No. 6 of 1982

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN:

ALEXANDRINE AUSTIN and DEBORAH AUSTIN,
SHARLENE AUSTIN and RICHARD AUSTIN
(infants by their mother and next
friend MARIA LEZAMA)
(Plaintiffs) Appellants

- and -

GENE HART (Defendant) Respondent

RECORD OF PROCEEDINGS

Approved for final reproduction 27.4.82
Philip Ponnay Thomas Co.,

PHILIP CONWAY THOMAS & CO.,
61 Catherine Place,
Westminster,
London SW1E 6HB.

Solicitors for the
Appellants

INGLEDEW, BROWN, BENNISON
& GARRETT,
International House,
26 Creechurch Lane,
London EC3A 5AL.

Solicitors for the
Respondent

No. 6 of 1982

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RECORD OF PROCEEDINGS

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No. 6 of 1982

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN:

ALEXANDRINE AUSTIN and DEBORAH AUSTIN, SHARLENE AUSTIN and RICHARD AUSTIN (infants by their mother and next friend MARIA LEZAMA)
(Plaintiffs) Appellants

- and -

GENE HART (Defendant) Respondent

RECORD OF PROCEEDINGS

No. 1
Writ of Summons

In the High Court

No. 1
Writ of Summons - 2nd August 1974

TRINIDAD AND TOBAGO:

IN THE HIGH COURT OF JUSTICE
Sub-Registry, San Fernando
No: 766 of 1974.

Between

1. ALEXANDRINE AUSTIN
2. DEBORAH AUSTIN, SHARLENE AUSTIN AND RICHARD AUSTIN (Infants by their mother and next friend, MARIA LEZAMA) Plaintiffs

and

GENE HART Defendant

ELIZABETH II, By the Grace of God Queen of Trinidad and Tobago and of Her other Realms and Territories, Head of the Commonwealth.

In the High Court

No. 1
Writ of Summons - 2nd August 1974 (cont'd)

TO: GENE HART c/o Hart's Electronics Ltd., Carlton Centre, St. James Street, San Fernando, or of Hart's Electronics Ltd., 65-69, Pointe-a-Pierre Road, San Fernando.

We command you that you within eight days after the service of this summons on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of:

1. Alexandrine Austin, 2.Deborah Austin, Sharlene Austin and Richard Austin (infants by their mother and next friend Maria Lezama) and take notice that in default of your so doing, the Plaintiffs may proceed therein and judgment may be given in your absence.

WITNESS: The Honourable Sir Isaac Hyatali, Kt., Chief Justice of Trinidad and Tobago, this 2nd day of August, 1974.

N.B. This Writ is to be served within twelve calendar months from the date hereof, or if renewed within six calendar months from the date of such renewal, including the day of such date and not afterwards.

A defendant who resides or carries on business within the above mentioned district must enter appearance at the Office of the Sub-Registry of that District.

A defendant who neither resides nor carries on business within the said District may enter appearance either at the Office of the Sub-Registry or at the Registry, Port-of-Spain.

The Plaintiffs' claim is for damages sustained by them as a result of the death of Simon Austin which took place on the 4th day of May, 1974, at the General Hospital in the Town of San Fernando in the Island of Trinidad, caused as a result of the negligence of the Defendant in the driving, management and/or control of Motor Vehicle TM-7477 on the 3rd day of May, 1974, along the Southern Main Road in the vicinity of Phoenix Park, in the Ward of Couva, in the Island of Trinidad, such claim being made under the Compensation of Injuries Ordinance, Chapter 5 Number 5 of the Revised Laws of this Territory.

NOTE: This Writ of Summons is accompanied with a Statement of Claim.

and $ for costs, and if the amount

claimed be paid to the Plaintiffs or their Solicitor within four days from the service hereof further proceedings will be stayed.

This Writ was issued by MR. GEORGE ANDREW TSOI-A-SUE of Nos: 1-3, Court Street, San Fernando, whose address for service is the same and in Port-of-Spain is in care of Messrs. Lai Fook, Harracksingh & Co., of No: 41, St. Vincent Street, Solicitor for the Plaintiffs who reside in the Town of San Fernando.

R.N. Kowlessar

Solicitor and Agent for George A. Tsoi-A-Sue

PLAINTIFFS' SOLICITOR

NO. 2

No. 2
Consent by Maria Lazama 2nd August 1974

Consent by Maria Lezama

TRINIDAD AND TOBAGO:

IN THE HIGH COURT OF JUSTICE
Sub-Registry, San Fernando

No: 766 of 1974.

Between

1. ALEXANDRINE AUSTIN

2. DEBORAH AUSTIN, SHARLENE AUSTIN and RICHARD AUSTIN (infants by their mother and next friend MARIA LEZAMA)

Plaintiffs

and

GENE HART Defendant

****

I, MARIA LEZAMA, of 3, Ogerally Street, in the Town of San Fernando, in the Island of Trinidad, the mother of Deborah Austin, Sharlene Austin and Richard Austin, infants under the age of 18 years, hereby authorise MR. GEORGE ANDREW TSOI-A-SUE, Solicitor and Conveyancer, to file High Court Action on behalf of the said Deborah Austin, Sharlene Austin and Richard Austin against GENE HART for damages sustained by them as a result

In the High Court

No. 2
Consent by Maria Lezama 2nd August 1974 (cont'd)

of the death of SIMON AUSTIN which took place on the 4th day of May, 1974, at the General Hospital in the said Town of San Fernando, caused as a result of the negligence of the said Gene Hart in the driving, management and/or control of Motor Vehicle, TM-7477 on the 3rd day of May, 1974 along the Southern Main Road in the vicinity of Phoenix Park, in the Ward of Couva in the Island of Trinidad; AND I hereby authorise the said Mr. George Andrew Tsoi-A-Sue to use my name as the mother and next friend of the said Deborah Austin, Sharlene Austin and Richard Austin in the said action.

Dated this 2nd day of August 1974.

Maria Lezama

Witness: K. Khan

No. 3
Statement of Claim
Undated

No. 3

Statement of Claim

IN THE HIGH COURT OF JUSTICE
Sub-Registry, San Fernando

No: 766 of 1974.

Between

1. ALEXANDRINE AUSTIN

2. DEBORAH AUSTIN, SHARLENE AUSTIN and RICHARD AUSTIN (Infants by their mother and next friend MARIA LEZAMA)

Plaintiffs

And

GENE HART

Defendant

****

STATEMENT OF CLAIM

1. The first-named Plaintiff is a Widow and was the mother of Simon Austin (hereinafter called "the Deceased") and she resides at 72, Point-a-Pierre Road in the Town of San Fernando in the Island of Trinidad.

2. The second-named Plaintiffs are infants and the children of the Deceased and bring this action by their mother and next friend Maria Lezama.

3. The first-named Plaintiff brings this action as the mother of the Deceased and the second-named Plaintiffs bring this action for the benefit of themselves as the children of the Deceased under the Compensation for Injuries Ordinance, Chapter 5 Number 5. The first-named Plaintiff also brings this action for the benefit of herself under the said Ordinance.

4. The Defendant is a Business Manager residing at 37 Bel Air, La Romain, in the Ward of South Naparima in the said Island and is and was at all material times the owner of Motor Vehicle TM-7477.

5. On the 3rd day of May, 1974, the Deceased was a passenger in the said Motor Vehicle TM-7477 driven by the Defendant along the Southern Main Road in the vicinity of Phoenix Park, in the Ward of Couva in the Island of Trinidad, when through the negligence of the said Defendant the said Motor Vehicle TM-7477 ran off the said road and collided with a bridge in consequence of which the Deceased suffered severe personal injuries resulting in his death on the 4th day of May, 1974, at the General Hospital in the said Town of San Fernando.

PARTICULARS OF NEGLIGENCE

The Defendant was negligent in:-

(a) Failing to keep any or any proper or efficient look-out;

(b) Driving at too fast a rate of speed;

(c) Dozing off at a time when the said Motor Vehicle TM-7477 was in motion;

(d) Failing to stop and/or slow down and/or swerve and so avoid running off the said road and colliding with the said bridge;

(e) Failing to exercise any or any due care and/or skill in the driving, management and/or control of the said Motor Vehicle, TM-7477.

PARTICULARS PURSUANT TO THE COMPENSATION FOR INJURIES ORDINANCE, CHAPTER 5 NUMBER 5

Names of persons for whose benefit the action is brought: Alexandrine Austin, the mother of the Deceased; Deborah Austin, aged 10 years, Sharlene Austin, aged 8 years and Richard Austin, aged 6¼ years, the children of the Deceased.

In the High Court

No. 3
Statement of Claim Undated (cont'd)

The nature of the claim in respect of which damages are sought: The Deceased was a Business Manager, the owner of several businesses, a Shareholder and Director in several businesses and his monthly income was far in excess of $2,500.00. He was a healthy man of 40 years of age and was the sole support of his said mother and his said children, and by his death they have suffered all means of support.

The first-named Plaintiff claims:-

1. Under the Compensation for Injuries Ordinance, Chapter 5 Number 5 damages for the benefit of herself as the mother of the Deceased.

2. The second-named Plaintiffs claim:

Under the Compensation for Injuries Ordinance, Chapter 5 Number 5 damages for the benefit of themselves as the children of the Deceased.

G.P. Ramgoolam
Of Counsel

No. 4
Defence
28th October 1974

No. 4

Defence

TRINIDAD AND TOBAGO:

IN THE HIGH COURT OF JUSTICE
Sub-Registry, San Fernando

No: 766 of 1974.

Between

1. ALEXANDRINE AUSTIN
2. DEBORAH AUSTIN, SHARLENE AUSTIN, RICHARD AUSTIN (infants by their mother and next friend Maria Lezama)

Plaintiffs

and

GENE HART — Defendant

DEFENCE of the above-named Defendant delivered this 28th day of October, 1974, by his solicitors, Messrs. Laurence, Narinesingh & Co., of No: 75, Broadway, San Fernando.

Laurence, Narinesingh & Co.
Defendant's Solicitors

1. The Defendant admits the allegations of fact contained in paragraphs 1 to 4 of the Statement of Claim.

2. The Defendant denies that he is and was at all material times the owner of motor vehicle TM-7477.

3. Save that the Deceased was an occupant of the said motor vehicle TM-7477 which was driven by the Defendant on the 3rd day of May, 1974, along the Southern Main Road the Defendant denies each and every allegation contained in paragraph 5 of the Statement of Claim and specifically denies that he was negligent in any of the respects alleged or at all.

4. If (which is denied) the Deceased suffered severe personal injuries resulting in his death and the Plaintiffs suffered the alleged or any loss and damage they were solely caused and/or alternatively contributed to by the negligence of the driver of a truck which was travelling in the opposite direction, the name of which driver and the number of which truck are not known to the Defendant.

5. Further the Defendant says that whilst motor vehicle TM-7477 was being skillfully and carefully driven by him on his left or proper side of the Southern Main Road owing to the acts hereinafter referred to the Defendant was placed in jeopardy and in order to avoid a head-on collision with the said truck he drove the car into the canefield further left of the said road.

PARTICULARS OF NEGLIGENCE OF THE DRIVER OF THE TRUCK

(1) Failing to keep any or any proper or efficient look-out;

(2) Driving at too fast a rate of speed;

(3) Driving with bright lights and/or failing to dip his lights;

(4) Driving on the wrong side of the road or alternatively failing to keep to his proper side of the road;

(5) Failing to heed the presence of the Defendant's vehicle on the road;

(6) Failing to stop and/or slow down and/or swerve and so avoid running into the pathway of the said vehicle driven by the Defendant;

(7) Failing to exercise any or any due care and/or skill in the driving management and/or control of the said motor vehicle;

(8) Driving into the pathway of the Defendant's vehicle.

6. The alleged dependancy, damage loss and expenses are specifically denied.

7. Save as to the admissions hereinbefore made, the Defendant denies each and every allegation and/or implication of fact in the said Statement of Claim contained in the same way as if the same were herein specifically set forth and traversed seriatim.

Ramesh L. Maharaj
Of counsel

No. 5
Reply to
Defence - 6th
November 1974

No. 5

Reply to Defence

TRINIDAD AND TOBAGO:

IN THE HIGH COURT OF JUSTICE
Sub-Registry, San Fernando

No: 766 of 1974

Between

1. ALEXANDRINE AUSTIN
2. DEBORAH AUSTIN, SHARLENE AUSTIN and RICHARD AUSTIN (infants by their mother and next friend MARIA LEZAMA)

Plaintiffs

and

GENE HART Defendant

R E P L Y

1. The Plaintiffs join issue with the Defendant on his Defence save in so far as admissions therein are concerned.

2. The Plaintiffs specifically deny that the

death of the Deceased and the loss and damage suffered by the Plaintiffs were solely caused and/or alternatively contributed to by the negligence of the driver of a truck which was travelling in the opposite direction.

3. The Plaintiffs specifically deny that at the material time there was any truck travelling in the opposite direction on the said road.

4. The Plaintiffs specifically deny that the Defendant was skillfully and carefully driving Motor Vehicle TM-7477 or that he was placed in jeopardy by any truck.

5. The Plaintiffs repeat the allegations contained in paragraph 5 of the Statement of Claim and the particulars of negligence thereto.

G.P. Ramgoolam
Of counsel

DELIVERED by Mr. George Andrew Tsoi-A-Sue of No: 1-3, Court Street, San Fernando, this 6th day of November, 1974, Solicitor for the Plaintiffs herein.

George A. Tsoi-A-Sue
Plaintiff's Solicitor

No. 6
Amended Defence

No. 6
Amended Defence
9th July 1975

TRINIDAD AND TOBAGO:

IN THE HIGH COURT OF JUSTICE
Sub-Registry, San Fernando

No: 766 of 1974.

Between

1. ALEXANDRINE AUSTIN
2. DEBORAH AUSTIN, SHARLENE AUSTIN and RICHARD AUSTIN (infants by their mother and next friend Maria Lezama)

Plaintiffs

And

GENE HART — Defendant

AMENDED DEFENCE of the above-named Defendant

In the High Court

No. 6
Amended Defence
9th July 1975
(cont'd)

delivered this 9th day of July, 1975, pursuant to leave granted by the Honourable Mr. Justice Narine on the 16th day of June, 1975, by Messrs. Laurence, Narinesingh & Co., of No: 75, Broadway, San Fernando, Solicitors for the Defendant herein.

Laurence Narinesingh & Co.,

Defendant's Solicitors

1. The Defendant admits the allegations of fact contained in paragraphs 1 to 4 of the Statement of Claim.

2. The Defendant denies that he is and was at all material times the owner of motor vehicle TM-7477.

3. Save that the Deceased was an occupant of the said motor vehicle TM-7477 which was driven by the Defendant on the 3rd day of May, 1974 along the Southern Main Road the Defendant denies each and every allegation contained in paragraph 5 of the Statement of Claim and specifically denies that he was negligent in any of the respects alleged or at all.

4. If (which is denied) the Deceased suffered severe personal injuries resulting in his death and the Plaintiffs suffered the alleged or any loss and damage they were solely caused and/or alternatively contributed to by the negligence of the driver of a truck which was travelling in the opposite direction, the name of which driver and the number of which truck are not known to the Defendant.

5. Further the Defendant says that whilst motor vehicle TM-7477 was being skillfully and carefully driven by him on the left or proper side of the Southern Main Road owing to the acts hereinafter referred to the Defendant was placed in jeopardy and in order to avoid a head-on collision with the said truck he drove the car into the canefield further left of the side road.

PARTICULARS OF NEGLIGENCE OF THE DRIVER OF THE TRUCK

(1) Failing to keep any or any proper or efficient lookout;

(2) Driving at too fast a rate of speed;

(3) Driving with bright lights and/or failing to dip his lights;

(4) Driving on the wrong side of the road or

alternatively failing to keep to his proper side of the road;

(5) Failing to heed the presence of the Defendant's vehicle on the road;

(6) Failing to stop and/or slow down and/or swerve and so avoid running into the pathway of the said vehicle driven by the Defendant;

(7) Failing to exercise any or any due care and/or skill in the driving management and/or control of the said motor vehicle;

(8) Driving into the pathway of the Defendant's vehicle.

6. The alleged dependancy, damage loss and expenses are specifically denied.

7. The Defendant will contend that the Court has no jurisdiction in terms of Section 8 of the Compensation for Injuries Ordinance, Chapter 5 No. 5 to entertain the claim herein or to enter any judgment thereon for the reason that by his Will dated 12th September, 1970, the deceased Simon Austin appointed two executors in one of whom namely, William Austin, the right to bring an action under the said Ordinance was vested at all material times.

8. Save as to the admissions hereinbefore made, the Defendant denies each and every allegation and/or implication of fact in the said Statement of Claim contained in the same way as if the same were herein specifically set forth and traversed seriatim.

Ramesh L. Maharaj

Ramesh L. Maharaj
Of counsel

Of counsel

In the High Court

No. 7
Proceedings
19th July 1977

No. 7

Proceedings

TRINIDAD AND TOBAGO:

IN THE HIGH COURT OF JUSTICE

No: 766 of 1974.

Between

1. ALEXANDRINE AUSTIN
2. DEBORAH AUSTIN, SHARLENE AUSTIN and RICHARD AUSTIN (infants by their mother and next friend, MARIA LEZAMA) Plaintiffs

and

GENE HART Defendant

Before the Honourable Mr. Justice A. Warner

E. Thorne, Q.C for Plaintiff, N. Mohammed with him.

M. de La Bastide, Q.C., for Defendant, Allan Alexander with him.

NOTES OF EVIDENCE

****

De la Bastide begins.
Point rased in para. 7 of Amended Defence.
Preliminary point ordered 16/6/75.
Relevant date - accident and death 3/5/74.
Writ issued 2/8/74
Probate of will granted 28/5/76.

De La Bastide tenders office copy of will and office copy of Grant of Probate. Thorne objects on ground documents not produced from proper custody.
De La Bastide states documents are from the Court.
Documents admitted in evidence and marked A and B.
On face of Writ Plaintiffs are Alexandrine, Deborah, Sharlene and Richard. Last 3 are infants suing by mother and next friend.
First named Plaintiff was mother of deceased Simon Austin.
Refers to endorsement of Writ.
Refers to Statement of Claim.
Action is brought by Plaintiffs under Compensation for Injuries Ordinance - comes from s. 2 of 1846 Act.

Initially only Executors or Administrators under

section 11 of Fatal Accidents Act18 made further provisions corresponding with 58 (2). 2 sets of circumstances in which dependants can bring action themselves.

Plaintiff must wait 6 months to qualify under the second head. If action brought before 6 months 2nd category closed.

By virtue of will of deceased there were two executors one of whom renounces probate. Because an executor derives his title from will, he has status of executor from date of death and while his title is not complete until probate granted, he can institute action before grant of probate but judgment will not be given in his favour until probate is granted. Consequence of Plaintiff not having competence is that action must be dismissed without reference to merits.

Meyappa Chetty v. Supramaniam Chetty (1916) A.C. 603.

When after a person's death does right to institute a suit arise? P.608 last para. Basis of which construction of statute resolved was competence of executor of bringing an action from date of death and even before Grant of Probate.

Biles v. Caesar (1957) 1 All E.R. 151.

Denning L.J. at 153. I. There can be no question that one or other of executors was in position to have brought this action before grant of probate.

Action wrongly brought.
Effect of incompetence.

Finnegan v. Cementation Co. (1953) 1 All E.R. 1130. Jenkins. L.J. 1836. Time relevant where there is an executor. 36Digest Blue Band P. 211. Hollerari v. Bagnell (1879) 4 L.R. in 740. Curran v. Grand Trunk Railway (1898) 25 A.R. 410.

Thorne, Q.C.

Point simple. Certain propositions unexceptionable. Consequence of finding action wrongly brought would be to stay action. There was in Finnegan a widow who would have been entitled to sue as a beneficiary. Sued as administratrix when not entitled to sue as administratrix. In such case capacity is vital. If title to sue not relevant would have been entitled to sue qua dependant. It is a different matter, in case of dependants suing whether or not

somebody subsequently takes out probate - Dependants have an inchoate right to sue for compensation from time of death - it is a right which awaits the happening of a certain event. Law will not allow so preposterous a result. Big difference between what has been put and true situation. It is true that the doctrine of relation back is applicable. Ch. 8 No. 2 section 21.

Until there is a grant there is no executor even though when the grant shall have been obtained it relates back to the time of death.

Therefore when action was instituted Grant obtained under 2 years after action instituted.

s. 21 of Wills and Probate Ordinance reinforced by s. 10 of Wills and Probate Ordinance.

Deceased died 3/5/74. Action instituted 2/8/74.

The grant of probate was obtained after limitation period had expired. Mc Cabe v. Great Northern Railway Co. of Ireland (1899) I.R. 123.

Are dependants entitled to maintain proceedings? No comparable provision to s. 21 of Wills and Probate Ordinance in English Statute Law.

If action instituted prematurely but time passes and it turns out executor has not instituted proceedings it does not matter. Action ought not to be dismissed. Even if there was an executor at time action was instituted and dependants took a chance then once the 6 months period passed and executor did not bring proceedings, then the chance will have been well taken. This provision is purely procedural - it is not that dependants are given a right of action in certain circumstances. What is alleged is restricted is the enforceability of that right.

As long as there is a right to receive compensation. If there is no executor means if there is nobody with a grant of probate. At any time after death if there be no probate in existence any dependant may bring action. It does not matter that a person might sue as executor and have a decree when his grant is obtained.

Chetty is irrelevant.
Even if there were no s. 21 result would be same. Because executor's title derived from will he can act before grant and when he obtains it will relate back.

There must be a distinction between "executor" and "a person named in will as executor".

De LaBastide Q.C.

Question is was there an executor of deceased on 2.8.74. It is a separate question whether the executor on that date could have brought an action. Even if executor had no capacity to sue it would not mean that he did not exist. One fatal admission made by Counsel for Plaintiff.

Doctrine of relation back is part of our law - Distinction between executor and dependants or administrator.

In Ch. 8 No. 2 term "executor" used in relation to a person who has not obtained probate. s. 10 shows that executor has a status recognised by the Ordinance before probate is granted.

s. 2 shows there are rights before probate obtained.
s. 3 use of words "an executor". Refers to s.6.
s. 2 really refers to vesting in person to benefit from will.
Defendant not saying condition in s. 8(2) governs s.8(1).
As long as there is a will naming a person as executor it cannot be said that there is no executor.
No competence to sue unless conditions in s.8 are fulfilled.
Right only given by s. 8(2) is substantive not procedural.
Right in orthodox section means right which can be enforced by action.

If at date of commencement of action dependants had no right to sue nothing happening after can give to them. Flaw in executor's title can be cured by grant of probate not to dependants.
Having made initial mistake the proper course would have been to 'discontinue' and bring it at end of 6 months.
Policy of Ordinance is clear, concession being made to dependants saying dependants sue if - 6 months have elapsed from death and personal representatives have not taken steps.
Stay pending what?

Plaintiffs were not competent when they brought action. In this case it is a substantive absence of capacity to bring action.

In the High Court

No. 7
Proceedings
19th July 1977 (cont'd)

Adjourned 19.7.77

Resumed.

N. Mohammed (B.P. Maharaj holding) for Plaintiffs.
Bholai (holding for de LaBastide) for Defendant.

Part Heard.

25th July 1977

Adjourned: 25.7.77.

Resumed: 25.7.77

N. Mohammed for Plaintiffs. Thorne Q.C. absent. Mohammed apologises.
De La Bastide Q.C. Alexander with him (absent) for Defendant.
S. Persad holding.
Action dismissed - Costs. Plaintiffs to pay Defendant - Costs to be taxed fit for 2 counsel.

No. 8
Judgment
25th July 1977

No. 8

Judgment

TRINIDAD AND TOBAGO:

IN THE HIGH COURT OF JUSTICE

No: 766 of 1974.

Between

1. ALEXANDRINE AUSTIN
2. DEBORAH AUSTIN, SHARLENE AUSTIN and RICHARD AUSTIN (infants by their mother and next friend MARIA LEZAMA)

Plaintiffs

and

GENE HART Defendant

Before the Honourable Mr. Justice Alcalde T. Warner

J U D G M E N T
****

On 2nd August, 1974, the Plaintiffs Alexandrine Austin, Deborah, Sharlene and Richard

Austin (the last three suing by their mother and next friend) commenced an action against the Defendant claiming damages for negligence on the 3rd May, 1974, resulting in the death of Simon Austin on the 4th May, 1974.

The action was brought by the Plaintiffs as dependants of the Deceased and the claim in each instance is said to be under the Compensation for Injuries Ordinance.

The Defendant entered appearance to the writ on 13th August, 1974, and delivered a Defence on 28th October, 1974. Pursuant to leave by Narine J. on 16th June, 1975, an amended Defence was delivered by the Defendant in July, 1975.

On 18th February, 1977, a direction was given by Braithwaite J. that the question raised in the amended Defence, as to whether the Court had jurisdiction to entertain the claim or enter judgment thereon for the reason that by his will dated 12th September, 1970, the Deceased Simon Austin appointed two executors in one of whom the right to bring an action under the Ordinance was vested at all material times, be dealt with as a preliminary point.

Having heard arguments on this preliminary question I must now decide on it.

For the Defendant it has been contended that there are two sets of circumstances in which a dependant is entitled to bring an action himself under Section 8 of the Compensation for Injuries Ordinance, Ch. 5 No. 5, (1) at any time when there is no executor or administrator (2) if there be an executor or administrator, where six months have passed since the death and no action has been brought by and in the name of the executor in respect of the injury resulting in death and for the benefit of the dependant.

It has been submitted for the Defendant that "executor" as used in section 8 of the Compensation for Injuries Ordinance means the person named as executor in the will, whether or not such person has obtained probate of the will. It was conceded that for the purpose of proving that a person is executor, it is necessary to show that he has obtained probate, but it was also submitted that the obtaining of a grant of probate is not a condition precedent to the executor commencing proceedings but only to his obtaining judgment on such proceedings.

For the Defendant, considerable reliance was placed on the doctrine of relation back. The grant of probate, it was contended, relates back to the death of the testator so that acts of an executor after the death, but before the grant of probate, must be regarded in the light of the grant as if they followed and did not precede the grant. Once a dependant has brought an action under the Compensation for Injuries Ordinance in the capacity of dependant, if he has done so before the expiration of six months from the death of the deceased and at the time of his bringing the action, there was in existence a person named as executor in the will who has not renounced probate, such action must fail because of lack of competence on the part of the plaintiff. The defect in the action is not cured by the fact that at some time after action was brought the six month period from the death expired and no action had been brought up to then by the executor.

For the Plaintiffs it was argued that there is no executor within the meaning of section 8 of the Compensation for Injuries Ordinance until probate has been granted. There must be, it was submitted, a distinction between "executor" and "person named as executor in the will."

Reference was made to section 21 of the Wills and Probate Ordinance which reads as follows:-

> 21. No will of any person deceased shall have any effect whatever, either in law or in equity, or shall pass any right title or interest whatever, until the same has been duly proved in accordance with the provisions of this Ordinance.

The further contention of the Plaintiffs was that from the time of the death the dependants have an inchoate right to sue. It is a right which awaits the happening of a given event, namely, the expiry of six months within which no action has been brought by the personal representative of the deceased.

Even if there was an executor at the time the action was instituted and the action was instituted by dependants before the expiry of six months from the death, if within six months, the executor did not commence proceedings, the action prematurely instituted, it was submitted, ought not to be dismissed. The law, the submission for the Plaintiffs continued, would not allow the preposterous result of proceedings prematurely instituted by a dependant failing altogether, even

though no action was brought by the executor. The provision for the bringing of the action by the executor for the benefit of the dependants was purely procedural and at all times the substantive right to compensation was that of the dependants.

It is clear that the writ in this case does not purport to have been issued by the executor in accordance with section 8(1) of the Compensation for Injuries Ordinance.

One must look, therefore, to see whether the case fits into section 8(2) of the Compensation for Injuries Ordinance. Section 8(2) may be divided into two parts, the first would read in this way, "If there be no executor or administrator of the person deceased, then and in every such case, such action may be brought by and in the name or names of all or any of the persons for whose benefit such action would have been if it had been brought by or in the name of such executor and administrator."

It is agreed that this first part would contemplate the absence of any executor or administrator of the person deceased at the time action was brought. The evidence does not show that there was any grant of administration, so there was no administrator. Was there an executor?

By the will of the deceased, William Austin and Ramesh Maharaj were appointed executors. The latter renounced probate, the former was granted probate on the 28th May, 1976.

The ordinary meaning of the word "executor" is the person named in the will of the deceased as executor and the provisions of section 21 of the Wills and Probate Ordinance Ch. 8 No. 2 would hardly alter the ordinary meaning of the word as used in section 8(2) of the Compensation for Injuries Ordinance, seeing that in the said Wills and Probate Ordinance the word "executor" is used in more than one place in its ordinary meaning and not as meaning an executor whom probate has granted. These instances are in sections 31 and 46 of the Wills and Probate Ordinance. It is unnecessary, however, to consider this question of ordinary meaning, seeing that the doctrine of relation back applies to probate granted to a person named as executor in the will. It is settled law that an executor derives title from the will and probate relates back to the moment of the testator's death. As Ashhurst J. held in Smith v. Milles 1786 1 T.R. 475, 99 E.R. 1205, the probate is a mere ceremony but when passed, the executor derives his

title not under the probate but under the will.

It is my judgment section 21 of the Wills and Probate Ordinance in no way attenuates the effect of the doctrine of relation back. Section 6 of the Wills and Probate Ordinance reads as follows:-

> 6. Every executor of any will which shall be proved after the commencement of this Ordinance and every administrator to whom any administration of the estate of any person shall be granted after the commencement of this Ordinance, shall take and have the same estate and interest in and control over the estate of his testator or of the intestate, and shall have the same rights, actions, powers and authorities, and be subject to the same actions, suits, and liabilities in respect of such estate, as any executor or administrator would take, have, and be subject to in respect of person estate according to the law of England, and all actions and suits and rights of action and suit which, by the law of England, would go to the executor or administrator or heir of any person dying in England and all actions and suits to which any executor or administrator or heir would be subject according to the law of England shall, in Trinidad and Tobago, in like manner go to and be maintainable against every representative who after the commencement of this Ordinance, shall prove the will or obtain administration of the estate of any person dying and leaving effects within Trinidad and Tobago."

"Law of England" as used in the Wills and Probate Ordinance means according to section 2 of the same Ordinance, the Law of England as in force on the 16th of May, 1921.

The difference between the application of doctrine of relation back in the case of an administrator and its application in the case of an executor was explained by Duke J. in the case of Rousseau v. Rousseau Vol. 13 of Trinidad and Tobago Supreme Court Judgments at pages 9 and 11.

In the instant case, leading Counsel for the Plaintiffs has agreed that relation back would give validity to an action brought by an executor before grant of probate.

Applying the doctrine of relation back to the facts of this case, I must hold that by relation back on 2nd August, 1974, there was an executor of the deceased Simon Austin. In these circumstances, I must hold further that the right given to dependants in what I have called the first part of section 8(2) cannot apply to the instant case.

One must now look at the second limb of section 8(2) of the Compensation for Injuries Ordinance. Is this a case in which there was an executor but no action in respect of the injury and for the benefit of the dependants was brought by such executor in his capacity as such within six months of the death of Simon Austin? The answer is "yes" but one must look to see what is the consequence of no action having been brought.

As I construe section 8(2) it is when the six months have passed and no action has been brought under the Ordinance by the executors for the benefit of the dependants that the right of the dependant to bring the action himself arises.

The argument has been advanced that an action brought by a dependant before the expiration of six months is protected by the sub-section if it turns out upon the expiration of the six months following the death that no action for the benefit of the dependant has been brought by an executor within the period. There is, it has contended, an inchoate right which the dependant has from the death and that right becomes full and complete if the executor has brought no action within the period. There is, it has contended, an inchoate right which the dependant has from the death and that right becomes full and complete if the executor has brought no action within the period. I hold that a distinction must be drawn between the right to bring an action and the right to receive compensation awarded in the action. Section 8(1) of the Compensation for Injuries Ordinance makes clear general provision requiring actions under the Ordinance to be brought by and in the name of the executor or administrator of the deceased. Section 8(2) on the other hand provides for two sets of circumstances in which the action may be brought by the dependant. Section 8(1) shows a clear distinction between the person who may bring the action namely the executor and the persons for whose benefit the action may be brought that is the wife, husband, parent and child whom I have compendiously described as dependants.

It is also interesting to note that the policy

of the Ordinance that actions under it should be brought by personal representatives is such that even the exceptions in section 8(2) are permissive not mandatory. Section 8(2) permits the dependant to bring the action but does not deprive the personal representative of his right to bring the action.

The theory of an inchoate right bears a resemblance to the doctrine of relation back. There is no authority however, for the proposition that the failure of a personal representative to bring an action within six months can relate back to the action brought by a dependant within the six months so as to validate it.

The doctrine of relation back in regard to executors is firmly embedded in law. The theory that there is from the time of death in inchoate right in the dependant to bring an action and that this right comes to full fruition if the personal representative has up to the end of six months brought no action is an attractive statement as to what the law ought to be but not of what the law is. Such right of action as a dependant has is conferred by section 8(2) and exists either when there is no personal representative or after the expiration of six months if the personal representative has not brought action.

It is not competent for a dependant to bring an action within six months of the death if there is a personal representative during that time. I have held that on 2nd August, 1974, a date within six months of the death of Simon Austin there was an executor of the deceased. It was not, therefore, competent for the dependants or any of them to bring this action at that date. At the conclusion of the six month period following the death, the Plaintiffs had already commenced these proceedings. Still-born as they were, these proceedings could not be brought to life by the passage of six months and inaction of the executors within that time.

The possibility of injustice in the broad sense of the word resulting from what must have been a mistake on the part of the Plaintiffs and from the Defendant making use of this mistake by a plea coming more than a year after the death has not escaped my notice.

Counsel for the Plaintiffs has described the result which would flow from the interpretation contended for on behalf of the Defendant as preposterous. There are many instances in which

the imperfections of the law, which is, after all, the product of minds human and fallible, become manifest. This case may be one of those, but I do not regard the ordinary meaning of section 8 as leading to the kind of manifest absurdity which would justify my departing from the ordinary general rules of interpretation. In my judgment, section 8 of the Compensation for Injuries Ordinance shows a clear policy. The dependant who waits until the passing of six months from the death, and after making sure that no action has been commenced by an executor, commences his action well within the next six months has nothing to fear from the interpretation of the first part of the sub-section which I have followed. If the law has not taken into account the possibility of a dependant erroneously proceeding too speedily, i.e. before the expiration of six months from the death and finding by the time of trial that the doctrine of relation back has taken away his right of action, I cannot for that reason say that the result will be preposterous and interpret the section contrary to its plain meaning.

It follows that I must find that the object taken for the Defendant is well taken.

The action is dismissed with costs to be taxed and paid by the Plaintiffs to the Defendant, fit for two Counsel.

Dated this 25th day of July, 1977.

Alcalde T. Warner
Judge

No. 9
Order

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
Sub-Registry, San Fernando

No: 766 of 1974

Between

1. ALEXANDRINE AUSTIN
2. DEBORAH AUSTIN, SHARLENE AUSTIN and RICHARD AUSTIN (infants by their mother and next friend, MARIA LEZAMA) Plaintiffs

and

GENE HART Defendant

In the High Court

No. 9
Order
25th July
1977.
(cont'd)

Entered the 25th July, 1977

Dated the 25th July, 1977.

Before The Honourable Mr. Justice Alcalde Warner.

THIS action coming on for hearing this day, upon reading the pleadings and upon hearing Counsel for the Defendant and Counsel for the Plaintiffs

IT IS ADJUDGED

that this action be and the same is hereby dismissed with costs to be taxed and paid by the Plaintiffs to the Defendant, fit for two counsel.

Asst. Registrar,
San Fernando.

In the Court of Appeal

No. 10
Notice and Grounds of Appeal - 5th August 1977

No. 10

Notice and Grounds of Appeal

TRINIDAD AND TOBAGO:

IN THE COURT OF APPEAL

Civil Appeal No: 47 of 1977

Between

ALEXANDRINE AUSTIN and DEBORAH AUSTIN, SHARLENE AUSTIN and RICHARD AUSTIN (infants by their mother and next friend MARIA LEZAMA)

Appellants

and

GENE HART

Respondent

TAKE NOTICE that the Appellants being dissatisfied with the whole of the decision more particularly stated in paragraph 2 hereof the High Court of Justice, Sub-Registry, San Fernando, No: 766 of 1974, contained in the judgment of Mr. Justice Alcalde Warner dated the 25th July, 1977, doth appeal to the Court of Appeal upon the grounds set out in paragraph 3 and will at the hearing of the appeal seek the relief set out in paragraph 4.

The Appellants further state that the names and addresses including their own, of the persons directly affected by the Appeal are those set out in paragraph 5.

2. That the action be dismissed with costs to be taxed and paid by the Appellants (Plaintiffs) to the Respondent (Defendant).

3. GROUNDS OF APPEAL:

(a) That the Judgment is unreasonable and cannot be supported by the evidence;

(b) That the Learned Trial JUDge erred in law in holding that the action was not maintainable by the Appellants (Plaintiffs).

4. The relief sought is that the said Judgment be set aside with costs both here and in the Court below.

5. The names and addresses of the persons directly affected by the Appeal are :-

1. Alexandrine Austin, Deborah Austin, Sharlene Austin and Richard Austin (infants by their mother and next friend, Maria Lezama) of No. 72, Pointe-a-Pierre Road, San Fernando;

2. Gene Hart of St. James Street, San Fernando.

Dated this 5th day of August, 1977.

George A. Tsoi-A-Sue

Solicitor for the Appellants, of Nos: 1-3, Court Street, San Fernando, whose address for service in Port-of-Spain is c/o Messrs. Lai-Fook, Haracksingh & Co., of No: 41 St. Vincent Street.

TO: The Registrar,
Court of Appeal;
Port-of-Spain;

AND TO: Messrs. Laurence, Narinesingh & Co.,
Solicitors for Respondent.

No. 11

Judgment of M. A. Corbin, J.A.

TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 47 of 1977

Between

ALEXANDRINE AUSTIN and DEBORAH AUSTIN, SHARLENE AUSTIN and RICHARD AUSTIN (infants by their mother and next friend MARIA LEZAMA) Appellants

And

GENE HART Respondent

Coram: M.A. Corbin, J.A.
C.A. Kelsick, J.A.
N.M. Hassanali, J.A.

22nd July, 1980.

E. Thorne, S.C. and N. Mohammed - for the appellants
M. de la Bastide, S.C. and A. Alexander - for the respondent

J U D G M E N T

Delivered by Corbin, J.A.

This appeal arises out of a claim for damages by the appellants as dependants of one Simon Austin who died from injuries received by him on 4th May, 1974 in an accident which occurred while he was a passenger in a vehicle owned and driven by the respondent.

In an amended defence delivered on 16th June, 1975 the respondent pleaded inter alia:-

"7. The defendant will contend that the Court has no jurisdiction in terms of section 8 of the Compensation for Injuries Ordinance Chapter 5 No. 5, to entertain the claim herein or to enter any judgment therein for the reason that by his Will dated 12th September, 1970, the deceased

Simon Austin appointed two executors in one of whom namely William Austin the right to bring an action under the said Ordinance was vested at all material times."

It is agreed between Counsel for the parties that on the 18th February, 1977 Braithwate J. directed that that question should be dealt with as a preliminary point, and it was heard and determined by Warner J. on 25th July, 1977, in favour of the respondent. The appellants have now appealed on two grounds:-

"(a) that the judgment is unreasonable and cannot be supported having regard to the evidence, and

(b) that the learned Judge erred in holding that the action was not maintainable by the appellants."

The only issue arising in this appeal is as to the competency of a dependant of a deceased person to bring an action, within six months of the death, in respect of compensation for the injury which resulted in death. The answer to this is to be found in the Compensation for Injuries Ordinance Ch. 5 No. 5 (hereinafter called "the Ordinance") Section 8 of which reads as follows:-

(1) "Every action in respect of injury resulting in death shall be for the benefit of the wife, husband, parent and child as the case may be, of the person whose death shall have been caused and shall be brought by and in the name of the executor or administrator of the person deceased.

(2) If there be no executor or administrator of the person deceased, or if although there be such executor or administrator no such action shall within six months after the death of such deceased person have been brought by and in the name of his executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator."

Apart from the right vested in a dependant by

this section he would have no power to bring such an action anymore than he would have to sue for a debt owing to the deceased's estate from which he would benefit. Consequently, the right is limited to the circumstances described in the section.

Sub-section (2) postulates two sets of circumstances:-

(a) If there be no executor or administrator of the person deceased, such action /referring to the action described in sub-section (1)/ may be brought by and in the name of the dependants, and

(b) If although there be an executor or administrator, no such action /again referring to the action in sub-section (1)/ shall within six months after the death of such deceased person have been brought by and in the name of his executor or administrator "then and in every such case such action may be brought by and in the name of the dependants."

In the view that I take of this matter the circumstances described at (a) above do not fall for consideration in the instant appeal since there is an executor. In my judgment, however, where the circumstances are such as are described at (b) above the competency of the dependants to bring an action arises only if the executor or administrator of the deceased has failed to do so at the expiration of six months after the death. Accordingly, these appellants were not competent to bring their action as they did within six months of the death of the deceased, there being an executor appointed under his will.

It was contended on behalf of the appellants that the word "executor" in this section means an executor who has obtained probate of the will since the will and the appointment have no effect until probate is granted. Counsel sought to support this contention by reference to section 21 of the Wills Ordinance Chapter 8 No. 2 which reads:-

> "No will of any person deceased shall have any effect whatever either in law or in equity, or shall pass any right title or interest whatever until the same has been duly proved in accordance with the provisions of this Ordinance."

As I see it, this section does not affect the appointment of an executor, but is solely intended to prescribe the time at which legal and equitable interests and estates created under a will shall pass.

The real question is what is meant by the word "executor" in section 8 of the Ordinance. It is a well established canon of construction that words which are not obscure or ambiguous must be given their ordinary meaning, and there seems to be no warrant for attaching any unusual meaning to the word in this section because:-

> "The general rule is to adhere to the ordinary meaning of the words used, and to the grammatical construction unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further." /Vide: Christopherson v. Lotinga (1864) 33 L.J.C.P. 121. 123/.

The ordinary meaning of the word "executor" as stated in 17 Halsbury's Laws 4th Edition para. 702 is:-

> "A person appointed, ordinarily by the testator in his will or codicil, to administer the testator's property and to carry into effect the provisions of the will."

Stroud's Judicial Dictionary 4th Edition at p. 968 defines it thus:-

> "Executor is when a man makes his testament and last will and therein nameth the person that shall execute his testament; then he that is so named is his executor."

I understand the word to have been used in this sense by Phillimore L.J. in Hewson v Shelley (1914) 2 Ch. 13 (although the case was decided on a different point) when he said at p. 38:-

> "It is said for the respondents that the property of a deceased person vests in the executor immediately upon the death and by the mere effect of the will. In some senses this is true. It is true that an executor can properly act at once, that he can collect his testator's goods, receive and give discharge for debts due, and alien the goods including

> chattels real in due course of administration, subject always to the condition that he will sometime or another satisfy the Court that has jurisdiction over the subject-matter that there is a will and that he is the executor. But till he has proved it or till it has been proved to the Court, till it has become probatum, his title is not certain, and in that way is not complete."

In Smith v Milles 99 E.R. 1205 it was pointed out by Ashurst J. that immediately on the death of a testator an executor may release and do other matters and probate is only evidence of his right but is necessary to enable him to sue. The learned judge must have meant "executor named in the will."

Even in the Wills Ordinance referred to by Counsel, the meaning which the word is intended to have in that Ordinance is shown clearly in section 19(2) which reads:-

> "Where a testator by his will appoints an infant to be his executor the appointment shall not operate to transfer any interest in the estate of the deceased to the infant or to constitute him a representative for any purpose unless and until probate is granted to him under this section."

It is manifest from this that although the appointment takes effect immediately no interest passes until probate is granted.

Section 31 of the same Ordinance reads in part:-

> "Where there shall be an executor of a will, but such executor shall not have proved the will...."

This could only be a reference to the person named in the will who has not yet taken steps to obtain probate and it cannot bear the meaning contended for by Counsel for the appellants.

It was also submitted by Counsel that in any event the Courts will not shut out a claim by the dependant merely because it is brought at a time when there is an executor who could have brought the action, and he cited the case of Cooper v. Williams and Or. (1963) 2 All E.R. 282 and three other cases in support of his submission. I think that those cases can all be distinguished and that

the principle does not apply to the circumstances of the present appeal.

He further submitted that as a matter of policy, the dependants should not be prevented from bringing their action since this would create a great hardship. While I feel great sympathy for the dependants in this case I can do no better than to re-echo the words of Lord Simon in King Emperor v. Benoari Lal Sarma (1945) A.C. 28 when he gave as his opinion that:-

> "In construing enacted words we are not concerned with the policy involved or with the results, injuries or otherwise, which may follow from giving effect to language used."

I would dismiss the appeal with costs.

MA. CORBIN,
Justice of Appeal.

No. 12

Judgment of C.A. Kelsick, J.A.

TRINIDAD AND TOBAGO:

IN THE COURT OF APPEAL

Civ. Appeal No. 47 of 1977

Between

ALEXANDRINE AUSTIN and DEBORAH AUSTIN, SHARLENE AUSTIN and RICHARD AUSTIN (infants by their mother and next friend MARIA LEZAMA) Appellants

And

GENE HART Respondent

****

Coram: M.A. Corbin, J.A.
C.A. Kelsick, J.A.
N.M. Hassanali, J.A.

July 22, 1980.

E. Thorne S.C. and N. Mohammed - for the Appellants
M. Dela Bastide S.C. and A. Alexander - for the Respondent

J U D G M E N T

Delivered by Kelsick, J.A.

This appeal raises indirectly, if not directly, an important and fundamental question concerning a difference between the law of probate of England and that of Trinidad and Tobago which has not been previously judicially considered.

These are the circumstances which have led to the present litigation.

Simon Austin ("the deceased") was fatally injured in a motor vehicular accident on May 4, 1974, and died on the same day. On August 2, 1974, the plaintiffs who are his mother and his three infant children (suing by their mother and next friend) issued the writ in these proceedings against Gene Hart ("the defendant") who was the driver of the motor vehicle that collided with a bridge in which the deceased was a passenger. The claim is in negligence and is for compensation for loss sustained as a result thereof by the plaintiffs. It is brought under s. 8 of the Compensation for Injuries Ordinance Ch. 5 No. 5 ("the Ordinance"). In the defence negligence is denied and contributory negligence is alleged on the part of the driver of a truck who is stated to have placed the defendant in jeopardy. Neither the truck nor its driver was identified.

By leave of a judge on June 16, 1975, the following question of law was raised in the amended defence:-

> "The Defendant will contend that the Court has no jurisdiction in terms of Section 8 of the Compensation for Injuries Ordinance, Chapter 5 No. 5 to entertain the claim herein or to enter any judgment thereon for the reason that by his Will dated 12th September, 1970, the deceased Simon Austin appointed two executors in one of whom namely, William Austin, the right to bring an action under the said Ordinance was vested at all material times."

Although the relevant documents do not form part of the record of appeal there is a statement in the judgment of Warner J., the trial judge,

that that question was on February 18, 1977, directed by Braithwaite J. to be dealt with as a preliminary point - presumably under Order 33 rule 3 of the Rules of the Supreme Court, 1975.

Warner J. decided that question in favour of the defendant.

Probate of the will of the deceased referred to in the amended defence was on May 28, 1976, granted to William Austin, the other executor having previously renounced his right to probate.

Section 8 of the Ordinance reads:-

"8. (1) Every action in respect of injury resulting in death shall be for the benefit of the wife, husband, parent, and child, as the case may be, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased.

(2) If there be no executor or administrator of the person deceased, or if although there be such executor or administrator no such action shall, within six months after the death of such deceased person, have been brought by and in the name of his executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator."

These subsections are reproduced respectively from s. 2 of the Fatal Accidents Act, 1846 (Lord Campbell's Act) and s. 1 of the Fatal Accidents Act, 1864.

I shall refer to a relative of the deceased mentioned in s. 8(1) as a "dependant", an expression used in s. 2 of the Ordinance as re-enacted by the Law Reform (Miscellaneous Provisions) Act, 1976 which amended the Ordinance.

As indicated by Morris C.J. in Holleran v. Bagnell 4 L.R. Ir. 740 at p.741, under the first limb of s. 8(2) an action may be brought by a dependant within six months of the death of the deceased if there is no executor or administrator. Under the second limb however, if there is such an executor or administrator, the dependant cannot

bring an action until the six months have elapsed.

Neither of the expressions "executor" or "administrator" is defined in the Ordinance.

The question of law for determination is whether or not for the purposes of s. 8 there was an executor of the deceased between the date of his death on May 4 and the issue of the writ on August 2, 1974; and, if there was, whether the writ in the proceedings was prematurely issued and was on that account a nullity.

When this point was taken in the amended defence which was delivered on July 9, 1975, the twelve months from the time of death within which the action had to be commenced, as ordained by s.6 of the Ordinance, had elapsed. So it was too late for the plaintiffs to discontinue this action and to issue a fresh writ after the expiration of the six months on November 4, 1974, and before May 3, 1975.

For the defendant it is contended that "executor" in s. 8(2) means the person or persons named in the will as such, whether or not probate of the will is granted to him or them. This meaning I shall refer to as "the first meaning".

The main plank in the plaintiff's case is that the common law as obtained in England in its application to Trinidad and Tobago was fundamentally altered by s. 21 of the Wills and Probate Ordinance Ch. 8 No. 2 with the result that there was no executor until probate was granted, more than two years after the death of the deceased. It would follow therefore that "executor" in s. 8(2) of the Ordinance means an executor who has proved the will. This meaning I shall designate "the second meaning".

S. 21 is in the following terms:-

> "No will, of any person deceased shall have any effect whatever, either in law or in equity, or shall pass any right, title, or interest whatever, until the same has been duly proved in accordance with the provisions of this Ordinance."
>
> (Emphasis mine)

Mr. Dela Bastide for the defendant argued that it was plain that "executor" in s.8(2) of the Ordinance has the first meaning, which is its ordinary meaning in English law, and the Court is

restricted to the provisions of the Ordinance and may not refer to any related legislation in construing the Ordinance; further that s. 21 of Ch. 8 No. 2 was a subsequent enactment to the Ordinance (which came into operation on December 10, 1896) and could not alter that meaning. The earliest ancestor of s.21 that I have traced is s. 17 of Ordinance No. 99 in the 1902 Revised Laws which came into operation on January 1, 1902.

I do not agree with Mr. Dela Bastide's submission. In the context of our law the word "executor" is ambiguous, as it is capable of two interpretations. To ascertain which of those meanings it bears as indicative of the intention of the legislature reference may, and indeed must, be had to external aids - to the common and statutory law relating to executors.

It is apposite to note that,even in the absence of any counterpart to s. 21 in the law of England, doubts were expressed as to whether the disputed word in the Land Transfer Act, 1897, meant an "executor who proved the will". In Hewson v. Shelley [1914] 2 Ch. 13 at p. 31, Buckley L.J. observed:-

> "Upon G.F. Hewson's death leaving a will appointing executors, it is contended and I assume that the legal estate vested in the executors, although no one knew that there was such. This is so unless 'executor' in s. 24, sub-s. 2, of the Land Transfer Act means 'executor who has proved'. It is not so defined in the Act of 1897. The definition is in contrast with that in s. 8, sub-s. 4 of the Conveyancing Act, 1911. For the present purpose I do not find it necessary to decide, but assume, that in the language of the Land Transfer Act an executor is before probate personal representative."

Section 8(4) of the Act of 1911 (to which there is no analogue in our law of probate) enacts:-

> "In this section 'personal representative' means an executor (original or by representation) or administrator, but does not include an executor who renounced or has not proved."

The earliest provisions introducing the English law of Probate into Trinidad (and later applied to Tobago) appear in s. 34 of Ordinance No. 4 of 1845, which was passed on January 22, 1845. Its long title is "An Ordinance to regulate the

probate of wills and letters of administration and to ascertain and define the powers and liabilities of executors and administrators." The section is re-enacted in s. 6 of Ch. 8 No. 2 which refers to the administration of the real and personal estate, whereas s. 34 related only to the personal estate. S. 6 ordains:-

> "Every executor of any will which shall be proved after the commencement of this Ordinance, and every administrator to whom any administration of the estate of any person shall be granted after the commencement of this Ordinance, shall take and have the same estate and interest in and control over the estate of his testator or of the intestate, and shall have the same rights, actions, powers and authorities, and be subject to the same actions, suits, and liabilities, in respect of such estate, as any executor or administrator would take, have and be subject to in respect of personal estate according to the law of England and all actions and suits and rights of action and suit which by the law of England, would go to the executor or administrator or heir of any person dying in England and all actions and suits to which any executor or administrator or heir would be subject according to the law of England, shall in /Trinidad and Tobago/ in like manner go to and be maintainable against every representative who, after the commencement of this Ordinance, shall prove the will or obtain administration of the estate of any person dying and leaving effects within /Trinidad and Tobago/".
>
> (Emphasis added)

Section 2 of Ch. 8 No. 2, which defines "law of England" to mean the law of England as in force on May 16, 1921, ("the relevant date"), was enacted by Ordinance No. 17 of 1939.

I shall first review the "law of England" before proceeding to examine what effect, if any, s. 21, which was enacted after s. 6, had had on that law.

As stated in Halsbury's Laws (4th ed.) Vol. 17 at para. 702, an executor is the person appointed, ordinarily by the testator by his will or codicil, to administer the testator's property and to carry into effect the provisions of the will. In Stroud's Judicial Dictionary Vol. 2

(4th ed.) at p.968 he is defined:-

> "'Executor' is when a man makes his testament and last will and therein nameth the person that shall execute his testament; then he that is so named is his executor."

Under the common law as obtained in England on the relevant date (and today) the executor derives his title from the will, and from the time of the testator's death, his personal estate vests in the executor, if of full age, who can thereupon assume administration of the estate.

Speaking for the Privy Council in Chetty v. Chetty [1916] A.C. 603 Lord Parker of Waddington said at pp. 608-9:-

> "It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled:".

Ashurst J. described the position in Smith v. Milles (1786) 1 T.R. 475 at p. 480:-

> "So the executor has the right immediately on the death of the testator, and the right draws after it a constructive possession. The probate is a mere ceremony, but, when passed, the executor does not derive his title under the probate, but under the will; the probate is only evidence of his right, and is necessary to enable him to sue; but he may release, etc. before probate."

And in Re Pawley v. London and Provincial Bank (1870) 1 Ch 58 Kekewich J. at p. 64, with reference to the Land Transfer Act, 1897, said:-

> "... by the term 'his personal representative'

used in the first and other sections of the Act those filling that character were intended to be described irrespectively of the question whether they had obtained a grant of probate or not. It is common knowledge that an executor derives his title from the will, and not from the grant of probate, and that he can in his representative character do many things, including the transfer of chattels real, notwithstanding that he has not proved the will."

It is because the executor derives his title from the will that the first meaning is the primary and ordinary meaning in English law, and that he can sue in respect of claims of the estate at any time after the death of the testator; although he cannot obtain judgment before the grant of probate, which is authenticated evidence of his title.

By contrast an administrator has no title until the grant of the letters of administration by which the title is conferred on him by the Court; and the assets of the estate vest in him only as from the time of the grant. I quote from Halsbury's Laws op. cit. at para. 702:-

"An administrator is a person approved by a court of competent jurisdiction to administer the property of a deceased person. The office of administrator is said to be dative because it derives from such a grant, whereas the office of executor derives from the will of the deceased."

In Ingall v. Moran [1944] 1 All E.R. 97 a writ was issued by a person who subsequently took out letters of administration. The doctrine of relation back did not operate so as to validate the writ. Scott L.J. said at p. 100:-

"It follows that on the issue raised by each plea he is driven to the same replication, viz., the doctrine of relation back. But in my opinion that doctrine does not help him on either plea. If the writ was bad when issued, the action was never commenced. The trial judge was in error in speaking of the issue of the writ as being a question of fact and not law; and no doctrine of relation back could give reality to a statement of claim not preceded by a duly issued writ. Finally, once Sept. 19 had passed without a writ duly issued by a duly qualified administrator, the cause of action was barred and could not be resurrected."

Luxmoore, L.J stated at p. 101:-

"It is, I think, well established that an executor can institute an action before probate of his testator's will is granted and that, so long as probate is granted before the hearing of the action, the action is well constituted although it may in some cases be stayed until the plaintiff has obtained his grant. The reason is plain. The executor derives his legal title to sue from his testator's will; the grant of probate before the hearing is necessary only because it is the only method recognised by the rules of court by which the executor can prove the fact that he is the executor. If any authority for this is required it is to be found in the judgment of Lord Parker in Chetty v. Chetty. An administrator is, of course, in a different position for his title to sue depends solely on the grant of administration. It is true that when a grant of administration is made the intestate's estate including all choses in action vests in the person to whom the grant is made, and the title thereto then relates back to the date of the intestate's death, but there is no doubt that both at common law and in equity in order to maintain an action the plaintiff must have a cause of action vested in him at the date of the issue of the writ. Lord Parker, in the case to which I have already referred, states this to be the law in the plainest terms."

And Goddard L.J. expressed it in this way at p.102:-

"There is no doubt that, where a deceased person leaves a will and therein names an executor, the latter can institute actions before obtaining probate, though the action may be stayed until the probate is granted: Tarn v. Commercial Banking Co. The reason for this is, no doubt, that the executor's title is derived from the will, which operates from the death of the testator, and all he has to do is to prove the will, that is, to prove that the will which names him as executor is the last will of the deceased. He had a title to sue but the court requires him to perfect his title and will not allow the action to proceed till this has been done. The action will be stayed, but not dismissed. An administrator is in a different position."

The respective positions of an executor and

of an administrator have been tersely summarised by Parry and Clark in their Law of Succession (7thed.) at p. 159:-

> "A grant of probate confirms the authority of an executor, whereas the grant of letters of administration confers authority on an administrator."

As there is no administrator until he is appointed by letters of administration, where it eventually transpires that the deceased died intestate a dependant may lawfully, under s. 8(2) of the Ordinance, have commenced proceedings between the date of death and six months thereafter, as in Holleran's case (supra), which was applied in the Canadian cases of Lampman v. Township of Gainsborough (1888) 17 O.R. 191 and Curran v. Grand Trunk Railway Company (1898) 25 O.A.R. 407. Osler J.A. in the latter appeal answered the objection to the validity of the proceedings in the following passage at p.415:-

> "Something has been suggested as to whether the action has not been brought too soon, the plaintiff having sued within six months after the death. But it is clear that there is nothing in the point, for section 7 of the Act gives two alternatives, (1) where there is no executor or administrator, and (2) where there is, but the executor has not within six months brought the action. In either of these events the person for whose benefit the action must have been brought may sue. Here there was no executor, and the action is competent."
>
> (Emphasis mine)

Where such an action has been initiated by a dependant, and thereafter before the expiry of the six months an administrator is appointed, the court will stay proceedings in one of the actions on motion by the defendant. In Mummery v. Grand Trunk Railway Company (1900) 1 O.L.R. 622 the action by the dependant was stayed.

This practice is in accord with the provisions of s. 11, (re-enacted as s.5(2)), of the Ordinance that not more than one action shall lie for and in respect of the same subject matter or complaint.

In Sevick v. C.N.R. [1933] 4 D.L.R. 668, Robson J.A. at pp. 672-3 referred to Kenny v. C.P.R.(1902) 5 Err. L.R. 420 and considered to be

sound the expression of opinion in that case by Donovan J. that an analogous enactment to s. 11 merely prevented more than one action being carried to judgment.

I consider that there is substance in Mr. Thorne's submission for the plaintiffs that the prohibition in s. 11 of the Ordinance is against "maintaining" two actions at the same time. The section decrees that "not more than one action shall lie"; not that "not more than one action may be brought". In s. 3 (cited below) reference is also made to the entitlement of the party injured to "maintain" an action and to recover damages in respect thereof.

The rationale behind s. 8(2) of the Ordinance seems to be that there should always be someone in a position to sue as from the date of death in vindication of the rights of the dependants; so that if the personal representative refrains from, or fails to take prompt action the dependant could take steps to obtain the necessary financial relief and maintenance. On this hypothesis s.8(2) was intended to fill the void under s. 8(1). During the first six months after the death of the deceased the personal representative's primary right under s. 8(1) was preserved. But this is subject to his being legally entitled to sue (in my opinion to judgment) and his doing so within that period; and until at least the first of these events takes place there is a concurrent right in the dependant to sue.

We have not been referred to any case in England similar to the instant case where an action has been started within the six months and thereafter within that period or thereafter an executor has proved the will of the deceased.

Until the will is proved by an executor it is not certain that there is an executor and his title is incomplete. In the words of Phillimore J. in Hewson's case (supra) [1914] 2 Ch. at p. 38:-

> "But until he has proved it or till it has been proved to the Court, till it has become probatum, his title is not certain and in that way is not complete."

If there were no executor in the instant case until the probate was granted to the proving executor, then the action was validly commenced. It follows also that, even if the will had been probated during the six months but after the commencement of these proceedings, this action

would have been competent and the court could have stayed these proceedings.

Unlike the causes of action in tort that survive for the benefit of the estate under s. 28 of the Supreme Court of Judicature Act, 1962 (reproduced from s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934 of the U.K.) the cause of action conferred on and vested in a dependant by s. 8 of the Ordinance does not form part of the general assets of the estate of the deceased to be administered and to be distributed to the beneficiaries named in the will or other persons statutorily entitled thereto.

The latter right is created by s. 3 which reads:-

> "Whenever the death of any person shall be caused by some wrongful act, neglect, or default, and the act, neglect or default is such as would before the commencement of this Ordinance (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been under such circumstances as amount in law to felony."

In Legott v. Great Northern Railway Co. (1875-6) 1 Q.B.D. 599, Mellor J. said at p. 605:

> "It is to be observed that the executrix in a case under the Act does not sue in respect of anything which belonged to the deceased, but by force of the statute which enacts that the deceased's death is to be made the subject of an action just as if he had lived.";

and at pp. 606-7:-

> "Now, Lord Campbell's Act gives an entirely new action, not an action connected with the estate of the deceased in the slightest degree, and the damages recoverable in it would be no part of the estate of the deceased. The Act merely says that the nominal person to bring the action on behalf of certain relations (not on behalf of the next of kin or the creditors of the deceased, but on behalf of the beneficiaries, certain relations named in the Act of Parliament) shall be the

executor or administrator. It is plain, therefore, that an action brought by the person designated by the statute is brought in an entirely different right from that in which the action is brought by the executors generally as representing the estate of the testator or intestate."

(Emphasis mine)

The same view was expressed by the Earl of Selborne L.C. in Seward v. The Vera Cruz (1881-1885) All E.R. Rep. 216, in construing s. 7 of Lord Campbell's Act (which corresponds to s. 3 of the Ordinance) when he said at pp. 219-220:-

"It is to my mind, as plain as possible, that the action given by the Act of 1846 is a personal action given for a personal injury inflicted by a person who would have been liable to an action for damages, manifestly in the common law courts if the death had not ensued. The Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, actio personalis moritur cum persona, because the action is given in substance, not to the person representing in point of estate the deceased man, who would normally represent him as to all his own right of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. Not only so, but the action is not an action which he could have brought if he had survived the accident, for that would have been an action for such injury as he had sustained during his lifetime; but death is essentially the cause of the action, an action which he never could have brought under circumstances which, if he had been living, would have given him, for an injury short of death which he might have sustained, a right of action, which might have been barred either by contributory negligence, or by his own fault, or by his own release, or in various other ways. [The defence of contributory negligence was abolished by the Law Reform (Contributory Negligence) Act, 1945]".

(Emphasis mine)

Warner J. held that a distinction must be drawn between the right to bring an action under s. 8 and the right of a dependant for whose benefit the action is brought to receive compensation

awarded in the action: that from the death of the deceased the dependant has an inchoate right to bring the action which becomes full and complete if the executor has brought no action within that period.

The trial judge rested the right of the executor to sue as from the date of the deceased's death on the doctrine of relation back, which, in his opinion, was a consequence of the executor deriving his title not under the probate but under the will; and he opined that the doctrine had in no way been attentuated by s. 21 of Ch. 8 No. 2. Applying that doctrine he felt himself obliged to hold that there was an executor of the deceased on August 2, 1974, when the plaintiffs filed the writ in this action.

It has been pointed out by Parry and Clark (op. cit) at p. 160 that a doctrine (or fiction) of relation back has been adopted by the courts for the limited purpose of protecting the deceased's estate from wrongful injury in the interval between his death and the grant of letters of administration to his estate. Under the doctrine the letters of administration relate back to the death of the deceased and enable the administrator to sue in respect of any wrongdoing to the assets of the deceased during that interval.

The courts have been reluctant to extend the doctrine, which has been hedged above with exceptions, one of which is where its application would result in injustice. In Lyttleton v. Cross (1824) 3 B. & C. 317, Bayley J. said at p. 325:-

> "Wherever therefore a fiction of law works injustice and the facts which by fiction are supposed to exist are inconsistent with real facts, a court of law ought to look at the real facts."

In Re Seaford [1968] 1 All E.R. 482 a submission was made to the Court of Appeal at p.487 that the rule of relation back in that case would result in an injustice because at the moment of the deceased's death the plaintiff acquired a vested right which it would be wrong to divest her of by the application of any fiction of law. Willner L.J. ibid at p. 418 commented:-

> "The doctrine after all, is a highly artificial doctrine resting as it does on a legal fiction; and I think it is fair to ask the question why, in reason, it should

be regarded as applicable to what was then a new jurisdiction, more particularly in a case like the present where all the essential facts are known."

In the instant case also we are concerned with a new jurisdiction whereunder a statutory right to compensation is conferred on the dependants and the application of the doctrine to which would work an injustice to the dependants by depriving them of that right which they acquired at the moment of the deceased's death.

As the right to sue under s. 8 of the Ordinance does not form part of the deceased's estate, the doctrine is, in my judgment, inapplicable to the right to sue bestowed on either the administrator or the executor.

The doctrine is, in any event, irrelevant to the executor's right under the law of England, unaffected by s. 21 of Ch. 8 No. 2, for the reason mentioned by Parry and Clark op. cit. at p.161:-

"An executor appointed by the deceased in his will does not need to rely on the doctrine of relation back, because the deceased's property vests in the executor at death by virtue of the will taking effect at that time, and not when probate is granted."

Even if the doctrine of relation back does apply it does not necessarily follow that the instant action was void and of no effect. That doctrine does not inhibit the court from granting letters of administration where there is a will appointing an executor but it has not been proved; and the grant is not void ab initio. It is perfectly valid and has full effect until the will is probated; so that for example a conveyance of land forming part of the deceased's estate by the administrator to a bona fide purchaser for value is unimpeachable, as in Hewson's case (supra) in which Phillimore J. stated the principle at p.42:-

"This means that the administrator gets and can give a good title subject to its being determined by the production of a will with an executor and perhaps also probate."

Sections 26 and 27 of Ch. 8 No. 2 are also to the same effect:-

"26. All letters of administration, granted at a time when there shall be an executor who

has not proven the will, shall be voidable only and not void; but such administration shall become void when and so soon as a will of the person of whose estate such administration shall have been granted shall be duly proved by an executor, or when such administration shall be revoked by order of the Court.

27. All acts done by any administrator under letters of administration which shall be voidable shall be valid notwithstanding administration shall afterwards become void or be revoked, but persons who shall have received any property as next of kin shall be liable to account for and transfer the same to the legatees or devisees or other persons entitled thereto under the will, without prejudice to the rights of purchasers for valid consideration."

So also, if an administrator after his appointment commences an action within the six months after the testator's death and an executor thereafter probates the will, whether within the six months or after its expiry, the probate does not invalidate the proceedings. Until the existence of the will and of its appointment of an executor becomes known, the deceased is treated as having died intestate.

By parity of reasoning, in similar circumstances an action initiated by a dependant may be regarded as valid; and unless and until an executor probates the will the proceedings are not nullified but have full effect and will thereafter merely be subjected to a stay in favour of the executor's suit. While it does not arise for decision in the instant case, there seems to be justification for holding that the same result would ensue where the will is probated within the six months after the testator's death.

Although I have not been referred to any case in which there has been a stay of an executor's action filed under s. 8 of Ch. 8 No. 2, where a non proving executor has commenced proceedings, a stay has been granted until he shall have obtained probate, as in Tarn v. Commercial Bank of Sydney (1884) 12 Q.B.D. 294. Before the enactment of the Common Law Procedure Act, 1852, which abolished profert and oyer, an action brought in England by a person as executor could be defeated by demurrer in limine if the plaintiff did not then and there tender his probate for inspection by the Court. After the coming into force of the Act of 1852 the

hearing of the action could proceed and the plaintiff could produce his probate at any time before judgment. To mitigate the uncertainty and possible hardship to the defendant the court stayed the proceedings, pending the production of the probate. The practice is described by Lopes J. ibid at p. 296:-

> "It is material to consider what was the mode of proceeding before the Common Law Procedure Act, 1852. A plaintiff suing as executor before that Act would not have succeeded in making out on his pleadings his title to sue without making profert of probate. In Webb v. Adkins 14 C.B. 401; 23 L.J. (C.P.) 96, decided since profert and oyer were abolished by that Act, the Court ordered a stay of proceedings in an action by an executor upon the principle that until probate has been granted there is nobody clothed with any legal title to sue, who could give a valid discharge to the defendant. What we are now asked to do will have much the same effect as the procedure before the Common Law Procedure Act. I think it is a reasonable and proper course to stay proceedings in the present case until the plaintiffs produce probate of the will. They could not succeed at the trial unless the probate was given in evidence."
>
> (Emphasis mine)

The effect of s. 21 of Ch. 8 No. 2 is to make the grant of probate a condition precedent to the issue of a writ by an executor. Whether or not it was so intentionally designed, it provides a remedy for the defendant's dilemma which was depicted by Jervis C.J. in Webb's case (supra) 23 L.J. (C.P.) at p. 97:-

> "It may be taken as conceded that there is no probate in this case, and that the plaintiff is not executor; but at any moment before the trial the plaintiff might get probate, and so defeat the defendant's plea; for that probate having relation back to the testatrix's death would prove that the plaintiff was executor at the commencement of the suit. That is a hardship, which must be remedied, otherwise it would be a great oversight in the Common Law Procedure Act."

There appears to be no valid objection to a similar practice being followed in an action by an executor under s. 8(2), brought before probate.

As it eventually transpired in the instant case that no proceedings were instituted by the executor within the six months, there was in my judgment no violation of s. 8(2); and in the absence of the issue of any writ by the proving executor of the deceased and of an application for a stay of the instant action, I would direct that the hearing of the instant action on its merits should proceed.

If my opinion is correct that this is not a matter that is governed strictly by the law of probate, the plaintiffs need not invoke and rely on s. 21 of Ch. 8 No. 2. But if it is such a matter, and as the question has been fully argued, I will express my opinion thereon.

There is no similar enactment in England or in Canada and counsel for neither party have cited any decision of the Courts interpreting the section.

The words of the section are plain, unequivocal, emphatic, mandatory and all embracing. If the will is to have no effect whatever nor to pass any right, title or interest whatever until the will is proved, it seems to follow that the executor who is named in the will does not derive his title from the will but from the grant of probate; and until then he has no interest in the assets or estate of the deceased nor any right to bring an action in respect thereof or qua executor.

If there is any ambiguity in the meaning of s. 21, which I do not concede, a scrutiny of other sections of Ch. 8 No. 2 and of the related Administration of Estates Ordinance Ch. 8 No. 1 (which by virtue of s. 1 of Ch. 8 No. 1 are to be read as one) will reveal that the scheme of this succession legislation is consistent with my construction of s. 21.

This law differs materially from the law of England under which the personal estate of a deceased person has always vested in the executor from the time of the testator's death; whereas if he died intestate before January 1, 1926, it vested in the Probate Judge.

As regards real estate, where a beneficial owner in England died, whether testate or intestate, before January 1, 1898, his real estate vested in his heir at law. If he died thereafter the Land Transfer Act, 1897, vested the real estate in his personal representatives.

Under the Administration of Estates Act, 1925, the personal estate as well as the legal estate in realty of a person dying after 1925 are, as from the time of his death, vested in his executor; and where he does not appoint an executor, or dies intestate, it is vested in the Probate Judge (now the President of the Family Division of the High Court) until divested by the grant of letters of administration.

Section 10 of Ch. 8 No. 1 and s. 21 of Ch. 8 No. 2 respectively reproduce s. 2 of the Property Devolution Ordinance No. 101 and s. 30 of the Wills and Probate Ordinance No. 99 - both of which came into operation on January 1, 1902. By s. 1 of Ordinance No. 99 it was to be read together with Ordinance No. 101 and the Distribution Ordinance No. 102. These three Ordinances formed a trilogy on the law of succession. Ch. 8 No. 1 and Ch. 8 No. 2 are a consolidation of that trilogy and subsequent amendments thereto.

The conjoint effect of sections 10 and 21 was to assimilate the rights of an executor over the estate of a deceased to those of an administrator according to the law of England.

Under s. 10(3) and (4) of Ch. 8 No. 1 both the personal and real estate of a deceased on his death vest in law in the Administrator General until it is divested by a grant of probate or of letters of administration in some other person or persons.

Those sub-sections read:-

"(3) Probate and letters of administration shall be granted in respect of, and shall take effect to vest in the executor or administrator, all real estate and personal estate whatever, including chattels real. And there shall be no devolution of estate by inheritance in any case save that the beneficial interest therein shall devolve as provided in Part III of this Ordinance.

(4) On the death of any person all his estate real and personal whatever within /Trinidad and Tobago/ shall vest in law in the Administrator General until the same is divested by the grant of probate or letters of administration to some other person or persons: Provided that the Administrator General shall not, pending the grant of such probate or letters of administration, take possession of or interfere in the

administration of any estate save as in this Ordinance and in the Wills and Probate Ordinance provided."

(Emphasis added)

In the result, just as a person named in s.30 of Ch. 8 No. 2, who is entitled on his application to be appointed to administer the estate of an intestate in order of priority, is only potentially an administrator, so also is a person named in the will and entitled to apply for probate only potentially an executor. In either case the person may renounce his claim or he may be incapacitated by death or for some other reason, such as the invalidity of the will; and so he may never become executor or administrator.

My exmination of s. 21 of Ch. 8 No. 1 and s. 10 of Ch. 3 No. 2 has made it apparent that whereas according to the law of England a will comes into operation from the date of the testator's death, in Trinidad and Tobago the operative date is that of the grant of probate.

To appreciate the full extent of its application, s. 21 may conveniently be rearranged as follows:-

"No will of any person deceased -

(a) shall have any effect whatever, either in law or in equity; or

(b) shall pass any right, title or interest whatever,

until the same has been duly proved in accordance with the provisions of this Ordinance."

Paragraph (a) is couched in general, wide and comprehensive terms. It necessarily includes paragraph (b), which is merely a particularisation of paragraph (a) and which is restated in respect to the deceased's property in s. 10.

Thus, the change encompassed by s. 21 to the law of England is not confined to the postponement of the transfer, to the executor of the title in the property of the testator, from the date of the will to the date of its probate. The will is dormant and totally ineffective until it is brought to life by the grant of probate; it is comparable to an Act which (and any appointments thereunder to offices thereby constituted) comes

into force only on proclamation.

Even if, when s. 8(2) of the Ordinance was enacted in the then state of the law as introduced by s. 6 of the 1845 Ordinance "executor" bore the first meaning, I would hold that s. 21, which is in the same statute as, and is to be read together with s. 6, but was enacted after s. 6, modified the law of England as applied by s. 6 to Trinidad and Tobago, and also any previous constructions of other sections of the trilogy that are inconsistent with s. 21.

As stated by North J. in Re WIlliams (1887) 36 Ch. D 573 at p. 578:-

> "The provisions of an earlier Act may be revoked or abrogated in particular cases by a subsequent Act, either from the express language used being addressed to the particular point, or from implication or inference from the language used."

Where an earlier enactment is ambiguous, a later statute may throw light on the true interpretation of that enactment; as where a particular construction of the earlier enactment will render the later incorporated statute ineffectual. Lord Buckmaster in Ormond Investment Co. v. Bretts [1928] A.C. 143 at p. 154 said:-

> "It is also possible that where ACts are to be read together, as they are in this case, a provision in an earlier Act that was so ambiguous that it was open to two perfectly clear and plain constructions could, by a subsequent incorporated statute, be interpreted so as to make the second statute effectual, which is what the courts would desire to do..."

Similar views were voiced in Kirkness v. John Hudson & Co. Ltd. [1955] 2 All E.R. 345 by Viscount Simonds at p. 350; Lord Morton at pp. 356-9; Lord Reid at pp. 364-6 and Lord Tucker at pp. 367-8.

The negative and categorical and all embracing language of s. 21 evinces the clear and unmistakeable intention of the legislature, from implication or inference, to extend its operation to all enactments, including s. 8(2), which regulate or relate to the rights and powers of an executor, however derived, and thus to change the meaning of "executor" in any law that would conflict with the universal application of s.21

and render it ineffectual.

In the context of s. 8 the first meaning is wholly inconsistent with s. 21 which, as the latest expression of the legislature, prevails.

The conclusion at which I arrive is that, as in the case of an administrator, the title of an executor derives from the court, and he is not competent to bring an action until the grant of probate is issued. Consequently there was no executor within the meaning of s. 8(2) of the Ordinance when these proceedings were commenced and the writ and the proceedings are perfectly valid.

It follows that the word "executor" in s. 8 of the Ordinance has the second meaning.

Different meanings may be ascribed to a word in the same statute; but, as indicated by Turner L.J. in RE National Savings Bank Association (1866) L.R. 1 Ch. App. 547 at pp. 549-550, there should be some very clear and sufficient reason for doing so.

The relevant principles are set out in Halsbury's Laws (3rd ed.) Vol. 36 at para. 595:-

> "As a general rule a word is to be considered as used throughout a statute in the same sense. It may happen, however, that the same word is used in different senses in the same section, and, a fortiori, in different sections of the same statute."

The word "liable", which twice appears in s. 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act, 1935, was interpreted as meaning "responsible in law" and "held liable by judgment" respectively, in Scott v. West Yorkshire Road Car Co. Ltd. [1971] 3 All E.R. 534.

Consequently, wherever the context so requires, "executor" will be given in Ch. 8 No. 2 the first meaning.

This interpretation obviates many of the problems that would confront a dependant who desires to exercise the power to sue conferred on him by s. 8(2) of the Ordinance in assertion of the right vested in him, and not in the personal representative of the deceased. For he would otherwise never be certain whether there was a will, or that there was an executor named therein or that the validity of the will would not be

successfully challenged, or that the executor would prove the will; and if the gamble in suing within six months fails, a rank injustice may result to deprive an entitled dependant of the compensation of which he may be sorely in need. The right ostensibly conferred on the dependant to sue within six months could otherwise be seen as a trap and to be therefore of little practicable value.

I summarise my reasons for concluding that the word "executor" in s. 8(2) of the Ordinance has the second meaning. In that section the expression is used in relation to his capacity and/or right to sue, and to recover damages as nominal plaintiff for the dependants of the estate.

In our probate law the word "executor" is capable of either the first or the second meaning. By operation of s. 21 of Ch. 8 No. 2 the second meaning is the ordinary and natural meaning.

But s. 8 deals with a right of action which, and any damages awarded in respect whereof, do not form part of the personal or other estate of the deceased, but which belongs to his dependants.

Consequently there is no question of the executor's power to sue relating back to the date of death of the deceased, as it does in regard to his personal estate.

The right of action under s. 8 vests in the dependant from the date of the deceased's death and the dependant may sue at any time thereafter, provided that at that time there is no legal personal representative of the deceased who is capable not only of starting the action but also of recovering judgment therein.

Where after the commencement of the action by the dependant but within six months of the death of the deceased, an administrator of his estate is appointed by the court or an executor proves his will, the dependant's action is not null and void; but, in compliance with s. 11 of the Ordinance, one of the actions will be stayed.

As there was no "Executor" of the deceased when the plaintiffs as dependants issued the writ in these proceedings the Court had jurisdiction to entertain the claim and to enter judgment thereon and at that time William Austin had no right as executor to bring an action under s. 8 of the Ordinance.

In the Court of Appeal

No. 12
Judgment of C.A. Kelsick J.a. - 22nd July 1980 (cont'd)

I would therefore answer the preliminary question of law in favour of the plaintiffs, allow the appeal, remit the action to the High Court for a hearing on the merits, and order the defendant to pay to the plaintiffs their costs of action in this court and in the court below, to be taxed.

C.A. Kelsick,
Justice of Appeal.

No. 13
Judgment of N.M.Hassanali J.A. - 22nd July 1980

No. 13

Judgment of N. M. Hassanali, J.A.

TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. 47 of 1977

Between

ALEXANDRINE AUSTIN and DEBORAH AUSTIN, SHARLENE AUSTIN and RICHARD AUSTIN (infants by their mother and next friend MARIA LEZAMA) Appellants

And

GENE HART Respondent

****

Coram: M.A. Corbin, J.A. :
C.A. Kelsick, J.A.:
N.M. Hassanali, J.A.:

July 22, 1980.

E. Thorne Q.C. and N. Mohammed - for the appellants
M. de la Bastide Q.C. and A. Alexander - for the respondent

J U D G M E N T

Delivered by Hassanali, J.A.:

On May 4, 1974 one Simon Austin, died from injuries he sustained in a vehicular accident on May 3, 1974 on the Solomon Hochoy Highway, while a passenger in a car driven by the respondent. The appellant Alexandrine Austin is the mother of the deceased, the other appellants are infants and children of the deceased. On August 2, 1974 as dependants they brought a claim in negligence against the respondent under the provisions of the Compensation for Injuries Ordinance Ch. 5 NO. 5 (hereinafter referred to as "the Ordinance"). The respondent denied negligence, but by para. 7 of his Statement of Defence as amended on July 9, 1975, he pleaded:

> "7. The defendant will contend that the court has no jurisdiction in terms of Section 8 of the Compensation for Injuries Ordinance, Chapter 5, No. 5 to entertain the claim herein or to enter any judgment thereon for the reason that by his Will dated 12th September, 1970 the deceased Simon Austin appointed two executors in one of whom namely, William Austin, the right to bring an action under the said Ordinance was vested at all material times."

The appellants delivered no Reply to the Respondent's Amended Defence. The will was probated on May 28, 1976 with the said William Austin as Executor.

On February 18, 1977 Braithwaite J. before whom the matter came on for trial, made an order it seems pursuant to Order 32 r. 3 of the R.S.C. 1975. No copy of the order appears in the record but it seems agreed between the parties that by that Order Braithwaite, J., directed that the question raised in the amended Statement of Defence be dealt with as a preliminary point.

Warner, J., heard arguments on the preliminary point and on July 25, 1977 he gave judgment answering the question in the respondent's favour and he dismissed the action. He upheld the submission by the respondent that the court was bound to dismiss the action because it was not open to the appellants to bring it within six months' after the death of the deceased at a time when there was in existence a will of the deceased with an executor named therein. He rejected a submission by the appellants that having regard to the provisions of sec. 21 of the Wills and Probate Ordinance Ch. 8 NO. 2 (hereinafter referred to as "the Wills Ordinance") there was on August 2, 1974 no executor within the

meaning of sec. 8(2).

From this judgment the appellants appealed on two grounds:

(a) that the judgment is unreasonable and cannot be supported having regard to the evidence, and

(b) that the learned judge erred in holding that the appellants' action was not maintainable.

Section 3 of the Ordinance reads:

"3. Whenever the death of any person shall be caused by some wrongful act, neglect, or default, and the act, neglect, or default is such as would before the commencement of this Ordinance (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been under such circumstances as amount in law to felony."

Section 6 provides that the period limited for bringing the action is twelve (12) months from the time of death.

Section 8 reads:

"8. (1) Every action in respect of injury resulting in death shall be for the benefit of the wife, husband parent, and child, as the case may be, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor of administrator of the person deceased.

(2) If there be no executor or administrator of the person deceased, or if although there be such executor or administrator no such action shall, within six months after the death of such deceased person have been brought by and in the name of his executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator."

The said section 8 is hereinafter referred to as "section 8", and the said sections 8(1) and section 8(2) as section "8(1)" and section "8(2)" respectively.

The basic issues arising on this appeal call for the construction of section 8, more specifically with reference to the word "executor" in section 8(2), Those issues are:

(a) whether it was competent for the appellants to bring the action on August 2, 1974; and

(b) if nay, whether the action was maintainable.

Prior to 1846 at common law the wrong done to another resulting in death died with him. The Fatal Accidents Acts, that of 1846, and that of 1864 (U.K.) an amendment to the former, greatly modified the common law. It is said that the necessity for the first of them was felt when in the early stages of the railway in England accidents resulting in death left many families without remedy against the railway companies. The earlier Act was amended in 1864 to enable the relatives of the deceased to bring the action themselves if the executor or administrator did not sue within six (6) months of the death of the deceased person. /See Winfield: The Law of Tort 2nd edit. pp.215-216/. The statute of 1864 is also described as enacting that if "no such action is brought by the personal representative within six (6) months after the death, the action may be brought by and in the name of the dependants." See Mustoe: Executors and Administrators, 4th edit. p. 57.

Sections 3, 8 and 11 of the Ordinance are substantially taken from these two Acts; secs. 3, 8(1) and 11 from the earlier and section 8(2) from the later. Section 11 provides that only one action lies in respect of the same subject matter of complaint; so that if the deceased before death has recovered compensation in an action for the injury which eventually caused his death no further action can be brought. /See Read v Great Eastern Railway Company (1868) L.R 3 Q.B. 550; Wood v Gray and Sons (1892) A.C. 576./

It is not in dispute that the appellants are individuals in the class of persons for whose benefit the action contemplated in section 8 may be brought. Hereafter I shall refer to that class as "the relatives".

The meaning of words is a question of fact in all cases; the effect of the words is a question of law. The cardinal rule for the construction of a statute is that it should be construed according to the intention expressed in the statute. Words should be given their primary meaning, but it is to be borne in mind that the primary meaning may vary with its context, including the subject matter to which it is applied. [See Craies: Statute Law 3rd edit. pp.64-657

It seems clear that:

(1) The conjoint effect of sections 8(1) and 8(2) is that during the six months next after the death of the deceased if there is an executor, the action shall be brought by and in the name of the executor; and

(2) The right conferred on the relatives to bring the action is conditional upon the existence of either of two situations defined in section 8(2).

Section 8(2) describes the first situation without reference to the executor or administrator mentioned in section 8(1). The first situation may be said to contemplate one case viz. that in which there is neither an executor of the deceased nor an administrator of the deceased; either because the deceased died intestate, or because he died leaving a will without having therein appointed an executor. The second situation contemplates two cases viz. (a) that in which there is an executor of the person deceased, six months have elapsed since the death of the deceased, and no action has yet been brought by and in the name of the executor of the deceased; and (b) that in which there is an administrator of the deceased, six months have elapsed since the death of the deceased, and no action has yet been brought by and in the name of the administrator of the deceased. In every such case i.e. to say in every one of at least three cases contemplated, the action may be brought by and in the name of the relatives.

There is no definition of the word "executor" in the Ordinance or in any related Ordinance. It is not in dispute that the primary meaning of "executor" is the person so appointed by a testator in his will to carry out the provisions of the will, or that an administrator is a person appointed by a competent court to administer the property of the deceased person. It is common

ground that there was no administrator in the instant case.

Three cases above contemplated may therefore be described thus:

(a) that in which there is neither a person appointed in the will of the deceased to carry out the provisions of the will nor a person appointed by a competent court to administer the property of the deceased;

(b) that in which there is a person appointed in the will of the deceased to carry out the provisions of the will, six months have elapsed since the death of the deceased, and no action has yet been brought by and in the name of the executor of the deceased;

(c) that in which there is a person appointed by a competent court to administer the property of the deceased, six months have elapsed since the death of the deceased, and no action has yet been brought by and in the name of the administrator of the deceased.

As I understand section 8 the first situation may exist as from the time of death of the deceased and continue to exist during the six months next following, and while it so does an action may at any time within that period be brought by and in the name of the relatives. However, the first situation does not exist when the deceased dies leaving a will with an executor appointed therein. It seems to me that in the instant case neither the first situation nor the second situation existed on August 2, 1974.

Admittedly, the deceased died leaving a will dated September 12, 1970 in which he appointed one William Austin, his executor; and that will was in existence when the instant action was brought on August 2, 1974, within six months after the death of the deceased.

On behalf of the plaintiffs, however, it was submitted that the word "executor" in section 8(2) must be confined in its meaning to one who has obtained probate of the will, and in support of the submission counsel referred to section 21 of the Wills Ordinance. I shall hereafter refer to that section as "section 21". It reads:

"21. No will of any person deceased shall have any effect whatever, either in law or in equity, or shall pass any right, title, or interest whatever, until the same has been duly proved in accordance with the provisions of this Ordinance."

Counsel submitted that there was no executor on August 2, 1974 and none indeed until May 28, 1976 when probate of the deceased's will was granted to the said William Austin.

For the defendant it was submitted that neither section 21 nor any other provisions of the Wills Ordinance affect the meaning of the word "executor" in section 8(2) as the person so appointed in the will of the deceased.

Section 21 predicates the existence of a will as a fact. A will by definition in the Wills Ordinance is any testamentary instrument capable of probate. Section 21 does not ordain that a will is void or of no effect until probate thereof is granted. What the section ordains is that on the death of the testator his will shall not have legal effect; and therefore no right or interest on title vests then by operation of law (as is the case in England); and the will can pass no right interest or title until probate thereof is granted. That is not to say that before probate there is no executor of the deceased. For the executor is the person so appointed by the (testator) deceased in a will capable of probate. He is therefore an executor of the deceased even before probate of the will, unlike an administrator who is appointed by the court.

It may well be that by virtue of the restraint imposed by section 21 an action may not be brought by and in the name of the executor of the deceased until probate of the will is granted. One may have to wait until probate of a will to identify its legal effects. One does not however necessarily have to wait until such probate to identify the executor of the deceased if a person is so appointed in his will to carry out the provisions of the will. The principal function of the Probate Court is to decide whether or not the document is entitled to probate as a will and who is entitled to be constituted the personal representative of the deceased. In the words of Lord Haldane in Attenborough v Solomon (1913) A.C. 76 at 82: "The position of an executor is a peculiar one. He is appointed by the will but then by virtue of his office by the operation of law and not under the bequest in the will he takes

a title to the personal property of the testator which vests him with the plenum dominium over the testator's chattels . . . He is an executor and he remains executor for an indefinite period ....."

The fact - in assuming it to be a fact - that an action may not be brought by and in the name of the executor until after probate is granted is my judgment no warrant for saying that in the instant case there was on August 2, 1974 no executor of the deceased within the meaning of section 8(2). Nor is it warrant for reading section 8(2), to mean that the relatives of a testator may bring an action any time within six months after the death of the deceased provided the executor appointed in the will has not yet obtained probate thereof.

There is no definition of the word "executor" in the Wills Ordinance, although the word "representative" therein is defined as meaning "the executor or the administrator for the time being of a deceased person ...." The provisions of that Ordinance as well as the provisions of the related Administration of Estates Ordinance Ch. 8 No. 1 show that a will comes into existence upon the death of the testator, and they recognize an "executor" as the person so appointed in the will. I have not been able to identify the origin of section 21. Be that as it may, neither section 21 nor any other provisions of that Ordinance support the plaintiffs' contention that the word "executor" in section 8(2) must be confined in its meaning to an "executor" after probate of the will has been granted. Neither expressly nor by necessary implication does any Ordinance suggest such restricted meaning of the word in that sub-section.

A later statute may not be referred to, to interpret the clear terms of an earlier Act which the later Act does not amend, even although both Acts are to be construed as one, unless the later Act expressly interprets the earlier Act; but if the earlier Act is ambiguous the later Act may throw light on it, as where a particular construction of the earlier Act will render the later Act ineffectual. /See Craies on Statute Law (supra) at page 147/. See also in this connection Felix v Thomas (1966) 10 W.I.R., 507 at 513 G and 514 D.

The conclusion which I reach is that the word "executor" in section 8(2) in the first situation as well as in the second must be given its primary meaning. Accordingly, I hold that it cannot be

said that in the instant case there was no executor of the deceased on August 2, 1974. I do not think it necessary to decide whether a right to bring the action vested in (William Austin) the executor on August 2, 1974. In my judgment it was not competent for the plaintiffs to bring the action on that day.

It was submitted however, that even if it be held that on that day there was an executor within the meaning of section 8 the right to bring the action vesting in the relatives was merely conditionally deferred by subsection 8(2) and that the instant action was not vitiated merely because it was brought within six months, but that it was nevertheless maintainable, and in appropriate circumstances might have been stayed.

Although as is indicated in section 3 of the Ordinance there can be no right in the relatives to bring an action unless the deceased person himself could have sued, the right to bring the action conferred on the relatives by section 8 is a new cause of action. It is separate from that which the deceased person would have had if he had not died and which survives for the benefit of his estate. I do not think it correct to say that a right of action "vests" or necessarily "vests" in the relatives at the time of the death of the deceased person. Neither section 3 of the Ordinance nor section 8 so suggests.

A right in the relatives to bring the action is created or conferred by the Ordinance in the circumstances prescribed. Section 8 declares that every action envisaged in section 3 shall be for the benefit of the relatives. However, a right of action vests in the relatives at the earliest, if it may at all be said to vest, when, and only when, there is combination of the following:-

(1) death as envisaged in the said section 3 resulting in the wrongdoer's being "liable to an action for damages ...." and

(2) The existence of either of the two situations defined in section 8(2).

Once, however, the deceased person at the time of his death had a cause of action, the action open to the relatives under the Ordinance has nothing to do with his claim. /See Winfield on Tort 2nd edit. p.218/. Their cause of action is "new in its species, new in its quality, new in its principle, in every way new ..." Seward v The Vera Cruz (1884) 10 App. Cas. 59 70 - 71.

Section 3 of the Ordinance describes the circumstances in which the wrongdoer remained liable after the death of the person wronged, while section 8 inter alia describes the circumstances in which the right of the relatives to bring the action arises, or rather, is conferred. The right of action, the creature of the Ordinance, is conferred only in each of the situations already referred to. Each situation is a condition precedent and until either exists it is not competent for the relatives to bring the action. If they do prematurely, the action is not competent; it is not maintainable. The learned judge was right in dismissing the plaintiffs' action. With respect, however, I do not think the doctrine of relation back a relevant consideration in that decision.

A condition precedent clearly imposed must be strictly performed before a statutory power can take effect. Kent Coast Railway v London Chatham and Dover Railway Company (1868) 3 Ch. App. 656. And as was pointed out in R. v County Court Judge of Essex "where the legislature has passed a new statute giving a new remedy, that remedy is the only one that can be pursued." /See (1887) 18 Q.B.D. 704 at 707, 708/. /See alsoCraies on Statute Law 7th edit. 247 - 248/.

With respect, none of the authorities to which counsel for the plaintiffs referred is authority for his submission that it was competent for the appellants to bring the action on August 2, 1974 or that it was open to the learned judge to maintain it.

In Holleran v Bagnell (1879) 4 L.R. Ir. 740 it was held that the relatives may, if there be no executor, bring an action immediately upon the death of the deceased; they need not wait till the expiration of the six-month period or to see if an administrator will be appointed within that time.

We were referred also to the Canadian case of Mummery ex Ux. v Grand Trunk R.W. Co. and Whalis v Grand Trunk R.W. Co. (1900) 1 O.L.R. 622 where an action brought by relatives within the six-month period was not dismissed. There, the statutory provisions were similar to those under review. An unmarried man, having come to his death by reason of injuries inflicted by the defendants, two actions were brought to recover damages occasioned by his death. The first in point of time was brought by relatives and the second by the administratrix of the deceased who had obtained letters of administration to his estate after the bringing of the first action.

Upon a motion by the defendants to stay one or other of the actions it was held that, while the relatives could legally proceed with their action under the Revised Statutes of Ontario, (1897) Chapter 166, although brought within six months of the death, so long as there was no executor or administrator, yet an administratrix having been appointed and an action brought by her within the six months, she was entitled to proceed with it, and the first action was the one to be stayed.

In the course of his judgment the learned judge observed that in Holleran v Bagnell (supra) the construction put on the like statutory provisions was that:

> "... if there is no executor or administrator, any one of the relatives mentioned in the Act may commence an action immediately after the death, and that 'it is only in cases where there is an executor or administrator that it is necessary that six months should elapse before the relatives can sue'. And he concluded:
>
> > "In my opinion, this is the construction which the wording of our statute bears, and while the plaintiffs Mummery could legally proceed with their action in case the administratrix, the plaintiff in the second action, had taken no proceeding within the six months after the death of the deceased, yet the administratrix, having brought an action within the time limited, is entitled to proceed with it."

It is clear that in the Mummery case it was open to the court in its discretion to stay the action brought by the relatives because that action as well as the other was competent. It would have been otherwise, if that action was not.

Finally, it was said that inasmuch as section 8 of the Ordinance stipulates that the action shall be brought by the executor on behalf of the relatives it is inconceivable that the executor should be allowed to act in a way so as to defeat the object or policy of the Ordinance, as would seem to be the case in the circumstances under review. There is of course no evidence suggesting that blame for the mischief alleged attaches to the executor.

It was said many years ago that it must not

be assumed that Parliament forsees every result which may accrue from the use of a particular word. /See Nairn v St. Andrews University (1909) A.C., per Lord Loreburn, L.C. at p.161/. A court is not required to modify the clear meaning of a statute to conform with its view of what is right or reasonable. The court interprets the statute as it is. The authorities establish that where the language of a statute is clear and unambiguous it must receive full effect, whatever the consequences. In such a case consequences, including hardship or harshness to affected parties, are for the legislature, and not for the courts to consider. /See Craies on Statute Law 7th edit. p. 89 et seq./. In this connection I would also, with respect refer to the views of this court expressed in Hope v Smith (1963) 3 W.I.R. 464 where the question which arose called for the interpretation of sec. 104 of the Summary Courts Ordinances Cap. 3 No. 4. The section reads so far as is relevant: "Any person who is found committing any summary offence may be taken into custody without warrant, by any constable ...."

Wooding C.J. delivering the judgment of the Court said at p. 467B:

> "This brings us, then, to the final submission that some limitation must be put upon the extremely wide power conferred by s. 104. It would be intolerable, it is said, if, say a constable who finds a motorist parking his car on the wrong side of the road, could, without more, take him into custody and march him off to a police station ..... But where the language of an enactment is clear and unambiguous, it is not the function of the courts to relieve against any harshness which it may or may be thought to occasion. That is a matter for Parliament to consider. And if Parliament thinks that any hardship which any legislation may cause can be avoided by the judicious exercise of discretion by those to whom is committed the duty of administering it, the courts must decline to assume a corrective power which they do not at all possess. In so saying we follow the opinion of the Privy Council, as expressed by Lord Simon in King Emperor v Benoari Lal Sarma (1) /1945/ A.C., at p. 28 that
>
> > 'in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to language used.'

"Accordingly, in our judgment, the phrase 'any summary offence' in sec. 104 means exactly what it says, any summary offence."

For the reasons indicated I would dismiss the appeal with costs to the respondent.

N.M. Hassanali
Justice of Appeal

No. 14
Order - 23rd July 1980

No. 14

Order

TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 47/77
High Court Action No. 766/74

Between

ALEXANDRINE AUSTIN, DEBORAH AUSTIN SHARLENE AUSTIN, & RICHARD AUSTIN (Infants by their mother and next friend MARIA LEZAMA) Appellant

And

GENE HART Respondent

Entered the 23rd day of July, 1980

Dated the 23rd day of July, 1980

Before the Honourables Mr. Justice M. Corbin J.A.,
Mr. Justice C. Kelsick J.A.,
Mr. Justice N. Hassanali J.A.,

UPON READING the Notice of Appeal filed on behalf of the above named Appellant and dated the 5th day of August, 1977 and the Judgment hereinafter mentioned

UPON READING the record filed herein

UPON HEARING Counsel for the Appellant and Counsel for the Respondent

IT IS ORDERED

(i) that this Appeal be and the same is hereby dismissed.

(ii) that the Order of the Honourable Mr. Justice Alcade Warner dated the 25th day of July, 1977 be affirmed.

(iii) that the Appellant do pay to the Respondent the taxed costs of this Appeal.

Sgd. Illegible
Asst. Registrar

No. 15

Order granting Final Leave to Appeal

No. 15
Order granting Final Leave to Appeal 2nd December 1980

TRINIDAD AND TOBAGO:

IN THE COURT OF APPEAL

On Appeal from the Court of Appeal

Civil Appeal No. 47 of 1977

Between

ALEXANDRINE AUSTIN and DEBORAH AUSTIN SHARLENE AUSTIN and RICHARD AUSTIN (Infants by their mother and next friend MARIA LEZAMA) Petitioners

And

GENE HART Respondent

Entered the 2nd day of December, 1980
Dated the 17th day of November 1980
Before the Honourable Mr. Justice Corbin, the Honourable Mr. Justice Scott and the Honourable Mr. Justice Cross

UPON MOTION made unto this Court this day by Counsel for the above named Petitioners for an Order granting the said Petitioners final leave to appeal to the Judicial Committee of the Privy Council against the Judgment of the Court of Appeal comprising the Honourable Mr. Justice J.A. Corbin, the Honourable Mr. Justice C,A. Kelsick and the Honourable Mr. Justice Noor Hassanali dated 22nd July, 1980. Upon Reading the Notice of Motion dated the 27th day of October, 1980, the affidavit

In the Court of Appeal

No. 15
Order granting Final Leave to Appeal 2nd December 1980 (cont'd)

of Carlyle Bharath sworn to on the 27th day of October, 1980, the Certificate of the Registrar of the Court dated the 22nd day of October, 1980, all filed herein, and Upon Hearing Counsel for the Petitioners in the presence of Counsel for the Respondent

THIS COURT DOTH ORDER

that final leave be and the same is hereby granted to the said Petitioners to appeal to the Judicial Committee of the Privy Council against the said Judgment and the costs of this motion be costs in the said cause.

Asst. Registrar
Ceil H.A. Pope
Supreme Court

Exhibits

A
Will of Simon Austin - 12th September 1970

EXHIBIT A

Will of Simon Austin

TRINIDAD:

This is the last will and testament of me SIMON AUSTIN of the Town of San Fernando in the Island of Trinidad, Businessman, and I hereby revoke all former wills and testamentary dispositions and declare this to be my last will.

I hereby appoint RAMESH L. MAHARAJ, Barrister-at-Law, and my brother WILLIAM AUSTIN, to be the joint executors of this my last will.

I direct my executors to pay all my funeral and testamentary expenses.

I give and bequeath unto Cynthia Khan a legacy of Ten Thousand Dollars in cash free of all estate and succession duties and probate expenses.

I give devise and bequeath unto MARIA LEZAMA my property situate at Vistabella for her absolute use and benefit free of all estate and succession duties and testamentary expenses.

I direct my executors to pay to the said Maria Lezama a monthly legacy of Five Hundred Dollars and in the event of her death that this legacy should continue for the benefit of my children with the said Maria Lezama for their

maintenance and education.

The residue of my estate I give devise and bequeath unto my brother William Austin for his absolute use and benefit.

IN WITNESS WHEREOF I have hereunto set my hand to this my last will and testament this 12th day of September in the year of Our Lord One Thousand Nine hundred and Seventy.

Simon Austin

Signed by the above-named testator and acknowledged by him as his last will and testament in our presence who in his presence and in the presence of each other have hereunto subscribed our names as witnesses:

Sd. Bertrand Seegobin, 86 Battoo Avenue, Marabella.
Sd. Tara Ramkhelewan of San Fernando.

EXHIBIT B.

Grant of Probate of Will of Simon Austin

B
Grant of
Probate of
Will of
Simon Austin
28th May
1976

TRINIDAD AND TOBAGO:

(Wills and Probate Ordinance, Ch. 8 No: 2)

L-243 of 1976.

The annexed will of SIMON AUSTIN otherwise SIMON JULES AUSTIN of 30, Ogerally Street Vistabella San Fernando Trinidad, Company Director and Businessman who died on the 4th day of May, 1974, at the General Hospital, San Fernando and in the will named Ramesh Lawrence Maharaj one of the executors who has renounced probate thereof was proved in the High Court of Justice on the date hereunder written by WILLIAM AUSTIN of 72, Pontea-Pierre Road, San Fernando, Garage Proprietor, brother of the Deceased the other executor named in the will.

The required certificate has been filed showing that the Estate and Succession Duty have been paid and that the valued of the property on which Estate Duty is payable is $304,430.43.

Dated this 28th day of May, 1976.

Exhibits

B
Grant of
Probate of
Will of
Simon Austin
28th May
1976
(cont'd)

George R. Benny

Registrar of the Supreme Court
of Judicature

Extracted by:

R.N. Kowlessar,
77 & 78 Court Street,
San Fernando

No. 6 of 1982

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN:

ALEXANDRINE AUSTIN and DEBORAH AUSTIN, SHARLENE AUSTIN and RICHARD AUSTIN (infants by their mother and next friend MARIA LEZAMA)
(Plaintiffs) — Appellants

- and -

GENE HART (Defendant) — Respondent

RECORD OF PROCEEDINGS

Approved for final reproduction 27.4.82
Philip Ponnay Thomas Co.,

PHILIP CONWAY THOMAS & CO.,
61 Catherine Place,
Westminster,
London SW1E 6HB.

Solicitors for the Appellants

INGLEDEW, BROWN, BENNISON & GARRETT,
International House,
26 Creechurch Lane,
London EC3A 5AL.

Solicitors for the Respondent