to trace the source of the funds used to purchase the Yanuca Shares in 1967 and 1968. Apart from the $12,500 cheque of 3.6.64 no cheques have been tendered to show from what account the 25,180 x £1 Yanuca shares were purchased.

It is surprising that income tax returns for 1948 and cheques and bank statement going back to 1961 as well as other accounts should be available and not more recent records. The documents tendered by the defence have been selected to try and show that some shares were Mrs. Davis's separate property, that the rest were community property, and that none were the deceased's separate property. If Mrs. Davis had pre-deceased Mr. Davis would he have declared that most of the Mocambo shares held in their joint names were not community property but were Mrs. Davis's separate property and should be assessed for her estate's death duties; would he have volunteered that the Yanuca shares held in his own name were not his separate property but were community property and therefore not exempt from death duty and that half of them should rank for death duties as Mrs. Davis's share. If the Commissioner suspected in the hypothetical case of Mrs. Davis's demise that the Yanuca shares were community property and not Mr. Davis's separate property would the latter be able to produce bank statements, and cheques of his own which have not been tendered to this Court to support a contention that they were his separate property.

I do not think that my comments are out of place in the light of the kind of one sided records tendered by the defendants. Mr. Handley asked who could go back as far as Mrs. Davis has done in presenting accounts. The answer is determined by one's marital property laws and the amount of property a married couple accrues from investment. It is clearly essential in California and in U.S.A. to retain records of separate and community property in case of divorce and death. Mr. & Mrs. Davis were obviously very conscious of this because, according to Mrs. Davis, the marital property agreement of October, 1961 was entered into because she had a great deal of separate property at a time when they were proposing to invest in Fiji.

There was reference to a ship called "the Rebel" which was purchased in Denmark and brought to Fiji. It was purchased in the deceased's name as evidenced by a Bill proving its sale for $18,000. Mrs. Davis claimed it as separate property evidencing this by a cheque Ex. 18 dated 10.2.71 and drawn on Tropical Pools Ltd., her separately owned firm. She says she sold 591 Seattle Bank shares to finance the purchase. Further cheques Exs. P.1K totalling $26,000 (approximately) were made out in payment for repairs to the vessel in Denmark. The total sum invested in "the Rebel" was $U.S. 44,000 of which about $29,000 was drawn on the account of Tropical Pools, but two payments amounting to $15,000 were made in the name of the deceased. The Courts

in U.S.A. have accepted that "the Rebel" was the property of Tropical Pools Ltd. If Mrs. Davis had pre-deceased Mr. Davis would he have relied on the registration being in his name and avoided pointing out that "the Rebel" was Mrs. Davis's separate property and liable to death duties?

After Mrs. Davis and Mr. Surke the family accountant, had given evidence the Commissioner accepted that "the Rebel" was the separate property of Mrs. Davis and withdrew his claim for death duties on its value of $40,000. However, I mention it because it indicated the need for particularity in tracing separate property where it is necessary to rebut presumptions of separate ownership which arise when possessions are held in the name of one spouse.

In my view there has definitely been no tracing which reveals that any part of the Yanuca shares were purchased with Mrs. Davis's separate property. Why did Mrs. Davis not produce all the cheques used for purchase of all the shares; and all the bank statements relative thereto? It has not been said that they have been lost or destroyed. The investments began in 1961. Mr. Davis died in 1972. The period between is not unusually long. In 1972 it was known that references to community property and separate property would arise. Consequently Mrs. Davis and her advisers are not casting back from 1979 to 1960 or thereabouts but from 1972. Mrs. Davis stated categorically that the deceased had no separate property. I accept that evidence because it is supported to some extent by the marital agreement of October 1961 annex RTH 4-9 to Mr. Holmes first affidavit. The preambles thereto state that property held in their joint names at the date of the agreement is community property, that Mrs. Davis has inherited property during the marriage and the agreement clarifies the position relating to community property and separate property. Nowhere is it stated that the deceased holds separate property. Having regard to the lack of cheques and bank statements relating to the purchase of the bulk of the Yanuca Island shares, and the omission of records relating to bank statements recording the deceased's and Mrs. Davis's salary payments into the community fund, it has not been shown in the slightest degree that all the Fiji shares could not have been purchased from community property. It seems that although the defendants have failed to establish that all the Mocambo shares and part of the Yanuca shares were Mrs. Davis's separate property I am satisfied that the Yanuca shares were not the deceased's separate property but were community property.

I find that all the shares and bank deposits in Fiji were community property at the time of the deceased's death. It remains to consider the effect in Fiji of the marital agreement of October 1961. Dicey's Conflict of Laws, 8th Edition at p.629 R.110, states that the terms of a marriage contract govern the rights of the husband and wife in respect of moveables. Sub-rule 1. at p.631 states that the marital contract is governed by the law of the matrimonial domicile. Thus the rights of the deceased to the marital property during his life-time are determined under the marital agreement of October 1961 as construed under Californian law. The expressions separate property and community property used in the marital agreement are common to Californian law and not to Fiji law.

It is clear from the relevant sections of the Civil Code of California annexed to Strader's affidavit and cases cited by Schainbaum and Strader that the earnings of the husband and wife during marriage are community property; money earned by a spouse from the use of his or her separate property is community property (e.g. Mrs. Davis's salary as a Director of Tropical Pools was community property although the company was her separate property; but dividends paid by the company were her separate property). However the husband has absolute control of community property and may dispose of it as he wishes. The wife may apply to the court to deter inconsiderate or fraudulent disposition of community property.

Under Californian law only half the community property belongs to the estate of a deceased spouse for death duty purposes. Estate duty payable in Fiji is determined under S.5 of the Estate and Gift Duties Ordinance, Cap.178. As a result of my finding that all the shares in Fiji are community property one has to determine under Fiji law to what extent the community property is liable to be assessed for death duty. The fact that only half of it is taxable under Californian estate duty law is no indication that the same statutory rule applies in Fiji. The portions of S.5 which the parties rely upon are S.5(1)(a), 1(e), 1(h), (1),(i).

S.5(1)(a) excludes from estate duty all property held by a deceased as trustee for another. The defence submitted that the deceased was a trustee of the community property to the extent of Mrs. Davis's half interest and that her half should be exempt. In my view the husband's control over community property in California is not as limited as that of a trustee. During his lifetime he does not have to ensure that the wife receives a half-share of the income which finds its way into the community.

Community property is a varying fund which fluctuates according to the earnings and expenses of the spouses and profits which may accrue from community investments. It is liable for medical expenses, education and maintenance of the children and other domestic requirements all and each of which receive such priority and share in the community funds as the husband sees fit. He may give more to one child than another, more to himself than to his wife or vice versa. One can present other illustrations which show that the husband is not a trustee of the kind envisaged by the law of Fiji.

The Commissioner submits that the whole of the community property and not simply the deceased's half is assessable for death duties under S.5(1)(h) which states that property over which the deceased had a general power of appointment at the time of his death is liable for death duty. He argues that the deceased's powers over community property under the Californian law amount to a general power of appointment under Fijian law.

He also contends that all the Fiji shares, even if they are all community property, come under S.5(1)(i)(i) & (ii) which states that assessable property includes :-

" (i) Any property situate in Fiji at the death of deceased comprised in any settlement, trust or other disposition of property (including the proceeds of the sale or conversion of any such property and all investments for the time being representing the same and all property which has in any manner been substituted therefor) made by the deceased whether before or after the commencement of this Ordinance -

(i) by which an interest in that property or in the proceeds of the sale thereof is reserved, either expressly or by implication, to the deceased for his life or for the life of any other person or for any period determined by reference to the death of the deceased or of any other person; or

(ii) which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person or for any period determined by reference to the death of the deceased or of any other person;

The contentions of the Commissioner under S.5(1) h and under S.5(1)(i)(i) & (ii) were both considered in Ochberg v. Commissioner of Stamp Duties in 49 (1949) State Reports (N.S.W.), 248, by the State's Full Court of Appeal. That case is remarkably similar to the instant case. Ochberg was domiciled in South Africa at the time of his marriage and he died on 11th December, 1937 at which time he had property in N.S.W. . Letters of administration were taken out in South Africa and re-sealed in N.S.W. The action was to determine to what extent his property in N.S.W. was liable for Australian death duty. Under South African law all property belonging to either spouse at the time of marriage and property acquired during marriage becomes community property (As in California the parties can make their own agreement controlling marital property.) The property in N.S.W. was community property. The community property is vested in them jointly subject to the husband's exclusive authority to control, manage and administer the community property subject to the wife's right to protect herself, as in California, against the husband's prodigality by an application to the court. On his death the husband's authority, as in California, ceases and the surviving spouse, as in California, is entitled to one half of the community property. It is apparent that the "joint interest" of the spouses in South Africa and California in the community property during their lives is not the same as a joint interest of the kind known to English law where the whole beneficial interest in a joint estate vests in the survivor(s).

In Ochberg's case, as in the instant case, the husband pre-deceased the wife and the question arose as to whether the wife's half of the community property held in New South Wales was assessable for duty under the law of New South Wales. The Full Court held that it was assessable under S.102(2)(e) and S.102(2)(j) of the Australian Stamp Duties Act, 1920, which are similar to the Fiji S.5(1)(i) and

5(1)(h) respectively. The Ochberg property in New South Wales consisted of bonds and once again there is a similarity with the instant case. The judgment delivered by Jordan C.J. referred to the Commissioner's contention that under the marital contract which is implied by the statute law of South Africa there was a disposition of property under S.102(2)(e) (corresponding to our S.5(1)(i)) by the deceased of one-half of the bonds to his wife, but an interest in them was reserved to him for his life and there was a reservation of or contract for a benefit to him for the term of his life. The learned C.J. stated near the top of p.255,

> "The correctness of these submissions depends upon the legal effect of that part of the law of S.A. which provides, in effect, that the wife's half as well as the husband's half is 'subject to the marital power."

He proceeded further down that page to express the Full Court's view of the "legal effect of the marital power", stating,

> "It would however I think be contrary to the scheme of community property - to conclude that it required all existing and after acquired property to be divided into vigorously separated halves, the husband being entitled to administer them both but entitled to have personal enjoyment only of his own half, the wife's half being left intact except in so far as it is applied by him for her benefit. Community of property appears by necessary implication to provide a scheme by which the whole of the community property is administered by the husband and utilised by him in any "way he thinks fit for the benefit of himself, his wife and his family. The interests of himself and his wife are thus the continually fluctuating halves of a necessarily fluctuating whole. When the husband takes anything for his own benefit he reduces his own half and his wife's half of the whole property by one moiety of each amount taken. Hence a beneficial interest in his wife's half is reserved to him. The view is borne out by the provision that the wife may protect herself against 'prodigality' by her husband by obtaining
> "from the court a 'separatio bonorum.' Further the provision that upon the death of one spouse the marital power of the husband ceases - and the survivor is entitled to half the estate indicates that until death (subject to a separatio bonorum) of one spouse the community property is to be administered by the "husband as a whole, the whole and every part of it being available to be applied by him for the personal benefit of himself and his family.
>
> "For these reasons I am of the opinion that the evidence shows that the wife's half of the bonds was dutiable under S. 102(2)(e). It follows that, in my opinion, the wife's half was dutiable under S. 102(2)(j)".

> From that judgment it is apparent that the wife's half was liable for duty under para (i) and para (ii) of S. 102(2)(e) of the N.S. Wales Act which are the same as para (i) and para (ii) of our S. 5(1)(i)."

The judgment at p. 254 refers to the statutory definition of "disposition of property" quoting S. 100(a) and (c) of the N.S.W. Act which are the same as the Fiji definition of disposition of property appearing in the Fiji S.2 '(disposition of property)' paras (a) & (c).

The Australian judgment does not explain why the full Court concluded that "the marital power" of the husband in Ochberg's case amounted under their S. 102(2)(j) to a general power of appointment over the community property held by the deceased at the time of his death. Clearly some thought was given by the Full Court to that conclusion because at p. 254 the judgment quotes the statutory definition of "a general power of appointment" which is similar for the purposes of this case to the definition in the Fiji S.2. The N.S.W. S. 102(2)(j) is the same as the Fiji S.5(1)(h).

Ochberg's case has been referred to in two N.Z. judgments without adverse comment but they have indicated that the facts in Ochberg were somewhat different from those in the N.Z. cases.

In Re Manson (deceased) 1964, N.Z.L.R. 257 the N.Z. Court of Appeal was considering whether a power vested in a beneficiary under a will was a general power. In the course of its judgment the Court referred to Ochberg's case in the following terms which appear at p. 269 :-

> "The Full Court of N.S.W. decided that the property was dutiable primarily because there was a 'disposition' within the meaning given to that term in that statute. That was so because community property by necessary implication, provided a scheme by which the whole of community property could be administered by the Husband and utilised by him in any way he thought fit for the benefit of himself, his wife and his family. This power remaining in the husband amounted, in the view of the Court, to a reservation sufficient to create a disposition of property within the meaning of S. 102(2)(c). That the Court went on to say, very briefly and in conclusion, that it followed that the wife's half was also dutiable under S. 102(2)(j)."
> The reason why is not enlarged upon and we take it that it was that, having the power to utilise the whole of the fund for his own purposes and those of his wife and family the husband had power to dispose of it."

Clearly the N.Z. Court regarded the husband's marital power in Ochberg's case as a mounting to a general power of appointment.

The N.Z. Court was at that time considering the meaning of general powers of appointment as defined in the N.Z. statute, S.5(1)(h), Estate & Gift Duties A. 1955, which

closely corresponds to our definition thereof in the Fiji S. 2 and they said of Ochberg's case, at p. 269 of their judgment,

> "Alternatively it was argued that the property was caught by S. 102(2)(j) - whose wording is similar to our S. 5(1)(h) and whose expression "general power of appointment" is extended by a definition similar to that contained in our S. 2".

Had there been anything dubious about the decision in Ochberg that the husband's marital power amounted to a "general power of appointment" there can be little doubt that the N.Z. Court in Manson's case would have drawn attention to it.

The other N.Z. case is In Re Going 1951 (70) N.Z.L.R. 144 and again the Court of Appeal was considering what amounted to a general power of appointment in connection with a demand for death duty. Hay J.A. in his judgment at the foot of P. 173 said of Ochberg's case :-

> "The judgment is almost wholly confined to a consideration of the circumstances of the case in relation to the Australian para (e) the equivalent of our para (j). After deciding that the case fell within that para, the Court went on simply to state that it followed that the wife's half of the bonds, being a portion of the joint estate was dutiable under para (j) the equivalent of our para (h). The obvious reason for the latter part of the decision was that during the joint lives of the parties the community property was to be administered by the husband as a whole, the whole and every part of it being available to be applied by the husband for the personal benefit of himself, his wife and his family. It is therefore understandable that while such a power qua the wife's share vested in the husband whilst he lived he was possessed of a general power of appointment within the extended meaning of that term in the Act, which is substantially the same words as the definition in our Act".

The Fiji section 5(1)(h) with its statutory definition of a power of appointment and S. 5(1)(i)(i)(ii) and (iii) with its statutory definition of disposition are expressed in similar terms. Therefore Ochberg is relevant to the facts in the instant case as are the comments thereon of the learned judges of the N.Z. Court of Appeal. Mr. Handley has drawn attention to the wording of S. 5(1)(h) which states that assessable estate includes :-

> "(h)-" __________ any property situate in Fiji at the death of the deceased over or in respect of which the deceased had "at the time of his death" a general power of appointment".

He stresses that if there is a general power of appointment in respect of the Fiji shares it must be one which the deceased held "at the time of his death." He submitted that the

No. 5
Judgment of
Mr. Justice
Williams
(Supreme Court,
Lautoka),
dated 15th
November 1979

deceased's powers necessarily ceased at the time of his death and therefor none of the shares were liable for death duties. He relied upon Re Silk deceased, Australian Tax Rep, 321, a judgment of the High Court of Australia in 1976. It refers to a wife who survived her husband. She was entitled under his will to request the trustees to, "raise any sum(s) out of the capital of

> "(half the residuary estate) and pay the same to my wife for her use and benefit."

The Australian Commissioner for taxes contended that the will gave her a general power of appointment over half her deceased husband's residuary estate, and therefore it was assessable for tax on her death under S. 7(1)(f) of the Australian act which is expressed in the same terms as our S.5(1)(h). The Australian Commissioner took the view that the words "at the time of death" meant "immediately before death." The High Court did not uphold that contention and held that S.7(1)(f) did not apply because the power did not exist at the time of her death.

Mason J. in his judgment at p. 327 said that he was reluctant to draw a distinction between the expressions "at the time of death" and "immediately prior to death" but that the Act itself made the distinction on four occasions in S.7. He said that as death was the event which terminated the power it could not exist at the time of death. The learned judge observed that the statutory definition of power of appointment did not assist in giving meaning to the expression "at the time of death".

The defence in the instant case draw a parallel to Mason J's reasoning by pointing out that the Fiji Statute uses the expression "immediately before death" as well as at "the time of death."

As was said in Silk's case it is difficult to accept that one can draw a fine distinction between the expressions "immediately prior to death" and "at the time of death". As Jacobs J. pointed out in his dissenting judgment it is only in theory that one can conceive of a person making a decision in the instant before death.

There seems in ordinary parlance to be an instant of time between the certainty that there is still life and the certainty of death at which the last spark of life is extinguished and which is loosely referred to as "the time of death". Till that instant a man in theory possesses all his powers of disposition. The instant the spark is extinguished he is already dead; "the time of death" has passed and such dispositions as are exercisable in his name are testamentary.

When S.5(1)(h) refers to "the time of death" the defence argue that it means that instant when all life has passed away. One may counter that by saying that if such were the meaning then the legislature would have used the words

No. 5
Judgment of
Mr. Justice
Williams
(Supreme Court,
Lautoka),
dated 15th
November 1979

"upon the death of." If it means the instant when the last spark of life is about to be extinguished it might be better expressed by the words "up to the time of death." It appears to me that the expression "at the time of death" is not an example of grammatical precision. The Australian High Court regarded it as an ambiguous phrase because they looked to other portions of the same statute for assistance in resolving the ambiguity. They concluded that it did not mean "immediately before death" because the statute used the expression "immediately before death" several times and would have done so again if that was what was meant.

The relevant sections of the Fiji Statute are similar to the Australian Statutory provisions. There is a slight difference in the Fiji definition of a "general power of appointment" in that it is a little wider in scope but that does not affect the outcome of these deliberations.

Although S. 5 uses the words "before death" on several occasions it only once uses the expression "immediately before death". It is found in S. 5(1)(e) which uses the expressions "immediately before death" and "at the death" in the course of enacting that joint interests are assessable for death duty. It makes assessable for duty :-

> ""(e) the beneficial interest held by the deceased 'immediately before his death' in any property as a joint tenant or joint owner with any other person or persons if that property was situate in Fiji 'at the death of' the deceased;""

On the death of a joint owner his share in the whole passes by operation of law to the survivor(s); his marriage, business partnership, contracts for his personal services, etc. are likewise dissolved on death. In the absence of S.5(1)(e) a claim for death duties against a deceased's joint beneficial interest could be met with the argument that it only survived up to the time of death and then automatically passed on death to the survivor(s) and therefore could not form part of his estate after his death. Para (e) avoids such argument and although assessment occurs after death, by which time the deceased's joint beneficial interest has already accrued to the survivor, para (e) still includes it in the deceased's estate by making a joint interest held immediately before death assessable for death duties.

S.5(1)(e) in using the expression "at the death of" obviously means the event of death as opposed to the instant before death. If the words "at the time of death" used in S.5(1)(h) mean the event of death the Commissioner could argue that the legislature would have said so by using the words of S.5(1)(e), namely "at the death of." Thus a reference to S.5(1)(e) for assistance in resolving the meaning of the words "at the time of death" merely tends to emphasise the ambiguity.

Therefore one must turn to other modes of interpretation in order to construe their meaning. If there are two possible meanings to a statutory expression one of which is absurd and one of which gives it a sensible meaning the Court will take the sensible one.

A power to make testamentary dispositions is not exercisable after death; it exists during life to include in one's will provisions which take effect after death. Testamentary powers not exercised during life cease on death. General powers of appointment cease on death. Therefor, when S. 5(1)(h) speaks of a power held "at the time of his death" it would be meaningless if it refers to powers held "at the death of." A corpse has no powers. If my reasoning is correct and logical and if S. 5(1)(h) becomes meaningless by reason of such a construction then the inclusion in S.2 of a definition of a general power of appointment would be a waste of legislative time for the reasons following.

S. 5(1)(h) is the only portion of the Ord. which refers to a general power of appointment except for S.2 which defines it as :-

> "any power or authority which enables the donee or other holder thereof, or would enable him if he was of full capacity, to obtain or appoint or dispose of any property or to charge any sum of money upon any property as he thinks fit for his own benefit, whether exercisable orally or by instrument inter vivos or by will or otherwise howsoever ________________."

If in S.5(1)(h) the expression "at the time of his death" means "at the death of" then the definition of a general power in S. 2 would become superfluous and unnecessary because the definition is only inserted for the purposes of S.5(1)(h), but, as I have said S. 5(1)(h) has no meaning if it speaks from death. A dead man could not exercise that general power of appointment which the legislation in S. 2 has so carefully defined. In fact the inclusion the definition in the Ord. would be an exercise in sheer futility.

S. 2 defines "the dutiable estate" as the estate of a deceased computed and constituted in accordance with S.5. S. 5(1) commences as follows :-

> "5(1) In computing for the purposes of this Ordinance, the final balance of the estate of a deceased person, his estate shall be deemed to include and consist of the following classes of property:-"

It then sets out in paras (a) to (i) the classes of property which are deemed to fall within the deceased's estate. Each paragraph of the subsection embraces a class or kind of property which is liable for death duties as part of the deceased's estate. It would be absurd to include

para (h) if it did not describe a class of property forming part of a deceased's estate but this is what would happen if the words "at the time of death" were to mean "on the death of." S. 5(1)(h) would become meaningless. By construing the words "at the time of his death" as meaning "up to the time of his death" or 'immediately before death,' S. 5(1)(h) would then include property over which the deceased had a general power of appointment up to the time of his death and would comply with the obvious intention of the legislature by giving a meaning to S. 5(1)(h) and by giving some sensible intention to the inclusion in S. 2 of a definition of a general power of appointment.

I consider that the expression "at the time of death" should be construed as meaning immediately before death.

I am disposed to the view that I can properly apply the reasoning of the Full Court of N.S.W. in Ochberg's case as explained by the N.Z. Court of Appeal (supra). In my opinion the deceased under the marital agreement held a general power of appointment over all the Fiji shares i.e. the community property in Fiji up to the time of his death. I accordingly find that all the Fiji shares are assessable for death duty under S. 5(1)(h).

Turning now to S. 5(1)(i) it makes assessable for death duty.

> "(i) any property situate in Fiji at the death of the deceased comprised in any settlement, trust or other disposition of property (including the proceeds of the sale or conversion of any such property and all investments for the time being representing the same and all property which has in any manner been substituted therefor) made by the deceased whether before or after the commencment of this Ordinance -
>
> (i) by which an interest in that property or in the proceeds of the sale thereof is reserved, either expressly or by implication, to the deceased for his life or for the life of any other person or for any period determined by reference to the death of the deceased or of any other person; or
>
> (ii) which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person or for any period determined by reference to death of the deceased or of any other person; or
>
> (iii) by which the deceased has reserved to himself the right by exercise of any power to restore to himself or to reclaim that property or the proceeds of the sale thereof."

It is expressed in very much the same terms as S. 102(2)(c) of the Australian Act considered in Ochberg's case. Any differences in wording are immaterial in applying the reasoning in Ochberg to the facts of the instant case. The Fiji Shares in the instant case were, as in Ochberg's case,

No. 5
Judgment of
Mr. Justice
Williams
(Supreme Court,
Lautoka), dated
15th November 1979

community property.

It was agreed in Ochberg's case that under South African law as under Californian law the spouses are presumed to enter into the community property agreement. The law imposes the arrangement upon them although they can, as under Californian law, make their own agreement. In the instant case the deceased and Mrs. Davis had made their own marital agreement for community of property.

The court held in Ochberg, P. 255, that under the Aust. S. 102(c) the South African marital agreement amounted to "a disposition of property" made by the deceased by virtue of the implied contract involved in his marriage whereby one half of the bonds passed to his wife, but an interest therein was reserved to him for life; and there was a reservation of, or contract for, a benefit to the deceased for the term of his life."

In the instant case the comparable disposition of property under the Fiji S.5(1)(i) arises under the marital agreement of October 1961 whereby one half of the shares passed to Mrs. Davis but an interest therein was reserved to the deceased for his life.

Following the reasoning adopted by Jordon C.J. p.254 which I have already quoted at length I find that Mrs. Davis's half of the Fiji shares is dutiable under S.5(1)(i), (i) & (ii).

There have been no submissions relating to the shares acquired after the death of the deceased and I take it that there is no attempt to include them in the assessable estate.

The parties have requested that I should not attempt to calculate the amount of duty payable but simply to state what proportion of the Fiji shares I regard as assessable for death duty.

I accordingly give judgment for the plaintiff for duty on the whole of the Fiji shares and direct the defendants to pay the death duty assessed thereon by the Commissioner.

By consent of the parties the question of costs is deferred for agreement between them following delivery of this judgment or failing agreement by application to the court.

26th Oct. 1979
LAUTOKA

(Sgd.) J.T. Williams
JUDGE

No. 6

SEALED ORDER OF THE SUPREME COURT, LAUTOKA, DATED 15TH NOVEMBER, 1979

No. 6
Sealed Order of The Supreme Court, Lautoka, dated 15th November 1979

IN THE SUPREME COURT OF FIJI, LAUTOKA
WESTERN DIVISION

No. 205 of 1976

BETWEEN : THE COMMISSIONER OF ESTATE AND GIFT DUTIES — PLAINTIFF

A N D : FIJI RESORTS LIMITED
A limited liability company incorporated in Fiji upon 25th June 1971. — DEFENDANT

BEFORE THE HONOURABLE MR. JUSTICE WILLIAMS
DATED AND ENTERED THE 26TH DAY OF OCTOBER 1979

This Action coming on for Trial on the 27th, 28th, 29th, 30th, 31st days of August and 3rd, 4th and 5th days of September 1979 before the honourable Mr. Justice Williams in the presence of counsel for the Plaintiff and for the Defendant AND UPON READING the pleadings and what was alleged therein.

AND UPON HEARING the evidence and what was alleged by counsel for the plaintiff and the defendant.

THIS COURT SHOULD ORDER that the said action should stand for judgment.

AND THIS ACTION standing for judgment this day in the presence of the counsels for the plaintiff and the Defendant.

THIS COURT DOTH ORDER that the whole of the Fiji shares are liable for duty and direct the Defendant to pay the duty assessed thereon by the Commissioner, and that the question of costs be deferred for agreement between the parties, and failing such agreement by application to the Court.

DATED this 15 day of November, 1979.

BY THE COURT

Signed
DEPUTY REGISTRAR

No. 7

MARITAL AGREEMENT,

ALAN EMMETT DAVIS/DORIS ANITA DAVIS,

6TH OCTOBER 1961

No. 7
Marital Agreement,
Alan Emmett Davis/
Doris Anita Davis,
6th October 1961

AGREEMENT

THIS AGREEMENT, made and entered into this 6th day of October, 1961, by and between ALAN E. DAVIS and DORIS DAVIS, his wife, residing in the County of San Mateo, State of California.

WITNESSETH:

THAT WHEREAS said husband and wife during the existence of their marriage have acquired and now own property of various kinds; and

WHEREAS certain property was inherited by said wife during their marriage; and

WHEREAS all property of every kind and nature now owned or held by said parties in their joint names was acquired and purchased with the community earnings of said parties; and

WHEREAS it is the intention of said husband and wife to enter into a written memorandum of agreement attesting to the community status of their joint tenancy property, and the separate status of certain other property;

NOW THEREFORE, it is hereby mutually understood and agreed by and between said husband and wife as follows:

1) That all property of every kind, nature and description now owned or held of record title by said husband and wife in their joint names as joint tenants, at all times herein mentioned has been, now is, and shall remain, the community property of said husband and wife without regard to the form and record of ownership under which the same was acquired or is now held.

2) That all property inherited by either said husband or said wife during their marriage, is the separate property, respectively, of said husband or of said wife.

3) That all property that may hereafter be acquired by said husband and wife, during the continuance of their marriage, EXCEPT that acquired by either of them by gift, bequest, devise or descent shall become and remain the community property of said husband and wife without regard to the form and record of ownership under which the same is acquired or held.

No. 7

Marital Agreement,
Alan Emmett Davis/
Doris Anita Davis,
6th October 1961

4) That any insurance policies on the life of said husband owned by the wife are the sole and separate property of said wife. That any insurance policies on the life of said wife owned by the husband are the sole and separate property of said husband.

5) That this Agreement shall remain in full force and effect until modified or revoked, in writing, by said husband and wife, and shall be binding upon them, their respective heirs, executors, administrators and assigns.

IN WITNESS WHEREOF, the undersigned have executed this Agreement, in duplicate, the day and year first hereinabove set forth.

Sgd. ALAN E. DAVIS

Sgd. DORIS A. DAVIS

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN MATEO)

On this 6th day of October, 1961, before me, a notary public in and for said County and State, personally appeared ALAN E. DAVIS and DORIS DAVIS, known to me to be the persons whose names are subscribed to the within Agreement, and acknowledged that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Sgd. FRANK C. VORSATZ

Notary Public
My principal office is at
6767 Mission Daly City,
County of San Mateo, Calif.
My Commission expires: 11-21-64

NO. 8

AFFIDAVIT OF G.A. STRADER,

DATED 11TH APRIL 1977

No. 8
Affidavit of
G.A. Strader,
dated 11th April
1977

IN THE SUPREME COURT OF FIJI, LAUTOKA

WESTERN DIVISION

BETWEEN : THE COMMISSIONER OF ESTATE AND GIFT DUTIES

Plaintiff

AND: FIJI RESORTS LIMITED
a limited liability company incorporated in Fiji upon 25th June, 1971.

Defendant

AFFIDAVIT OF G..A. STRADER, ATTORNEY AND COUNSELOR AT LAW AND DEPUTY ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

G.A. STRADER, being first duly sworn, deposes and says:

I, G.A. STRADER, am an attorney and counselor at law, licensed as such to practice in all of the courts of the State of California, and have been so licensed since the 19th day of June 1946. I have been actively engaged in the practice of law since said 19th day of June 1946, am now employed as a Deputy Attorney General of the State of California, and am familiar with, have knowledge of, and have expertise in regard to the laws of the State of California relating to the property rights of husband and wife, and particularly in respect to the laws of the State of California relating to community property of husband and wife.

The purpose of this affidavit is to set forth the opinion of the affiant in regard to the nature of community property, and the extent of control existing in favor of a California husband over the community property of himself and his wife under the laws of the State of California as of February 28, 1972. All statements herein, whether in the present or past tense, relate to and state the law of California in effect on February 28,1972. Attached hereto are copies of all Civil Code sections referred to and certified as being true and correct and in effect as of February 28, 1972.

No. 8
Affidavit of G.A. Strader, dated 11th April 1977

The law of the State of California in effect on February 28, 1972, governing the property rights of a husband and wife was as set forth in the provisions of the Civil Code of the State of California, unless there existed a marriage settlement or contract between the spouses containing stipulations contrary to the statutory provisions set forth in said Civil Code. A husband and wife were authorised by law to enter into a contract whereby the statutory designation regarding the character of their property rights is changed. Civil Code § 5103.

The law of the State of California on February 28, 1972 recognized two types of ownership of property by husband and wife -- (1) the separate property of each, and (2) the community property of both. The separate property of a spouse might be held in joint tenancy or tenancy in common with the other spouse. Civil Code § 5104. These two types of ownership of property were defined in sections 5105, 5107, 5108, and 5110 of the Civil Code. The term "separate property" means that property which is held both in its use and its title for exclusive benefit either of the husband or of the wife. The term "community property" is that property which is acquired by husband and wife, or either, during marriage when not acquired as the separate property of either.

All property owned by a husband or a wife before marriage and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues and profits thereof, was the separate property of the husband or wife. With certain exceptions, all real property situated in California and all personal property wherever situated acquired by either spouse during the marriage while domiciled in the State of California, was community property. Certain exceptions and presumptions were set forth in Civil Code sections 5109, 5110, 5111, 5118, 5119 and 5126.

Pursuant to section 5125 of the Civil Code and subject to certain exceptions, the husband had the management and control of the community personal property, one exception being that subject to the further conditions set forth in Civil Code section 5124, the wife had the management and control of the community personal property earned by her. Similarly, pursuant to the provisions of Civil Code section 5127, the husband had the management and control of the community real property subject to the exceptions and conditions set forth in that section.

The authority of the husband to manage and control the community personal property included the power of disposition, other than testamentary, subject to certain statutory restrictions. Civil Code § 5125. The husband also had the management and control of the community real property subject to the requirement that the wife join him in executing any written instruments whereby the property was leased for a period longer than one year or was sold, conveyed, or encumbered, unless the transaction was between the spouses. Civil Code § 5127. In regard to the

No. 8

Affidavit of G.A. Strader, dated 11th April 1977

management and control of personal community property, there was an exception where the property was held in a trust, or where one or both spouses was incompetent. Civil Code §§ 5113.5 and 5128. A husband was also prohibited from making a gift of community personal property or from disposing of it without valuable consideration. Civil Code § 5125. The husband was also prohibited from selling, conveying or encumbering the furniture, furnishings or fittings of the home, or the clothing of the wife or minor children which was community property without the consent of the wife. Civil Code § 5125.

State of California

Office of the
Secretary of State

I, MARCH FONG EU, Secretary of State of the State of California, hereby certify :

That CECIL F HERWICK, whose name appears on the annexed certificate of acknowledgment, proof or affidavit, was, on APRIL 11, 1977, a duly commissioned, qualified and acting NOTARY PUBLIC, in the State of California, empowered to act as such Notary in any part of this State and authorized to take the acknowledgment or proof of powers of attorney, mortgages, deeds, grants, transfers, and other instruments of writing executed by any person, and to give a certificate of such proof or acknowledgment, indorsed on or attached to the instrument, and to take depositions and affidavits and administer oaths and affirmations in all matters incident to the duties of the office or to be used before any court, judge, office or board in this State.

I FURTHER CERTIFY that the seal affixed or impressed on the annexed certificate, proof or affidavit is the official seal of said Notary Public and it appears that the name subscribed thereon is the genuine signature of the person aforesaid, his (or her) signature being of record in this office.

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this

THE GREAT SEAL OF
THE STATE OF CALIFORNIA

11th day of April 1977

MARCH FONG EU
Secretary of State

By JANE E BACON
Deputy Secretary of State

No. 8
Affidavit of
G.A. Strader,
dated 11th April
1977

Attached hereto are true and correct copies of all sections of the Code of Civil Procedure of the State of California, cited above or to which reference is made in said sections. All of said copies attached hereto are certified as true and correct copies of the statutes of State of California as of February 28, 1972.

Sgd. G.A. STRADER

Subscribed and sworn to before me
this 11th day of April 1977

Sgd. Cecil F. Herwick

OFFICIAL SEAL

State of California

Office of
March Fong Eu
Secretary of State
SACRAMENTO

I, March Fong Eu, Secretary of State of the State of California, hereby certify:

That as the legal custodian of the statutes and laws of the State of California, including the codes, I am the proper officer to certify or authenticate copies or provisions thereof.

I further certify that the annexed transcripts set forth the provisions of the following listed Sections of the CIVIL CODE of the State of California, and that said sections were in full force and effect as of February 28,1972.

Section 5103	Section 5118
Section 5105	Section 5119
Section 5107	Section 5124
Section 5108	Section 5125
Section 5109	Section 5126
Section 5110	Section 5127
Section 5111	Section 5128
Section 5113.5	Section 5119

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this 12th day of April, 1977

THE GREAT SEAL OF
THE STATE OF CALIFORNIA

Sgd. March Fong Eu
Secretary of State

§ 5103. (Property transactions between spouses or with other person: Rules governing confidential relations)

Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by Title 8 (commencing with Section 2215) of Part 4 of Division 3.

---

§ 5105. (Interests in community property)

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in Sections 5125 and 5127. This section shall be construed as lefining the respective interests and rights of husband and wife in community property.

---

§ 5107. (Wife's separate property, and conveyance thereof)

All prcperty of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.

---

§ 5108. (Husband's separate property, and conveyance thereof)

All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits therof, is his separate property. The husband may, without the consent of his wife, convey his separate property.

---

§ 5109. (Personal injury damages paid by married person to spouse as separate property)

All money or other property paid by or on behalf of a married person to his spouse in satisfaction of a judgment for damages for personal injuries to the spouse or pursuant to an agreement for the settlement or compromise of a claim for such damages is the separate property of the injured spouse.

No. 8
Affidavit of G.A. Strader, dated 11th April 1977

§ 5110. (Other real property situated in this state and other personal property acquired during marriage: Presumptions)

All other real property situated in this state and all other personal property wherever situated acquired during the marriage by a married person while domiciled in this state, and property held in trust pursuant to Section 5113.5, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife and that when a single family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single family residence is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that the real property was community property, or to recover the real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

As used in this section, personal property does not include and real property does include leasehold interests in real property.

---

§ 5111. (Same: Inapplicability of presumption to property held at death after marriage dissolution)

The presumption that property acquired during marriage is community property does not apply to any property to which legal or equitable title is held by a person at the time of his death if the marriage during which the property was acquired was terminated by dissolution of marriage more than four years prior to such death.

---

§ 5113.5. (Community property transferred to trust: Terms of trust: Effect on other community property transfers: Power of trustee to convey trust property)

Where community property, before or after the effective date of this section, is transferred by the husband and wife to a trust, regardless of the identity of the trustee, which trust originally or as amended prior or subsequent to such transfer (a) is revocable in whole or in part during their joint lives, (b) provides that the property after transfer to the trust shall remain community property and any withdrawal therefrom shall be their community property, (c) grants the trustee during their joint lives powers no more extensive than those possessed by a husband under Sections 5125 and 5127, except as to property described in Section 5124 respecting which the trustee's powers shall be no more extensive than those possessed by a wife under Section 5124, and (d) is subject to amendment or alteration during their joint lifetime upon their joint consent, the property so transferred to such trust, and the interests of the spouses in such trust, shall be community property during the continuance of the marriage, unless the trust otherwise expressly provides. Nothing in this section shall be deemed to affect community property which, before or after the effective date of this section, is transferred in a manner other than as described in this section or to a trust containing different provisions than those set forth in this section; nor shall this section be construed to prohibit the trustee from conveying any trust property, real or personal, in accordance with the provisions of the trust without the consent of the husband or wife unless the trust expressly requires the consent of one or both spouses.

---

§ 5118. (Earnings and accumulations constituting separate property: Income of spouse, etc., when living separate from other spouse)

The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse.

---

§ 5119. (Same: Income after judgment of legal separation)

After the rendition of a judgment decreeing legal separation of the parties, the earnings or accumulations of each party are the separate property of the party acquiring such earnings or accumulations.

---

§ 5124. (Wife's control of community personal property earned by her or received by her in satisfaction of judgment for damages for personal injuries, etc.:

No. 8

Affidavit of G.A. Strader, dated 11th April 1977

Limitations and exceptions: Wife's gifts and testamentary dispositions: Absence of change in nature of property or respective interests therein)

Notwithstanding the provisions of Sections 5105 and 5125, the wife has the management and control of the community personal property earned by her, and the community personal property received by her in satisfaction of a judgment for damages for personal injuries suffered by her or pursuant to an agreement for the settlement or compromise of a claim for such damages, until it is commingled with community property subject to the management and control of the husband, except that the husband may use such community property received as damages or in settlement or compromise of a claim for such damages to pay for expenses incurred by reason of the wife's personal injuries and to reimburse his separate property or the community property subject to his management and control for expenses paid by reason of the wife's personal injuries.

The wife may not make a gift of the community property under her management and control,or dispose of the same without a valuable consideration, without the written consent of the husband. The wife may not make a testamentary disposition of such community property except as otherwise permitted by law.

This section shall not be construed as making such earnings or damages or property received in settlement or compromise of such damages the separate property of the wife, nor as changing the respective interests of the husband and wife in such community property, as defined in Section 5105.

---

§ 5125. (Husband's control of community personal property: Limitations: Consent of wife)

Except as provided in Sections 5113.5, 5124 and 5128, the husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

---

§ 5126. (Property received by married person in satisfaction of judgment for damages for personal injuries, etc., as separate property: Other spouse's right to reimbursement for expenses)

(a) All money or other property received by a married person in satisfaction of a judgment for damages for his personal injuries or pursuant to an agreement for the settlement or

compromise of a claim for such damages is the separate property of the injured person if such money or other property is received as follows:

(1) After the rendition of a decree of legal separation or a final judgment of dissolution of a marriage.

(2) While the wife, if she is the injured person, is living separate from her husband.

(3) After the rendition of an interlocutory decree of dissolution of a marriage and while the injured person and his spouse are living separate and apart.

(b) Notwithstanding subdivision (a), if the spouse of the injured person has paid expenses by reason of his spouse's personal injuries from his separate property or from the community property subject to his management and control, he is entitled to reimbursement of his separate property or the community property subject to his management and control for such expenses from the separate property received by his spouse under subdivision (a).

---

§ 5127. (Husband's control of community real property: Wife's joinder in conveyance or encumbrance: Presumption of validity: Limitations on actions to avoid instruments)

Except as provided in Sections 5113.5 and 5128, the husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.

---

§ 5128. (Procedure for dealing with and disposing of community property where spouse(s) incompetent)

Where one or both of the spouses are incompetent, the procedure for dealing with and disposing of community

No. 8
Affidavit of
G.A. Strader,
dated 11th April
1977

property is that prescribed in Chapter 2a(commencing with Section 1435.1) of Division 4 of the Probate Code.

---

§ 5129. (Absence of tenancy by courtesy or estate in dower)

No estate is allowed the husband as tenant by courtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband.

NO. 9

FURTHER AFFIDAVIT OF G.A. STRADER

DATED 23RD JANUARY 1979

No. 9
Further Affidavit of
G.A. Strader dated
23rd January 1979

IN THE SUPREME COURT OF FIJI, LAUTOKA

WESTERN DIVISION

No. 205 of 1976

BETWEEN : THE COMMISSIONER OF ESTATE AND GIFT DUTIES

Plaintiff

AND : FIJI RESORTS LIMITED

a limited liability company incorporated in Fiji upon 25th June, 1971.

Defendant

FURTHER AFFIDAVIT OF G.A. STRADER, ATTORNEY AND COUNSELOR AT LAW AND DEPUTY ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

G.A. Strader, being first duly sworn, deposes, further to his Affidavit herein sworn 11th April 1977:

The purpose of this Affidavit is to set forth the opinion of the Affiant in regard to certain particular issues relating to community property, and the extent of control existing in favour of a California husband over the community property of himself and his wife under the laws of the State of California as of February 28, 1972, such issues being additional to or explanatory of those discussed by me in my previous Affidavit herein.

No. 9
Further Affidavit of G.A. Strader dated 23rd January 1979

All statements herein contained, in whatever tense expressed, relate to and state the law of California in effect on February 28, 1972.

The law of the State of California in effect on February 28, 1972, governing the property rights of a husband and wife, was as set forth in my previous Affidavit herein, the following additional propositions of law in relation to the same being herein set out as follows :-

(1) The principles upon which separate property of a spouse can be traced, where separate and community property are commingled, are set out accurately in the following decisions:

(a) In re Marriage of Mix (1975) 14 Cal. 3d 604, 122 Cal.Rptr. 79, 536 P.2d 479;

(b) Hicks v Hicks (1962) 211 Cal.App.2d 144, 152-157, 27 Cal.Rptr. 307;

(c) Estate of Lissner (1938) 27 Cal.App.2d 570,574, 81 P.2d 448, 449-451.

(2) The extent of a husband's control over community funds is such that he is entitled to possession of same, and has a cause of action against his wife, in the event of her secreting same and refusing to pay same to him after demand, such action by the wife being an invasion and violation of his right to manage, control, and dispose of them. (Wilcox v Wilcox (1971) 98 Cal.Rptr. 319, 21 Cal.App.3d 457; Salveter v Salveter (1933) 135 Cal.App. 238, 26 P.2d 836).

(3) The husband's relationship to community property is such that as a general rule he, and he alone, has lawful standing to bring court actions concerning community property (Sanderson v Niemann (1941) 17 Cal.2d 563, 110 P.2d 1025; Johnson v. National Surety Co. (1931) 118 Cal.App. 227, 5 P.2d 39; Sbarbaro v. Rosa (1941) 120 P.2d 141, 48 Cal.App.2d), an exception being that the wife "may resort to appropriate judicial remedies to protect and safeguard the community property against inconsiderate and fraudulent acts of the husband."

(4) The husband's testamentary disposition of more than one-half of the community property is not absolutely void as to the wife, but only voidable by her upon proof of the necessary facts (Spreckels v. Spreckels (1916) 158 P. 537, 172 Cal. 775; Estate of King (1942) 19 Cal.2d 354, 121 P.2d 716). The wife's right to void such disposition of her one-half community interest survives her death and may be exercised by her personal representative (Estate of Kelley (1953) 122 Cal.App.2d 42, 264 P.2d 210). In any event, the testamentary power is not an essential incident to property, and depriving the husband of such power with reference to community estate did not take from him any right of property. (Spreckels v. Spreckels (1897) 48 P. 228, 116 Cal. 339.)

No. 9
Further Affidavit of G.A. Strader dated 23rd January 1979

(5) The husband has control of community property, and may mortgage personal property without his wife's consent (Schwartzler v. Lemas (1936) 53 P.2d 1039, 11 Cal.App.2d 442), but the wife must join in executing any instrument by which community real property is conveyed or encumbered (Civ. Code § 5127), and a conveyance or mortgage without her signature is voidable by the wife as to her one-half interest (Gantner v. Johnson (1969) 274 Cal.App.2d 869, 79 Cal.Rptr. 381; Schelling v. Thomas (1929) 96 Cal.App. 682, 274 P. 755);

(6) The husband has power to sell community personal property and community real property acquired prior to 1917 of himself and his wife as if it were his separate property for adequate consideration, so that it is immaterial that his contract to sell it is not signed or acknowledged by his wife. (McClellan v. Lewis (1917) 169 P. 436, 35 Cal.App. 64.) As to community real property acquired after 1917, the husband may so dispose of his half interest only. (Simpson v. Schurra (1928) 91 Cal.App. 640, 267 P. 384; Gantner v. Johnson, supra, 274 Cal.App. 2d 869, 79 Cal.Rptr. 381.);

(7) Gifts of community property made by a husband without consent of his wife are not void, but are voidable only at instance of the wife (Harris v. Harris (1962) 19 Cal.Rptr. 793, 369 P.2d 481, 57 Cal.2d 367);

(8) All community property is liable for the husband's debts, and subject to his disposal. (Farmers' Exchange National Bank v. Drew (1920) 192 P. 105, 48 Cal.App. 442). Community property is not liable for the wife's torts or contractual obligations after marriage since such liability would impose an unwarranted interference with and infringement upon the husband's right to management and control and make of his property a nonexistent liability. (McClain v. Tufts (1948) 187 P. 2d 818, 83 Cal.App.2d, 140); except that the wife's earnings which are community property are liable for such obligations and all community property is liable for necessaries contracted for by the wife, or where the wife is acting as the agent of the husband or he ratifies her acts (Medical Finance Association v. Allum (1937) 22 Cal.App. 2d Supp. 747, 66 P.2d 761; Hulsman v. Ireland (1928) 205 Cal. 345, 270 P. 948).

Sgd. G.A. STRADER

Subscribed and sworn to before me this 23rd day of January 1979.

Sgd. Ann M. Norman

SEAL

No. 9
Further Affidavit
of G.A. Strader
dated 23rd
January 1979

STATE OF CALIFORNIA

OFFICE OF THE SECRETARY OF STATE

I, MARCH FONG EU, Secretary of State of the State of California, hereby certify:

That ANN M NORMAN whose name appears on the annexed certificate of acknowledgment, proof or affidavit, was, on JANUARY 23, 1979 a duly commissioned, qualified and acting NOTARY PUBLIC, in the State of California, empowered to act as such Notary in any part of this State and authorized to take the acknowledgment or proof of powers of attorney, mortgages, deeds, grants, transfers, and other instruments of writing executed by any person, and give a certificate of such proof or acknowledgment, endorsed on or attached to the instrument, and to take depositions and affidavits and administer oaths and affirmations in all matters incident to the duties of the office or to be used before any court, judge, office or board in this State.

I FURTHER CERTIFY that the seal affixed or impressed on the annexed certificate, proof or affidavit is the official seal of said Notary Public and it appears that the name subscribed thereon is the genuine signature of the person aforesaid, his (or her) signature being of record in this office.

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this 23rd day of January , 1979

THE GREAT SEAL OF
THE STATE OF CALIFORNIA

MARCH FONG EU
Secretary of State

By JAMES W RANDALL
Deputy Secretary of State

NO. 10

AFFIDAVIT OF MARTIN A. SCHAINBAUM,
DATED 8TH NOVEMBER, 1978

IN THE SUPREME COURT OF FIJI, LAUTOKA
WESTERN DIVISION

No. 205 of 1976

BETWEEN: THE COMMISSIONER OF ESTATE AND GIFT DUTIES

Plaintiff

AND : FIJI RESORTS LIMITED
a limited liability company incorporated in Fiji upon 25th June, 1971.

Defendant

AFFIDAVIT OF MARTIN A. SCHAINBAUM, ATTORNEY AT LAW STATE OF CALIFORNIA

No. 10
Affidavit of Martin A. Schainbaum, dated 8th November, 1978

I, MARTIN A. SCHAINBAUM, of San Francisco, California make oath and say as follows:

I am an attorney at law, licensed to practice as such in all the courts of the State of California and have been so licensed since June, 1965. I have been actively engaged in the practice of law since admission to the bar of the State of New York in December, 1962. I was employed as a trial attorney in the office of Regional Counsel, Internal Revenue Service, Western Region, San Francisco, California from 1964 to 1969 and as an Assistant United States Attorney in the Tax Division of the Northern District of California from 1969 to 1978. I presently have my own law practice in San Francisco. I specialize in taxation law, and am a certified specialist in taxation law at the California Board of Legal Specialization.

The purpose of this Affidavit is to set forth my opinion on the community property law of California, the principle of tracing as recognized by the California courts, and the nature of the power of management and control of a husband over community property.

The major premise upon which California community property laws operate is that property acquired during marriage is presumed to be community property. Alverson v. Jones, 10 Cal. 9, (1858); Smith v. Smith 12 Cal. 216, 224 (1859) Meyer v. Kinzer, 12 Cal. 248, 252-254 (1859). All that is necessary to cause the presumption to arise is proof that the property was acquired during marriage. In Re: Marriage of Mix, 14 Cal. 3d. 604, 610-611, 536 P. 2d 479

No. 10

Affidavit of Martin A. Schainbaum, dated 8th November, 1978

483, 122 Cal. Rptr, 79, 83 (1975); Smith v Smith, 12 Cal. 216, 224, (1859); Fidelity & Casualty Co. v. Mahoney, 71 Cal. App. 2d. 65, 68-69, 161 P. 2d. 944, 946 (2d. Dist. (1945) See also Estate of Jolly, 196 Cal. 547, 553-555, 238 P. 353, 355-356 (1925), where possession at the end of a long marriage was sufficient to cause the presumption to arise. Estate of Duncan, 9 Cal. 2d. 207, 217 70 P. 2d. 174, 179 (1937) To negate the presumption of community, the spouse asserting that the property is separate bears the affirmative burden to substantiate the separate classification by a degree of proof that ordinarily produces conviction in an unprejudiced mind. See v. See, 64 Cal. 2d. 778, 783, 415 P. 2d. 776, 779, 51 Cal. Rptr. 888, 891, (1966); Estate of Duncan, 9 Cal. 2d. 207, 217, 70 P. 2d. 174, 179 (1937); Smith v. Smith, 12 Cal. 216, 224 (1859) However, it should be noted that a special presumption of separate property arises where property has been conveyed to a married woman by written instrument. ch. 219 1889 Cal. Stats. 328; Cal. Civil Code § 5110, formerly § 164. Furthermore, property purchased with a spouse's separate property funds is that spouse's separate property. Huber v. Huber, 27 Cal. 2d. 784, 791, 167 P. 2d 708, 712-173 (1946); Thomasset v. Thomasset, 122 Cal. App. 2d. 116, 124, 125, 264 P. 2d. 626, 631 (2d. Dist. 1953).

Where separate and community property are commingled, as long as the origin of the separate property can be traced, mere change in form, will not alter the substance of the ownership rights. Estate of Jolly, supra 196 Cal. 547, 553, 556, 238 P. 353, 356 Thomasset v. Thomasset, 122 C.A. 2d. 116, 123-131, 124, 125 264 P. 2d. 626, 631-635 (1953) See Estate of Lissner, 27 Cal. App. 2d. 570, 574, 81 P. 2d. 448, 449-451 (tracing of separate funds commingling with community into stock).

The Supreme Court in In Re: Marriage of Mix, 14 Cal. 3d. 604; 122 Cal. Rptr. 79, 536 P. 2d 479 summarized the principle of "tracing" (pp. 610-611) as follows:

> However, "(property acquired by purchase during a marriage is presumed to be community property, and the burden is on the spouse asserting its separate character to overcome the presumption (Citations) "See v. See (1966) 64 Cal. 2d. 778, 783 (51 Cal. Rptr. 888, 415 P. 2d. 776) This presumption applies to property purchased during the marriage with funds from a disputed source, such as an account or fund in which one of the spouses has commingled his or her separate funds with community funds. (See v. See, supra, 64 Cal. 2d. 778, 783; see Estate of Neilson, (1962) 57 Cal. 2d. 733, 742 (22 Cal. Rptr. 1, 371 P. 2d. 745) (3) "The mere commingling of separate with community funds in a bank account does not destroy the character of the former if the amount thereof can be ascertained." (Hicks v. Hicks, (1962) 211 Cal. App. 2d. 144, 154 (27 Cal. Rptr, 307); see Huber v. Huber, supra, 27 Cal. 2d 784, 791, Patterson v. Patterson, (1966 242 Cal. App. 2d
>
> 333, 341, (51 Cal. Rptr. 339), disapproved on other grounds in See v See, supra, 64 Cal. 2d at p. 784; Thomasset v. Thomasset supra, 122 Cal.

No. 10
Affidavit of
Martin A.
Schainbaum,
dated 8th
November, 1978

> App. 2d. 116, 124) . As the court in Patterson stated: "If the property, or the source of funds with which it is acquired, can be traced, its separate property character remains unchanged. (Citations). But if separate and community property or funds are commingled in such a manner that it is impossible to trace the source of the property or funds, the whole will be treated as community property ...." (Patterson v. Patterson, supra at 341) (Emphasis supplied).

There are two methods of "tracing" recognized by the California Courts. The first method involves direct tracing. Hicks v. Hicks 211 Cal. App. 2d. 144, 152-157, 27 Cal. Rptr, 307; 7 Witkin, Summary of California Law (8th Ed.) sss, pp. 5126-5127) In Hicks, the husband was able to prevail that the disputed property was his separate property. He introduced evidence showing separate property deposits totalling $267,580.81, which total was derived from deposits of $91,610.90 in dividends, $66,266.70 in proceeds from sales of separate property assets, and $109,703.21 from separate property loans. Additionally, Mr. Hicks demonstrated that he withdrew $172,931.80, leaving $94,649.01 in excess separate property on deposit. This evidence, as well as evidence adduced at the trial that the questioned withdrawals were intended to purchase the disputed property as separate property permitted the trial court to find for Mr. Hicks that the disputed property was indeed his separate property. Hicks v. Hicks, 211 Cal. App. 2d 144, 157-161 27 Cal. Rptr. 307, 312-315 (4th Dist. 1962) The second method of tracing is based upon payment of family expenses. Under this method there is a presumption that family expenses are paid from community funds Thomasset v. Thomasset, 122 Cal. 116, 126, 7 Witkin, Summary of Cal. Law (8th ed.) Sec. 42, pp. 5133-5136). Thus, if it can be shown that at the time the disputed property was acquired with funds from a commingled account, all the family income in that account had been exhausted by family expenses, then any remaining funds would be considered separate funds. See v. See, 64 Cal. 2d 778, 783, 415 P. 2d 777, 779-780 (1966), 51 Cal. Rptr. 888, 891-892.

Uncommingling or tracing can be accomplished by having the surviving spouse testify as to the nature of the property. The character of the property, whether separate or community is determined at its acquisition. In Re Marriage of Mix, 14 Cal. 3d 604, 536 P. 2d 479, 122 Cal. Rptr. 79 (1975) Cf. See v. See 64 Cal. 2d 778, 415 P. 2d 776, 51 Cal. Rptr. 888, (1966). In the Mix case, although the wife could not correlate each item of deposit with withdrawal with a specific bank account, she did introduce into evidence a schedule showing chronologically each source of the separate funds, each expenditure for separate property purposes, and the balance of separate property funds remaining after each expenditure. The Supreme Court in In re Marriage of Mix, 14 Cal. 3d 604, 613-614; 122 Cal. Rptr. 79, 536 P. 2d 479 (1975), found :

* * *

> The schedule demonstrated that Esther's expenditures for separate property purposes closely paralleled in time and amount separate property receipts and thus established her intention to use only her separate property funds for separate property expenditures.

* * *

No. 10
Affidavit of
Martin A.
Schainbaum,
dated 8th
November, 1978

(6) We agree that the schedule by itself is wholly inadequate to meet the test prescribed by Hicks v. Hicks, supra, 211 Cal. App. 2d 144, and to support the trial court's finding that Esther "identified and traced" the separate property. However, the schedule was not the only evidence introduced by Esther to effect the tracing. She personally testified that the schedule was a true and accurate record, that it accurately reflected the receipts and expenditures as accomplished through various bank accounts, although she could not in all instances correlate the items of the schedule with a particular bank account, and that it accurately corroborated her intention throughout her marriage to make these expenditures for separate property purposes, notwithstanding her use of the balance of her separate property receipts for family expenses.

* * *

If property is purchased from a combined separate and community source, and full payment is made, the property so acquired is owned as tenancy in common by the separate and community estates in the same ratio as the two sources bear to the total purchase price. Estate of Lewis, 218 Cal. 526, 24 P. 3d 159, (1933); Mears v. Mears, 180 Cal. App. 2d 484, 503, 4 Cal. Rptr. 618, 630; disapproved on other grounds in See v. See 64 Cal. 2d 778, 795, 51 Cal. Rptr. 888, 893. The apportionment concept of gain between community and separate property owned during marriage is a long standing approach taken by the California Courts. In essence, there are two basic formulas. The California Supreme Court has directed that the formula that "will achieve substantial justice between the parties" be utilized in a given circumstance. Beam v. Bank of America, 6 Cal. 3d 12, 490 P. 2d 257, 98 Cal. Rptr. 137 (1971). One approach computes a fair return for the separate estate, i.e., seven (7%) percent on the value of separate capital during the operative period. Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909). Alternatively, an approach can be utilized which determines the reasonable value of the community labor. First the amount drawn for salary or other compensation, which benefits the community is determined. This sum is then subtracted from an overall determination of a reasonable value for community labor. Thus, the balance of the reasonably valued community remaining after withdrawal for return on community labor is the determined community interest. The then remaining gain or value is attributable to separate property. Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885 (2d Dist. 1921). This approach is appropriate where the community labors "had a minor influence on the growth of the investment". See In re: Marriage of Lopez, 38 Cal. App. 3d 93, 106, 113 Cal. Rptr. 58, 66 (1974) A compromise formula midway between the Pereira and Van Camp approach was used in Todd v. Commissioner, 153 F. 2d 553 (C.A. 9, 1945) and Todd v. McClogan, 89 Cal. App. 2d 509, 207 P. 2d 414 (1949).

An agreement between spouses may affect the character of marital property. In re Marriage of Dawley, 17 Cal. 3d 342, 551 P. 2d 323, 131 Cal. Rptr. 3 (1976) (written antenuptial agreement effective) Woods v. Security First National Bank 46 Cal. 2d 697, 299 P. 2d 657 (1956) (oral agreement after marriage effective); Tomaier v. Tomaier, 23 Cal. 2d. 754, 146 P. 2d 905 (1944) (agreement to hold property as community despite joint tenancy title); Estate of Nelson, 224 Cal. App.

No. 10
Affidavit of Martin A. Schainbaum, dated 8th November, 1978

2d. 138, 36 Cal. Rptr. 352 (1st Dist. 1964) (agreement inferred from conduct).

While the husband under community property law principles operative on February 28, 1972 may have powers of management and control, such powers are not unlimited. Beard v. Knox, 5 Cal. 252 (1855); Smith v. Smith, 12 Cal. 216 (1859). See also, ch. 220 1891 Cal. Stats. 425 (restricting the husband's right to make a gift of community property); ch. 190 1901 Cal. Stats. 598 (Requiring wife's consent before husband could dispose of or encumber home furnishings or fittings, or the wearing apparel of his wife or minor children); ch. 583 1917 Cal. Stats. 829-30, Former Civil Code §§ 172 and 172a, (restricting husband's disposition of or encumbering real property, or a lease for more than one year without consent of wife). These restrictions on managerial power continue to this date. Cal. Civil Code §§ 5125, 5127 (West Supp. 1976).

There is a fiduciary relationship between husband and wife pertaining to community property dealings. See v. See, 64 Cal. 2d. 778, 415 P. 2d. 776, 51 Cal. Rptr. 888 (1966). Vai v. Bank of America, 56 Cal. 2d. 329, 364 P. 2d. 247, 15 Cal. Rptr. 71 (1961); Williams v. Williams, 14 Cal. App. 3d. 560, 92 Cal. Rptr. 385 (2d. Dist. 1971); Fields v. Michael, 91 Cal. App. 2d. 443, 205 P. 2d. 402 (2d. Dist. 1949); See also Boeseke v. Boeseke, 10 Cal. 3d. 844, 519 P. 2d. 161, 112 Cal. Rptr. 401 (1974).

Legislation passed in California in 1927, ch. 589, §1 (2) 1971 Cal. Stat. 881 provides that :

"....one half of the community property ...

> shall not be deemed to pass to her as heir to her husband, but shall be deemed to go, pass, or be transferred to her for valuable and adequate consideration and her said one-half of the community shall not be subject to the provisions of this act..."

This legislation resulted from a 1908 decision by the California Supreme Court in Estate of Moffitt, 153 Cal. 359, 95 P. 653 (1908) that it was appropriate to tax all of the community at the husband's death since it was believed that during the life of the marriage the husband was the full owner, and upon his death the wife received the property as an heir. Thereafter, in 1920, the federal courts upheld the view that for federal estate taxation only one-half the California community property would be includible in the deceased husband's estate. Blum v. Wardell, 270 F. 309 (N.D. Cal. 1920), aff'd sub. mon. Wardell v. Blum, 276 F. 226 (C.A. 9,1921), cert. denied 258 U.S. 617 (1922). However, in 1926, the United States Supreme Court in United States v. Robbins, 269 U.S. 315 (1926), in an opinion written by Justice Homes held all of the community property was includible in the deceased husband's estate. Also in 1926, the California Supreme Court reaffirmed the "mere expectancy" theory of a wife's interest in community property. See Stewart v. Stewart 199 Cal. 318, 249 P. 197 (1926).

No. 10
Affidavit of Martin A. Schainbaum, dated 8th November, 1978

As a result of the Robbins and Stewart decisions, the California legislature in 1927 passed legislation defining each spouse's interest in their community property as "present, existing and equal" interests subject to the management and control of the husband. See Cal. Civil Code §5105. Subsequently in 1931, the United States Supreme Court in United States v. Malcolm 282 U.S. 792 (1931), construed the Revenue Act of 1928 and the 1927 legislation. Two questions were certified:

"1. Under the applicable provisions of the Revenue Act of 1928 must the entire community income of a husband and wife domiciled in California be returned and the income tax thereon be paid by the husband?"

Answer: No.

"2. Has the wife under § 161 (a) of Civil Code of California such an interest in the community income that she should separately report and pay tax on one-half of such income?"

Answer: Yes.

Thus, for taxation purposes one-half of the community is taxable to each spouse, but the entire community is not taxable to the husband.

Respectfully submitted,

Sgd. Martin A. Schainbaum
8 Nov. 1978

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO) ss

Sworn at San Francisco, California, on November 8, 1978, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Martin A. Schainbaum, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

OFFICIAL SEAL

Sgd. J. Kerbleski

Notary Public in and for said County and State

No. 10

Affidavit of Martin A. Schainbaum, dated 8th November, 1978

State of California } ss.
City and County of San Francisco

I, CARL M. OLSEN County Clerk of the City and County of San Francisco, State of California, and ex-officio Clerk of the Superior Court thereof, the same being a Court of Record, do hereby certify that

J. KERBLESKI

is a Notary Public of the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, and authorized by the laws of the State of California to administer oaths and affirmations, and take affidavits and deposition in any matter whatever, and to take acknowledgments and proofs of deeds, mortgages, and other instruments requiring proof of acknowledgment, to be recorded in said State of California, and full faith and credit are due to all his official acts.

I further certify that his commission bears the date of October 9, 1978 and the same will expire October 8, 1982

Dated Aug. 2 1979

(Seal)

CARL M. OLSEN, Clerk

By D. Flanagan
Deputy Clerk

NO. 11

AFFIDAVIT OF FRANCIS CHUAH HOCK HAI,

DATED 8TH NOVEMBER, 1978

IN THE SUPREME COURT OF FIJI, LAUTOKA

WESTERN DIVISION

No. 205 of 1976

BETWEEN: THE COMMISSIONER OF ESTATE AND GIFT DUTIES

Plaintiff

AND : FIJI RESORTS LIMITED

Defendant

No. 11
Affidavit of
Francis Chuah Hock
Hai, dated 8th
November 1978

I, FRANCIS CHUAH HOCK HAI of Fijian Hotel, Yanuca Island, Accountant make oath and say as follows:

1. I am the Secretary and Financial Controller of Fiji Resorts Limited, and its subsidiaries Fiji Mocambo Holdings Limited and Yanuca Island Limited

2. I have in my custody the minute books and statutory records of the companies referred to in paragraph 1 above.

3. I have examined the various company records which reveal the following information.

4. Fiji Holdings Limited was a company wholly owned by International Airport Hotel Limited which by a resolution of the company passed on the 22nd day of March 1966 changed its name to Fiji Mocambo Holdings Limited.

5. On or about the 23rd day of October 1961 there was issued in the name of Alan E. and Doris A. Davis as joint tenants with right of survivorship and not as tenants in common 2454 shares of £1 each in Fiji Holdings Limited and 7361 notes of £1 each in Fiji Holdings Limited.

6. On or about the 5th day of April 1965 there was issued in the name of Alan E. Davis and Doris A. Davis as joint tenants with right of survivorship and not as tenants in common 224 shares of £1 each in Fiji Holdings Limited and 672 notes of £1

No. 11
Affidavit of
Francis Chuah
Hock Hai, dated
8th November 1978

each in Fiji Holdings Limited.

7. On or about the 22nd day of March 1966 resolutions were passed by the members of Fiji Holdings Limited that the company be wound up voluntarily and that the shareholders and registered note holders of Fiji Holdings Limited be compensated by the issue of shares and registered notes in Fiji Mocambo Holdings of the same face value.

8. In pursuance of the resolutions referred to in paragraph 7 above on or about the 31st day of March 1967 there were issued in the name of Alan E. or Doris A. Davis 2678 stock units of £ 1 each and 8033 notes of £ 1 each in Fiji Mocambo Holdings Limited.

9. On or about the 1st day of July 1969 resolutions were passed by the members of Fiji Mocambo Holdings Limited to convert the stock units referred to in paragraph 8 above into stock units of $1 each and to convert the notes referred to in paragraph 8 above into stock units of $1 each and that there be a bonus issue of stock units to the holders of stock units after the conversion of the notes.

10. In pursuance of the resolutions referred to in paragraph 9 above on or about the 1st day of July 1969 there was issued in the name of Alan E. or Doris A. Davis 5356 stock units of $1 each in Fiji Mocambo Holdings Limited (being the conversion of the 2678 stock units referred to in paragraph 8 above) and 31,998 stock units of $1 each in Fiji Mocambo Holdings Limited (being the conversion of the 8033 notes referred to in paragraph 8 above and the bonus stock referred to in paragraph 9 above). This resulted in a total holding in the name of Alan E. or Doris A. Davis of 37,354 stock units of $1 each in Fiji Mocambo Holdings Limited.

11. Yanuca Island Limited was originally incorporated on the 2nd day of November 1963 as Fiji Resorts Limited and subsequently changed its name on the 1st day of April 1971 to Yanuca Island Limited.

12. On or about the 23rd day of October 1967 there were issued in the name of Alan E. Davis 6295 stock units of £ 1 each in Fiji Resorts Limited.

13. On or about the 1st day of July 1968 there were issued in the name of Alan E. Davis 18,885 stock units of £ 1 each in Fiji Resorts Limited. These stock units represented 18,885 registered unsecured notes which had been issued in the name of Alan E. Davis and by resolution of the directors of the company passed on the 1st day of July 1968 were converted into stock units of £ 1 each.

No. 11

Affidavit of Francis Chuah Hock Hai, dated 8th November 1978

14. The said stock units were subsequently converted into stock units of $2 each resulting in a total holding in the name of Alan E. Davis of 25180 stock units of $2 each in Fiji Resorts Limited, subsequently Yanuca Island Limited.

SWORN at Suva)
this 8th day of) Sgd.
November 1978)

Before me: K.C. Ramrakha
Commissioner for Oaths

This affidavit is filed on behalf of the Defendant.

NO. 12

AFFIDAVIT OF ADAM DICKSON
DATED 17TH NOVEMBER 1978

IN THE SUPREME COURT OF FIJI, LAUTOKA
WESTERN DIVISION

No. 205 of 1976

BETWEEN: THE COMMISSIONER OF ESTATE AND GIFT DUTIES
Plaintiff

AND : FIJI RESORTS LIMITED
Defendant

No. 12

Affidavit of Adam Dickson dated 17th November 1978

I, ADAM DICKSON of Tamavua, Suva, Chartered Accountant, make oath and say as follows :

1. I am a partner in the firm of Coopers and Lybrand, Chartered Accountants, formerly R.S. Kay & Co.

No. 12
Affidavit of Adam Dickson dated 17th November 1978

2. Our firm has been the Auditors and Financial Advisors to Fiji Mocambo Holdings Limited, and Yanuca Island Limited (formerly Fiji Resorts Limited) since their incorporation and for Fiji Holdings Limited since approximately 1961 until its liquidation.

3. I have examined our firm's files relating to the companies and have discovered correspondence from Clodfelter & Dempcy formerly Clodfelter & Bowden Attorneys-at-Law of Seattle Washington, U.S.A. The correspondence reveals that Clodfelter & Dempcy were the attorneys and tax consultants for Mr. George Wilson.

4. Mr. George Wilson was one of the first directors of Yanuca Island Limited, formerly Fiji Resorts Limited, and was its Chairman of Directors from 1965 to 1973, was the Chairman of Directors of Fiji Holdings Ltd from 1962 to its liquidation in 1966 and Chairman of Directors of Fiji Mocambo Holdings Limited, formerly International Airport Hotel Limited from 1962 to 1973.

SWORN at Suva this)
17th day of) Sgd.
November 1978)

Before me: Sgd.
Commissioner for Oaths

NO. 13

FURTHER AFFIDAVIT OF ADAM DICKSON, DATED 23RD AUGUST 1979

IN THE SUPREME COURT OF FIJI, LAUTOKA
WESTERN DIVISION

No. 205 of 1976

BETWEEN: THE COMMISSIONER OF ESTATE AND GIFT DUTIES
Plaintiff

AND : FIJI RESORTS LIMITED
Defendant

No. 13
Further Affidavit of Adam Dickson, dated 23rd August 1979

I, ADAM DICKSON of Tamavua Suva, Chartered Accountant make oath and say as follows:

1. I refer to my affidavit sworn on the 17th day of November 1978 and filed herein.

2. In paragraph 4 of that affidavit the word "directors" was mistakenly omitted from the end of the first line, so that the text of the first part of that paragraph should have read:
"Mr. George Wilson was one of the first directors of Yanuca Island Limited."

3. In all other respects my said affidavit was correct.

SWORN at Suva by the said ADAM DICKSON this 23rd day of August 1979 } Sgd. A. Dickson

Before me :

Sgd. ____________________
Commissioner for Oaths

This Affidavit is filed on behalf of the Defendant.

NO. 14

NOTICE OF MOTION OF APPEAL TO FIJI COURT OF APPEAL FILED BY RESPONDENT, DATED 18TH DECEMBER 1979

IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION

No. 60 of 1979.

On appeal from the Supreme Court of Fiji (Western District) Civil Action No. 205 of 1976.

BETWEEN: FIJI RESORTS LIMITED

Appellant
(Original Defendant)

AND : THE COMMISSIONER OF ESTATE AND GIFT DUTIES

Respondent
(Original Plaintiff)

No. 14

Notice of Motion of Appeal to Fiji Court of Appeal filed by Respondent, dated 18th December 1979

TAKE NOTICE that the Fiji Court of Appeal will be moved at the expiration of fourteen (14) days from the service upon you of this notice, or so soon thereafter as Counsel can be heard by Counsel for the abovenamed Appellant for an order that the decision herein of the Honourable Mr. Justice Williams given at Lautoka on 26th October 1979 whereby it was ordered that the whole of the shares in Fiji Companies held by the late A.E. Davis, or held jointly by the late A.E. Davis with his wife D.A. Davis are liable for estate duty on the death of A.E. Davis, and whereby it was ordered that the Defendant pay the estate duty thereon assessed by the Commissioner, be set aside and that in lieu thereof the following orders may be made:-

1. That it may be declared that the interest of Mrs. D.A. Davis in the said shares was not liable for estate duty upon the death of her husband Mr. A.E. Davis.

2. That it may be declared that Mrs. D.A. Davis owned an undivided half interest in the said shares at the time of her husband's death by virtue of the operation of the community property system of the State of California, or in the alternative under the marital property agreement of October 1961.

3. In the alternative that it may be declared that Mrs. D.A. Davis owned an undivided interest in the said shares at the time of her husband's death as her separate property, and also owned an undivided half interest in the remaining interest in the shares as her share of the community interest therein.

4. That the Respondent pay the costs of this appeal and the whole or such proportion as the Court thinks just of the costs of the proceedings in the Supreme Court since the order of Stuart J. therein.

5. That the amount of duty (if any) payable by the Appellant may be determined.

6. That such further or other order may be made as the nature of the case may require.

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

1. That the Judge was in error in holding that Section 5(1)(h) of the Estate and Gift Duties Ordinance brings to duty property in which the deceased had a general power of appointment immediately before his death which ceased on his death.

2. That the Judge should have held that Section 5(1)(h) only applied to general powers of appointment which were exercisable by will.

No. 14

Notice of Motion of Appeal to Fiji Court of Appeal filed by Respondent, dated 18th December 1979

3. That the Judge should have followed the unanimous decision of the High Court of Australia in Equity Trustees v. Commissioner of Probate Duties (1976) 135 C.L.R. 268, affirming the unanimous decisions (on this point) of the trial Judge and the Full Court of the Supreme Court of Victoria that an equivalent provision of the Victorian Act did not apply to a general power of appointment which ceased on the death of the donee of the power.

4. That the Judge should have held that Section 5(1)(h) did not apply to the husband's powers of management and disposition over community property under the law of California because such powers were fiduciary and as such were excluded from the definition of general power of appointment.

5. That the Judge was in error in holding that Section 5(1)(i) of the Ordinance applied to the wife's community interest in the shares.

6. That the Judge was in error in holding that the marital property agreement of October 1961 between Mr. and Mrs. Davis was a settlement by Mr. Davis of the property comprised in his wife's community interest in the shares.

7. That the Judge should have held that the California community of property system which became applicable to Mr. and Mrs. Davis when they acquired a domicile of choice in California, attached by operation of law, and did not constitute or involve a settlement or disposition of property made by the deceased within Section 5(1)(i).

8. That the Judge should have held that to the extent that the income from, or the proceeds of the sale or pledge of Mrs. Davis's separate property provided the funds used to make the investments in Fiji represented by the shares held at the date of Mr. Davis's death, even if these shares were wholly community property the funds in question represented a settlement or disposition of property by Mrs. Davis in favour of her husband and not vice versa, and accordingly to that extent the shares were not caught by section 5(1)(i).

9. That the Judge should have held that Mrs. Davis had a substantial separate property interest in the shares and that such interest was not dutiable on the death of her husband.

10. That the Judge should have held on the evidence of Californian law that loans raised by the pledging of separate property are themselves separate property, and that assets purchased with separate property loan funds are also separate property.

No. 14

Notice of Motion of Appeal to Fiji Court of Appeal filed by Respondent, dated 18th December 1979

11. That the Judge was in error in finding that the deceased had saved more than $40,000 from his salary between 1961 and 1971 and that such savings had been used to repay two loans each of $20,000 borrowed from the Pan American Credit Union.

12. That the Judge was in error in rejecting Mrs. Davis's evidence that her husband had little opportunity for saving.

13. That the Judge was in error in concluding that a substantial number of relevant documents showing the financial dealings between Mr. and Mrs. Davis had not been produced to the Court, and that the documents which were produced were the result of a process of selection by Mrs. Davis and/or Mr. Suhrke.

DATED the 18th day of December 1979.

CROMPTONS

per: (Sgd.) P.I. Knight
....
Solicitors for the Appellant

This Notice of Motion was taken out by Messrs Cromptons of Prouds Building, The Triangle, Suva, Solicitors for the Appellant, whose address for service is at the chambers of the said Solicitors.

NO. 15

RESPONDENT'S NOTICE FILED BY APPELLANT, DATED 8TH JANUARY 1980

IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION

NO. 60 OF 1979

On appeal from the Supreme Court of Fiji .

(Western Division) Civil Action No. 205 of 1976.

BETWEEN: FIJI RESORTS LIMITED

Appellant
(Original Defendant)

AND : THE COMMISSIONER OF ESTATE AND GIFT DUTIES

Respondent
(Original Plaintiff)

No. 15

Respondent's Notice filed by Appellant, dated 8th January 1980

RESPONDENT'S NOTICE UNDER RULE 19, COURT OF APPEAL RULES

TO: FIJI RESORTS LIMITED AND ITS SOLICITORS, MESSRS CROMPTONS, PROUDS BUILDING, THE TRIANGLE, SUVA.

TAKE NOTICE that at the hearing of Civil Appeal No. 60 of 1979 the Commissioner of Estate and Gift Duties, who has not appealed from the decision of the Court below, will seek an order to vary in part in any event the Judgment of the Honourable Mr. Justice Williams in Civil Action No. 205 of 1976, rendered the 26th day of October, 1979, in the following particular, namely by the addition to the orders made by the Honourable Mr. Justice Williams of an Order for Fiji Resorts Limited to forfeit a sum not exceeding one thousand dollars as provided for by Section 31(2) of the Estate and Gift Duties Act (Chapter 178).

FURTHER TAKE NOTICE that at the hearing of Civil Appeal No. 60 of 1979, the Commissioner of Estate and Gift Duties will contend that the Judgment of the Honourable Mr. Justice Williams aforesaid, should be affirmed on certain grounds other than those relied upon by the Court below, namely :

(a) THAT Fiji Resorts Limited was bound by certain unexplained admissions made by those in privity with it, to the effect that shares the subject matter of Civil Action No. 205 of 1976 were at all material times Community Property under Californian Law.

(b) THAT Fiji Resorts Limited were estopped from denying that the shares aforesaid were at all material times Community Property under the Law of California.

(c) THAT the effect of a Marital Property Agreement of 6th of October 1961 between Alan Emmett Davis and Doris Anita Davis was to render the shares aforesaid Community Property under Californian Law in any event and regardless of the source of funds used to purchase same.

(d) THAT the shares aforesaid were dutiable in toto under Section 5(1)(e) of the Estate and Gift Duties Act (Chapter 178).

DATED the 8th day of January 1980.

Sgd. G. Grimmett
....
GEOFFREY GRIMMETT, CROWN SOLICITOR, for Solicitor-General of and whose address for service is Crown Law Office, Government Buildings, Suva, Fiji, the Solicitor for the Respondent.

NO. 16

NOTICE OF AMENDMENT TO RESPONDENT'S NOTICE OF MOTION OF APPEAL TO FIJI COURT OF APPEAL, FILED BY RESPONDENT, DATED 23RD SEPTEMBER 1980

IN THE FIJI COURT OF APPEAL
Civil Jurisdiction

Civil Appeal No. 60 of 1979

BETWEEN: FIJI RESORTS LIMITED

Appellant

AND : THE COMMISSIONER OF ESTATE & GIFT DUTIES

Respondent

AMENDMENT TO APPELLANT'S GROUNDS OF APPEAL

No. 16
Notice of Amendment to Respondent's Notice of Motion of Appeal to Fiji Court of Appeal, filed by Respondent dated 23rd September 1980

Add additional ground 4A

4A. That the deceased husband's powers of disposition of community personal property under the law of California did not fall within the definition of "general power of appointment"in Section 2 of the Ordinance because they were not powers which he could exercise "as he thinks fit for his own benefit" and accordingly the wife's half of the community property in Fiji was not dutiable under Section 5(1)(h) of the Ordinance.

DATED the 23rd day of September, 1980.

CROMPTONS

per: P.I. Knight ....
Solicitors for the Appellant

NO. 17

JUDGMENT OF FIJI COURT OF APPEAL

(GOULD VP, HENRY JA, SPRING JA)

DATED 3RD OCTOBER 1980

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 60 of 1979

Between:

FIJI RESORTS LIMITED — Appellant

and

THE COMMISSIONER OF ESTATE AND GIFT DUTIES — Respondent

Mr. K.R. Handley Q.C. with Mr. P.I. Knight for the Appellant

Mr. M.J. Scott with Miss G. Fong for the Respondent

Date of Hearing: 22, 23, 24, 25, 26 September 1980
Delivery of Judgment: 3-10-80

JUDGMENT OF THE COURT

No. 17
Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

This is an appeal against the assessment of estate duty payable by appellant in respect of the estate of Alan Emmett Davis who died in Fiji on February 28, 1972. He was survived by his wife Doris Anita Davis. The spouses will be referred to respectively as "the husband" and "the wife" because their matrimonial relationship is crucial to the determination of their respective rights and interests which have to be defined for the purposes of assessing estate duty. At the date of death the husband held in his own name 25,180 shares of $2 each in a company called Yanuca Island Limited (called "the Yanuca shares") and the husband and wife held 37,354 shares

of $1 each in Fiji Mocambo Holdings Limited (called "the Mocambo shares"). The Mocambo shares were held as "tenants in common and not as joint tenants". The Yanuca and Mocambo shares were later converted into shares in appellant. After death, in circumstances which are not material to this appeal, a further 56,281 shares were acquired in appellant's shareholding.

Appellant registered transfers of these shares on September 26, 1973 and subsequent dates before any grant of administration had been made in Fiji. As a result, although a stranger to the estate, appellant became liable to pay estate duty by virtue of Section 31(1) and (2) of the Estate and Gift Duties Act (Cap.178) which reads:

> "31. (1) If any person takes possession of or in any manner deals with any part of the estate of any deceased person without obtaining administration of his estate within six months after his decease, or within two months after the termination of any action or dispute respecting the grant of administration of the estate, or within such further time as may be allowed by the Commissioner on application, the Commissioner may apply to the Supreme Court for an order that the person so taking possession or dealing as aforesaid deliver to the Commissioner within such time as the Commissioner may determine, a statement as required by subsection (1) of section 28 of this Act, and to pay such duty as would have been payable if administration had been obtained, together with the cost of the proceedings, or to show cause to the contrary.
>
> (2) If no cause or no sufficient cause is shown to the contrary, the person so offending shall, in addition to the duty payable by him as aforesaid, forfeit a sum not exceeding five hundred pounds, in the discretion of the Supreme Court; but if cause is shown, such order shall be as seems just."

Respondent assessed estate duty on the whole of the estate in Fiji notwithstanding claims by the wife to separate ownership of part of the said shares. The present proceedings were brought against appellant under Section 31. The assessment was upheld by the Supreme Court. Respondent has filed a cross-appeal, which may be considered together with the appeal.

The husband and the wife were domiciled in the State of California. Administration of the husband's estate was granted in California to The First National Bank of San Jose on May 2, 1972 and re-sealed in Fiji, we are advised from the Bar, in or about November 1976. The administrator was concerned in the assessment of estate duty so its solicitors took part in the inquiries which preceded and followed the assessment of estate duty. This will be discussed later. The relevant history of the spouses is that they were American citizens who married in Seattle in the State of Washington on 14th September 1940. The husband was employed

as a pilot by Pan American Airways in 1945. In 1948 they acquired a domicile of choice in the State of California which domicile was thereafter retained. By acquiring a Californian domicile all property then owned and after acquired by either the husband or wife became subject to the law of California which has a statutory system of community property. The present appeal falls for determination of the respective rights and interests of the husband and wife in the said shares according to Californian law and then for the determination of what, upon the true construction of the Fiji Estate and Gift Duties Act (Cap.178), comprises the dutiable estate of the husband in Fiji.

Since the Courts in Fiji cannot take judicial notice of foreign law the relevant law of the State of California must be proved as a fact. Affidavits were made by two experts in that law. There is no conflict of opinion between them so the task of this Court is to apply the law as so laid down to the relevant Fiji law. The general law was stated by Mr. Strader, a duly qualified practitioner of law in the State of California, who said:

> " The law of the State of California in effect on February 28, 1972, governing the property rights of a husband and wife was as set forth in the provisions of the Civil Code of the State of California, unless there existed a marriage settlement or contract between the spouses containing stipulations contrary to the statutory provisions set forth in said Civil Code. A husband and wife were authorized by law to enter into a contract whereby the statutory designation regarding the character of their property rights is changed. Civil Code s. 5103.
>
> The law of the State of California on February 28, 1972, recognized two types of ownership of property by husband and wife - (1) the separate property of each, and (2) the community property of both. The separate property of a spouse might be held in joint tenancy or tenancy in common with the other spouse. Civil Code s. 5104. These two types of ownership of property were defined in sections 5105, 5107, 5108, and 5110 of the Civil Code. The term 'separate property' means that property which is held both in its use and its title for exclusive benefit either of the husband or of the wife. The term 'community property' is that property which is acquired by husband and wife, or either, during marriage when not acquired as the separate property of either.
>
> All property owned by a husband or a wife before marriage and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues and profits thereof, was the separate property of the husband or wife. With certain exceptions, all real property situated in California and all personal property wherever situated acquired by either spouse during the marriage while domiciled in the State of California, was community property. Certain exceptions and presumptions were set forth in Civil Code sections 5109, 5110, 5111, 5118, 5119 and 5126."

The following are relevant provisions of the Californian Civil Code :

"5105. Interests in community property

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in Sections 5125 and 5127. This section shall be construed as defining the respective interests and rights of husband and wife in community property."

"5125. Husband's control of community personal property: Limitations: Consent of wife

Except as provided in Sections 5113.5, 5124, and 5128, the husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife."

The husband and wife entered into a written contract concerning their separate and community property on October 6, 1961 (called "the 1961 contract"). It contained the following provisions :

" THIS AGREEMENT, made and entered into this 6th day of OCTOBER, 1961, by and between ALAN E. DAVIS and DORIS DAVIS, his wife, residing in the County of San Mateo, State of California,

WITNESSETH:

THAT WHEREAS said husband and wife during the existence of their marriage have acquired and now own property of various kinds; and

WHEREAS certain property was inherited by said wife during their marriage; and

WHEREAS all property of every kind and nature now owned or held by said parties in their joint names was acquired and purchased with the community earnings of said marriage and

WHEREAS it is the intention of said husband and wife to enter into a written memorandum of agreement attesting to the community status of their joint tenancy property, and the separate status of certain other property;

NOW THEREFORE, it is hereby mutually understood and agreed by and between said husband and wife as follows:

No. 17
Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

1) That all property of every kind, nature and description now owned or held of record title by said husband and wife in their joint names as joint tenants, at all times herein mentioned has been and now is, and shall remain, the community property of said husband and wife without regard to the form and record of ownership under which the same was acquired or is now held.

2) That all property inherited by either said husband or said wife during their marriage, is the separate property, respectively, of said husband or of said wife.

3) That all property that may hereafter be acquired by said husband and wife, during the continuance of their marriage, EXCEPT that acquired by either of them by gift, bequest, devise or descent shall become and remain the community property of said husband and wife without regard to the form and record of ownership under which the same is acquired or held.

4) That any insurance policies on the life of said husband owned by the wife are the sole and separate property of said wife. That any insurance policies on the life of said wife owned by the husband are the sole and separate property of said husband.

5) That this Agreement shall remain in full force and effect until modified or revoked, in writing, by said husband and wife, and shall be binding upon them, their respective heirs, executors, administrators and assigns.

IN WITNESS WHEREOF, the undersigned have executed this Agreement, in duplicate, the day and year first hereinabove set forth.

Sgd. ALAN E. DAVIS
Sgd. DORIS DAVIS "

The relevant provisions of the Estate and Gift Duties Act under which respondent claims duty is payable are :

"S.5(1) In computing for the purposes of this Act, the final balance of the estate of a deceased person, his estate shall be deemed to include and consist of the following classes of property :

(e) the beneficial interest held by the deceased immediately before his death in any property as a joint tenant or joint owner with any other person or persons if that property was situate in Fiji at the death of the deceased;

(h) any property situate in Fiji at the death of the deceased over or in respect of which the deceased had at the time of his death a general power of appointment;

(i) any property situate in Fiji at the death of the deceased comprised in any settlement, trust or other disposition of property (including the proceeds of the sale or conversion of any such property and all investments for the time being representing the same and all property which has in any manner been substituted therefor) made by the deceased whether before or after the commencement of this Act -

(i) by which an interest in that property or in the proceeds of the sale thereof is reserved, either expressly or by implication, to the deceased for his life or for the life of any other person or for any period determined by reference to the death of the deceased or of any other person; or

(ii) which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person or for any period determined by reference to the death of the deceased or of any other person; or

(iii) by which the deceased has reserved to himself the right by exercise of any power to restore to himself or to reclaim that property or the proceeds of the sale thereof."

It is sufficient, of course, if the said shares or any of them come within any one of these provisions.

The intention of subsection (e) is to make exigible the interest of a deceased in joint property which passes by survivorship to the other joint tenant or tenants on death of one joint tenant. The intention of subsections (h) and (i) is to overcome various devices for avoiding or minimising death duties by reducing the value of the estate at the date of death or by diverting from the estate property in respect of which the deceased may have taken for himself in his lifetime if he so wished. The form of title created by the California law is unknown to Fiji law but in California, as one might expect, proper provision has been made for equitable assessment of death duty. If the assessment made by the appellant is upheld so that duty is exigible on the whole of the Fiji estate, then the wife's interest will bear full duty despite that it appears that she contributed assets at least to the value of her half share. If she died immediately after her husband whilst still holding the shares they would again be taxed to their full value, thus her own assets would be liable for double duty.

A general power of appointment has been defined as a power that the donee can exercise in favour of such person or persons as he pleases, including himself or his executors and administrators:

No. 17
Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

Halsbury's Laws of England 3rd Edn. Vol. 30 para. 368. Section 2 of the Estate and Gift Duties Act defines the term as follows:

> "2. In this Act, unless the context otherwise requires -
>
> 'general power of appointment' includes any power or authority which enables the donee or other holder thereof, or would enable him if he was of full capacity, to obtain or appoint or dispose of any property or to charge any sum of money upon any property as he thinks fit for his own benefit, whether exercisable orally or by instrument _inter vivos_ or by will or otherwise howsoever, but does not include any power exercisable by a person in a fiduciary capacity under a disposition not made by himself, or exercisable as mortgagee."

Each definition has a provision referring to the extent to which the power may be exercised. In the first definition it is "in favour of such person or persons as he pleases including himself" and in the statutory definition it is "as he thinks fit for his own benefit". Thus to qualify the power must be one which gives that right to the donee.

In the Supreme Court it was held that the said shares were property which came within subsections (1)(h) and (i). No finding was made in respect of subsection (1)(e). The contentions of counsel for appellant may be summarised as follows:

(1) The powers defined in subsection (1)(h) are testamentary in character and that subsection does not include powers which cease on death. For this proposition counsel relied on _Equity Trustees Executors and Agency Co. Ltd. v. Commissioner of Probate Duties (Vict.) 135 C.L.R. 268_. (Commonly known as "Silk's case" and so referred to in this judgment).

(2) The powers vested in deceased were powers exercisable by a person in a fiduciary capacity and therefore excluded by reason of the definition of a general power of appointment.

(3) The powers were not exercisable as deceased "thinks fit for his own benefit" and so did not come within subsection (1)(h).

(4) By reason of the statutory nature of the powers they did not come within subsection (1)(i).

(5) Subsection (1)(e) applies only to joint interests whilst the property in question was not so held.

No. 17
Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

It is convenient first to deal with subsection (1)(e). Section 5105 of the California Code defines the interests of the husband and wife in community property as "present existing and equal interests under the management and control of the husband .....". Upon death the deceased estate takes one-half and the survivor retains his or her half. The opinions of the experts were not sought expressly on the subject but it is clear that such a result does not flow from joint ownership where the survivor or survivors take by virtue of the nature of the estate. It is commonly said, "each joint tenant holds the whole and holds nothing, that is, he holds the whole jointly and nothing separately".

The nature of a joint tenancy is succinctly stated in Fadden v. Deputy F.C.T. [1943] 68 C.L.R. 76-84 where Williams J citing Lord Selborne said :

> "....... technically joint tenants are originally entitled to all which they ever have; and when one joint tenant dies, the other does not succeed to his interest by devolution of law, but remains the sole owner, the property being discharged from the control of the other. It is incident to the very nature of joint tenancy that, until it is severed the right of survivorship is part of the original estate; it is not that the survivor succeeds to anything from the other."

The intention of subsection (1)(e) is to bring to duty the value of the beneficial interest of the deceased. Since that interest ceases on death, the time of ascertainment is fixed at "immediately before his death". Counsel for respondent argued that the title defined by Section 5105 (California) was a peculiar class of joint ownership falling within subsection (1)(e). We reject this argument. Except for the right of the husband to manage the whole property in terms of Section 5125 (California) the description of the estate clearly does not make the husband and wife joint tenants as that term is used in Fiji law. Their respective interests and rights are clearly as to one-half each.

Counsel for respondent sought to draw a distinction between the disjunctive terms "joint tenant" or "joint owner". Nothing turns on the use of both terms since the first applies to real property and the second to personal property. In Halsbury's Laws of England 3rd Edn. vol. 29 page 380 it is stated :-

> "752. Co-ownership. Concurrent ownership of chattels personal may be either joint or in common, and in this respect resembles concurrent interests in real estate; moreover, expressions contained in any instrument which, at common law, would create a joint tenancy or tenancy in common in realty have an analogous effect when applied to personalty.
>
> "753. Joint ownership in personalty. A joint ownership or joint tenancy is distinguished by the four unities of possession, interest, title and time of commencement. The right of survivorship attaches to a joint tenancy of personalty,

No. 17

Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

including choses in possession and in action, as well as to realty until severance."

The beneficial interest referred to in subsection 1(e) is the interest as a joint tenant or joint owner. This is to be contrasted with such an interest being held in trust. The distinction is between the legal interest of a trustee and the beneficial interest of a beneficiary. The powers of the husband do not create any beneficial interest in a joint tenancy or joint ownership. Such powers are alien to the nature of a beneficial or other interest in a joint tenancy or ownership. This does not help respondent. Accordingly subsection 1(e) does not apply.

We turn next to the contentions of counsel for appellant numbered 1, 2 and 3 above which require a consideration of subsection (1)(h). The first contention was the principal one put forward by counsel but it will be more convenient if we deal with (2) and (3) first and then turn to (1) which, as stated, is based on Silk's case.

Jacobs J. in Silk's case, albeit in a dissenting judgment which did not turn on this point, in describing the powers in two provisions, one of which is the same as Fiji subsection (1)(e), said at p. 283 :

> "Each imports the idea that the property was not in the ownership of the deceased so that thereby he could freely deal with it but nevertheless was property with which he could freely deal as he thought fit as though it were his own property. The question is whether Jessica Silk had that power."

We respectfully agree that that is the question, namely, did the husband have that power?

Dealing first with (3), namely, that subsection (1)(h) did not apply because the power of the husband was not exercisable "as he thinks fit for his own benefit." Subsection (1)(h) differs from the statement of the law on general powers which expressly includes an exercise in favour of himself, that is the donee of the power. It is clear that the intention at law is that the donee can control the exercise of the power to the extent that he can appoint himself absolutely to the property. There are numerous cases where this has been done to the exclusion of other beneficiaries. Instances need not be cited. This leads to a consideration of the extent of the powers of the husband under California law. It is clear that he cannot appoint himself absolutely to his wife's share or any part of it because he would still hold it as community property. It was not suggested that he had this power. It is true that by Section 5125 it is stated that the husband has absolute power of disposition, but with the important qualification "other than testamentary". But this qualification must also be read in conjunction with the provision that, as long as the husband holds community property it remains community property. This is so even if there is a conversion as,

for instance, a change of investment or sale because the converted or resulting funds while in the hands of the husband remain community property. The husband cannot make a gift nor can he dispose of personal property without a valuable consideration. A valuable consideration has been held to require an adequate consideration. Mr. Martin A. Schainbaum, an expert who gave evidence for respondent, said :

> " While the husband under community property law principles operative on February 28, 1972 may have powers of management and control such powers are not unlimited. Beard v. Knox, 5 Cal. 252 (1855); Smith v. Smith, 12 Cal. 216 (1859). See also, ch. 220 1891 Cal. Stats. 425 (restricting the husband's right to make a gift of community property). Ch. 190 1901 Cal. Stats. 598 (Requiring wife's consent before husband could dispose of or encumber home furnishings or fittings, or the wearing apparel of his wife or minor children); ch. 583 1917 Cal. Stats. 829-30, Former Civil Code SS. 172 and 172a."

It is true that, to the extent that a husband disposes of community property to a third party in accordance with his absolute power the third party acquires a good title as against the wife and the community property is depleted accordingly. In some cases an infringement of the restrictions so imposed results only in a voidable transaction but that does not alter the fact that the power is circumscribed and not absolute in the full meaning of that expression. For these reasons we are of opinion that the husband could not dispose of community property as he thinks fit for his own benefit.

The next submission of counsel for appellant is that subsection (1)(h) does not apply because it comes within the exception in the definition of a general power of appointment in that it is a power "exercisable by a person in a fiduciary capacity under a disposition not made by himself". The question whether or not the effect of California law in creating community property is a "disposition" arises under subsection (1)(i) and will be dealt with under that subsection. It is to be noted that the expression used is not fiduciary powers but fiduciary capacity. In Halsbury's Laws of England 3rd Edn. Vol. 30 para. 370 p. 210 it was said:

> " The distinction between trusts and powers is that, while the court will compel the execution of a trust, it cannot compel the execution of a power. But there are powers which in their nature are fiduciary, in the sense that the donee of the power is a trustee of it, and has an interest extensive enough to allow of its exercise. These powers may be called fiduciary powers, or powers in the nature of trusts; powers which are not fiduciary are often called bare powers."

No. 17
Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

The term "fiduciary capacity" is wider. On a number of occasions in his submission counsel for respondent based his argument on a claim that no fiduciary relationship could possibly arise because deceased could appoint himself. With respect this is not so.

Mr. Schainbaum, an expert in California law, said:

> " There is a fiduciary relationship between husband and wife pertaining to community property dealings. See v. See, 64 Cal. 2d. 778, 415 P. 2d. 776, 51 Cal. Rptr. 888 (1966). Vai v. Bank of America, 56 Cal. 2d. 329, 364 P. 2d. 247, 15 Cal. Rptr. 71 (1961); Williams v. Williams, 14 Cal. App. 3d. 560, 92 Cal. Rptr. 385 (2d. Dist. 1971); Fields v. Michael, 91 Cal. App. 2d. 443, 205 P. 2d. 402 (2d. Dist. 1949); See also Boeseke v. Boeseke, 10 Cal. 3d. 844, 519 P. 2d. 161, 112 Cal. Rptr. 401 (1974)."

In Vai v. Bank of America (supra) the following passage appears at p. 252 :

> " (2) Since the husband's control of the community property continues until there has been a division of it by agreement or by court decree, it would follow that the husband would continue to remain a fiduciary in respect to his wife's interest in the community assets until such division was made. Of course, as was the case in Collins v. Collins, 48 Cal. 2d 325, 309 P. 2d 420, the wife may choose not to rely on her husband and release him from the performance of his fiduciary duties.
>
> (3) This fiduciary relationship arises by virtue of the community property system which gives the husband management and control of such property in order that the assets be more efficiently handled, and exists only as to the community property over which the husband has control. It should be distinguished from the confidential relationship which is presumed to exist between spouses."

Counsel for respondent argued that the words "person in a fiduciary capacity" must be a person to whom such a description would apply in respect of a fiduciary relationship recognised by Fiji law. We can see no reason so to construe the provision, which, as a whole, is clearly wide enough to include powers over property rights governed by foreign law. That is what this case is about. In Commissioner of State Duties v. Livingston [1965] A.C. 694 the Privy Council stated at p. 707 that an administrator was in a "fiduciary position" with regard to assets which are in full ownership, without distinction between legal and equitable interests. Their Lordships held that the carrying out of the functions and duties of administrator would place him in a fiduciary position.

Although the husband did, unlike an administrator, necessarily have an interest in the final distribution of the totality of the community property, nevertheless the husband had duties in respect of the preservation of his wife's half share. This would be so in Fiji law. The husband could properly be said to have duties which came within the term fiduciary capacity. As an instance he could be restrained from making a gift of Fiji property.

In our view the expression fiduciary capacity in subsection (1)(h) is wide enough to include the capacity of the husband in respect of the wife's interest as set out in passage cited from Vai's case. Moreover, that passage reinforces our opinion expressed earlier that the power is not one to be exercised as the husband thinks fit for his own purpose. The two expressions in the definition to this extent overlap.

We turn next to the main submission of counsel for appellant which was based on the decision of the High Court of Australia in Silk's case which turned on the true construction of similar questions which arose under legislation in New South Wales. The basic submission is that subsection (1)(h) is testamentary in its nature. The argument is that the power of the husband is not one which "the deceased had at the time of his death" within those words in subsection (1)(h). This construction was given by the High Court in Silk's case to the same wording in a similar subsection in the legislation of New South Wales. The reasoning of the learned judges turned upon the use of different wording relating to time of death in other provisions in the same act. In Fiji the contrast exists only between subsection (1)(e) which relates to "an interest held by the deceased as joint tenant or joint owner immediately before his death" and subsection (1)(h) which relates to any property situate in Fiji over which deceased had "at the time of his death" a general power of appointment.

In Silk's case, after setting out the definition of a general power of appointment, Mason J. said at p. 279 :

> "This definition provides little assistance in applying s. 7(1)(f) (Fiji s. 5(1)(e)) to the facts of this case. The frailty of the Commissioner's argument in so far as it is based on this paragraph stems not so much from the elements in the statutory definition as from the terms of the paragraph itself. It requires that the power of appointment over or in respect of the property should subsist at the time of the deceased's death.
>
> Although I am reluctant to draw a distinction based on the difference between the expressions 'immediately prior to his death' and 'at the time of his death', the distinction is one which the Act itself insists upon making. The first of the two expressions, or its equivalent 'immediately before his death', is to be found on no less than four occasions in s. 7(1) - see paras (d), (e), (i) and (j). The second

expression appears twice in the same subsection - see paras (c) and (f). The difference cannot be ignored. Indeed, the history of the section requires that it be recognized. The ancestor of s. 7(1)(j), which appeared in s. 104(1) of the Administration and Probate Act 1958, contained the expression 'at the time of his death'. It was altered in the 1962 Act to 'immediately prior to his death'.

To give effect to the change in language it is necessary that the provision now be read as requiring that the power should exist not immediately prior to the deceased's death, but at the time of her death. As death is the event which terminates her power to make a request in writing it cannot be said with accuracy that the power existed at that time."

In the result four judges, Gibbs, Stephen, Mason and Murphy JJ. came to the conclusion (Jacobs J. dissenting on different grounds) that the power in question, since it had to be exercised in deceased's lifetime, was not exercisable at the time of his death. It was argued before us that the power of the husband also ceased on his death so it came within the reasoning of the High Court and judgments in previous cases in Australia. From this it was submitted that subsection (1)(h) related only to dispositions of a testamentary character and so excluded the power conferred on a husband by California law. It is interesting to note that Mr. G.A. Strader, one of the experts on California law, said :

" The husband's testamentary disposition of more than one-half of the community property is not absolutely void as to the wife, but only voidable by her upon proof of the necessary facts (Spreckels v. Spreckels (1916) 158 P. 537, 172 Cal. 775; Estate of King(1942) 19 Cal. 2d 354, 121 P. 2d 716). The wife's right to void such disposition of her one-half community interest survives her death and may be exercised by her personal representative (Estate of Kelley (1953) 122 Cal. App. 2d 42, 264 P. 2d 210). In any event, the testamentary power is not an essential incident to property, and depriving the husband of such power with reference to community estate did not take from him any right of property. (Spreckels v. Spreckels (1897) 48 P. 228, 116 Cal. 339)."

However, be that as it may, the Fiji Act does not have the number of different provisions, some five, in which it, to use the words of Mason J., "the Act itself insists on making". Subsection (1)(e) uses the expression "immediately before his death" for the obvious reason that joint property that at the time of death of one of the joint owners the other remains as sole owner. At that point of time there is no beneficial interest which might attract duty. Subsection (1)(e) is dealing with joint interests which have the peculiarity of the four unities of possession, interest, title and time of commencement and upon death the result noted in Fadden v. Deputy F.C.T.(supra) follows. For property to pass on death to the personal representatives of

the deceased there must be some interest which survives the death of the deceased. In Halsbury's Laws of England 4th Edn. Vol. 17 para. 1106 it is categorically stated that the interest of a deceased person under a joint tenancy where another tenant survives the deceased is an interest ceasing on his death. It is clear that such an interest would not be liable to duty as part of the estate unless it is notionally brought within his estate by an expression which pre-dates death. In the case of powers of appointment (subsection (1)(h)) no such considerations arise. So one would expect a different expression as to time to be used. The Fiji legislation is not encumbered with a number of contrasting provisions on the same topic so that it requires a construction such as that which the High Court felt compelled to adopt. The two differing expressions are apposite for the differing subject matter of each of the subsections (1)(e) and (1)(h). Subsection (1)(e) deals with property interests which cease to exist at the time of death so that latter expression is not apposite to the subject matter of subsection (1)(h).

We proceed to examine subsection (1)(h) further.

Section 5(1) reads :

> "5. (1) In computing for the purposes of this Act, the final balance of the estate of a deceased person, his estate shall be deemed to include and consist of the following classes of property:"

The intention is to create classes and subsection (h) is the only part of Section 5(1) which classifies property in relation to a general power of appointment. It includes powers of disposal under a wide definition of the power. This is unlike the statutory provisions in other jurisdictions dealt with in the cases cited. In such statutes there was, in addition to the general power of appointment, a separate class of property in respect of which the deceased "was competent to dispose" at the time of his death (cf. re Russell [1968] V.R. 285).

In Fiji the only subsections which deal with the time of death are subsection (1)(e) (joint interests) and subsection (1)(h) which deals with property affected by general powers of appointment. In those circumstances the definition in Section 2 is important and should be read into subsection (1)(h). There is nothing in the context which would require otherwise. Subsection (1)(h) would then read:

> "(1)(h) any property situate in Fiji at the death of the deceased over or in respect of which the deceased had at the time of his death any power or authority which enables (the husband) to obtain or appoint or dispose of any property or to charge any sum of money upon any property ....whether exercisable orally or by instrument inter vivos or by will or otherwise howsoever........"

Counsel for appellant did not examine subsection (1)(h) as extended by the definition. His submission that subsection (1)(h) was confined to testamentary powers means, in effect, that the only operative words in the extended meaning by which the power may be exercised are "by will". This makes the terms "orally or by instrument inter vivos ..... or otherwise" surplusage and of no effect. We can see no reason why the definition in Section 2 should not be applied to subsection (1)(h) when construing its meaning.

In Silk's case and other cases cited the Courts were dealing in particular with two provisions. One was in the same terms as the Fiji subsection (1)(h). The other which has no corresponding provision in Fiji, read as follows:

> "(j) Any property of which immediately prior to his death the deceased was (whether with the concurrence of some other person or not) competent to dispose, otherwise than in a purely fiduciary capacity;"

Prima facie, (j) above is a right to dispose which might be included in the definition of a general power of appointment. But the legislature in Australia thought it necessary to make such further provision, no doubt, for good reasons. Contrasting expressions as to time were used. This, as well as other provisions as to time, caused Mason J. to say in the passage cited earlier that the definition provided little assistance in applying the New South Wales subsection to the facts of the case the Court was then considering. That is not so in Fiji where the use in subsection (1)(e) of the term "immediately before his death" was necessary notionally to preserve a joint interest which would at death cease to exist. Such a consideration did not arise under subsection (1)(h) (Fiji) dealing with a separate type of property where the definition relates to all powers or authorities set out in the definition.

It was not contended that a power exercisable by will is not a power which the deceased had at the time of his death (vide Lush J. Silk's case [1976] V.R. 60, 71). If the legislation in Fiji intended subsection (1)(h) to be confined to testamentary dispositions there was no occasion to define a specific point of time since death is the necessary time when a testamentary disposition comes into operation even if the interest vests at a later date. The words "by will" would be sufficient. In our view the expression at the time of death does not in its context, when read with the definition in Section 2, define powers solely in relation to the time when they cease to operate. The time of death is the point of time when the existence of unexercised powers coming within the definition are ascertained. The expression is not used to define the power itself by reference to the time when it ceases to be exercisable by the donee. To hold otherwise would render the definition nugatory except in respect of the words "by will". In the absence of compelling reasons, such as those found in Silk's case, effect should be given to all

No. 17

Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

powers and authorities set out in the extended meaning of a general power of appointment.

We are accordingly of the opinion that appellant succeeds on grounds 2 and 3 but not on ground 1. The result is that we find that the said shares do not come within subsection (1)(h).

Subsection (1)(i) reads:

> "(1)(i) any property situate in Fiji at the death of the deceased comprised in any settlement, trust or other disposition of property (including the proceeds of the sale or conversion of any such property and all investments for the time being representing the same and all property which has in any manner been substituted therefor) made by the deceased whether before or after the commencement of this Act -
>
> (i) by which an interest in that property or in the proceeds of the sale thereof is reserved, either expressly or by implication, to the deceased for his life or for the life of any other person or for any period determined by reference to the death of the deceased or of any other person; or
>
> (ii) which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person or for any period determined by reference to the death of the deceased or of any other person; or
>
> (iii) by which the deceased has reserved to himself the right by exercise of any power to restore to himself or to reclaim that property or the proceeds of the sale thereof."

The question is whether under subsection (1)(i) the incidents creating the community property in question was a settlement, trust or other disposition made by the husband by which he reserved for himself either of the interests set out in sub-paragraph (i) or (ii) above. Subsection (1)(i)(iii) does not apply.

When, in 1948, the husband and wife acquired a domicile in the State of California all property which fell within the definition of community property became community property subject to California law without any concurrence or act on their part and without the imputation to them of anything in the nature of an implied contractual relationship in terms of the expression used by Lord Shand in De Nichols v. Curlier [1900] A.C. 21, 37. This case dealt with French law

No. 17
Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

which is in a form different from California law. The creation of the estate by the California statute arose by the act of acquisition irrespective of the wish of the parties unless they agreed to the contrary. The statute did not imply any contract. In no sense does it appear that either the husband or wife made, which implies some express intentional and separate act on their part, any settlement or trust of these shares. They were acquired as a purchase or investment in the manner given in evidence, and, apart from the October 1961 agreement to which we will refer later, all dealings in their acquisition were ordinary acts of acquisition, unaccompanied by any other act or thing done by them in the way of creating a settlement or trust. The general law of their domicile defined and imprinted on the shares, the nature of the estate and interest which each took.

Moreoever, by the law of California, the wife took a present, existing and equal share: S. 5107. We are here concerned, not with the husband's interest in his half share because that is liable to duty, but to the wife's interest and whether any reservation,as above defined, was made by the husband in his own favour. Until a final division is made the husband remains a fiduciary in respect of his wife's interest: Vai v. Bank of America (supra) p. 252. It is true that the statute has given to the husband over his wife's half share, rights of disposal but, as we have shown earlier, this applies to disposals to third parties - he cannot himself acquire any title because so long as the property is in his hands, either converted or otherwise, it remains subject to the statutory title and so is still held in equal interests. The husband did not make, nor was he competent to make, any reservation to himself in respect of his wife's half interest. He can dispose of her half share as we have said but this results from statutory powers imprinted on all community property and not from anything in the nature of a trust or settlement made by him.

The learned judge held on the authority of Ochberg and Others v. Commissioner of Stamp Duties (1969) 49 S.R. (N.S.W.) 248 that a disposition of property under Section 5(1)(i) (i) and (iii) arises under the agreement of October 1961 "whereby one half of the shares passed to Mrs. Davis but an interest therein was reserved to the deceased for his life". Before dealing with the facts relevant to the effect (if any) of the October 1961 agreement, the decision in Ochberg's case requires consideration. It concerned the common law of the Province of Cape Colony, South Africa. A man domiciled in the Province and a woman about to contract a marriage were entitled by an ante-nuptial agreement to regulate their rights in property then held by each and thereafter to be acquired. In the absence of such agreement they were, and are understood, to enter into a tacit agreement that their property, including all property acquired during the subsistence of the marriage should be held in community property. Such property is vested in the two spouses jointly at all times during the existence of such community property and so remain after its dissolution by death of either.

No. 17

Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

The 'marital power' or marital authority of the husband includes the guardianship of the person and property of the wife and entitles him during their joint lives to the exclusive right of controlling, managing and administering all the property belonging to the joint estate including the power to alienate, pledge or mortgage all the property of the joint estate whether movable or immovable without his wife's consent, subject however to the wife's right to protect herself against prodigality by her husband by an application to the Court for a separatio bonorum.

The Court was concerned with bonds held by the deceased husband in New South Wales. The bonds were solely the after-acquired property of the husband. The Court held at p. 255:

> " It is a fair inference, and has been common ground throughout, that the bonds in question were after-acquired property of the husband. Hence, by a disposition of property made by the deceased (by virtue of the implied contract involved in his marriage) one-half of these bonds passed to his wife, but an interest in or benefit out of or connected therewith, was reserved to him for his life, and there was a reservation of, or contract for, a benefit to the deceased for the term of his life."

The Court referred to the wife's half but this, with respect, is not except in equity strictly correct in dealing with a joint tenant. The conclusion was that the evidence showed that "the wife's half of the bonds were dutiable under a provision in terms similar to the Fiji subsection (1)(i)".

Counsel for appellant strenuously argued that Ochberg's case was overruled by Silk's case which was not discussed in any of the judgments. We find it unnecessary to do more than show that the facts were not comparable and further that the October 1961 agreement did not supersede or alter the statutory provisions which already applied by virtue of California law. The learned judge in the Court below held that, since the Fiji shares were community property, as they were in Ochberg's case, that case applied. But in our view the decision in Ochberg's case depended upon the finding that the husband had, by a trust agreement under the statute, settled a one-half interest in his shares on his wife. That situation is not the fact in the instant case.

It seems to be accepted on the evidence that the wife, in 1958, obtained from her grandmother's estate assets consisting in part of shares in the Seattle First National Bank amounting to $80,000. The total investment in Mocambo shares was $28,153.92. On September 5, 1961 a cheque for $25,000 drawn on a joint bank account by the husband was paid as the first payment for stock or shares in the Mocambo project. The wife claimed that this cheque consisted of $20,000 borrowed by both from Pan American Credit Union on two promissory notes each for $10,000 - one being signed by each. The wife pledged or mortgaged in favour of the Pan American

Credit Union part of her inheritance consisting of 591 shares in Seattle First National Bank to obtain the loan of $20,000. This sum of $20,000 was paid into a joint bank account. The wife provided a further $5,000 from her separate property. It appears that since the husband, as the learned judge held, had no separate assets and the wife had pledged 591 of her Seattle Bank shares, that again it was her separate property which at least facilitated the loan. These facts distinguish Ochberg's case where the sole source of the bonds arose from funds supplied by the husband.

Further it was contended by counsel for appellant that the October 1961 agreement did not alter or affect rights inter se but merely affirmed the title and interest which was impressed on the Mocambo shares by reason of California law. The October 1961 agreement was entered into shortly after the first cheque was paid in respect of the acquisition of the shares. It is a fair inference that it was entered into to define what was separate property of each and what was community property in view of that venture. Clause 1 dealt with existing property. Clause 2 dealt with inherited property. Clause 3 provided as follows:

> "3. That all property that may hereafter be acquired by said husband and wife, during the continuance of their marriage, EXCEPT that acquired by either of them by gift, bequest, devise or descent shall become and remain the community property of said husband and wife without regard to the form and record of ownership under which the same is acquired or held."

Clause 4 deals with insurance policies, and Clause 5 provides:

> "5. That this Agreement shall remain in full force and effect until modified or revoked, in writing, by said husband and wife, and shall be binding upon them, their respective heirs, executors, administrators and assigns."

It has not been shown that the husband has brought into account under the October 1961 agreement any property which was his separate property. No new funds have been settled by the husband for the purchase of the shares. The wife has provided at least one-half from her own property. There is no provision of funds by the husband comparable to the bonds contributed solely by the husband in Ochberg's case which resulted in the wife obtaining a half share therein. If the October 1961 agreement did not settle any new property of the husband resulting in the wife taking an interest therein, then the document does no more than to declare the same rights and interests as those imposed by statute. So far as any free estate of the husband is concerned, he brought no new property into the community property under the October 1961 agreement which was used to acquire the said shares. The learned judge accepted the evidence of the wife when she stated categorically that her husband had no separate

No. 17
Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

property. He was then referring (inter alia) to the October 1961 agreement. It was the wife who provided additional funds which were used in conjunction with community property for the purpose of acquiring the said shares.

The effect of such a deed is stated by Rich A.C.J. in Wedge v. Acting Comptroller of Stamp Duties (Vict.) 64 C.L.R. 75, 79 (a case on stamp duty) :

> " The question must be determined by construing the particular instrument, which, of course, includes the transaction set forth in that instrument (Collector of Imposts (Vict.) v. Peers), and examining its legal effect. The subject instrument contains no disposition or agreement to dispose of property belonging to the appellant but is merely an acknowledgment or recognition that he is not the absolute owner of the property comprised in the instrument and preserves other trusts or rights affecting it. No new beneficial interest is created in favour of the appellant or anybody else, and the property remains subject to the same trusts as it did before the instrument was executed."

Williams J. said at p. 82:

> " As a result of the transfer he only acquired the same beneficial interest in the property as he already had under the will. He could only create new trusts of his own property. As he did not acquire an absolute interest in any of the property which was transferred to him he could not and did not purport to create new trusts affecting such an interest corresponding to the trusts of the will. His undertaking was a mere recognition of existing trusts. The case is therefore distinguishable from that of Davidson v. Chirnside 7 C.L.R. 324."

Reference may also be made to Commissioner of Stamp Duties (Q) v. Hopkins 71 C.L.R. 351, 367 and Inland Revenue v. Oliver [1909] A.C. 427, 432. In our view these cases apply. The October 1961 agreement did not alter the effect of the previous provisions of California law respecting the funds used in acquiring the said shares.

For these reasons we are of opinion that the husband did not, in respect of the acquisition of such shares, make any settlement or trust (different from that already existing by law) of any property within the provisions of subsection 5(1)(i). Whether or not Ochberg's case is overruled by Silk's case is not a matter we need to entertain nor do we need to decide the correctness of that case further in relation to the California statutory provisions. The said shares do not, for the reasons given, come within the provisions of subsection (1)(i).

The appeal also involves a challenge to the learned judge's findings of fact. The basic finding was that the shares both in Mocambo Investments and in Yanuca Island were community property and, in view of our other findings on the appeal, all that is involved in this aspect, is that a finding that part of the shares were the wife's separate

No. 17

Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

property would affect the quantum of shares remaining liable for duty in the estate of the deceased. The learned judge found they were all community property. The notice of appeal includes the following grounds:-

> "9. That the judge should have held that Mrs. Davis had a substantial separate property interest in the shares and that such interest was not dutiable on the death of her husband.
>
> 10. That the judge should have held on the evidence of California law that loans raised by the pledging of separate property are themselves separate property, and that assets purchased with separate property loan funds are also separate property.
>
> 11. That the judge was in error in finding that the deceased had saved more than $40,000 from his salary between 1961 and 1971 and that such savings had been used to repay two loans each of $20,000 borrowed from the Pan American Credit Union.
>
> 12. That the judge was in error in rejecting Mrs. Davis' evidence that her husband had little opportunity for saving.
>
> 13. That the judge was in error in concluding that a substantial number of relevant documents showing the financial dealings between Mr. and Mrs. Davis had not been produced to the Court, and that the documents which were produced were the result of a process of selection by Mrs. Davis and/or Mr. Suhrke."

This raises the question of the position of this Court as a Court of Appeal in relation to purely factual matters. It is not limited in such appeals as the present to the resolution of questions of law, but there are limitations to be drawn from decided cases in its approach to questions of fact. The position regarding proof of California law as a matter of fact may be a special one, but that does not apply to this aspect of the appeal which involves a question of the intention of the parties.

The limitations we have mentioned above are implicit in the following passage from the judgment of the Vice President of this Court in Mahadeo Singh v. Ram Chandar Singh (1970) 16 F.L.R. 155 at 159-160:

> " Much has been written as to the position of an appeal court which is invited to reverse on a question of fact the judgment of a judge, sitting without a jury, who has had the advantage of seeing and hearing witnesses. Where he has based his opinion in whole or in part on their demeanour it is only in the rarest of cases that an appeal

No. 17

Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

court will do so: Yuill v. Yuill [1945] P. 15. When, however, the question at issue is the proper inference to be drawn from facts which are not in doubt the appellate court is in as good a position to decide as the judge at the trial: Powell v. Streatham Manor Nursing Home [1935] A.C. 243; Benmax v. Austin Motor Co. Ltd. [1955] A.C. 370. The first rule stated by Lord Thankerton in Watt (or Thomas) v. Thomas [1947] A.C. 484 at 487-8 is 'Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.'

The present case is a composite one. The evidence was partly oral and partly documentary. The trial judge did not appear to emphasize the demeanour of the appellant but rather disbelieved his evidence on account of its confused nature. He finally used the word 'fabricated' in regard to the allegations which the appellant made. There was, on the other hand, documentary evidence which the trial judge, for no stated reason, treated with scant respect. The weight to be given to this evidence, unlike the oral evidence of the appellant, is a matter of inference, and if this Court found it to be of substantial cogency, it would, I think, be justified in giving effect to its own conviction, upon the basis that the trial judge had misdirected himself as to its weight."

This case likewise is a composite one and, while much information is contained in affidavits and can be derived from exhibits, they are to be looked at in the light of the oral evidence also given. The learned trial judge's views of this are not to be disregarded without cogent reason arising from the documentary evidence.

With all due respect to Mr. Handley's wide ranging argument there is only one aspect of the matter in which it appears the learned judge may have erred in his appreciation of the documentary evidence; what has to be considered is whether this error is sufficiently material to affect the outcome. It relates only to the acquisition of the Mocambo shares which were acquired in 1961 in the joint names of husband and wife.

The learned judge's findings were as follows:

1. The shares were purchased with a cheque dated the 5th September, 1961 for US$25,000, signed by the husband, though the account could be drawn on by either husband or wife.

2. $20,000 of that amount was a loan from Pan American Credit Union under two promissory notes of $10,000 "each signed by the husband and wife."

No. 17
Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

(The signed promissory notes dated the 25th August, 1961, appear each to have been signed by one of the parties - the renewal in May 1966, by both).

3. The wife claimed to have deposited 591 Seattle Bank shares as security for the $20,000. (This is confirmed by documentary evidence). The judge refers also to the wife's claim to have sold 150 bank shares for $10,050; the proceeds of 100 thereof were paid to the bank to meet the balance of the $25,000 cheque.

4. The wife held a considerable amount of stock in the Seattle Bank, as her separate property.

5. The judge refers to the wife's affidavit (the first) in para. 7 of which (as amended) she says "We borrowed the $20,000 so that my husband and I could obtain shares" in Mocambo.

6. There was no doubt that the cheque was used to purchase Mocambo stock. The relevant bank statement however was not produced.

7. It appears that the $20,000 loan was renewed twice; once on 4.5.66 and again on 13.7.71 or thereabouts "in which stock was again the security". (As will be seen the stock did not enter into the 1971 loan).

Then comes a portion of the judgment which, in the submission of Mr. Handley, shows a misunderstanding of the situation. It reads :

> " It appears from Ex. P.1 (N1, N2 & N3) that the $20,000 Pan Am loan was renewed twice; once on 4.5.66 and again on 13.7.71 or thereabouts in which stock was again the security. Ex. P1 (N4) and (N5), are two portions of the Pan Am loan repayment account relating to the $20,000 loan. They are isolated accounts in the name of the deceased although two other similar loan repayment accounts each marked Ex. P.N6 show $10,000 under the deceased's name and $10,000 under Mrs. Davis' name. Exs. P1 (N4, N5 and N6) show repayments of the $20,000 loans from April 1971 to March 1972. They indicate that the second $20,000 loan and the third loan including 'Mrs. Davis' portion' was being repaid out of the deceased's monthly salary from Pan Am. Why were the loan statements for the period 1961 to 1972 not tendered? Was it because they would show that the first loan was also repaid by monthly deductions from the deceased's Pan Am salary? Mrs. Davis said in cross-examination that the Pan Am loan had been originally made with the San Francisco branch but the loan was transferred to the Seattle branch which gave better terms and Seattle did not require her stock as collateral. Ex.P. 1 N6 are two Pan Am records showing repayments of the loan to the San Francisco branch.

No. 17
Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

Even the interest on those loans came from the deceased's salary. The conclusion I come to is that the first $20,000 loan and the second loan for the same amount and the interest thereon were repaid by the deceased from his monthly salary and as is indicated later he was repaying the third $20,000 loan at the time of his death."

Mr. Handley's submission, and it appears to be borne out by reference to the documents, is that the learned judge drew wrong inferences from or attached a wrong meaning to the term "renewed". Having said they were renewed twice he appears to have taken that as meaning they had been actually been paid off in cash during the currency thereof and a new cash loan made in each case. If that had actually happened (and it would be an unnatural meaning to attach to the word "renewed") there was nothing to show what had happened to the $40,000 which must have been received in addition to the original loan which went to pay for the shares.

Mr. Handley's reference to the documents can be summarised as follows. There were first the two promissory notes each dated 25th August 1961 for $10,000 each, for which "stock" was the collateral security, one signed by the husband and one the wife repayable on the 25th February, 1962. Each of the promissory notes had "Ref. 4/19/63" written across item which it was submitted meant "Refinanced 19th April 1963". On the 4th May, 1966, two replacement promissory notes (N1 and N2 of Ex.P1) were signed by husband and wife jointly: one was for $10,000 and the other for $9,998.68; both again showed "stock" as collateral security. The submission was that these were in renewal of the loan of the 25th August, 1961; they provided for repayments of $79.04 of principal and interest payable monthly by 240 instalments - a 20 year term.

Statements issued by the Pan American Credit Union, San Francisco, for the quarter ending June 1971 contained a reference to the loan number and showed the balance of the loan outstanding. One statement addressed to the husband (deceased) showed the balance owing as $8651.57 and the loan account No. 4-23242. The other statement addressed to the wife showed the loan balance of $8,570.03 and the loan account as No. 4-23241. The submission was that it could be calculated that the pay roll deductions of $79.04 had been in operation since the replacement promissory notes were signed in May 1966. It appears that those deductions were made from the husband's salary alone. It is to be noted that the numbers appearing on the promissory notes dated May 1966 accord with the loan numbers shown on the Pan American Credit Union notices for the quarter ending June 1971.

The submission was that the inference was clear that the original promissory notes, which contained no provision for payment by instalments had remained unreduced until May 1966, when the instalment system of payment started, as shown on the "replacement" promissory notes.

On the 26th July, 1971 the balance of the loan owing by the husband and wife to the San Francisco Branch of the above Credit Union was repaid; the husband arranged a loan of $20,000 from the Seattle Branch of the Credit

No. 17

Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

Union for the purpose of repaying the loan as aforesaid. (A receipt voucher and letter confirms this). The bank stock security provided for the earlier loan was not required by the Seattle Branch which made the advance to the husband solely.

We accept the inference that the original loan of $20,000 was not paid off in full until this time, when it was replaced by the loan from the Seattle Branch of the said Credit Union; there was some $18,300 still owing to the Credit Union by the deceased at his death.

The significance of this matter, it was submitted, lies in the fact that the learned judge was under a misapprehension as to the amount paid by the husband between 1961 and 1971 to the said Union, and therefore was wrong to disbelieve the wife when she said the husband had little opportunity for saving because of his domestic commitments.

We continue now with the learned judge's reasons for not accepting the Mocambo shares as the wife's separate property.

8. There was no evidence that the additional $5000 was paid into the account in 1961 from which the cheque was drawn.

9. (The criticism of the wife's statement concerning his opportunity for saving. We have referred to this above).

10. The wife's statement in evidence that the marriage agreement of 1961 was entered into because she and the husband were going to invest in Fiji.

11. The wife was a business woman and if she had been purchasing the Mocambo shares for herself she would have done so in her name alone as had been done in Tropical Pools Ltd.

12. She never sold the 591 shares she used as security, and when that $20,000 loan was renewed for the third time her shares were not required as security. (As has been seen the final loan was in the husband's name alone).

The learned judge also made a finding that Mocambo shares purchased in 1965 with a cheque for $3,153.92 were also community property. This is a comparatively minor matter and the finding should, we consider, logically stand or fall with the finding on the major Mocambo purchase in 1961.

The question for decision is whether the finding in relation to the Mocambo shares is vitiated by the apparent error in the learned judge's view of the result of the loan "renewals". In our judgment it should not be, and we think that the learned judge would have come to the same conclusion even on a more accurate appreciation of what happened in relation to the "renewals".

Our reasons are two fold. First, the general evidence of the intention of the husband and wife is strong. It is

No. 17
Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

expressed first in the 1961 marriage agreement where it was agreed that (with some exceptions which do not apply) all property thereafter acquired by the husband and wife should be and remain community property. No point has been taken that the $25,000 cheque was dated shortly before the marriage agreement. The wife's own evidence covers the point, and as the learned judge indicated, was couched in terms of appertaining to a husband and wife investment. That the investment was made in the joint names - as the learned judge pointed out; if intended to be her separate property why not use the wife's name only? Further for what it is worth, the executors showed the whole of the Fiji shares in estate accounts filed in California, as community property.

Secondly the facts established concerning the use of the bank shares and the handling of the loans from the Credit Union are more consistent with the concept of a community property dealing. The wife was not, in relation to the $20,000 loans, deprived of her shares. She got them back, and in that sense the Mocambo shares were never a replacement of the bank shares. The latter can more easily be seen as having been used as a convenient method of borrowing money to acquire the Mocambo shares as a community project. This receives support from the fact that both parties (at first) were liable for repayment, that the only actual repayments, comparatively small, were made by the husband and the interest was paid by him. There were considerable gaps in the evidence relating to the loan statements from the Credit Union from 1961 to 1971 as the learned judge pointed out. Furthermore, in 1971 the husband took over the whole transaction, releasing the wife and her bank shares from liability. Why should this be if everything was her separate property. In this sense the husband did pay off the loan, though in a way which involved, in a large measure, a paper transaction, and not the large payments which the learned judge envisaged.

In our opinion these facts are virtually unchallenged and, even if the wife had been accepted by the learned judge as a witness of truth when she said that the husband had little opportunity for saving, the facts remain more consistent with a community property transaction than with a separate estate purchased by the wife.

We therefore reject the appeal on this aspect of the factual issues, and as we have intimated, we see no basis for reviewing the learned judge's finding concerning the Yanuca shares.

The finding of the Supreme Court that all the shares were community property at the time of the death of the deceased will therefore stand.

Respondent in the grounds of the cross-appeal sought the exaction of a penalty under Section 31(2) of the Estate and Gift Duties Act. Such a claim was not expressly made in the original proceedings and the learned judge does not refer to it. In the circumstances we see no right in the respondent to seek the exaction of such a penalty on appeal.

The appeal is allowed and the order made in the Court below is set aside. The case is remitted to the Supreme Court for the assessment of duty on the basis that one-half only of the

No. 17

Judgment of Fiji Court of Appeal (Gould VP, Henry JA, Spring JA) dated 3rd October 1980

community property as determined above is liable to duty and for such further or other orders as seem just. Respondent will pay the costs of appeal to be fixed by the Chief Registrar.

Case remitted accordingly.

Sgd. V.P. Gould ....
VICE PRESIDENT

Sgd. J.A. Henry ....
JUDGE OF APPEAL

Sgd. J.A. Spring ....
JUDGE OF APPEAL

NO. 18

SEALED ORDER OF THE FIJI COURT OF APPEAL, DATED 3RD OCTOBER 1980

IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION

Civil Appeal No. 60 of 1979

BETWEEN: FIJI RESORTS LIMITED Appellant

AND : THE COMMISSIONER OF ESTATE AND GIFT DUTIES

Respondent

FRIDAY THE 3RD OCTOBER 1980

No. 18

Sealed Order of the Fiji Court of Appeal, dated 3rd October 1980

UPON MOTION by way of Appeal from the judgment of the Honourable Mr. Justice Williams given in the Supreme Court Lautoka on 26th October 1979, made unto this

No.18
Sealed Order of the Fiji Court of Appeal, dated 3rd October 1980

Court by Counsel for the Appellant (the Defendant in the Supreme Court) and UPON HEARING Mr. K.R. Handley QC with Mr. G.M.G. Johnson of Counsel for the Appellant and Mr. M.J. Scott of Counsel for the Respondent (the Plaintiff in the Supreme Court) and UPON READING the aforesaid judgment and after nature deliberation thereon IT IS THIS DAY ORDERED that this Appeal be allowed, and that the orders made in the Court below be set aside. IT IS FURTHER ORDERED: (a) That this action be remitted to the Court below for assessment [illegible] upon the basis that one-half only of property the subject of this Appeal is liable to duty, and for the making of such further or other orders as seem just. (b) That the Respondent do pay to the Appellant the costs of this Appeal, to be fixed by the Chief Registrar.

FIJI COURT OF APPEAL

BY ORDER
Sgd K.P. Sharma
REGISTRAR

NO. 19

ORDER OF THE FIJI COURT OF APPEAL GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL, DATED 4TH MAY 1981

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. [illegible] of 19[illegible]

Between:

THE COMMISSIONER OF ESTATE AND GIFT DUTIES — Applicant (Original Respondent)

- and -

FIJI RESORTS LIMITED — Respondent (Original Plaintiff)

Mr. M.J. Scott for the Applicant
Mr. P.I. Knight for the Respondent

No. 19
Order of the Fiji Court of Appeal granting final leave to appeal to Her Majesty in Council, dated 4th May 1981

ORDER

Final leave to appeal to Her Majesty in Council is granted, on condition that all necessary procedural steps be taken with reasonable diligence.

Costs of the present application to be costs in the cause.

Sgd.
Judge of Appeal

Suva,
4th May, 1981

NO. 20

SUMMONS UNDER SECTION 8(1) OF THE FIJI (PROCEDURE IN APPEALS TO PRIVY COUNCIL) ORDER, TAKEN OUT BY THE APPELLANT, DATED 11TH SEPTEMBER 1981

IN THE FIJI COURT OF APPEAL

CIVIL APPEAL NO. 60 OF 1979

BETWEEN: FIJI RESORTS LIMITED — APPELLANT

AND : THE COMMISSIONER OF ESTATE AND GIFT DUTIES — RESPONDENT

SUMMONS FOR DECISION BY THE COURT OF APPEAL OF FIJI OF A DISPUTED QUESTION ARISING IN CONNECTION WITH THE PREPARATION OF THE RECORD OF PROCEEDINGS BEFORE THE COURT OF APPEAL OF FIJI FOR THE PURPOSES OF AN APPEAL BY THE RESPONDENT TO HER MAJESTY IN COUNCIL (THE FIJI (PROCEDURE IN APPEALS TO PRIVY COUNCIL) ORDER 1970, LEGAL NOTICE 111 OF 1970, SECTION 8(1))

TO: FIJI RESORTS LIMITED,

AND TO ITS SOLICITORS,

MESSRS CROMPTONS,
PROUDS BUILDING,
THE TRIANGLE,
SUVA

AND TO THE REGISTRAR,
FIJI COURT OF APPEAL

No. 20

Summons under Section 8(1) of the Fiji (Procedure in Appeals to Privy Council) Order, taken out by the Appellant, dated 11th September 1981

Let all parties attend a Judge of the Court of Appeal of Fiji in Chambers at Government Buildings, Suva, on Wednesday the 23rd day of September 1981 at 9.00 o'clock in the fore noon or so soon thereafter as Counsel can be heard on the hearing of an application by the Respondent the Commissioner of Estate and Gift Duties FOR AN ORDER under section 8(1) of the Fiji (Procedure in appeals to Privy Council) Order 1970 that, as Fiji Resorts Limited, is not now at liberty to challenge before Her Majesty in Council the correctness of the Order made by the Court of Appeal of Fiji upon Thursday 3rd August 1978 in Civil Appeal No. 60 of 1977 (Fiji Resorts Limited v. Commissioner of Estate and Gift Duties), documents pertaining to such appeal do not properly form part of the record of the Court of Appeal of Fiji for the purposes of the pending appeal by the Commissioner of Estate and Gift Duties to Her Majesty in Council against the decision herein of the Court of Appeal of Fiji given upon 31st October 1980.

AND FOR AN ORDER That costs of this application be costs in the cause.

Dated the 11th day of September 1981.

PER: Sgd. M.J. Scott ....
SOLICITOR FOR THE COMMISSIONER OF
ESTATE AND GIFT DUTIES

NO. 21

AFFIDAVIT IN SUPPORT OF NO. 20
DATED 11TH SEPTEMBER 1981

IN THE FIJI COURT OF APPEAL

CIVIL APPEAL NO. 60 OF 1979

BETWEEN : FIJI RESORTS LIMITED APPELLANT

AND : THE COMMISSIONER OF ESTATE AND GIFT DUTIES RESPONDENT

AFFIDAVIT OF MICHAEL JOHN SCOTT IN SUPPORT OF SUMMONS UNDER SECTION 8(1), THE FIJI (PROCEDURE IN APPEALS TO PRIVY COUNCIL) ORDER 1970

I, MICHAEL JOHN SCOTT, PRINCIPAL LEGAL OFFICER, INLAND REVENUE DEPARTMENT, make Oath and say:

No. 21
Affidavit in support of No. 20 dated 11th September 1981

1. That I am authorised by the Commissioner of Estate and Gift Duties to make this Affidavit.

2. That I have the conduct of proceedings herein on behalf of the Commissioner of Estate and Gift Duties. I also had the conduct of proceedings on behalf of the Commissioner of Estate and Gift Duties of (A) Civil Action 205 of 1976 (Supreme Court, Lautoka), Commissioner of Estate and Gift Duties v. Fiji Resorts Limited; (b) Fiji Court of Appeal, Civil Appeal 60 of 1977, Fiji Resorts Limited v. Commissioner of Estate and Gift Duties and of (c) Fiji Court of Appeal, Civil Appeal 60 of 1979, Fiji Resorts Limited v. Commissioner of Estate and Gift Duties. A true copy of the originating notice of motion in civil action 205 of 1976 is annexed marked 'MJS A'.

3. Upon 29th July 1977 I caused to be sent to Messrs Cromptons, Solicitors, a letter, a true copy of which is annexed marked 'MJS B'. Messrs Cromptons replied by letter of 12th August 1977, true copy annexed marked 'MJS C'.

No.21
Affidavit in support of No. 20 dated 11th September 1981

4. Civil Action 205 of 1976 was set down for hearing upon 17th October 1977 in the Supreme Court, Lautoka before Mr. Justice Stuart. Upon such date I attended for the Plaintiff, Mr. P.I. Knight of Messrs Cromptons for Fiji Resorts Limited, I asked the Court that the proceeding be split into two parts, as suggested by in my letter 'MJS B' ante. I told the Court: "All that I am now asking for is an order on the first part of the case. If that is done the duty can then be assessed and if there is a dispute the matter can be again referred to the Court. Californian Law would come into the matter only on the second part." Mr. Knight responded: "I think that is correct." Mr. Justice Stuart stated: "I will, then, deal at this stage only with the first point."

5. Upon 9th November 1977 the Supreme Court Lautoka made an Order in Civil Action 205 of 1976. A true copy of said sealed order is annexed marked 'MJS D'.

6. Fiji Resorts Limited upon 16th December 1977 supplied a statement as required by section 28(1) of the Estate and Gift Duties Act, as required by the Order of the Supreme Court 'MJS D' ante. Said statement was accompanied by a letter, true copy annexed marked 'MJS E'. Subsequently Fiji Resorts Limited filed a Notice of Appeal to the Fiji Court of Appeal against the aforesaid judgment of Mr. Justice Stuart, a true copy of which is annexed, marked 'MJS F'. Fiji Resorts Limited was subsequently assessed. Upon 3rd May 1978 I received a letter from Messrs Cromptons, true copy annexed marked 'MJS G'. I replied by letter of 9th May 1978, true copy annexed marked 'MJS H'. Messrs Cromptons did not subsequently to 'MJS H' persist in seeking a case stated. I subsequently wrote another letter, true copy annexed marked 'MJS I', of 31st May 1978.

The aforesaid Order of Mr. Justice Stuart was affirmed by the Fiji Court of Appeal upon 3rd August 1978. A true copy of the sealed order of the Fiji Court of Appeal is annexed marked 'MJS J'. Fiji Resorts Limited did not within twenty-one days of the date of the said decision of the Fiji Court of Appeal, apply for leave to appeal to Her Majesty in Council against the said decision, as required by section 3 of the Fiji (Procedure in Appeals to Privy Council) Order. Nor has Fiji Resorts Limited made any application to Her Majesty in Council for leave to Appeal out of time against such decision. I subsequently wrote a letter 'MJS K' of 10th August 1978. Fiji Resorts wrote vis a vis the 'second part' of Civil Action 205 of 1976 upon 23rd February 1979 (true copy annexed 'MJS L').

7. Fiji Resorts Limited upon 27th, 28th, 29th, 30th and 31st August 1979, and 3rd, 4th and 5th September 1979, endeavoured, as required by the Order of the Supreme Court 'MJS D' ante as affirmed by the Order of the Fiji Court of Appeal 'MJS J' ante, to show cause why it should not pay the duty assessed by the Commissioner of Estate and Gift Duties.

No. 21
Affidavit in support of No. 20 dated 11th September 1981

Upon 26th October 1979 the Supreme Court Lautoka made an order against Fiji Resorts Limited, a true copy of which is annexed marked 'MJS M'. Fiji Resorts Limited appealed (True Copy notice of Appeal 'MJS N').. Upon 3rd October 1980 the Court of Appeal allowed its Appeal (True Copy order annexed 'MJS O').

8. Fiji Resorts Limited has expressed to the Commissioner of Estate and Gift Duties its wish to challenge the correctness of the decision of the Supreme Court given upon 9th November 1977 (MJS D ante) affirmed by the Fiji Court of Appeal upon 31st August 1978 (MJS E ante) not withstanding its failure to apply for leave to appeal from the latter decision within the time stipulated by Section 3 of the Fiji (Procedure in Appeal to Privy Council) order and seeks inclusion in the record to be compiled for purposes of the Commissioner of Estate and Gift Duties' appeal herein to Her Majesty in Council of documentation pertaining to such decision, as shown by its letter of 8th July 1981, copy annexed marked 'MJS P'. The Commissioner of Estate and Gift Duties has replied by letter of 9th day of September 1981 copy annexed marked 'MJS Q'.

SWORN by the said Michael John Scott at Suva on the 11th day of September 1981) Sgd. M.J. Scott

Before me: Sgd.
A Commissioner for Oaths

MJS A

APPLICATION AMENDED THE 5TH DAY OF SEPTEMBER 1977, PURSUANT TO LEAVE GRANTED BY THE HONOURABLE MR. JUSTICE STUART UPON 16TH AUGUST 1977

IN THE SUPREME COURT OF FIJI, LAUTOKA

WESTERN DIVISION

No 205 of 1976

BETWEEN: THE COMMISSIONER OF ESTATE AND GIFT DUTIES — Plaintiff

A N D : FIJI RESORTS LIMITED a limited liability company incorporated in Fiji upon 25th June 1971 — Defendant

No. 21
Affidavit in support of No.20 dated 11th September 1981

APPLICATION FOR ORDER FOR PAYMENT OF ESTATE DUTY AND DELIVERY OF STATEMENT (SECTION 31, ESTATE AND GIFT DUTIES ORDINANCE, CHAPTER 178 OF THE LAWS OF FIJI)

LET all parties attend a Judge in Chambers at the Supreme Court Western Division Lautoka on the 15th day of October 1976 at 9.30 o'clock in the fore noon on the hearing of an application by the Commissioner of Estate and Gift Duties:-

FOR AN ORDER under Section 31 of the Estate and Gift Duties Ordinance Chapter 178 that Fiji Resorts Limited do

(1) DELIVER TO THE COMMISSIONER OF ESTATE AND GIFT DUTIES WITHIN THIRTY DAYS OF THE SAME BEING ORDERED the Administrator's statement required by subsection (1) of section 28 of the Estate and Gift Duties Ordinance in respect of the estate of one Alan Emmett Davis, deceased, (hereinafter referred to as "the deceased") who died at Lautoka, Fiji on 28th February 1972, being at that time domiciled in California.

(2) PAY TO THE COMMISSIONER OF ESTATE AND GIFT DUTIES such duty payable as provided for by the Estate and Gift Duties Ordinance together with interest thereon, namely the principal sum of $45,935.01 (forty five thousand nine hundred and thirty five dollars and one cent) together with interest thereon payable in accordance with section 21 of the Estate and Gift Duties Ordinance until payment or Judgment herein, as would have been payable had Fiji Resorts Limited obtained administration of the estate of the deceased prior to registering the transfers of certain shares forming part of the said estate, particulars of the said shares and the said transfers being as follows:

(a) 187,942 (one hundred and eighty seven thousand nine hundred and forty two) shares in Fiji Resorts Limited sold to Qantas Airways Limited on the 26th September, 1973 (of the said shares a quantity totalling 131,661 (One hundred and thirty one thousand six hundred and sixty one) were formerly, and at the date of death of the deceased, two dollar stock units in Yanuca Island Limited, numbering 25,180 (twenty five thousand one hundred and eighty) of a value of $131,661.18 (one hundred and thirty one thousand six hundred and sixty one dollars and eighteen cents).

(b) 95,123 (ninety five thousand one hundred and twenty three) shares in Fiji Resorts Limited sold to Qantas Airways Limited on the 26th September, 1973 and a further 1,500 (one thousand five hundred) Fiji Resorts Limited shares sold to McClintock Metal Fabricators Inc. on the 18th April, 1974 (the said shares were formerly, and at the date of death of the deceased, part of a quantity of one dollar stock units in Fiji Mocambo Holdings Limited

No. 21

Affidavit in support of No. 20 dated 11th September 1981

numbering 37,354 (thirty seven thousand three hundred and fifty four) and of a value of $101,404.90 (one hundred and one thousand four hundred and four dollars and ninety cents).

AND FOR AN ORDER that the defendant do pay to the plaintiff the costs of this application.

AND FURTHER TAKE NOTICE that the grounds of this application are as follows, namely that Fiji Resorts Limited dealt with part of the estate of the deceased, namely the above described shares, without first obtaining administration of the said estate, as shown by the affidavits of Ross Thomas Holmes and Nanu Bhai s/o Ranchord Bhai Patel filed herewith.

AND TAKE FURTHER NOTICE that at the hearing of this application the plaintiff will, inter alia, seek in support of his claim to refer to and rely upon relevant provisions of the Californian Civil Code pertaining to marital relations.

Dated the 5th day of September 1977.

Sgd. M.J. Scott
....
Solicitor Acting for the Commissioner of Estate and Gift Duties, whose address for service is :

Crown Law Office,
Government Buildings, Suva.

This is the document marked 'MJS A' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11th day of September 1981.

Sgd.

A Commissioner of Oaths

MJS B

No. 21
Affidavit in support of No. 20 dated 11th September 1981

211691

29th July 1977

Messrs Cromptons
G.P.O. Box 300
SUVA.

Dear Sirs,

RE: COMMISSIONER OF ESTATE & GIFT DUTIES v. FIJI RESORTS LIMITED (SUPREME COURT, LAUTOKA, CIVIL ACTION 205/76)

I refer again to the above action, to the matter of proof of foreign law, and to your letter of 12th July 1977 regarding the same.

I have now carefully considered the contents of your letter, and regret that I feel obliged to make the following comments in particular:

(1) Having perused my note of the order made by Mr. Justice Stuart on 15th October 1976 (not 15th August 1976 as stated in your letter) I am satisfied that the same bound both parties. The order was "that proof of relevant law in California be furnished by affidavit evidence." The order made no mention of any particular party furnishing evidence in this way, hence it was an order binding both. This further appears from the fact that my application was not for the Plaintiff to adduce evidence by Affidavit, but that all evidence on this particular point be adduced in this manner. The fact that the defendant was not specifically mentioned in the wording of the order is wholly irrelevant: neither was the Plaintiff. As to your statement that "It is clearly not open to one party to direct the other how he should conduct its case", the reply is simply that the defendant has already been instructed by the Court as to proof of Californian Law: my letter of 6th July 1977 sought merely to remind you of such instruction.

    On this point, the avenue open to the defendant, should it wish to call oral evidence of Californian Law, is clear, as the Learned Judge on 15th October 1976 gave "general liberty to apply": namely, to make specific application, on notice, to call such evidence. Take notice that such application would be opposed.

(2) As to possible adjournement of this case, please take notice that such would be opposed, the relevant date having been fixed by consent. Notwithstanding this, however, I feel that I ought to inform you as to the Crown's submission as to what form proceedings in the Supreme Court would take. I stress that what follows is merely the view of the Crown, which you would of course be entirely free to reject or accept as you see fit, and which would be entirely subject to the approval or disapproval of the Court.

In our view proceedings in the present case would be split into separate parts as follows:

No. 21

Affidavit in support of No. 20 dated 11th September 1981

(1) Upon the first date of hearing, the Court would consider whether it was proved or admitted that Fiji Resorts Limited had registered the transfer of shares forming part of the deceased's estate without first having obtained authority to do so;

(2) Should the Court be satisfied as to facts and matters set out in (1) above, the Court would order Fiji Resorts to deliver the equivalent of an Administrator's statement;

(3) After delivery of the statement referred to in (2), the Court at a later sitting would determine the amount of duty (if any) payable by Fiji Resorts.

The question of Californian Law as such could be dealt with either at stage (1) or stage (3) above.

It is submitted that the fact that proceedings under Section 31, of the Estate and Gift Duties Ordinance are 'split' is borne out by close study of the wording of that section.

I would be most grateful if you would promptly inform me as to whether you are in agreement with my understanding as to the appropriate procedure to be followed in the present case. Should you inform me that you are in agreement I would be able to request the Court on 16th August to deal merely with the 'initial questions' in this case referred to above, as to registration and lack of authority. The matter of Californian Law could then be left to be argued at a later date.

With regard to this case generally, I understand from a recent conversation with Mr. Knight that Fiji Resorts is not disputing that it registered the transfer of the relevant shares, and that it did so without first having obtained administration. As I understand it, issue is not being taken with the contents of the affidavit of the Deputy Attorney-General of California filed by the plaintiff. I have been informed that the only point being taken by the defendant is that relevant shares were community property. I would be most grateful if you would confirm this understanding.

Yours faithfully,

Sgd. M.J. Scott

for Commissioner of Inland Revenue

This is the document marked 'MJS B' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981

Sgd:......................
A Commissioner for Oaths

MJS C

No. 21

Affidavit in support of No. 20 dated 11th September 1981

MILES JOHNSON LL B
(Melb)
(Also admitted Victoria and the High Court of the Western Pacific)

PETER I. KNIGHT LL B
(Sheffield)
(also admitted England)

CROMPTONS
BARRISTERS & SOLICITORS
COMMISSIONERS FOR OATHS
NOTARIES PUBLIC

PROUDS BUILDING
THE TRIANGLE
SUVA, FIJI

Cable: Cromptons
Telephone 23-821
(5 lines)

Address all communications to
G.P.O. Box 300
Suva, Fiji

Our Ref: P74/PIK/mc
Your Ref:

12 August 1977

The Commissioner for Inland Revenue,
Private Bag,
SUVA.

Dear Sir,

re Commissioner of Estate & Gift Duties -v- Fiji Resorts Limited (Supreme Court, Lautoka, Civil Action 205/76)

Thank you for your letter of 29th July and 9th August. As earlier indicated to you we will be applying for the case to be adjourned on 16th August on the grounds contained in the summons and affidavits copies of which are enclosed.

As regards paragraph (1) of your letter of 29th July dealing with affidavit evidence your understanding of the situation is clearly different from ours and we can see no point in pursuing the issue any further in correspondence.

As regards the splitting of the proceedings into separate parts our initial feeling is that this is probably the correct approach.

With reference to the last paragraph of your letter of 29th July we do not dispute that Fiji Resorts registered transfers of the shares in question. However we do not accept that this amounts to a dealing as provided for in section 31 of the Ordinance, nor do we agree with your assessment of duty.

We agree with you that it would be of considerable assistance to the Court as well as the parties if a statement of facts could be agreed upon. We enclose two copies of a statement that we would propose submitting to the Court. Please let us have your views as soon as possible.

Yours faithfully,

CROMPTONS

Sgd.

Encs.

This is the document marked 'MJS C' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981.

Sgd.
A Commissioner for Oaths

No. 21
Affidavit in support of No. 20 dated 11th September 1981

MJS D

IN THE SUPREME COURT OF FIJI, LAUTOKA
WESTERN DIVISION

No 205 of 1976

BETWEEN: THE COMMISSIONER OF ESTATE AND GIFT DUTIES — PLAINTIFF

A N D : FIJI RESORTS LIMITED
a limited liability company incorporated in Fiji upon 25th June 1971. — DEFENDANT

BEFORE THE HONOURABLE MR. JUSTICE STUART IN CHAMBERS, THE 9TH DAY OF NOVEMBER 1977.

UPON HEARING Mr. M.J. Scott of Counsel for the Plaintiff, and Mr. P.I. Knight of Counsel for the Defendant, and UPON READING the application filed herein by the Plaintiff, and the Affidavits of Ross Thomas Holmes, G.A. Strader and Nanu Bhai s/o Ranchord Bhai Patel, sworn and filed herein.

IT IS HEREBY ORDERED THAT: The Defendant do deliver to the Commissioner of Estate and Gift Duties a statement as required by Section 28(1) of the Estate and Gift Duties Act, Cap 178 of the Laws of Fiji, such statement to be furnished within 21 days hereof, and show cause why the said Defendant should not pay the duty assessed by the said Commissioner.

IT IS FURTHER ORDERED that such statement do contain only details of property taken possession of and dealt with by the Defendant, and that the Defendant do pay to the Plaintiff the costs of this part of the proceedings brought against the said Defendant.

Dated this 22nd day of November 1977.

Sgd. M.C. Rai
....
DEPUTY REGISTRAR

This is the document marked 'MJS D' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981.

Sgd.
....
A Commissioner for Oaths

No. 21
Affidavit in support of No. 20 dated 11th September 1981

MJS E

MILES JOHNSON LL B (Melb)
(Also admitted Victoria and the High Court of the Western Pacific)

PETER I. KNIGHT LL B (Sheffield)
(Also admitted England)

CROMPTONS
BARRISTERS & SOLICITORS
COMMISSIONERS FOR OATHS
NOTARIES PUBLIC

PROUDS BUILDING
THE TRIANGLE
SUVA, FIJI

Cable: Cromptons
Telephone 23-821
(5 lines)

Address all communications to
G.P.O. Box 300
Suva, Fiji

Our Ref: P74
Your Ref:

16th December 1977

The Commissioner of Estate and Gift Duties
Suva

For the attention of Mr Scott

Dear Sir,

Estate of Alan Emmett Davis deceased

Further to the order of Mr Justice Stuart we now enclose the required statement prepared on behalf of Fiji Resorts Limited.

Kindly note that the statement is submitted without prejudice to the company's right to appeal against the said order of Mr Justice Stuart requiring the company to file such a statement.

Yours faithfully,

Cromptons

Sgd.

RECEIVED

19 DEC 1977

INLAND REVENUE

This is the document, marked 'MJS E' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981

Sgd...........................
A Commissioner for Oaths

MJS F

No. 21
Affidavit in support of No. 20 dated 11th September 1981

IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION

Civil Appeal No. 60 of 1977

On appeal from the Supreme Court of Fiji (Western Division) Civil Action No 205 of 1976

BETWEEN FIJI RESORTS LIMITED

Appellant
(Original Defendant)

AND THE COMMISSIONER OF ESTATE AND GIFT DUTIES

Respondent
(Original Plaintiff)

TAKE NOTICE that the Fiji Court of Appeal will be moved at the expiration of 14 days from the service upon you of this Notice of Appeal or so soon thereafter as Counsel can be heard by Counsel for the abovenamed Appellant for an order that the decision herein of the Honourable Mr Justice Stuart given at Lautoka on the 9th day of November 1977 whereby it was ordered that the Appellant deliver to the Respondent a statement as required by section 28(1) of the Estate and Gift Duties Ordinance Cap 178 be set aside and for an Order that the costs of this Appeal be paid by the Respondent to the Appellant and for such further or other order as to the Fiji Court of Appeal shall seem just

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

1. That the learned Judge erred in fact and in law in holding that by registering the transfer of the stock in question the Appellant took possession of and dealt with a part of the estate of Alan Emmett Davis deceased.

DATED the 21st day of December 1977

Cromptons

per Sgd.
Solicitors for the Appellant

This notice was taken out by Messrs Cromptons of Prouds Building, The Triangle, Suva, Solicitors for the Appellant whose address for service is at the Chambers of the said Solicitors.

This is the document marked 'MJS F' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981

Sgd.........................
A Commissioner for Oaths

MJS G

No. 21
Affidavit in support of No. 20 dated 11th September 1981

MILES JOHNSON LL B (Melb)
(Also admitted Victoria and the High Court of the Western Pacific)

PETER I. KNIGHT LL B (Sheffield)
(Also admitted England)

CROMPTONS
BARRISTERS & SOLICITORS
COMMISSIONERS FOR OATHS
NOTARIES PUBLIC

PROUDS BUILDING
THE TRIANGLE
SUVA, FIJI

Cable: Cromptons
Telephone 23-821
(5 lines)

Address all communications to

G.P.O. Box 300
Suva, Fiji

Our Ref: PK74
Your Ref:

2 May 1978

Commissioner of Estate
and Gift Duties
Inland Revenue
Private Bag
SUVA

Dear Sir

Fiji Resorts Limited
Estate of Alan E Davis

We refer to the Notice of Assessment of Estate Duty addressed to Messrs Cromptons dated 18 April 1978 for the sum of $53,303.59 together with interest at 10% from 28 February 1973.

On behalf of our clients, Fiji Resorts Limited, we dispute the assessment and in accordance with the provisions of the Estate and Gift Duties Ordinance require the Commissioner to state a case for the opinion of the Supreme Court.

Yours faithfully,

CROMPTONS

Sgd.

RECEIVED 3/5/78

Sgd. R.T. Holmes

This is the document marked 'MJS G' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981.

Sgd. ....
A Commissioner for Oaths

MJS H

No. 21
Affidavit in support of No. 20 dated 11th September 1981

211-691

9th May, 1978

Messrs Cromptons
G.P.O. Box 300
SUVA.

Dear Sirs,

FIJI RESORTS LIMITED
ESTATE OF ALAN E DAVIS

I refer to your letter of 2nd May 1978 regarding notice of assessment served upon your client, Fiji Resorts Limited, and to your client's "requirement" for the stating of a case to the Supreme Court. I regret, however, that I must decline to comply with the said "requirement", no appeal by case stated being open to your client, which is not an "administrator" of the Estate of Alan E. Davis within the definition of that term contained in section 2 of the Estate and Gift Duties Act. (The right to have a case stated is, by section 55(1) of the same Act, vested in the "administrator").

I would point out with respect that the procedure to be followed, in the event of the disputing by your client of the correctness of the relevant assessment, is that already established and agreed upon in regard to Action 205/76 brought against your client in the Supreme Court Lautoka. I refer to my letter of 29th July 1977 setting out the procedure to be followed in that action as follows:

"In our view proceedings in the present case would be split into separate parts as follows:

(1) Upon the first date of hearing, the Court would consider whether it was proved or admitted that Fiji Resorts Limited had registered the transfer of shares forming part of the deceased's estate without first having obtained authority to do so;

(2) Should the Court be satisfied as to facts and matters set out in (1) above, the Court would order Fiji Resorts to deliver the equivalent of an Administrator's statement;

(3) After delivery of the statement referred to in (2), the Court at a later sitting would determine the amount of duty (if any) payable by Fiji Resorts."

Your reply to that letter, by your letter of 12th August 1977, was as follows: "As regards the splitting of the proceedings into separate parts our initial feeling is that this is probably the correct approach". Further on this point, you will recall that at the hearing of the 'first part' of Action 205/76, on 17th October 1977, your Mr. Knight agreed that the said proceedings be 'split' as aforesaid. The said agreed approach to the same is therefore a matter of record.

The situation is now that your client has delivered the statement as required by section 28(1) of the Estate and Gift Duties Act, has been assessed, and must now show cause

No. 21
Affidavit in support of No. 20 dated 11th September 1981

why the same should not pay the duty assessed. Such 'showing of cause' would necessarily occur upon the hearing of the 'second part' of Action 205/76. Such hearing would occur upon application.

I would be grateful if you would now inform me as to what further steps you propose to take in regard to disputing of the relevant assessment.

I feel that I should also mention the matter of legal costs incurred to date. Two awards of costs have been made in favour of this Department:

(i) Costs of an adjournement at your client's request, awarded on 16th August 1977, estimated by this Department to lie in the sum of $102.50;

(ii) Costs of the hearing of the 'first part' of Civil Action 205/76, awarded 9th November 1977, which costs I am in course of calculating.

Please inform me promptly whether the first figure of costs set out above is agreed, and, if so, arrange for payment. As to the second figure of costs, I shall communicate with you shortly regarding the same.

I should also mention that I will be shortly making application to the Supreme Court to amend my claim in Civil Action 205/76 to show a claim for $81,907.59, the amount of the relevant recent assessment.

Yours faithfully,

Sgd. S. Singh

Commissioner of Estate and Gift Duties

This is the document marked 'MJS H' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981.

Sgd. ....
A Commissioner for Oaths

MJS I

No. 21
Affidavit in support of No. 20 dated 11th September 1981

211691

31 May 1978

Messrs Cromptons
G.P.O. Box 300
SUVA

Dear Sirs,

Re: FIJI RESORTS LIMITED: ESTATE OF ALAN E. DAVIS

I refer to my conversation of 25th May 1978 with your Mr. Knight regarding the above matter, and Commissioner of Estate and Gift Duties v Fiji Resorts Limited (Supreme Court, Lautoka, Civil Action 205/76). In the course of our conversation I referred to the fact that apparently Fiji Resorts Limited had filed an appeal to the Fiji Court of Appeal against the ruling of Mr. Justice Stuart in this case, and pointed out that I was raising the matter as a copy of the record of the Supreme Court had now been made available to Crown Law Office. I also however, pointed out that no Notice of Appeal to the Court of Appeal had ever been served in this matter, a fact confirmed by Mr. Knight as being the outcome of advice received. I then pointed out that, as no Notice of Appeal had been served, I contemplated proceedings to strike out the appeal (you will of course note that judgement was sealed on 22nd November 1977, and that, in accordance with Rule 16 of the Court of Appeal rules, time limited for filing and serving was six weeks from the said date). Mr. Knight advised me that he believed that it was not proposed to proceed with the appeal, but that he would have to take instructions on this point.

I then discussed with Mr. Knight the question of a demand for a case stated made by your firm by letter of 2nd May 1978. I had replied to this letter by my letter of 9th May 1978, pointing out that the case stated procedure could not be employed in this action, and that the matter of the correctness of the relevant assessment could only be resolved by proceedings upon the hearing of the 'second part' of Civil Action 205/76. Mr. Knight appeared to be in agreement with my suggestion that case stated procedure was not available.

Finally in the course of our discussion, Mr. Knight mentioned the matter of source of funds used to purchase shares the subject of Civil Action 205/76. He stated that he was still continuing enquiries to identify relevant sources, but was having some difficulty in accomplishing this.

He stated that any proof of source obtained would be made available to this office.

Further to the above, I would be grateful if you would promptly inform me whether or not you propose to proceed with Civil Appeal 60/77 against the judgement of the

No. 21
Affidavit in support of No. 20 dated 11th September 1981

Supreme Court in this matter. Failing the filing of Notice of Discontinuance within 14 days hereof, I would have no alternative but to take proceedings to strike out the appeal for non-service of Notice of Appeal.

Could you also please reply to my letter to you of 9th May 1978, regarding procedural aspects of this matter.

Yours faithfully,

Sgd. M.J. Scott
for Commissioner of Inland Revenue

This is the document marked 'MJS I' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981.

Sgd. ....
A Commissioner for Oaths

MJS J

No. 21
Affidavit in support of No. 20 dated 11th September 1981

IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION

Civil Appeal No. 60 of 1977

BETWEEN: FIJI RESORTS LIMITED APPELLANT

A N D : THE COMMISSIONER OF ESTATE AND GIFT DUTIES RESPONDENT

THURSDAY THE 3RD AUGUST, 1978

UPON MOTION by way of Appeal from the Judgment of the Honourable Mr. Justice Stuart given in the Supreme Court, Lautoka on 9th November 1977, made unto this Court by Counsel for the Appellant (the original Defendant)

AND UPON HEARING Mr. K.C. RAMRAKHA of Counsel for the Appellant and MR. M.J. SCOTT of Counsel for the Respondent AND UPON READING the aforesaid judgement and after mature deliberation thereon

IT IS THIS DAY ORDERED that this Appeal do stand dismissed out of this Court

IT IS FURTHER ORDERED that the Appellant do pay to the Respondent the costs of this Appeal, together with the additional sum of $75.00 (Seventy five dollars) in respect of proceedings herein before this Court upon 6th July 1978.

BY ORDER
Sgd. K.P. Sharma
for REGISTRAR

This is the document marked 'MJS J' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981

Sgd. .... A Commissioner for Oaths

MJS K

No. 21
Affidavit in support of No. 20 dated 11th September 1981

211-691

14931

10 August 1978

Messrs Cromptons
G.P.O. Box 300
SUVA.

Dear Sirs,

RE: FIJI RESORTS LIMITED v. THE COMMISSIONER OF ESTATE AND GIFT DUTIES (FIJI COURT OF APPEAL, CIVIL APPEAL 60/77)

I refer to your clients' above appeal against the order of Mr. Justice Stuart in the Supreme Court, Lautoka upon the "first part" of Civil Action 205/76, which was dismissed by the Fiji Court of Appeal on 3rd August 1978. I have now sealed the order of the Fiji Court of Appeal.

It is my wish to promptly proceed to the hearing of the "second part" of Civil Action 205/76. I would therefore be grateful if, within seven days hereof, you would communicate with me to agree a date, or dates for a continuation of this case.

Yours faithfully,

Sgd. M.J. Scott
for Commissioner of Estate & Gift Duties

This is the document marked 'MJS K' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981.

Sgd. ....
A Commissioner for Oaths

Received Original
letter 10/8/78
3.20 pm

Cromptons

per: M Slatter

No. 21
Affidavit in support of No. 20 dated 11th September 1981

MJS L

MILES JOHNSON LL B (Melb)
(Also admitted Victoria and the High Court of the Western Pacific)

PETER I. KNIGHT LL B (Sheffield)
(Also admitted England)

CROMPTONS
BARRISTERS & SOLICITORS
COMMISSIONERS FOR OATHS
NOTARIES PUBLIC

PROUDS BUILDING
THE TRIANGLE
SUVA, FIJI

Cable: Cromptons
Telephone 23-821
(5 lines)

Address all communications to

G.P.O. Box 300
Suva, Fiji

Our Ref: PK/P74
Your Ref:

23rd February 1979

The Commissioner of Estate & Gift Duties,
Inland Revenue,
Private Mail Bag,
SUVA.

Attention : Mr. M.J. Scott

Dear Sir,

re : The Commissioner of Estate and Gift Duties - v - Fiji Resorts Ltd. (Supreme Court Lautoka Civil Action No. 205/76.

Thank you for your letter of the 20th February. As you are aware Counsel in Sydney has been instructed in this matter and we have sought his advice on the question as to whether we will require Mr. Scott to attend for cross-examination. As soon as we hear from Counsel we will contact you again.

As regards a hearing date for the second part of the action Mr. Knight of our office who has been handling the matter will be out of Fiji for most of May and June 1979. We would therefore prefer a date after June. We are also checking on the availability of Counsel and will advise you as soon as we hear from him as to his availability.

Yours faithfully,
CROMPTONS

Sgd.

Received 26/2/79

Sgd. R.T. Holmes

This is the document marked 'MJS L' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981

Sgd. ....
A Commissioner for Oaths

No. 21
Affidavit in support of No. 20 dated 11th September 1981

MJS M

IN THE SUPREME COURT OF FIJI, LAUTOKA
WESTERN DIVISION

No. 205 of 1976

BETWEEN: THE COMMISSIONER OF ESTATE AND GIFT DUTIES — Plaintiff

AND: FIJI RESORTS LIMITED
a limited liability company incorporated in Fiji upon 25th June 1971. — Defendant

BEFORE THE HONOURABLE MR. JUSTICE WILLIAMS
DATED AND ENTERED THE 26TH DAY OF OCTOBER 1979

This Action coming on for Trial on the 27th, 28th, 29th, 30th, 31st days of August and 3rd, 4th, and 5th days of September 1979 before the honourable Mr. Justice Williams in the presence of counsel for the Plaintiff and for the Defendant AND UPON READING the pleadings and what was alleged therein.

AND UPON HEARING the evidence and what was alleged by counsel for the plaintiff and the defendant.

THIS COURT SHOULD ORDER that the said action should stand for judgment.

AND THIS ACTION standing for judgment this day in the presence of the counsels for the plaintiff and the Defendant.

THIS COURT DOTH ORDER that the whole of the Fiji shares are liable for duty and direct the Defendant to pay the duty assessed thereon by the Commissioner, and that the question of costs be deferred for agreement between the parties, and failing such agreement by application to the Court.

Dated this 15 day of November, 1979.

BY THE COURT
Sgd. M.C. Rai
DEPUTY REGISTRAR

This is the document marked 'MJS M' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981.

Sgd. ....
A Commissioner for Oaths

MJS N

No. 21

Affidavit in support of No. 20 dated 11th September 1981

IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION

No. 60 of 1979

On appeal from the Supreme Court of Fiji (Western District) Civil Action No. 205 of 1976.

BETWEEN: FIJI RESORTS LIMITED

Appellant
(Original Defendant)

AND : THE COMMISSIONER OF ESTATE AND GIFT DUTIES

Respondent
(Original Plaintiff)

TAKE NOTICE that the Fiji Court of Appeal will be moved at the expiration of fourteen (14) days from the service upon you of this notice, or so soon thereafter as Counsel can be heard by Counsel for the abovenamed Appellant for an order that the decision herein of the Honourable Mr. Justice Williams given at Lautoka on 26th October 1979 whereby it was ordered that the whole of the shares in Fiji companies held by the late A.E. Davis, or held jointly by the late A.E. Davis with his wife D.A. Davis are liable for estate duty on the death of A.E. Davis, and whereby it was ordered that the Defendant pay the estate duty thereon assessed by the Commissioner, be set aside and that in lieu thereof the following orders may be made:-

1. That it may be declared that the interest of Mrs. D.A. Davis in the said shares was not liable for estate duty upon the death of her husband Mr. A.E. Davis.

2. That it may be declared that Mrs. D.A. Davis owned an undivided half interest in the said shares at the time of her husband's death by virtue of the operation of the community property system of the state of California, or in the alternative under the marital property agreement of October 1961.

3. In the alternative that it may be declared that Mrs. D.A. Davis owned an undivided interest in the said shares at the time of her husband's death as her separate property, and also owned an undivided half interest in the remaining interest in the shares as her share of the community interest therein.

4. That the Respondent pay the costs of this appeal and the whole or such proportion as the Court thinks just of the costs of the proceedings in the Supreme Court since the order of Stuart J. therein.

No. 21

Affidavit in support of No. 20 dated 11th September 1981

5. That the amount of duty (if any) payable by the Appellant may be determined.

6. That such further or other order may be made as the nature of the case may require.

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

1. That the Judge was in error in holding that Section 5(1)(h) of the Estate and Gift Duties Ordinance brings to duty property in which the deceased had a general power of appointment immediately before his death which ceased on his death.

2. That the Judge should have held that Section 5(1)(h) only applied to general powers of appointment which were exercisable by will.

3. That the Judge should have followed the unanimous decision of the High Court of Australia in Equity Trustees v. Commissioner of Probate Duties (1976) 135 C.L.R. 268, affirming the unanimous decisions (on this point) of the trial Judge and the Full Court of the Supreme Court of Victoria that an equivalent provision of the Victorian Act did not apply to a general power of appointment which ceased on the death of the donee of the power.

4. That the Judge should have held that Section 5(1)(h) did not apply to the husband's powers of management and disposition over community property under the law of California because such powers were fiduciary and as such were excluded from the definition of general power of appointment.

5. That the Judge was in error in holding that Section 5(1)(i) of the Ordinance applied to the wife's community interest in the shares.

6. That the Judge was in error in holding that the marital property agreement of October 1961 between Mr. and Mrs. Davis was a settlement by Mr. Davis of the property comprised in his wife's community interest in the shares.

7. That the Judge should have held that the California community of property system which became applicable to Mr. and Mrs. Davis when they acquired a domicile of choice in California, attached by operation of law, and did not constitute or involve a settlement or disposition of property made by the deceased within Section 5(1)(i).

8. That the Judge should have held that to the extent that the income from, or the proceeds of the sale or pledge of Mrs. Davis's separate property provided the funds used to make the investments in Fiji represented by the shares held at the date of Mr. Davis's death, even if these shares were wholly community property the funds in question represented a settlement or disposition of property by Mrs. Davis in favour of her husband and not vice versa, and accordingly to that extent the shares were not caught by section 5(1)(i).

No. 21
Affidavit in support of No. 20 dated 11th September 1981

9. That the Judge should have held that Mrs. Davis had a substantial separate property interest in the shares and that such interest was not dutiable on the death of her husband.

10. That the Judge should have held on the evidence of Californian law that loans raised by the pledging of separate property are themselves separate property, and that assets purchased with separate property loan funds are also separate property.

11. That the Judge was in error in finding that the deceased had saved more than $40,000 from his salary between 1961 and 1971 and that such savings had been used to repay two loans each of $20,000 borrowed from the Pan American Credit Union.

12. That the Judge was in error in rejecting Mrs. Davis's evidence that her husband had little opportunity for saving.

13. That the Judge was in error in concluding that a substantial number of relevant documents showing the financial dealings between Mr. and Mrs. Davis had not been produced to the Court, and that the documents which were produced were the result of a process of selection by Mrs. Davis and/or Mr. Suhrke.

DATED the 18th day of December 1978.

CROMPTONS

per: sgd. ....
Solicitors for the Appellant

This is the document marked 'MJS N' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981

Sgd. ....
A Commissioner for Oaths

This Notice of Motion was taken out by Messrs Cromptons of Prouds Building, The Triangle, Suva, Solicitors for the Appellant, whose address for service is at the chambers of the said Solicitors.

No. 21
Affidavit in support of No. 20 dated 11th September 1981

IN THE FIJI COURT OF APPEAL
Civil Jurisdiction

Civil Appeal No. 60 of 1979.

BETWEEN: FIJI RESORTS LIMITED

Appellant

AND : THE COMMISSIONER OF ESTATE & GIFT DUTIES

Respondent

AMENDMENT TO APPELLANT'S GROUNDS OF APPEAL

Add additional ground 4A

4A. That the deceased husband's powers of disposition of community personal property under the law of California did not fall within the definition of "general power of appointment" in Section 2 of the Ordinance because they were not powers which he could exercise "as he thinks fit for his own benefit" and accordingly the wife's half of the community property in Fiji was not dutiable under Section 5(1)(h) of the Ordinance.

DATED the 23rd day of September, 1980.

CROMPTONS

per: Sgd. P.I. Knight ....
Solicitors for the Appellant

No. 21
Affidavit in support of No. 20 dated 11th September 1981

MJS O

IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION

Civil Appeal No. 60 of 1979

Between : FIJI RESORTS LIMITED Appellant

A n d : THE COMMISSIONER OF ESTATE AND GIFT DUTIES Respondent

FRIDAY THE 3RD OCTOBER 1980

UPON MOTION by way of Appeal from the judgment of the Honourable Mr. Justice Williams given in the Supreme Court Lautoka on 26th October 1979, made unto this Court by Counsel for the Appellant (the Defendant in the Supreme Court) and UPON HEARING Mr. K.R. Handley QC with Mr. G.M.G. Johnson of Counsel for the Appellant and Mr. M.J. Scott of Counsel for the Respondent (the Plaintiff in the Supreme Court) and UPON READING the aforesaid judgment and after nature deliberation thereon IT IS THIS DAY ORDERED that this Appeal be allowed, and that the orders made in the Court below be set aside. IT IS FURTHER ORDERED: (a) That this action be remitted to the Court below for assessment of duty upon the basis that one-half only of property the subject of this Appeal is liable to duty, and for the making of such further or other orders as seem just. (b) That the Respondent do pay to the Appellant the costs of this Appeal, to be fixed by the Chief Registrar.

BY ORDER

REGISTRAR

This is the document marked 'MJS O' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981.

Sgd. ....
A Commissioner for Oaths

RECEIVED
10/7/81 MJS

MJS P

No. 21
Affidavit in support of No. 20 dated 11th September 1981

MILES JOHNSON LL B (Melb)
(Also admitted Victoria and the High Court of the Western Pacific)

PETER I. KNIGHT LL B (Sheffield)
(Also admitted England)

CROMPTONS

BARRISTERS & SOLICITORS
COMMISSIONERS FOR OATHS
NOTARIES PUBLIC

PROUDS BUILDING
THE TRIANGLE
SUVA, FIJI

Cable: Cromptons
Telephone 23-821
(5 lines)

Address all communications to
G.P.O. Box 300
Suva, Fiji

Our Ref: PK74
Your Ref:

8th July, 1981

The Principal Legal Officer,
Inland Revenue Department,
Development Bank Centre,
SUVA.

Attention: Mr. M.J. Scott

Dear Sir,

Commissioner of Estate & Gift Duties v. Fiji Resorts Ltd.

Further to your letter of 2nd July we confirm our agreement that the Printed Record for the Privy Council should include the documents listed by you other than the cheques comprised in Exhibits 1, 5 , 6 and P1.

The Company does not propose to challenge in the Privy Council the concurrent findings of the Fiji Courts that the shares in question were the community property of Mr. and Mrs. Davis. Accordingly, the whole of the evidence in the community property/ separate property question can be omitted from the printed record. However, we understand from discussions with you on 7th July that the Commissioner wishes the cheques included in the record in order to support an argument that the cheques effected a disposition of property, presumably by the deceased, in favour of his wife which would be a disposition of property within Sec. 5(1) (i) of the Estate and Gift Duties Ordinance.

As we recall, and subject to correction, a submission that the cheques themselves were dispositions of property falling within Sec. 5(1)(i) was not advanced to the Supreme Court

No. 21
Affidavit in support of No. 20 dated 11th September 1981

or the Court of Appeal. This would not necessarily prevent the submission being made to the Privy Council, but it does mean that it is necessary for us to understand the point that is being taken before we can agree to the omission of the community property/separate property evidence from the printed record. The cheques do not exist in isolation, and their effect can only be considered in relation to other evidence.

We would ask therefore that you outline in say a paragraph the submission that is intended to be made to the Privy Council on the Cheques. We must be told this in your printed case prior to the hearing in any event. If you are not prepared to outline your submission we will have no alternative but to insist on the whole of the property evidence being included in the printed record at your clients' risk as to costs if it turns out that this material is not required.

In addition to the material referred to in your letter we require the record to include relevant documents from the first stage of the proceedings. The respondent wishes to challenge in the Privy Council the correction of the interlocutory order of the Court of Appeal in the first stage of the proceedings. It is submitted that the respondent is entitled to adopt this course without any substantive appeal or cross appeal in accordance with the following statement in Bentwich "Privy Council Practice" 3rd Edition 1937 at page 213.

> "The suitor need not appeal from every interlocutory order which does not purport to dispose of the cause and by which he may feel himself aggrieved, nor in appealing from the final decision is he bound to appeal in express terms from any interlocutory order of which he may complain - the appeal from the final decision enables the Court to correct any interlocutory order which it may deem erroneous. The objections to the interlocutory orders should be stated in the appellant's case."

The first order of the Court of Appeal was clearly interlocutory because it did not finally dispose of the proceedings, and it is our view that a respondent who wishes to challenge an interlocutory order is in the same position as an appellant. The point [illegible] final appeal the Privy Council can consider [illegible].

The short point we intended to [illegible] in relation to the first interlocutory order of the Court of Appeal is that the grant of probate to the executor after the commencement of the proceedings related back to the date of death pursuant to Sec. 9 of the Succession Probate and Administration Ordinance, 1970 so as to validate the intermediate acts of the executor including the signing of the share transfers. This is a new point not taken before, but it raises a pure question of law, and as such it is open on a final appeal.

See Connecticut Fire Insurance v. [illegible] (1892) A.C. 473 at 480.

The additional documents which we wish to be included in the printed record in order to [illegible] this question are as follows:-

No. 21
Affidavit in support of No. 20 dated 11th September 1981

Application as amended	Document 17 pages 270-271 in Record in First Appeal to Court of Appeal.
Statement of Agreed Facts	Document 13 pages 260-261.
Judgment of Stuart J.	Document 19 pages 283-293.
Sealed Order.	Document 20 page 294.
Notice of Appeal.	Document No. 2 page 1
Judgment of Court of Appeal.	

If agreement, without prejudice to the appellant's rights, cannot be reached for the above documents to be included in the printed record, they can either be included in terms of rule 8(3) of the Privy Council Order of 30/9/70 or else the matter will have to be referred to a single judge of the Court pursuant to Rules 8(1) and 5.

We also advise that we believe that without any cross appeal the Respondent is entitled to raise the Silk point before the Privy Council and any other questions of law which if successful would sustain the judgment of the Court of Appeal. We certainly intend to raise the Silk point in our printed case and on the hearing.

Finally we acknowledge that the various errors referred to in your letter of 22nd June are in fact errors, and we would acknowledge the existence of these errors on the hearing of the appeal if that becomes necessary.

Yours faithfully,
CROMPTONS

Sgd.

This is the document marked 'MJS P' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981.

Sgd. ....
A Commissioner for Oaths

No. 21

Affidavit in support of No. 20 dated 11th September 1981

MJS Q

211-692

9th September 1981

Messrs Cromptons
Barristers & Solicitors
Prouds Building
The Triangle
Suva
FIJI.

ATTENTION: MR. P.I. KNIGHT

Dear Sirs,

RE: COMMISSIONER OF ESTATE AND GIFT DUTIES v FIJI RESORTS LIMITED

I refer to your letter of 8 July 1981.

I note that Fiji Resorts does not propose to challenge the finding of fact in both Courts that the shares in question were community property.

I could not agree that no submission was made in the Court of Appeal relating to the possibility that the cheques themselves were a disposition of property for the purposes of section 5(1)(i). Such a submission was made for the Commissioner and Mr. Handley Q.C. in his reply conceded that the payments by cheque were a disposition of the funds concerned but argued that there was no "disposition" for the purposes of the particular statutory provision. In these circumstances I believe that the cheques comprised in Exhibits 1, 5, 6 and P1 should and can be included in the record. Their inclusion is, as observed by you, in relation to section 5(1)(i) and is not related to the community property/separate property point. I cannot agree that I should outline at this stage the precise submission that is being made on behalf of the Commissioner. I would merely observe that I find it difficult to see how the inclusion of the cheques can give rise to a situation which necessitates the inclusion of all of the property evidence, such inclusion to be at the Commissioner's risk. This is particularly so when you acknowledge that you are not challenging the fact that the shares were community property.

In my opinion the Order of the Fiji Court of Appeal that Fiji Resorts deliver to the Commissioner a statement as required by section 28(1) of the Estate and Gift Duties Act/is not now open to appeal by Fiji Resorts Limited. The determination by the Fiji Court of Appeal was not an interlocutory order and in my opinion is not within the principle stated in Bentwich "Privy Council Practice" 3rd Edition, 1937 at page 213. In any event, it appears from your letter that you consider that the point which you desire to take is a new point and as such I would contend that it would not be open in the Privy Council. See Pillai v Comptroller of Income Tax (1970) A.C.

No. 21
Affidavit in support of No. 20 dated 11th September 1981

1124 at 1130 and United Marketing Company v Hasham Kara (1963) 2 All E.R. 553 both of which evidence a distinct narrowing of any principle enunciated in the Connecticut Fire Insurance v Kavanagh case.

I therefore cannot agree that the documents referred to on page 3 of your letter should be included in the Record. I am seeking the resolution of this issue by application to the Fiji Court of Appeal under section 8(1) of the Fiji (Procedure in Appeals to Privy Council) Order.

I note that you acknowledge the various errors referred to in my letter of 22 June and that you will be prepared to acknowledge the same during the hearing of the appeal if that becomes necessary.

Yours faithfully,

Sgd. M.J. Scott

Principal Legal Officer
Inland Revenue Department

Received 9th September 1981

Sgd. ....
MESSRS CROMPTONS

This is the document marked 'MJS Q' referred to in the Affidavit of Michael John Scott sworn before me at Suva this 11 day of September 1981.

Sgd. ....
A Commissioner for Oaths

NO 22

JUDGMENT OF MARSACK J.A.

RE CONTENTS OF RECORD

DATED 28TH SEPTEMBER 1981

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 60 of 1979

Between:

THE COMMISSIONER OF ESTATE AND GIFT DUTIES

Appellant

and

FIJI RESORTS LIMITED Respondent

M.J. Scott and Ms I.V. Helu for the Appellant
P.I. Knight for the Respondent

JUDGMENT

No. 22
Judgement of
Marsack J.A.
Re Contents
of Record
dated 28th
September
1981

This is an application by the appellant brought under section 8(1) of the Fiji (Procedure in Appeals to Privy Council) Order 1970 concerning matters to be included in the Record in an appeal to Her Majesty in Council by the appellant from the judgment of the Court of Appeal given on the 3rd October 1980. For a determination of this application it is necessary to set out briefly the course of the litigation between the parties in respect of which there are two phases. Some confusion has arisen from the fact that the records of the two aspects of litigation have each been given the same file number.

The matter in issue between the parties is the assessment of estate duty on the death of Allan Emmett Davis who died at Lautoka on 28th February 1972. At the date of his death the deceased, who at his death was domiciled in California, U.S.A., held in his own name 25,180 shares at $2 each in a company called Yanuca Islands Limited; and deceased and his wife held, as tenants in common, 37,354 shares of $1 each in Fiji Mocambo Limited. These shares were later converted into shares in the respondent company.

No. 22

Judgment of Marsack J.A. Re Contents of Record dated 28th September 1981

The first of the phases referred to above was an application by the appellant (then plaintiff) for an order that the respondent (then defendant) deliver to the appellant a statement as required by section 28(1) of the Estate and Gift Duties Act (Cap.178), and to show cause why the respondent (defendant) should not pay the duty assessed by the Commissioner. An order was made by the Supreme Court on 22nd November 1977 that such statement be delivered. The present respondent appealed against this order, and on the 3rd August 1978 the Court of Appeal gave judgment dismissing the appeal and upholding the order. The statement ordered under the Supreme Court judgment was submitted by the respondent company on 16th December 1977. No appeal was brought against the judgment of the Court of Appeal upholding the order of the Supreme Court that a statement be delivered.

What may be referred to as the second phase was initiated by the Commissioner against the respondent company for the payment of the death duty assessed by the Commissioner. By judgment of the Supreme Court given at Lautoka on the 26th October 1979 it was ordered that the whole of the shares held by the deceased and those held jointly by the deceased and his wife were liable for estate duty. The respondent company appealed to the Court of Appeal which by judgment given on the 3rd October 1980 allowed the appeal and ordered that the case be remitted to the Supreme Court for assessment of duty on the basis that one half only of the community property was liable to duty. The Commissioner - the present appellant - on the 4th of May 1980 was given final leave to appeal to Her Majesty in Council against this judgment.

The question for determination on the present application is as to what material is to be included in the Record to be sent to the Privy Council. It is contended on behalf of the respondent company that the Record should include the proceedings referred to above as phase 1 and in particular the judgment of the Court of Appeal delivered on the 3rd August 1978. The Court was led to understand that it is desired, at the hearing before the Privy Council, to argue that the validity of that judgment may be challenged at the hearing of the present appeal.

It is quite clear that if the judgment of 3rd August 1978 is a final judgment no right of appeal at the present time exists, nothing in this direction having been done for over three years since the delivery of the judgment. Mr. Knight, however, argues that that was not a final judgment but merely an interlocutory one. In the argument before me many authorities were cited by counsel on both sides. I have carefully studied these authorities but do not find it necessary to quote from them in any detail. In the present case it was necessary for a finding to be made as to whether the proper party to be liable to the Commissioner for Estate and Gift Duties was the respondent company, the shares in which were not held by deceased and his wife at the time of his death but were acquired subsequently, though before any grant of probate was made in Fiji. The judgment of 3rd August 1978 in my view finally settled the question of the liability of the respondent company.

No. 22

Judgment of Marsack J.A. Re Contents of Record dated 28th September 1981

Once that was established, what I have referred to as the second phase of the proceedings could properly be instituted; and the only issue involved in the subsequent proceedings is the quantum of duty payable. In no sense did that earlier judgment have any reference to the matter really in issue in this present appeal. This view is, as I see it, entirely consistent with the judgment of the Privy Council in Becker v. Marion /1977/ A.C. 271. The issues in the present case are somewhat similar to those in West v. Dillicar (1921) N.Z.L.R. 617 where a first judgment was given declaring that the appellant was bound by a certain agreement and a second judgment defined the relief to which the respondents were entitled. It was held that both these judgments were final judgments.

In the result I am satisfied that the judgment of 3rd August 1978 and any papers relating to such judgment should not form part of the Record as defined in section 2(1) of the Fiji (Procedure in Appeals to Privy Council) Order 1970. They cannot be considered as forming part of the pleadings, proceedings, evidence and decisions proper to be laid before Her Majesty in Council on the hearing of this appeal.

Accordingly it is ordered that the judgment of the Court of Appeal of 3rd August 1978 and the documents pertaining thereto do not properly form part of the Record for the purposes of the present appeal to Her Majesty in Council against the judgment of the Court of Appeal delivered on 31st October 1980.

It is further ordered that costs of this application be costs in the cause.

Sgd. ....

Judge of Appeal

Suva,

28th September, 1981

NO. 23

SEALED ORDER OF MARSACK J.A.
RE CONTENTS OF RECORD
DATED 28TH SEPTEMBER 1981

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 60 of 1979

Between:

THE COMMISSIONER OF ESTATE AND GIFT DUTIES Appellant

AND

FIJI RESORTS LIMITED Respondent

BEFORE THE HONOURABLE SIR CHARLES MARSACK IN CHAMBERS, THE 28TH DAY OF SEPTEMBER, 1981.

No. 23
Sealed Order of Marsack JA Re Contents of Record dated 28th September 1981

UPON HEARING Mr M.J. Scott of Counsel for the Appellant, and Mr. P.I. Knight of Counsel for the Respondent, and

UPON READING the application under Section 8(1) of the Fiji (Procedure in Appeals to Privy Council) Order 1970 filed herein by the Appellant, and the affidavit of Michael John Scott sworn and filed herein in support thereof.

IT IS HEREBY ORDERED THAT: the Judgment of the Court of Appeal of 3rd August 1978 in Civil Appeal 60 of 1977 and the documents pertaining thereto do not properly form part of the record for the purposes of the Appellant's appeal to Her Majesty in Council against the Judgment of the Court of Appeal delivered on 3rd October, 1980 in Civil Appeal 60 of 1979.

IT IS FURTHER ORDERED that the costs of this Application be costs in the cause.

DATED THIS 29 DAY OF SEPTEMBER 1981

Sgd...................
REGISTRAR

FIJI COURT OF APPEAL

NO 24

JUDGMENT OF THE FULL FIJI COURT OF APPEAL
RE CONTENTS OF RECORD, DATED 11TH
NOVEMBER 1981

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Action No. 60 of 1979

Between:

FIJI RESORTS LIMITED — Appellant

and

THE COMMISSIONER OF ESTATE AND GIFT DUTIES — Respondent

P. Knight for the Appellant
M.J. Scott for the Respondent

Date of Hearing: 11th November, 1981
Delivery of Judgment: 11th November, 1981

ORDER OF COURT

No. 24
Judgment of the Full Fiji Court of Appeal Re Contents of Record dated 11th November 1981

Gould V.P. (Orally)

Having read the judgment of Marsack J.A. which was referred for our consideration, and having listened to the submissions of counsel, we are satisfied that the order made by the learned justice of appeal was correct. We are in agreement with him that the judgment of the 3rd August, 1978, by this Court, was a final judgment, and no steps have been taken against it by the respondent company either by way of appeal or by any purported cross appeal in the present proceedings. We reject Mr. Knight's submission that in these circumstances it would still be open to him to challenge that judgment (even if we regarded it as interlocutory, which we do not) as part of these present proceedings before the Privy Council.

We confirm the order made by Marsack J.A.: the costs of the present application will be in the cause.

Sgd. V P Gould
Vice President

Sgd. J A Spring
Judge of Appeal

Sgd. J A Henry
Judge of Appeal

NO 25

SEALED ORDER OF THE FULL FIJI
FIJI COURT OF APPEAL
RE CONTENTS OF RECORD, DATED
11TH NOVEMBER 1981

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 60 OF 1979

BETWEEN: THE COMMISSIONER OF ESTATE AND GIFT DUTIES — APPELLANT

A N D : FIJI RESORTS LIMITED — RESPONDENT

WEDNESDAY THE 11TH NOVEMBER 1981

ORDER UPON REFERENCE UNDER SECTION 5 OF THE FIJI (PROCEDURE IN APPEALS TO PRIVY COUNCIL) ORDER 1970, FOR CONSIDERATION OF ORDER MADE BY SIR CHARLES MARSACK UNDER SECTION 8(1) OF THE SAID ORDER

No. 25
Sealed Order of the Full Fiji Court of Appeal Re Contents of Record, dated 11th November 1981

UPON HEARING Mr. P.I. Knight of Counsel for the Respondent in support of the making of an Order under Section 5 of the Fiji (Procedure in Appeals to Privy Council) Order, varying, discharging or reversing the Order herein made by Sir Charles Marsack under Section 8(1) of the said Order, whereby the said Sir Charles Marsack held that the judgment of the Court of Appeal of 3rd August 1978 in Civil Appeal 60 of 1977 and the documents pertaining thereto did not properly form part of the record for the purposes of the Appellant's appeal to Her Majesty in Council against the judgment of the Court of Appeal delivered on 3rd October 1980 in Civil Appeal 60 of 1979

And UPON HEARING Mr. M.J. Scott of Counsel for the Appellant

And UPON READING the aforesaid Order of Sir Charles Marsack

No. 25

Sealed Order of the Full Fiji Court of Appeal Re Contents of Record, dated 11th November 1981

IT IS HEREBY ORDERED that the Respondent's application to vary, discharge or reverse the said Order be dismissed.

IT IS FURTHER ORDERED that the costs of this application be costs in the cause.

Dated this 30 day of November 1981.

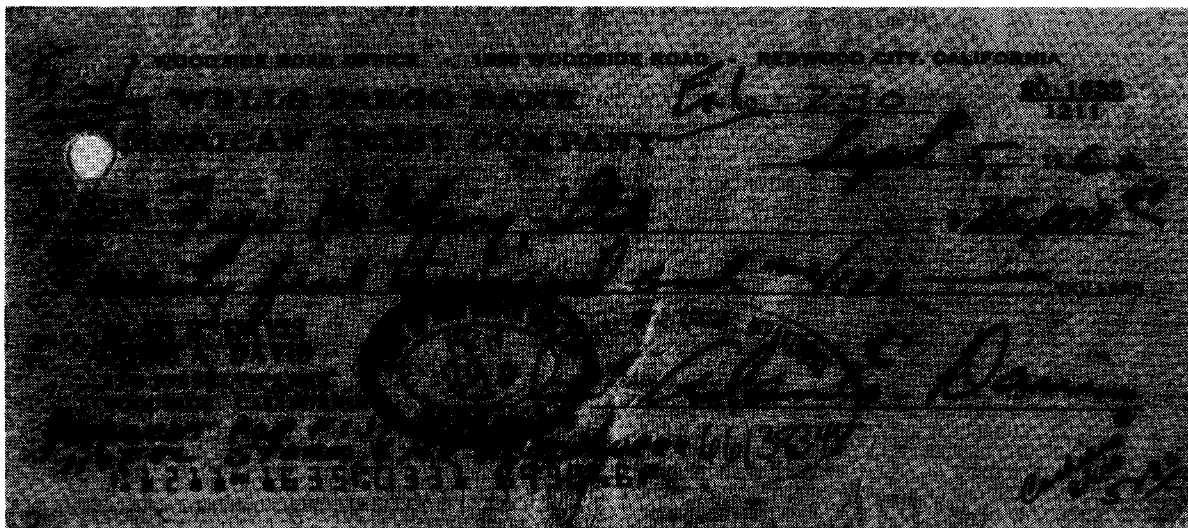
Sgd. ....

FIJI COURT OF APPEAL

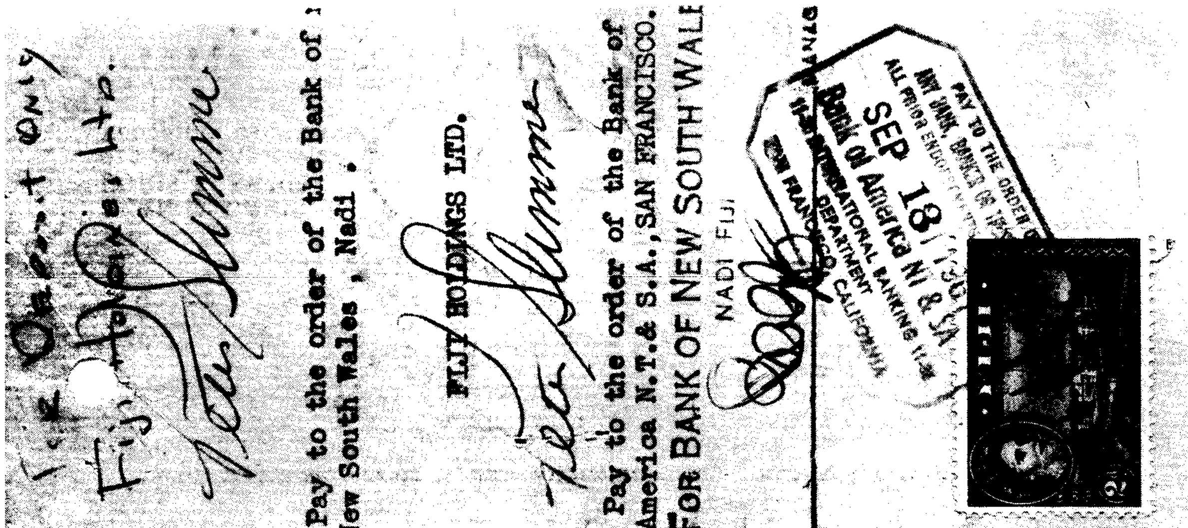
REGISTRAR

NO 26

CHEQUE FROM ALAN E. DAVIS TO
FIJI HOLDINGS LIMITED
DATED 5TH SEPTEMBER 1961



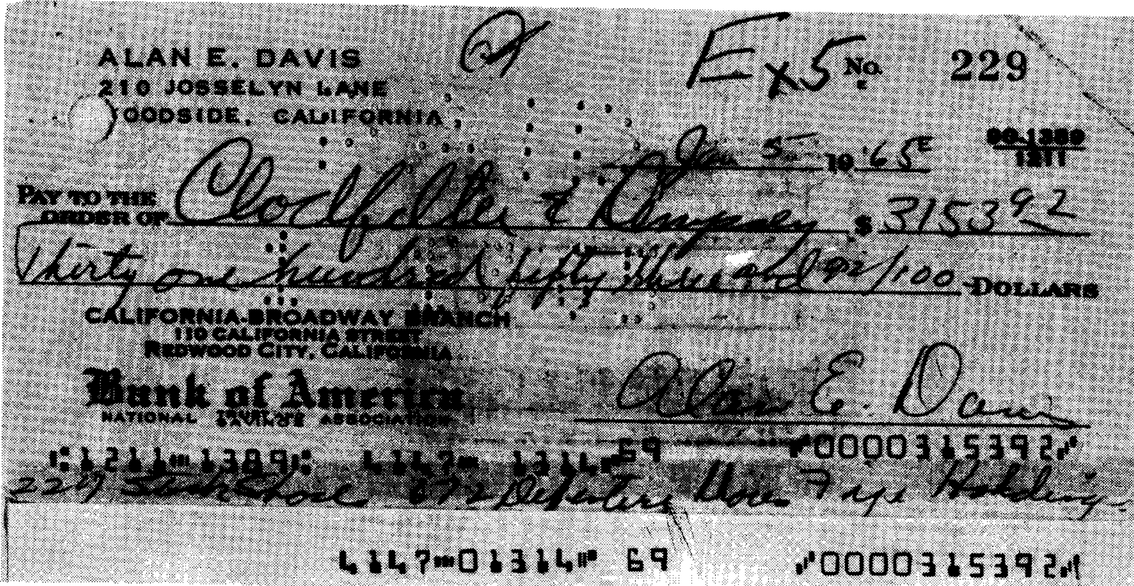
REVERSE



No 26
Cheque from
Alan E. Davis
To Fiji Holdings Limited
dated 5th September 1961

NO 27

CHEQUE FROM ALAN E DAVIS
TO CLODFELTER AND DEMPSEY
DATED 5TH JANUARY 1965


ALAN E. DAVIS
210 JOSSELYN LANE
WOODSIDE, CALIFORNIA

No. 229

Jan 5 1965

PAY TO THE ORDER OF Clodfelter & Dempsey $3153 92

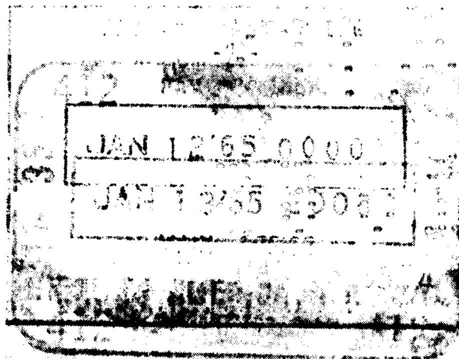
Thirty one hundred fifty three and 92/100 DOLLARS

CALIFORNIA-BROADWAY BRANCH
110 CALIFORNIA STREET
REDWOOD CITY, CALIFORNIA

Bank of America
NATIONAL TRUST AND SAVINGS ASSOCIATION

Alan E. Davis

REVERSE



For deposit only
Clodfelter & Dempsey
Trust account

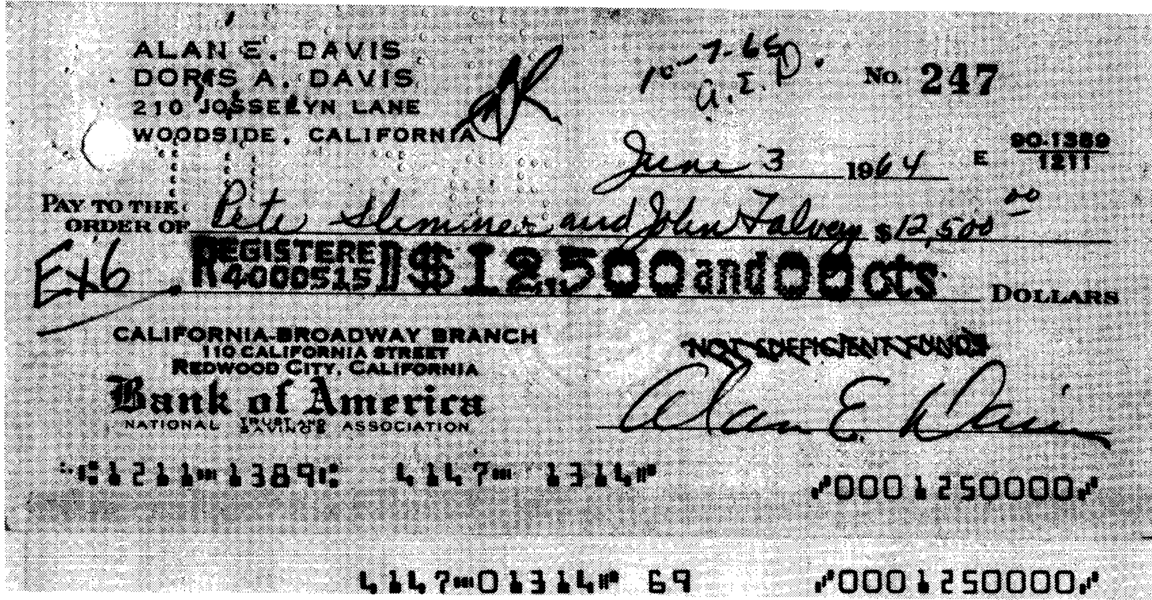
No 27
Cheque from
Alan E Davis to
Clodfelter and
Dempsey, dated
5th January 1965

NO 28

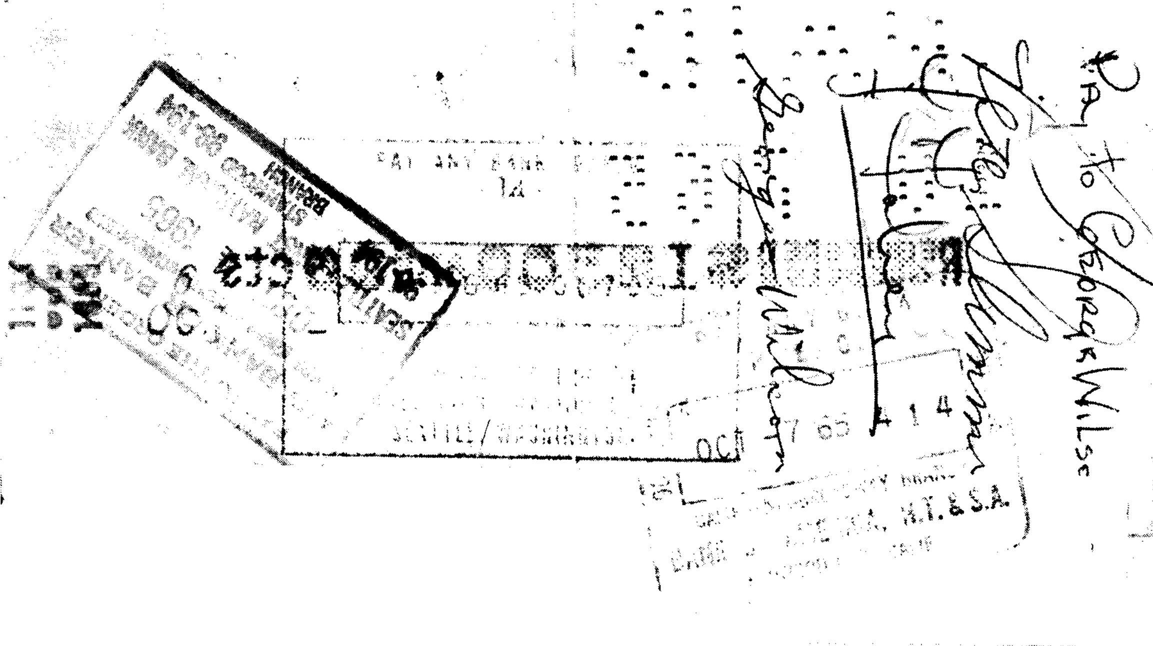
CHEQUE FROM ALLAN E DAVIS

TO PETER SLIMMER AND JOHN FALVEY

DATED 3RD JUNE 1964



REVERSE



No 28

Cheque from Allan E Davis to Peter Slimmer and John Falvey dated 3rd June 1964

NO 29

SHARE CERTIFICATE

FIJI HOLDINGS LIMITED

NOS. 16276 - 18729

DATED 23RD OCTOBER 1961

Certificate No. ...30........

Share No.'s
16276-18729

FIJI HOLDINGS LIMITED

Incorporated under the Companies Ordinance (Cap.185)

CAPITAL : £200,000 DIVIDED INTO 200,000 SHARES OF £1 EACH

This is to certify that...Alan E. and Doris A. Davis..................

As Joint Tenants With Right Of Survivorship And Not As Tenants In Common

of ....210 - Josslyn Lane - Woodside - California........................ is

the registered holder of .2454.shares numbered 16276 to 18729 inclusive in the abovenamed Company subject to the Memorandum and Articles of Association thereof and that the sum of £1 has been paid upon each of the said shares.

Given under the Common Seal of the Company this..October 23....
day of 1961

THE COMMON SEAL of the company was hereunto affixed in the presence of :-

Sgd. George A. Wilson Director

Sgd:.................... Secretary

FIJI HOLDINGS LIMITED
COMMON SEAL

No 29

Share Certificate
Fiji Holdings Limited
Nos. 16276 - 18729
dated 23rd October 1961

NO 30

SHARE CERTIFICATE, FIJI HOLDINGS LIMITED
NOS 19615 - 19838

DATED 5TH APRIL 1965

Certificate No ...68........

Share No.'s
19615 - 19838

FIJI HOLDINGS LIMITED

Incorporated under the Companies Ordinance (Cap.185)

CAPITAL: £200,000 DIVIDED INTO 200,000 SHARES OF £1 EACH

This is to certify that ..ALAN E. AND DORIS A. DAVIS AS JOINT TENANTS WITH RIGHT OF SURVIVORSHIP AND NOT AS TENANTS IN COMMON ....

of ...210 JOSSLYN LANE, WOODSIDE, CALIFORNIA ....

is the registered holder of 224 shares numbered 19615 to 19838 inclusive in the abovenamed Company subject to the Memorandum and Articles of Association thereof and that the sum of £1 has been paid upon each of the said shares.

Given under the Common Seal of the Company this ..5th.....

day of....April......1965.

THE COMMON SEAL of the Company
was hereunto affixed in the presence of:-

Sgd. George A. Wilson Director

Sgd. .... Secretary

FIJI HOLDINGS LIMITED
COMMON SEAL

No 30
Share Certificate
Fiji Holdings Limited
Nos 19615 - 19838
dated 5th April 1965

NO 31

SHARE CERTIFICATE, FIJI RESORTS LIMITED,
FOR 6,295 SHARES, DATED 22ND OCTOBER 1967

ORDINARY
STOCK
CERTIFICATE

CERTIFICATE NO. 65

FIJI RESORTS LIMITED
(INCORPORATED IN FIJI UNDER THE COMPANIES ORDINANCE)

AUTHORISED CAPITAL £200,000

NO. OF
STOCK UNITS 6,295

DIVIDED INTO 200,000 ORDINARY SHARES OF £1 EACH CONVERTED AS REGARDS FULLY PAID SHARES INTO STOCK UNITS OF £1 EACH

THIS IS TO CERTIFY that ALAN E. DAVIS

of 1670 EL CAMINO REAL, MENLO PARK, CALIFORNIA 94025, U.S.A. is the registered holder of SIX THOUSAND TWO HUNDRED AND NINETYFIVE Units of Ordinary Stock in FIJI RESORTS LIMITED, subject to the Memorandum and Articles of Association of the Company, and that the sum of One Pound has been paid on each of the said Units of Stock.

Given under the Common Seal of the Company at SUVA this TWENTYSECOND day of OCTOBER 1967

FIJI RESORTS LIMITED
THE COMMON
SEAL OF

Sgd. George A. Wilson Director

Sgd. .... Secretary

No transfer of any portion of the Stock Units comprised in this Certificate will be registered unless accompanied by this Certificate.

No 31

Share Certificate
Fiji Resorts Limited,
for 6,295 shares
dated 22nd October
1967

NO 32

SHARE CERTIFICATE, FIJI MOCAMBO HOLDINGS LIMITED,

FOR 37,354 SHARES,

DATED 14TH JANUARY 1970

ORDINARY STOCK CERTIFICATE

CERTIFICATE NO. 7.

FIJI MOCAMBO HOLDINGS LIMITED
(INCORPORATED IN FIJI UNDER THE COMPANIES ORDINANCE)

AUTHORISED CAPITAL $1,000,000

NO. OF STOCK UNITS 37,354.

DIVIDED INTO 1,000,000 ORDINARY SHARES OF $1 EACH CONVERTED AS REGARDS FULLY PAID SHARES INTO STOCK UNITS OF $1 EACH

THIS IS TO CERTIFY that ALAN E. OR DORIS A. DAVIS of 2856 MIDDLEFIELD ROAD, REDWOOD CITY, CALIFORNIA, U.S.A. is the registered holder of THIRTYSEVEN THOUSAND THREE HUNDRED AND FIFTYFOUR Units of Ordinary Stock in FIJI MOCAMBO HOLDINGS LIMITED, subject to the Memorandum and Articles of Association of the Company, and that the sum of One Dollar has been paid on each of the said Units of Stock.

Given under the Common Seal of the Company at NADI AIRPORT this FOURTEENTH day of JANUARY 1970.

..........................Director

..........................Secretary

No transfer of any portion of the Stock Units comprised in this Certificate will be registered unless accompanied by this Certificate.

No 32
Share Certificate
Fiji Mocambo Holdings
Limited, for 37,354
shares, dated 14th
January 1970

NO 33

CHEQUE FROM ALAN E DAVIS

TO PETER SLIMMER

DATED 17TH JUNE 1965

DORIS A. DAVIS
ALAN E. DAVIS
210 JOSSELYN
WOODSIDE, CALIFORNIA

No. 509

90-1389
1211

PAY TO THE ORDER OF

DOLLARS

CALIFORNIA-BROADWAY BRANCH
110 CALIFORNIA STREET
REDWOOD CITY, CALIFORNIA
Bank of America
NATIONAL TRUST AND SAVINGS ASSOCIATION

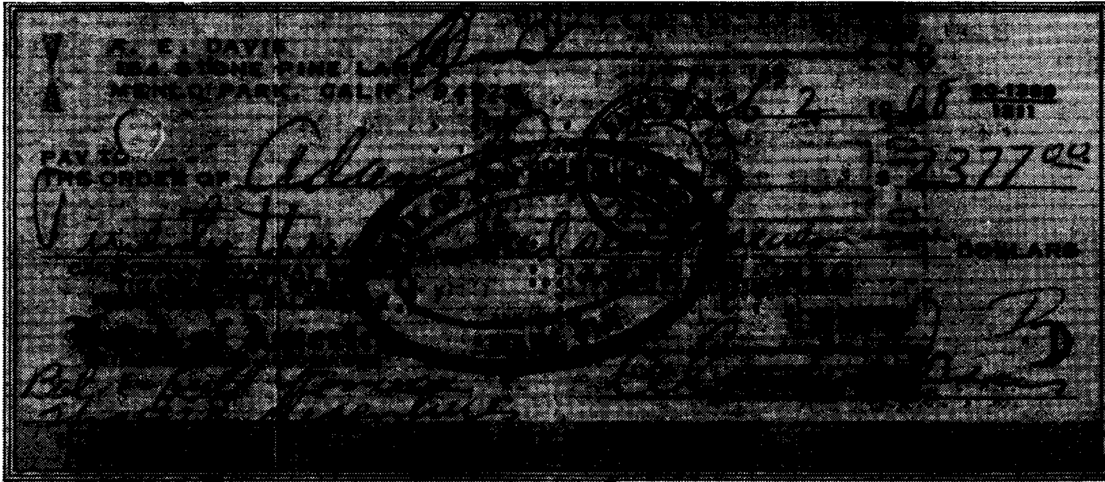
REVERSE

No 33

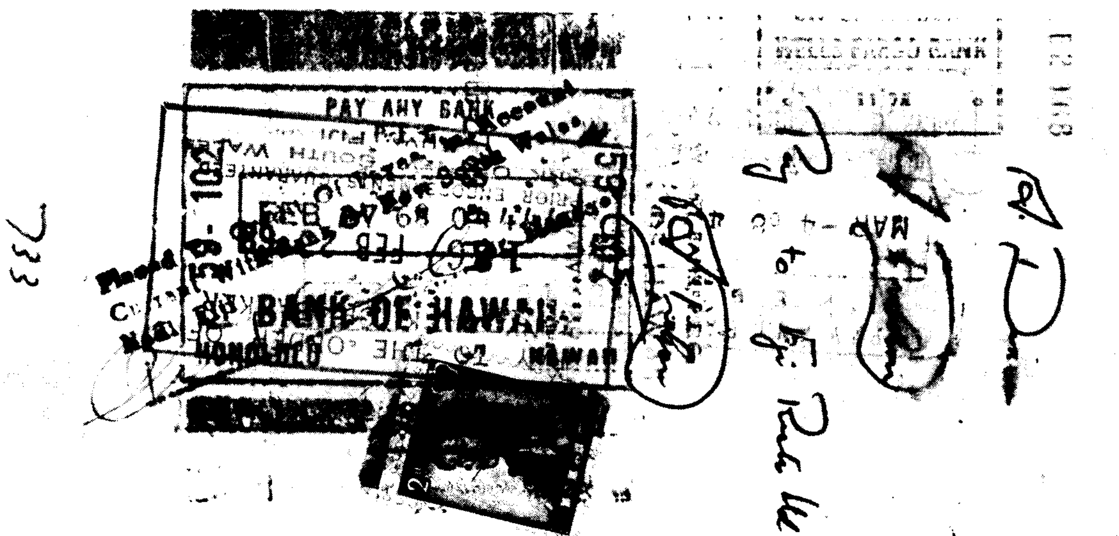
Cheque from
Alan E Davis to
Peter Slimmer
dated 17th June
1965

NO 34

CHEQUE FROM ALAN E. DAVIS
TO ADAM DICKSON
DATED 2ND FEBRUARY 1968



REVERSE



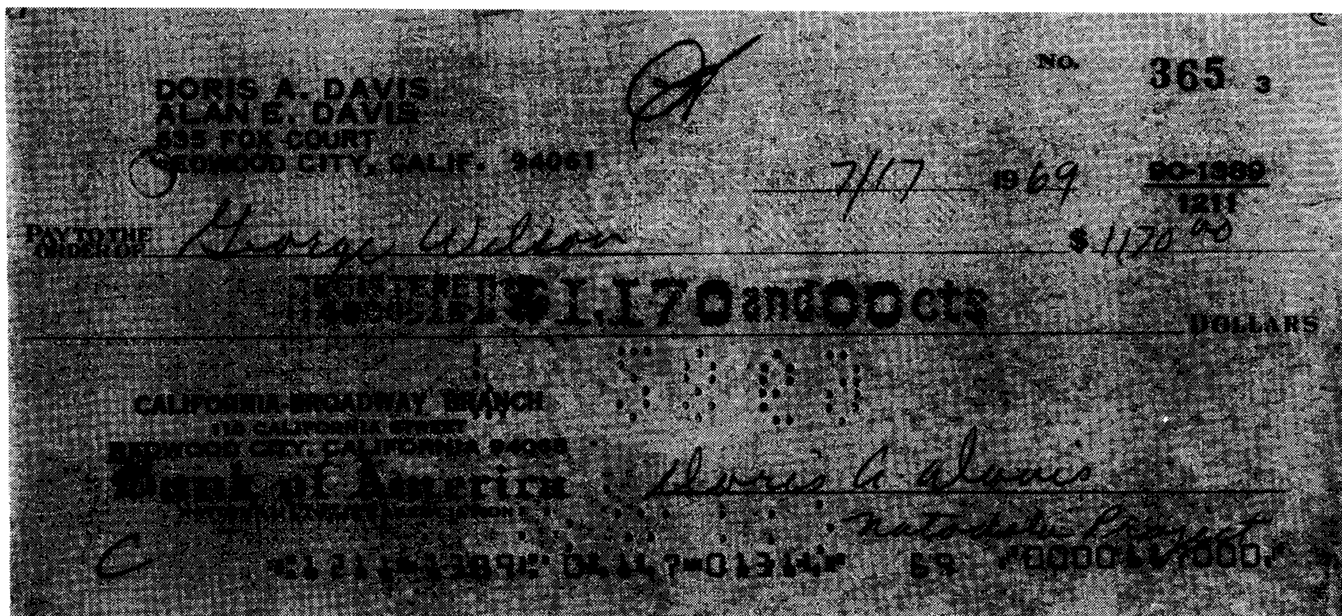
No 34
Cheque from Alan E.Davis
to Adam Dickson dated
2nd February 1968

NO 35

CHEQUE FROM DORIS A DAVIS

TO GEORGE WILSON

DATED 17TH JULY 1969



DORIS A. DAVIS
ALAN E. DAVIS
REDWOOD CITY, CALIF. 94061

NO. 365

7/17 19 69

90-1389
1211

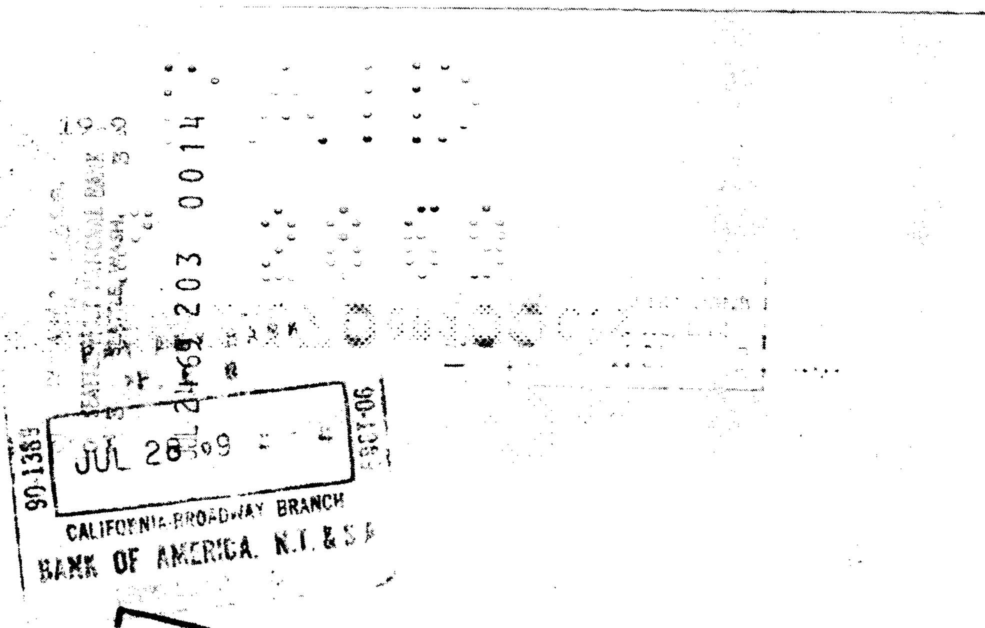
PAY TO THE ORDER OF George Wilson $1170.00

$1,170 and 00 cts DOLLARS

CALIFORNIA-BROADWAY BRANCH
REDWOOD CITY, CALIFORNIA 94063
Bank of America

Doris A Davis

REVERSE



George Wilson
Deposit only

90-1389
JUL 28 1969
CALIFORNIA-BROADWAY BRANCH
BANK OF AMERICA, N.T. & S.A.

No 35
Cheque from
Doris A Davis
to George Wilson
dated 17th July
1969

IN THE PRIVY COUNCIL No. of 1982

ON APPEAL
FROM THE FIJI COURT OF APPEAL

BETWEEN:

THE COMMISSIONER OF ESTATE AND GIFT DUTIES — APPELLANT (Original Plaintiff)

- and -

FIJI RESORTS LIMITED — RESPONDENT (Original Defendant)

RECORD OF PROCEEDINGS

Messrs Charles Russell & Company
Hale Court
Lincolns Inn
LONDON WC2A 3UL

Solicitors for the Appellant