BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APP. NO.2 OF 1997

BETWEEN:

[1] T. CHOITHRAM INTERNATIONAL S.A.
[2] BYTCO INTERNATIONAL S.A.
[3] BHOLENATH INC
[4] MAHADEV INC
[5] KISHORE THAKURDAS PAGARANI
[6] LEKHRAJ THAKURDAS PAGARANI
[7] RAMCHAND DHARMADAS RAJWANI
[8] VASHDEV LALCHAND PAMNANI

Defendants/Appellants

and

[1] LALIBAI THAKURDAS PAGARANI
[2] HASIBAI known as MORA LILARAM KEWLANI
[3] RIJHA known as KANTA KISHINCHAND JETHWAIRI
[4] GOPA known as VANITA JAI MOTIANI
[5] KUMARI DHANWANTITHAKURDAS PAGARANI
[6] SARASWATI known as KANCHAN SATISH MONTIAN
[7] RUKMANI ASWANI
[8] JOHN GREENWOOD

Plaintiffs/Respondents

Before:

The Hon. Mr. C.M Dennis Byron	Chief Justice [Ag.]
The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert Redhead	Justice of Appeal

Appearances:

Mr. John Mowbray Q.C., Mr. J. Stephen Smith,
Mr. Paul Webster and Ms. Dawn Smith for the Appellants
Mr Alan Steinfield Q.C., Mr. Stephen Moverley Smith
for the Respondents

1998: January 7; 8; 9; 10; 13; 14; 15;
April 8.

Law of Succession/Trusts Law – Deceased died intestate, leaving behind a considerable fortune – Deceased married twice, producing 14 children – Trust deed signed by deceased, an unexecuted will, as well as an oral declaration of present gift purporting to give all his wealth to a Foundation established for charitable purposes – Whether this declaration was effective to make the Foundation the owner of shares and/or credit balances previously owned by deceased, and to

subject them to the trusts of the trust deed – Whether the deceased had in effect declared himself a trustee of all his assets for the Foundation, rather than effect a transfer of his assets to the Foundation's trustees – Whether a gift inter vivos can be made of a person's 'wealth' – Making a gift vis-à-vis declaration of a trust – Richards v Delbridge [1847] 18 Eq.11, Milroy v Lord [1862] 21 De G.F. and J 264 applied – Rules governing the transfer and gift of shares – Milroy v Lord Turner; Re Rose [1949] 1 Ch. 78 applied – Holt v Heatherfield Trust [1942] 2 KB 1 distinguished – Whether a purported transfer/assignment by directors of the company, to the Foundation, of the shares and credit balances in the deceased's companies was effective in law – Whether such action was within the directors' powers – Interpretation of International Business Companies Ordinance, section 30[2] – Whether such power can be made to over-ride the provisions of a company's articles – Whether a written transfer is essential, or can effect be given to an oral transfer [as done in the present case] – Rules regarding assignment of a legal chose in action in equity by way of a voluntary gift – Re Westerton [1919] 1 Ch. 104 considered – Whether an oral agreement by the deceased to release the companies from their debts owed to him in consideration of their promising to pay the credit balances to the Foundation, meant that the defendant/appellant companies attorned to the Foundation – Israel v Douglas [1789] 1 H and I 239; In Griffin Weatherby [1868] LR 3 QB 753; Liversage v Broadbent [1859] 4 H and N No. 603; Shamia v Joory [1958] 1 QB 448 considered – Factors constituting evidence of attornment – Whether the appointment of an administrator was sufficient to give effect to the transfer of the shares and credit balances, and therefore release the companies from their debt – Strong v Bird [1874] LR 18 Eq. 315 distinguished – Re James [1935] Ch. 449 doubted – Re Stewart [1908] 2 Ch. 251 applied – Cross-appeal on the issue of whether the plaintiffs/respondents were rightly estopped by the trial judge from litigating in the B.V.I. questions surrounding the deceased's domicile and validity of his second marriage in Sierra Leone, and therefore, legitimacy of the children of that marriage - Jacobs v London County Council [1950] AC 361 referred to. Appeal dismissed. Cross-appeal allowed.

JUDGMENT

REDHEAD, J.A.

On 19th March, l992 Thakurdas Choithram Pagarani [T.C.P] died at the age of about 78 years, intestate, possessed of huge assets.

T.C.P. was born in India. In 1930, he was married to the first named respondent according to Hindu rites. They had six daughters by that union.

The deceased left India in l939 and went to Sierra Leone where he met a Miss Virginia Harding with whom he formed a relationship. In 1944 he contracted a second form of marriage with Miss Harding according to local law and custom. There were eight children by that union.

Whilst in Sierra Leone, the deceased began a food Supermarket business which was very successful and eventually became a world wide chain by the time of his death.

After Sierra Leone obtained its Independence in 1967 T.C.P. became a national of Sierra Leone. Although apparently he never acquired a home there, he maintained a home in India to which he habitually returned.

From the 1970's when civil strife broke out in Seirra Leone, the deceased ceased to reside there permanently but instead paid periodic visits when in mid 1980's his visits ceased altogether.

During that period he spent most of his time in Dudai where he had considerable business interests.

As I have said above, at the time of the deceased's death he had amassed a great fortune which included:

[a] His shares in holding companies into which he had transferred the share capital of most of the companies world wide in his Supermarket business,

[b] The sum owed to him [i.e. the credit balances] on his various loan accounts with the companies and their subsidiaries,

[c] His interest as a partner in a number of Dudai partnerships and limited liability companies through which the Supermarket businesses in the united Arab Emirates were carried out,

[d] The land and dwelling house in India in which his wife and one of his daughters were living,

[e] His interest in a number of companies incorporated in Spain, Bangkok Muscat.

T.C.P was of a profoundly charitable disposition.

He founded hospitals and charities for poor relief in India and Sierra Leone.

The Learned Trial judge said at page 11 of his judgment:

> "There can be no denying that the deceased throughout his life manifested profound charitable intentions and towards his later years having made generous provision for his first wife and each of his children, intended to leave most of the remainder of his wealth to charity, to the exclusion of his children. This he hoped to achieve by setting up a foundation to serve as an umbrella organization for those charities which had been already established and which will in due course be the vehicle to receive most of his assets when he died. This was from all accounts a longstanding intention of the deceased".

And as Mr. Mowbray argued:

> "this was not something which suddenly sprang to the mind of the deceased, it began since l989".

To that end, T.C.P consulted London Solicitors, MacFarlenes, who in 1989 drafted and in 1990 finalised a Jersey trust deed with an original nominal £1,000 trust fund but contemplating additions.

In late 1991 the deceased fell ill and was diagnosed as suffering from lung cancer. In December l991, he went to London to seek Specialist advice and treatment.

On 17th February, l992, the deceased, in an elaborate ceremony, in the presence of a number of the appellants and the Consular Attache from the Indian High Commission in London executed a trust deed in his bed at 5 Elmcroft Road,Golders Green

establishing the Foundation. Over the next few days the intended trustees who were not present, at the time executed the deed.

Immediately after the deceased had executed the trust deed it is admitted, by all the parties, that he then and there orally declared words to the effect that now he had given "all his wealth to the Foundation". He then instructed Mr. Paramalingham [Param] the accountant to the Dubai Companies and partnerships to transfer to the said Foundation "all his wealth with the companies and their subsidiaries".

The learned trial judge in his judgment at page 7 wrote:

> "it was about that time [December 1991] that he [TC.P] instructed a Mr. Lock, a partner from another firm of Solicitors to draw up a will for him which provided that the whole of his residuary estate, apart from the property in India, should go to the Foundation".

In an affidavit sworn to by Barry David Stewart Lock on 20th day of May, l992. He deposed that on 10th January, l992 he visited T.C.P at 5 Elmcroft Avenue,Gloders Green.

At paragraph 4 Mr. Lock deposed:

> "The draft will which I had prepared for the deceased in accordance with the instructions indicated by his son Mr. Lekhraj Thakurdas Pagarani was drafted on the basis that the Choithram International Foundation already existed. I was informed by the deceased and his son that this was not the case but that the deceased was pressing ahead with the creation of the Foundation as swiftly as possible. I was handed a copy of the latest draft of the deed establishing the trust and I was asked to comment on it and the deceased was adamant that he wished his residuary estate to be applied for charitable purpose and particularly Choithram International Foundation. I explained that the will could not provide a residuary bequest to the Choithram International Foundation as that fund was not yet established, explained that it would probably be best to arrange a stop gap situation whereby the residuary estate was bequeathed for general charitable purpose and then the executors could pay over the residuary estate to the Trust; the Choithram International Foundation in fulfillment of the general charitable discretion. The deceased asked to revise the will on that basis and states that in the meantime he and his son would prepare the

> necessary assignments for assets to have transferred to the Choithram International Foundation". [my emphasis]

In his skeleton argument Mr. Mowbray Q.C. alluded to the fact that the firm of Clifford Chance also drew up a draft will. For T.C.P in 1991, leaving his residuary estate outside India to the Foundation but as the Foundation had not been established the date of its establishment had to be left blank and the will could not be executed. Learned Counsel made reference to exhibit DI-6: 49-50.

A copy of that will which is there exhibited reads in part as follows:

> "I Thakurdas Choithram Pagarani of 5 Rawdon Street P.O. Box 26, Freetown Sierra Leone DECLARE this to be my last will which I make this day of One thousand nine hundred and ninety two. ……
> I bequeath all my property both movable and immovable and wheresoever situate except property in India unto my executors upon trust to sell the same…….. to apply and transfer all my said property to the trustees for the time being of the Choithram International Foundation established by a settlement dated the 17th February, l992……."

I make the observation that Georges J. in his judgment at page 5 said:

> "[T.C.P] never apparently acquired a home as such in Sierra Leone and ceased residing there permanently in the 1970's when civil strife broke out. His visit there became sporadic and ceased altogether in the mid 1980's".

If this is the case, and presumably there must have been some evidence to support this statement by the learned trial judge; one wonders why an address in Sierra Leone would appear on the will.

The second and more serious observation is that although the will was not executed and there is no indication when it was drawn up but having regard to the fact that it makes reference to the establishment of the Foundation on 17th February, l992. I came to

the conclusion that it must have been drawn up sometime post that date.

The evidence is that shortly after the deceased had signed the trust deed, establishing the Foundation, the deceased said that he had given "all his wealth to the Foundation "he then said to Param "you known what to do" or words to that effect.

As a result of which the deceased's shareholding in each of the company was re-registered in the name of that Foundation.

The Plaintiffs/Respondents as a result brought an action in the High Court of the British Virgin Islands [B.V.I.] seeking inter alia the following reliefs:

An order for the rectification of the share registers of the first, second, third and fourth Defendants. A declaration that the Fifth to Eighth Defendants inclusive hold upon trust for the estate of the deceased all assets.

An injunction restraining the Defendants and each of them from dealing with or registering any transfer of any shares in the Companies in the name of the deceased at the date of his death.

In a well reasoned judgment the learned trial judge granted the declaration that the Fifth to Eighth Defendants hold upon trust the Estate of THAKURDAS CHOITHRAM PAGARANI all assets transferred to them as trustees of the Choithram International Foundation. And ordered rectification of the share registers of the First, Second, Third and Fourth Defendants and ordered the defendants to pay the plaintiffs costs fit for two counsel.

From this judgment the defendants have appealed to this court.

The Defendants/Appellants main ground of appeal is contained in ground 3 which has 14 subheads.

I now deal with ground 3[vi]

1. That having made the following findings of fact, namely:

   [a] "I am satisfied that after the signing of the document [viz The Trust Deed establishing the Foundation] the

[b] deceased uttered some form of words by which he make a gift of all his wealth to the Trust/Foundation [P.15].

[c] "I am satisfied that the deceased signed the Trust Deed and made a gift of all his wealth with the companies to the Foundation….. There is no doubt in my mind that on the totality of evidence, the deceased made an oral declaration giving all his wealth to the Foundation [P.16] and

[d] "I am satisfied on the evidence before me that following the signing of the trust deed by the deceased on 17th February, l992, he thereafter made an oral declaration of an immediate present gift of all his wealth to the Foundation [P.25] and

[e] "The Court has found as a fact that the deceased did utter words of present gift and intended thereby to vest in the Foundation all his wealth or assets"[P.30];

The learned judge erred in law in holding that this declaration was not effective or did not become effective to make the Foundation the owner of the shares of the credit balances and to subject them to the trusts of the trust deed.

And that the learned judge sought to have found that the said gift took effect..

The appellants argued their case in court below on two limbs i.e.

[a] T.C.P had made an immediate and irrevocable gift of all his assets to the Foundation and/or in the alternative.

[b] That the deceased had declared himself a trustee of all his assets for to Foundation.

In this court reliance was placed on both limbs. Although, in my view, the emphasis which was given to each limb in this court was in the reverse proportion to that given in the court below:

More emphasis was placed on the second limb in this court. In fact Mr Mowbray Q.C. said apologetically . 'we did not open our case on the basis of a declaration of trust. It did not at the time occur to us that T.C.P. had declared himself a trustee. We did so in the closing.

The deceased had used the words "I give all my wealth to the Foundation" or "now I give all my wealth to the Foundation" or some such similar statement.

Mr. Steinfeld Q.C. contended that by these words "I give" T.C.P. intended a transfer to the trustees it was not his intention to create himself the sole trustee.

At common law when one says I give it connotes a transfer of the thing to be given to the receiver. And shows an intention to part with the gift. A settlor may declare himself to be a trustee of his property by word of mouth or may be inferred from conduct. It need not be a formal declaration. The settlor need not use the words, "I declare myself a trustee", but he must do something which is equivalent to it and use expressions which have that meaning for how anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning [See Snell's Principles of Equity 25th Ed. P. 125].

Mr. Steinfeld submitted that T.C.P made words of gift by mere words of present gift which was not sufficient to complete the gift and equity will not assist a volunteer.

Mr. Steinfeld contended that the gift failed because of uncertainty. As the words of the gift were not of the shares and credit balances but of all my "wealth". A gift of one's specific assets made inter vivos cannot meet with this objection. However, a purported gift of all one's wealth during one's lifetime is meaningless because untill all testamentary and other debts are paid it is impossible to know what particular assets owned by the Testator are the subject matter of the gift. In short, argued learned

senior counsel, there cannot be made inter vivos a gift of such an inchoate concept as a person's wealth.

The Appellants argued that T.C.P was disposing of his assets, leaving his debts to be covered by the Foundation., of which he was the first named beneficiary. There is no suggestion that he had any large or long-term debts and the Foundation would obviously have paid his living expenses, hospital bills. That being so, there could be no question of defeating, let alone defrauding creditors, even in settling all his assets.

The issue, in my view is not whether he was defeating his creditors but when he purported to give away all his wealth to the Foundation whether his wealth at that time was capable of ascertainment. I think not.

It is well established than the making a gift is inconsistent with the declaration of a trust..

Richards v Delbridge [1847] 18 Eq. 11

D who was possessed of leasehold premises and Stock-in-trade, shortly before his death purported to make a voluntary gift in favour of his grandson E who was an infant by the following memorandum signed and indorsed in the lease. This deed and all thereto belonging I give to E from this time forth with all the stock-in-trade. The lease was then delivered to E's mother on his behalf.

It was held that there was no valid declaration of a trust of the property in favour of E.

At page 13 Sir G. Jessel M.R. said:

> "The one thing necessary to give validity to a declaration of trust-the indispensible thing-the donor, or grantor should have absolutely parted with that interest which had been his up to the time of the declaration should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest".

At page 14 Sir G. Jessel M.R said:

> "A man may transfer his property, without valuable consideration in one or two ways: he may either do such acts

> as amount in law to a conveyance or assignment of the property, and then completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficiaby" or on trust as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust constitute himself as trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true that he need not use the words "I declare myself a trustee" but he must do something which is equivalent to it and use expressions which have that meaning, for however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning."

And at page 15 the M.R. said:

> "The true distinction appears to me to be plain and beyond dispute. For a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over the property to another and not retain it in the donor's own hands for any purpose, fiduciary or otherwise". [my emphasis].

In Milroy v Lord [1862 21 De G.F.& J 264] Lord Justice Turner after referring to the two modes of making a voluntary settlement valid and effectual adds these words: "The cases, I think go further to this extent, that if the settlement is intended to be effectual by one of either of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of a trust for then every imperfect instrument would be made effectual by being converted into a perfect trust.

It appears to me that that sentence contains the whole law on the subject".

In the instant appeal the words of T.C.P in my opinion must be regarded as an intention to and over the property to the Foundation.

I am fortified in this view when one looks at the affidavit of Mr. Lock and subsequent events.

If the words of T.C.P created a valid binding and irrevocable trust then of course the house in India would have been included in that trust. But as it turns out this was clearly not T.C.P's intention. When he executed the trust deed it was for £1,000.00 in favour of the Foundation. There was the will in favour of the Foundation, which he never executed. The will excluded the property in India. There were the Deeds of addition in favour of the Foundation. Quite clearly, in my view, T.C.P did not intent, by his conduct, that the Foundation should benefit by a declaration of a trust but rather by means of the will and the Deeds of addition.

The Appellants however argued that the word "give" was not inconsistent with T.C.P retaining the legal title to the assets, seeing that he intended to retain them in his new capacity as trustee. They argued that he said he was giving his wealth to the trust that was consistent with his retaining it on the trust as trustee, unlike an attempted gift of the legal title to an individual or to third parties as trustees which indicates an intention to part with the property and so is inconsistent with an intention to hold as trustee.

I do not agree with this argument as it is my view that the Settlor either declares himself a trustee or in this case he delivers on the behalf of the Foundation i.e by transferring the assets to himself and his co-trustees for the Foundation. But I do not agree with the argument that T.C.P said he was giving it to the trusts and that was not inconsistent with his retaining it on trusts as trustees. Moreover in my view this is inconsistent with the principle enunciated in Richards v Delbridge [Supra].

The assets which were transferred to the Foundation were the shares in the four defendant/appellant companies and the credit balances.

The share certificates were in the hands of Param up to the time of and after the death of T.C.P. To complete the gift the donor must have done everything, which was necessary to be done in order to transfer the shares and render the settlement binding upon him.

Milroy v Lord [1862] 4 DeCF&J J 264

Heartley v Nicholson [1872] 19 Eq.233

Richard v Delbridge [1874] 18 Eq. 11

Re Fry [1946] Ch.312

Re Rose [1949] 1 Ch. 78

Re Rose [1952] Ch 499.

In Milroy v Lord Turner L.J at page 1184 said:-

> "I take the law of this court to be settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effecutal, and it will be equally be effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, trust may, as I apprehend be declared either in writing or by parol; but, in order to render the settlement binding, one or other of those modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. …….
> Applying, then, these principles for the cases, there is not here any transfer of the one class of shares or of his other to the objects of the settlement, and the question therefore must be, whether a valid and effectual trust in favour of those objects was created in the Defendant Samuel Lord or in the Settlor himself as to all or any of these shares".

In this appeal the share certificates were not handed over to the Foundation but were kept by Param who was the bailee of the

deceased. The deceased had also failed to execute the transfer in favour of the Foundation.

If T.C.P had executed a transfer in favour of the Foundation and had handed over the share certificates to the Foundation or to the trustees of the Foundation, then the deceased would have done all that was necessary to be done to vest the shares in the Foundation.

In that way the Foundation could have compelled the registration of those shares in the name of the Foundation.

> In Re Rose [1949] [supra] Jenkins J. at page 89 said:
> "In this case, as I understand it, the transferor had done everything in his powers to divest himself of the shares in question to Mr. Hook. He had executed a transfer. It is not suggested that the transfer was not in accordance with the company's regulations. He had handed that transfer together with the certificates to Mr. Hook. There was nothing else the testator could do.
> It is true that Mr. Hook's legal title would not be perfected until the directors passed the title transfer for registration, but that was not an act which the transferor had to do, it was an act which depended on the discretion of the directors".

The Appellants admitted that T.C.P, could have done more e.g he could have signed the share transfer forms authorised Param expressly to surrender the certificates. But they argued that the applicable principles do not require this. Some authorities find that a gift was good on the ground that the deceased had "done everything in his powers". But it does not follow from that if he does, not do everything he could, but everything necessary, the gift is bad. Argued the Appellants.

Learned Counsel, Mr. Mowbray Q.C., referred to Re Williams 917 1 Ch.

> Lord Cozens Hardy M.R. at page 6 said:
>
> "One question whether in the circumstances there is a voluntary gift always involves the consideration not whether the donor might have given the property, but what is the form in which he has purported to give it. Take the case of shares

> in a limited company which are only transferable at the Bank of England, it is quite clear that a mere letter not under seal in either of those cases purporting to assign would not amount to an assignment giving the benefit of the property to the donee. The transaction would not have been complete, the donor would not have done as he could to perfect it, and the intended gift would have failed. Of course if there had been valuable consideration for the assignment the position might have been different".

Warrington L.J at page 8 said:

> "Has the assignee here made out the assignor has done everything that was necessary in order to transfer the property and render the assignment binding upon him. The question turns largely if not entirely on the construction of the document" [my emphasis]

In my view I see absolutely no difference between the words the settlor "must have done everything which was necessary to be done in order to transfer the property" [Milroy v Lord] and "everything that was necessary in order to transfer the property" [Re Williams]

Learned Counsel, Mr. Mowbray Q.C. argued that the donor need not take every measure open to him is demonstrated by:

Holt v Heatherfield Trust 1942 2 KB 1

P having recovered judgment for a sum of money against a company assigned the judgment debt absolutely to the Plaintiff. After the assignment but before notice thereof had been received by the company the defendant obtained a garnishee order nisi charging the judgment debt

Held that the assignment even on the assumption that it was made without consideration, was a good equitable assignment, and as the garnishee order only charged property with which the assignor could honestly deal it did not charge the assigned debt which was the property of the assignee.

At page 2 Atkinson J. said:

> "At common law things in action were not assignable, and an assignee had to go to equity to enforce his claims. If the thing in action was a legal claim, he had to file a bill to compel the assignor to permit him to sue in the name of the assignor, and equity would help him only if he had given valuable consideration for the assignment".

At page 4 the learned judge said:

> "Absence of notice does not affect the efficacy of the transaction as between the assignor and assignee until notice be given the assignment is an equitable assignment, but it is
>
> an assignment which requires nothing more from the assignor to become a legal assignment".

And at page 5:

> "Therefore, it seems beyond argument that the absence of notice does not affect the efficacy of the transaction as between assignor and assignee. The Supreme Court of Judicature Act, l873 relieved the assignor from the necessity of applying to equity for help, and therefore, valuable consideration is no longer necessary".

This case has no relevance with the principle under discussion, but deals with the assignment of a judgment debt which was held to be a good equitable assignment even if made without consideration.

In relation to ground 3[3]

The Appellants argued, that in the alternative T.C.P's shares in the B.V.I. Companies were validly transferred to the Foundation at law and that his credit balances were validly assigned to the trustees in equity, or the companies, were, as debtors, attorned to them as their new legal creditors i.e. assuming that T.C.P did not declare himself a trustee on 17th February, l992 but intended to transfer his assets to himself and the other trustee.

I deal first of all with the shares which the appellants argued were validly re-registered in the name to the Foundation by the Directors of the company. The Appellants argued that if the directors acted within their powers, no question arises of completing

an uncompleted gift. The Foundation would then have become the legal owner. They also argued that the Directors acted within their powers and that the shares came into the hands of the donee trustees with propriety. The appellants relied on.

Re Rallis will Trusts 1964 Ch. P301 for that preposition.

Mr. Mowbray contended that the Directors of an International Business Companies Ordinance [IBC] Cap.29 can register an oral transfer under this ordinance S.30[2].

> "S.30[1] subject to any limitations in the memorandum or articles registered shares of a company incorporated under this ordinance may be transferred by a written instrument of transfer signed by the transferor and containing the same name and address of transferee.
> [2] In the absence of a written instrument of transfer mentioned in subsection [1] the directors may accept such evidence of a transfer of shares as they consider appropriate".

The appellants argued that it is clear or the wording of S.30[2] that it confers on the directors of an IBC an overriding statutory power to give effect to an oral transfer, if satisfied on the evidence before them that it took place. They also argued that usually this will be documentary evidence, but three of the directors heard the declaration and acted upon it.

The Respondent argued that S.30[2] cannot be construed so as to enable the directors to ignore the provisions of a company's articles.

The articles take effect as a contract under seal between the members inter se and between the members and the company. The shareholders have agreed that shares may only be transferred in a particular manner, it is seemingly illogical that their agreement should be overriden by a subsequent section of the ordinance. The opening words of S.30 [1] indicate that such was not the intention of the section.

The appellants further argued that even assuming that S.30[2] does confer power upon the directors to dispense with a

written transfer as required by the Articles, that does not assist the Defendants. For in the circumstances the deceased would still not have done all that lay within his power to vest the share in the Foundation.

The learned judge at page 35 of his judgment said:

> "Speaking for myself I must say that I am pursuaded by the argument. For in any event, even if S. 30[2] does confer power on the directors to dispense with a written transfer as required by Article 13[a] the deceased would still not have done all that lay within his power to vest their shares in the Foundation, because by not signing the requisite instrument of transfer, the ability of the Foundation to become registered would not rest with the directors in exercise of their powers under S.30[2] and unlike the directors' power to refuse registration, is something which lay within his power to avoid.
>
> In my judgment therefore the deceased's purported gift of his shares in the companies to the Foundation fails and the subsequent minutes of the directors and trustees, and the book entries in the Companies' journals and shares register do not in any wise alter that fact since the deceased in my view did not do everything which was within his power to do to enable the Foundation to become registered as holder of his shares".

I agree entirely with the learned trail judge. However I am of the opinion that in order to transfer shares from to A to B that the shares must eventually, at least, be registered in B's name and there cannot be a registration of the shares in B's name unless the shares are first of all transferred to B. In my view, therefore, the directors cannot act under S.30[2] unless there is a transfer in the first place. There being no transfer of T.C.P's shares to the Foundation the directors could not act under S.30[2].

I now deal with the credit balances. The appellants argued that there has been a valid equitable assignment of the balances to the trustees.

In the British Virgin Islands a legal chose in action could only be assigned in equity by way of a voluntary gift by deed.

In re Westerton [1919] 1 Ch. 104

At page 111 Sergant J said:

> "I now turn to the principal difficulty in the case, and that is the absence of valuable consideration. It seems to me, though I
>
> am not sure that it was completely admitted by Mr. Gover that apart from the judicature Act 1873 S.25 sub-s[6] the want of consideration would have been fatal to Mr. Gray's claim.
> Prior to the Judicature Act, l873, a legal chose in action such as this debt could not be transferred at law, and the assignee of the debt could only have sued in the name of the assignor and in the absence of consent by the assignor or a binding contract by the assignor to allow the use of his name, the use of the assignor's name could only have been enforced by filing a bill in equity and so obtaining an injunction in parsonam to allow the use of the name, and equity would not have granted that relief unless the assignment had been for valuable consideration. But to my mind the effect of S.25 sub-s[6] of the Judicature Act l873 has been to improve the position of the assignee of a chose in action who satisfies the words of the subsection, that is to say an assignee under an absolute assignment by writing under the hand of the assignor not purporting to be by way of a charge only, by enabling that assignee to dispense with the circuitors process of compelling the assignor in equity to allow his name to be used in proceedings by the assignee. The result of the sub-section is now an assignee who takes under such an absolute assignment as is there mentioned can now sue at law in his own name, and I see no reason why in the present case the assignee should not do so".

In the B.V.I. there is no corresponding section to S.25 subs.6 of the Judicature Act of 1873 of England. The result is that the only way in which a legal chose in action can be assigned in equity by way of a voluntary gift is by deed.

The appellant also argued that T.C.P have agreed to release the companies from their debts owed to him in consideration of their promising to pay the credit balances to the Foundation. In other words, after the directors met on 17th February and passed the resolution to the transfer the credit balances in the books of Defendant companies Nos 1 to 4, to the Foundation. The defendants attorned to the Foundation.

In Israel v Douglas 1789 1H& I 239

The defendant was the debtor of the third party who instructed him to pay the plaintiff the amount of the debt. The defendant agreed to do so, whereupon the plaintiff lent the third party a further sum. The plaintiff recovered the amount of the debt from the defendant on an indebitatus count.

In Griffin Weatherby [1868] LR.3Q.B753

BlackburnJ. at page, 58 said:

> "Ever since the case of Walker v. Rostron, it has been considered as settled law that when a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if does promise to pay to the transferee, then that which was merely an equitable right, becomes a legal right in the transferee founded on the premise; and the money becomes a fund received or to be received for and payable to the transferee, and when it has been received an action for money had and received to the use of the transferee lies at is suit against the holder".

In Liversage v Broadbent [1859] 4 H & N & No 603

The defendant being indebted to C. in a sum of £113.13s and C being indebted to the Plaintiff on two bills of exchange for £60.00 and £53.13s one of which was dishonoured and the other about to become due, the Plaintiff required some security proposed to and that the defendant should guarantee the payment of the bills when C signed the following document. "I hereby agree to authorise B [the defendant] to pay to [the plaintiff] or his order the sum of £113.13s, the amount of two acceptances towards my account for building the cottages at W. B to debit my account with the above money: also his receipt to B I acknowledge shall be binding between myself and B in the contract. At the foot of the document the defendant wrote 'acknowledged" with his signature. Held that the Plaintiff could maintain no action against the defendant to recover the money, since the document was merely an

assignment of a chose in action, and there was no consideration for a promise to pay, in as much as the debt due from C to the plaintiff was not extinguished.

At page 980 Pollock C.B. said:

> "Now the mode by which clapham would naturally authorise the defendant to pay the money to the plaintiff or his order would be by drawing on him a bill of exchange payable for the plaintiff's order. In this respect the case differs from those relied upon by the plaintiff. The document goes on 'towards my account for building the cottages at Weatherby Mr. Broadbent to debit my account with the money" that does not mean "instanter", so as to transfer the debt, but "debit my account with the money when you have paid it". All the defendant does is to add the words "acknowledged", with his signature, which may only mean that he has received the agreement, and that when he gets the authority he will act upon it".

The respondent argued that the minutes [Bundle DI. Tab 8] record no such attornment and even if they did, that is merely an attempt to rely as Shamia v Joory 1958 1Q.B.448. They argued that so far as it is suggested that the principle of "attornment" can apply to debts or chose in action is inconsistent with earlier authorities.

The respondents made the observation that the minutes in question were not signed by the deceased and no evidence was led to show that he saw them let alone approved their contents.

In Shamia v Joory [supra]

The defendant, an Iraq, merchant, carrying on business in the U.K agreed at the request of Y, his agent in Iraq, to pay £500 to the plaintiff [Y's brother] in the U.K out of money owed by the defendant to Y as renumeration for services rendered. Y informed the plaintiff of the arrangement and in due course the defendant sent the plaintiff a cheque for £500. Owing to an irregularity the cheque was not met and the plaintiff returned it to the defendant at his request for correction. Notwithstanding the defendant's promise to send the corrected cheque back to the plaintiff; it was never sent and the £500 was never in fact paid to the plaintiff.

In an action by the plaintiff against the defendant inter alia, for money had and received by the defendant to the plaintiff's use the defendant admitted his promise to Y to pay to the plaintiff the sum claimed but contended that in view of certain unauthorised property dealings subsequently carried out by Y for which Y had received, the money, the defendant was no longer indebted to Y at the date of the writ and was not indebted to the plaintiff.

> "Held [1] although the plaintiff was not a creditor of Y but the recipient of a gift from him he had a legal right to recover the £500 and could recover it from the defendant provided that there was a "fund" in the defendants hands at the time he accepted Y's instructions and made his promise to the plaintiff.
>
> [2] That to establish the existance of a "fund" it was not necessary to show that an identifiable sum of money had been handed to the defendant, and, for a suit for money had and received to lie at the hands of the transferee against the third party, all that the law required was that there must be in the hands of third a party, or accruing to him either a sum of money, or a monetary liability over which the transferor had a right of disposal; it was immaterial whence the liability arose and it could include a debt for money lent or for services rendered, and of a temporary nature provided that it existed at the date of the transfer and of the debtor promise to pay the transferee; accordingly, the plaintiff was entitled to recover the £500 from the defendant and his right to do so could not be defected by any subsequent dealings between the defendant and Y".

In an article by Lord Goff and Jones written in the Law of Restitution this decision was criticized.

> The two distinguished learned gentlemen wrote.
>
> "It is dificult to justify the decision in Shamia v Joory. It extends Griffin v. Weatherby and appears to be in conflict with Liversage v Broadbent a case not cited in Shamia v Joory, where the court of Exchequer held that the defendants promise to hold a debt to the plaintiff's use was a nudum pactum. Historically, Shamia v Joory is unsound since it circumvents the common law's refusal to give effect to a chose in action. Moreover, it is open to grave objection that it blurs the fundamental distinction between assignment and attornment. Where there is a fund in the hands of the defendant, he can on the third party's instructions, hold in for

the plaintiff thereby attorning to him. But if the defendant merely agrees to pay a debt to the plaintiff instead of to a third party, there can by no attornment. Attornment requires a right of property in a specific asset.

The critical diference is that the consent of the debtor is not necessary, though it may be desirable, to perfect an equitable assignment, whereas in cases of attornment it is essential to show that the debtor assented to hold to the plaintiff's use.

The law cannot be regarded as settled. But the following conditions must apparently be satisfied before the plaintiff can succeed in his own claim to the money

[1] There must be a "fund" in the defendant's hands. On the present authorities it is doubtful whether a debt is a "fund" for the purposes of trust rule; in our opinion, for reasons already stated, a debt should not, in the

[2] present context be regarded as a fund capable of attornment.

[3] A third party, from whom the defendant received the "fund" or to whose use he held it, must have requested the defendants either before or after the "fund" reached the defendant's hands to hold it to the plaintiff's use.

[4] The defendant must have assented to hold the "fund" to the plaintiff's use and such assent must have been communicated to the plaintiff by the defendant or his authorised agent. In other words, the defendant must have "by some act attorned to the plaintiffs [See also Ramcharan Arima Bus Services Ltd 1969 W.I.R. 375]."

In the instant appeal of I entertain no doubt that the first four appellants have not attorned to the Foundation.

First of all the credit balances which were held by the four companies on behalf of T.C.P cannot in my view be regarded as a "fund" but rather as a debt owing to T.C.P.

1. Secondly, that even if the credit balances could be regarded as a "fund" there is no evidence that the four companies or any of them assented to hold the balances on behalf of the Foundation and that assent was communicated to the Foundation.

Thirdly, was there any promise by the four companies or any of them to pay to the Foundation the credit balances? If so when was that promise made?

In my view it cannot be said that promise to pay was made at the Board meeting on 17th February, l992 [See D.1.8 P.106]

The final point argued on behalf of the appellant in the alternative, though not with much force, was that by the words of the gift, both shares and credit balances become effective on the appointment in the B.V.I. of Mr. Sydney Bennet as "attorney administrator" for Mr. Azard [the person for whom Letters of Administration have been granted in Sierra Leone who was in turn attorney administrator for Lekhra].

In Strong v Bird [1874] LR.18Eq.315

B borrowed £1,000 from his stepmother, who lived in his house, paying £212.10s a quarter for board and it was agreed that the debt should be paid off by deduction of £100 from each quarter payment. Deduction of this amount were for two quarters, but on the third quarter day the creditor refused to make any further deductions and paid the full amount of £212.10s and continued down to the time of her death [which took place more than four years afterwards] to pay to B the like quarterly sum. B was appointed the sole executor of his stepmother, and proved the will and a suit for administration was instituted.

Held that the debt was gone first because the appointment of B as executor released the debt at law and any claim in equity was rebutted by the evidence of continuing intention on the part of the testatrix to give; and secondly because the intention of the testatrix to give B the sum of £900 was completed by nine quarterly payments of £212.10s each.

At page 31 Sir G. Jessel M.R. said:

> "First of all, it is said and said quite accurately that the mere saying by a creditor to a debtor "I forgive you the debt" will not operate as a release at law. It is what the law calls nudum pactum, a promise made without actual consideration passing and which consequently cannot be supported as a contract. It is not a release, because it is not under seal.

> Therefore the mere circumstances of saying "I forgive you will not do". There are however two modes in which, as it appears to me the validity of this transaction can be supported. First of all, we must consider what the law requires. The law requires nothing more than this, there is a case where the thing which is the subject of donation is transferable or releaseable at law, the legal transfer or release shall take place. The gift is not perfect until what has generally been called a change of the property at law has taken place. Allowing that sale to operate to its full extent what occurred was this. The donor or the alleged donor had made her will, and by that will had appointed Mr. Bird the alleged donee executor. After his death he proved the will and the legal effect of that was to release the debt in law, and therefore the condition which is required, namely, that the release shall be perfect at law was complied with by the testatrix making him executor."

Learned Counsel Mr. Mowbray Q.C. argured that the judgment of the court below was wrong in not following

Re James 1935 Ch.449

which decided that……

The legal estate acquired by an administrator is no less effectual that that of an executor appointed by will to perfect an imperfect gift made by the deceased owner of the estate to the administrator.

On the death of his father. J.J. handed over the furniture and title deeds of a certain house and premises forming part of his father's estate to S.M.J and allowed her to occupy the house rent free. J.J. died intestate and the son S.M.J was appointed administrator:-

Held that there was a continuing intention on the part of the donor up to the time of his death to give the property to the donee, and that by her appointment as an administratrix she had acquired the legal estate.

As I understand the decision in Strong v Bird the appointment of Bird as executor released the debt at law. It was an act of the donor that released Bird from the debt whereas in re

James it was not the act of the donor which was said to release the donee.

> In re James Farwell J. at page 451 said:
> "it is well settled that in such a case equity will not aid the donee, but on the other hand if the donee gets the legal title to the property vested in him he no longer wants the assistance of equity and is entitled to rely on his legal title as against the donor or persons claiming through him".

The learned Judge seemed to be relying on Strong v Bird but, with respect, as I understand it that is not what Strong v Bird decided "that if he gets the legal estate vested in him", but rather he must get it vested in him through the act of the donor.

The principle enunciated in Strong v Bird was explained and given approval.

> In re Stewart 1908 2 Ch. 251
>
> At 254 Neville J. said:
>
> "He had in his hands £500 or thereabouts, the proceeds of the bond paid off which formed part of the provision he had in 1905 made for his wife. He had, I think, in his pencil note indicated his intention of adding to that provision in 1906 to the extent of £1,500 under those circumstances he buys three £500 bonds at a price slightly exceeding £1,500. Coupling this with the statement of the wife that he told her "I have bought bonds for you". I have no doubt that he intended the bonds to be her property. The intention of the testator to give the bonds being thus, as I hold proved, does the fact that the wife was appointed executrix give validly to what unless, it can be supported as a declaration of a trust would be an imperfect and invalid gift? I think it does, the case in my opinion being within the principle of Strong v Bird……..
> That has remained unchallenged for upwards of thirty years, and has been followed in several cases. It purports to lay down a principle of general application and I think I am bound to apply that principle to the present case. The decision is, as I understand it, to the following effect that where a testator has expressed the intention of making a gift of personal estate belonging to him to one who upon his death becomes his executor, the intention continuing unchanged, the executor is entitled to hold the property for his own benefit. The reasoning by which the conclusion is
> reached is of a double character first, that the vesting of the property in the executor at the testator's death completes the imperfect gift made in the lifetime, and secondly, that the

> intention of the testator to give the beneficial interest to the executor is sufficient to countervail the equity of beneficiaries under the will, the testator having vested the legal estate in the executor."

This was adopted by the court of Appeal in Re Pink [1912] 2 Ch. 528.

Whereas the validity of re James [supra] was in re Smith [1979] Ch. 17 doubted by Watson J. when he said at page 35:

> "I am of course aware that in re James [1935] Ch.449 was cited with no dissent by Buckley J. in re Rallis will Trust [1964] 288, 30 though I think the matters there in issue were fundamentally different from those which arose under the rule in Strong v Bird L.R. 18 Eq. 315, and as I read the judgment in re James was only used as an illustration. However, inspite of those doubts, I will follow as I said in re James, leaving it for another court to consider at some appropriate time whether there is or is not any solid foundation for those misgivings".

I said that this ground was not argued with much enthusiam because Mr. Mowbray reluctantly admitted that the releasing of the grant of administration to Mr. Sydney Bennett in the B.V.I may have been unlawful. However he argued on the authority of Isaacs v Robertson 1984 43 W.I.R.126 that the grant was valid until set aside. Having regard to the foregoing this court will refuse to follow re James, it being a first instance judgment and of doubtful validity.

I hold therefore that the words of the gift did not become effective on the appointment in the B.V.I. of Mr. Sydney Bennett as attorney administrator for Mr. Azard.

Finally, I now deal with the cross appeal.

By their respondent's notice, the respondents appeal that part of the judgment as adjudged that the plaintiffs should be estopped from litigating in the jurisdiction of the British Virgin Islands the following issues, namely those in which the plaintiffs seek to allege that :

[i] The deceased died domiciled in India and not Sierra Leone.

[ii] The deceased was never married to Virginia Harding

[iii] The children of the union between the deceased and virginia harding are accordingly not legitimate children of the deceased for the purpose of sharing in the deceased's estate on intestacy.

[iv] The grant made of Letters of Administration in Sierra Leone ought to be revoked, be set aside.

Following the death of the deceased Lekhraj claiming to be the eldest child of the deceased and that the deceased died domicile in Sierra Leone, obtained in the name of his attorney, a Mr. Azard, a grant of letters of Administration to the Deceased's estate in Sierra Leone. On 30th october, 1992 proceedings were issued in the name of the plaintiffs by the 2nd plaintiff's husband Mr. Kewlani purporting to act as their attorney seeking to have the Letters of Administration revoked on the principal ground that Lekhraj was not a legitimate child of the deceased because he was never married to his mother, Virginia Harding.

Ademosu J. in his judgment in High Court of Sierra Leone on pages 8 and 9 said:

> "Mr. Jenkins Johnson seems to be saying that the defendant had proved the plaintiff's case for him. For instance he contended that the deceased died domicile in India and not in Sierra Leone and claiming that a grant of Letters of Administration be made to the 1st plaintiff or his lawfully appointed attorney and agent. I have carefully perused the evidence of P.W.3 [Mr. Kewlani]. I observed as Dr. Renner Thomas rightly pointed out, that throughout his testimony at no time did he say that he brought this action as attorney and agent of the 1st plaintiff and neither did he produce any Power of Attorney or any documentary evidence of any sort which invested him with authority or power to sue on behalf of the plaintiffs. It is trite law that a person who claims to sue in a representative capacity must be invested with a representative capacity at the date of issue of the writ in order to sue in a representative capacity.

> According to the writ of summons P.W.3 sued on behalf of the plaintiffs as their Attorney but he failed signally to show any evidence that he is entitled to the relief sought in that capacity. The law is well settled that an action, if brought in a representative capacity which the plaintiffs did not possess must fail……..
> In the instant case the plaintiff's case should stand or fall by the capacity in which they have sued. I did not think anybody would expect this court to assume that P.W.3 had a written authority from the plaintiffs without proof of it. In the circumstances, I hold that P.W.3 had no locus standi to bring the present action and the action is accordingly dismissed for want of capacity.
> If per adventure I am said to be wrong in the conclusion I have made, I will consider another aspect of the plaintiff's case".

The learned judge then went on to make pronouncements on the issue of legitimacy and domicile.

This judgment was not appealed against. The learned judge was not shown to be wrong. His pronouncements therefore in dismissing the action as want of capacity stand.

Learned Senior Counsel, Mr. Mowbray referred to Jacobs v London County Council 1950 A.C. 361

Lord Simmons at page 369 said:-

> "It is not, I think, always easy to determine how far, when several issues are raised in a case and a determination of any one, of them is in favour of one or other of the parties, the observations upon other issues are to be regarded as obiter. That is the inevitable result of our system……. But, however this may be. There is in my opinion no juscification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter that a case which ex facie decide two things would decide nothing".

Mr. Mowbray further argued that the decision of Ademosu J. not only binds the plaintiffs, as they were parties to the proceedings but binds the whole world because it made pronouncements on status. I do not agree because as I have said the learned judge said that Kewlani had no locus standi to bring the action and

dismissed the action for want of capacity. So in my view that part of the judgment is inconsistent, irrelevant with the other part of the judgment and can only be activated brought to life if Ademosu "per adventure" is shown to be wrong and he has not been shown to be wrong.

Having regard to the foregoing I would dismiss the appeal and allow the cross appeal.

Costs of this appeal to the Respondents fit for two Counsel.

ALBERT J. REDHEAD
Justice of Appeal

I Concur.

C.M. DENNIS BYRON
Chief Justice [Ag.]

I Concur.

SATROHAN SINGH
Justice of Appeal