

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 17/89

COR: THE HON. MR. JUSTICE ROWE - PRESIDENT  
THE HON. MR. JUSTICE FORTE, J.A.  
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	DONALD PANTON	APPLICANT/APPELLANT
AND	THE ATTORNEY GENERAL OF JAMAICA	DEFENDANT/RESPONDENT

Enos Grant and Miss Jacqueline Hall for Appellant

Lennox Campbell and Lackston Robinson for Respondent

February 12, 14, 15, 18, 19 & May 8, 1991

ROWE. P.:

I have read in draft the judgments prepared by Forte and Downer, JJ.A. and I am in complete agreement with the views which they have expressed to support their conclusions that neither Section 15 nor Section 16 of the Constitution of Jamaica confers a right on a person to leave Jamaica. I agree, too that the Rules set out in the Second Schedule to the Income Tax Law, Law 69 of 1954 were preserved by Section 26 (8) of the Constitution and were wholly unaffected by the provisions of Section 4 of the Jamaica (Constitution) Order in Council, 1962. There was consequently no impediment to prevent the legislature from enacting Section 21 of the Income Tax (Amendment) Act, 1970.

I agree, for the reasons stated by both Forte and Downer JJ.A., that Panton's appeal should be dismissed and that

the appeal by the Attorney General should be allowed and that the Order made by the Constitutional Court should be set aside. I would order that there be no order as to costs here or in the Court below.

FORTE, J.A.

On the 11th November, 1988 the appellant attended at the Norman Manley Airport with the intention of boarding an aircraft for a destination outside of Jamaica. He never succeeded in doing so. An Immigration Officer prevented his departure and detained him for a period of 45 minutes. The officer was acting in accordance with a list of names of persons to whom notices of restrictions against leaving the island without permission of the Commissioner of Income Tax had been served and who as a consequence were not permitted to leave the island. His release came only upon his production of a copy of an Order of the Supreme Court, quashing the notice of restriction which had been served on him on the 2nd November 1987.

As a result of his detention and the "inconvenience, anguish and embarrassment" suffered by him before and at the time, the appellant filed a notice of Originating Motion asking for the following declarations:

- "(a) that Notices of Restriction issued on the 2nd day of June, 1987, and/or the 2nd day of November, 1987, by the Commissioner of Income Tax are null void and of no effect;
- (b) that Sections 13, 15 and/or 16 of the Constitution have been contravened in relation to the Applicant in that he has been deprived of his personal liberty and/or freedom of movement by the issuing of the said Notices of Restriction;
- (c) that Sections 13, 15 and/or 16 of the Constitution have been contravened in relation to the Applicant in that he has been deprived of his personal liberty and/or freedom of movement by the actions of officers of the Immigration Department on the 11th day of November, 1988;

- "(d) that Rules set out in the Second Schedule of the Income Tax Law, Law 64 of 1959, and/or the amendment thereto, are null and void in so far as they purport to conflict with Sections 13, 15 and/or 16 of Chapter III of the Constitution, having regard to the provisions of Section 4 of the Jamaica (Constitution) Order in Council 1962;
- (e) that the Applicant is entitled to compensation, in particular, in the form of exemplary and/or aggravated damages, for the contravention of his Constitutional rights.

and an Order:

- "(a) that the Plaintiff's name be removed from the list of persons who are restricted from leaving the Island without the permission of the Commissioner of Income Tax;
- (b) that the assessment of the said compensation be set down for hearing before a Judge in Chambers;
- (c) that the Respondent pays the costs of these proceedings.

Upon the hearing before the Constitutional Court, that Court made the following Declarations and Orders:

**"A DECLARATION**

- (a) that notices of restriction issued on the 2nd day of June 1987, and/or the 2nd day of November 1987, by the Commissioner of Income Tax are null and void and of no effect;
- (b) that Section 13 and 15 of the Constitution have been contravened in relation to the applicant in that he has been deprived of his personal liberty by the issuing of the said notices of restriction;
- (c) that the applicant is entitled to compensation for the contravention of his constitutional rights.



**AN ORDER**

- (a) that the applicant's name be removed from the list of persons who are restricted from leaving the Island without the permission of the Commissioner of Income Tax in relation to assessments for the years 1981 - 1986 inclusive;
- (b) that the assessments of the said compensation be set down for assessment in Open Court;
- (c) that the Respondent pays the costs of these proceedings. "

In support of his application the appellant relied on his own affidavit which remained unchallenged and which sets out the history of the matter leading up to his detention on the 11th November, 1988. For a better appreciation of the complaints, and the answers advanced by the respondent, the following is a chronological history of the case.

On the 2nd June 1987 the appellant was served by the Commissioner of Income Tax with six (6) notices of assessment of Income Tax for the years 1981 to 1986 and with a notice pursuant to Section 21 of the Income Tax Act 1970 restricting him from leaving the island.

On the 28th August, 1987, the Commissioner informed him by letter that he could be allowed to travel if he produced a guarantee. A standard form of guarantee was enclosed in the letter, and on the 3rd September 1987 the appellant sent a duly executed guarantee to the Commissioner, who on the 7th September 1987, by letter, gave him permission to leave the island during the period 7th September 1987 to 31st December 1987. However, on the day after i.e. the 8th September 1987, the Commissioner again wrote, indicating that the permission granted could only extend for 90 days. Nevertheless, on the 2nd November 1987 the Commissioner revoked the notice of the

2nd June 1987 and the permission granted on the 7th September 1987, and again served notice to the appellant restricting him from leaving the island.

On the 7th or 9th December 1987 the appellant filed a notice of motion for Certiorari and Mandamus and upon the hearing on the 18th January 1988, an Order of Certiorari was granted to quash the notice of the 2nd November 1987.

In the meanwhile the appellant having appealed to the Revenue Court, in respect of the assessments, was successful, and in the event by the 24th October 1988, all income tax owed by him was fully paid up.

Consequently when he attempted to depart the island on the 11th November 1988, he owed no income tax for the assessed years, and no notice of restriction was subsisting in relation to him. The Immigration Officer, had no legal basis therefore for his action.

The appellant, though being a beneficiary of the declarations and orders made by the Constitutional Court, nevertheless filed ten (10) grounds of appeal. The respondent also not content with the judgment of the Constitutional Court filed a Respondent's Notice involving four (4) complaints. The issues, however can be confined to the following -

1. Does Section 15 and/or 16 of the Constitution give(s) a right to a person in Jamaica to leave the island?
2. If so, is Section 21 of the Income Tax Act 1970, by virtue of which the Commissioner of Income Tax purported to issue the Notices of Restrictions, in breach of Section 15 and/or 16 of the Constitution, and consequently null and void?

- "3. If the answer to 2 is in the affirmative is the appellant entitled to any remedy by virtue of Section 25 (2) of the Constitution, and in particular is he entitled to compensation, and if so, to what extent?

1. IS THERE A CONSTITUTIONAL RIGHT TO LEAVE THE ISLAND?

The Constitutional Court in its written judgment delivered by Langrin J, dismissed the existence of such a right under Section 16 of the Constitution in the following words:

"An examination of Section 16 of the Jamaica Constitution in respect of the freedom of movement provides basically for movement within the island and it is demonstrably clear that such movement in a foreign country could not be guaranteed by the Jamaica Constitution. Accordingly, the section does not come to the aid of the applicant."

Of Section 15 Langrin J., in finding for the applicant, came to the following conclusion:

"In our view the right to travel abroad is within the ambit of the expression 'personal liberty' as used in Section 15 and personal liberty in the same section was not intended to bear the narrow interpretation of freedom from physical restraint."

For clarity and easy reference, the sections under review insofar as relevant are set out hereunder:

"15 (1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law -

- (a) in consequence of his unfitness to plead to a criminal charge; or
- (b) in execution of the sentence or order of a court, whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted; or

- " (c) in execution of an order of the Supreme Court or of the Court of Appeal or such other court as may be prescribed by Parliament on the grounds of his contempt of any such court or of another court or tribunal; or
- (d) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed on him by law; or
- (e) for the purpose of bringing him before a court in execution of the order of a court; or
- (f) upon reasonable suspicion of his having committed or of being about to commit a criminal offence; or
- (g) in the case of a person who has not attained the age of twenty-one years, for the purpose of his education or welfare; or
- (h) for the purpose of preventing the spread of an infectious or contagious disease; or
- (i) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community; or
- (j) for the purpose of preventing the unlawful entry of that person into Jamaica, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Jamaica or the taking of proceedings relating thereto; or
- (k) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Jamaica or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of

" any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Jamaica in which, in consequence of any such order, his presence would otherwise be unlawful.

16. (1) No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Jamaica, the right to reside in any part of Jamaica, the right to enter Jamaica and immunity from expulsion from Jamaica.

(2) Any restriction on a person's freedom of movement which is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

- (a) which is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
- (b) for the imposition of restrictions on the movement or residence within Jamaica of any person who is not a citizen thereof or the exclusion or expulsion from Jamaica of any such person; or
- (c) for the imposition of restrictions on the acquisition or use by any person of land or other property in Jamaica; or
- (d) for the imposition of restrictions upon the movement or residence within Jamaica of public officers, police officers or members of a defence force; or
- (e) for the removal of a person from Jamaica to be tried outside Jamaica for a criminal offence or to undergo imprisonment outside Jamaica in execution of the sentence of a court in respect of a criminal offence of which he has been convicted. "

Mr. Grant for the appellant was content to accept and rely on the finding of the Constitutional Court in respect to Section 15 that 'personal liberty' as used in the section included the right to leave Jamaica.

In advancing his contention that Section 16 also secured that right, he conceded that the section did not expressly declare such a right but submitted that it did so by necessary implication. This inference he maintained could be drawn from the fact that the section dealt with a right to enter Jamaica and not to be expelled from Jamaica and that subsection 3 (b) and (c) both dealt specifically with exclusion or expulsion of persons from Jamaica. For his proposition, Mr. Grant relied on the dicta in the case of Jamakana v. Attorney General of the Solomon Islands and Another (1985) LRC (Const) 569 in which it was held that the prevention of the applicant from boarding an aircraft in order to leave the Solomon Islands amounted to a deprivation of his "right to move freely throughout Solomon Islands" as protected by Section 14 of the Constitution even though the section contained no express provision protecting the right to leave the Solomon Islands.

In coming to this conclusion, Daley C.J. sitting in the High Court of the Solomon Islands gave his reasons at page 573:

" ..... However in paragraphs (a), and (g) of subsection (2) of section 14 there are included circumstances in which a law may restrict a right to leave Solomon Islands and, reading that section as a whole, in my judgment the 'right to move freely throughout Solomon Islands' must include a right to board a vessel or aircraft which will cross part of Solomon Islands to reach the frontiers and cross them. ...."

Reliance was placed on this case because of the similarity in terms between Section 16 (1) of the Jamaica Constitution and Section 14 (1) of the Constitution of the Solomon Islands which states as follows:

"14. (1) No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Solomon Islands, the right to reside in any part of Solomon Islands, the right to enter Solomon Islands and immunity from expulsion from Solomon Islands."

These words are in exact terms as is in Section 16 (1) but the provisions of Section 14 of that Constitution departs from the provisions of Section 15 when each in subsection 4 and 3 respectively provides for the exemption of laws made for certain specified purposes.

The relevant section in the Constitution of the Solomon Islands is Section 14 (3) which provides -

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

- (a) for the imposition of restrictions on the movement or residence within Solomon Islands of any person or on any person's right to leave Solomon Islands that are reasonably required in the interests of defence, public safety or public order;
- (b) for the imposition of restrictions on the movement or residence within Solomon Islands or on the right to leave Solomon Islands of persons generally or any class or persons that are reasonably required in the interests of defence, public safety, public order, public morality or public health;

"c-f .....

- (g) for the imposition of restrictions, by order of a court, on the movement or residence within Solomon Islands of any person or on any person's right to leave Solomon Islands either in consequence of his having been found guilty of a criminal offence under the law in force in Solomon Islands or for the purpose of ensuring that he appears before a court at a later date for trial or for proceedings relating to his extradition or lawful removal from Solomon Islands, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society." (Emphasis mine)

The underlined words give a clear indication that the constitution of the Solomon Islands recognized that persons in those islands had a constitutional right to leave. It is of great significance that Daley C.J. referred to two of those subsections in declaring that the section had to be construed as a whole, and on that basis arrived at his conclusion. It is sufficient to say that there are no such provisions in the Jamaica Constitution and consequently the reasoning of Daley C.J. in the Jamakana case cannot be called in aid in interpreting Section 16 of our own Constitution.

In my view there are no words in Section 16, from which it could be interpreted that the creators of the Constitution intended to give the right to leave the island under that section. On the contrary, read in its context the section can be seen to be specifically dealing with a person's right to remain within the island, and to move freely within, living wherever he so chooses. It preserves the right, in particular of Jamaican Citizens to enter Jamaica, and exempts from the section, per subsection 3 (a) the power of the State to refuse entry to and to expel persons who are not citizens. In my view the words



in the section are clear and unambiguous and indicate clearly the intention of the makers of the constitution. If there was an intention to enshrine a constitutional right to leave the island, then it would have been a simple process for those words to be added.

Of significance also is the contention of Mr. Campbell for the respondent that the section in clear words expressly states what is meant by "freedom of movement" for the purposes of that section and therefore must be exhaustive leaving no room for giving additional meanings to the words. With this contention I agree.

In Baker v. R (1975) 23 W.I.R. 463 Lord Diplock speaking of the interpretation of a Jamaican statute used words which are applicable. He said:

"Where the meaning of the actual words used in a provision of a Jamaican statute is clear and free from ambiguity, the case for reading into it words which are not there and which, if there, would alter the effect of the words actually used can only be based on some assumption, as to the policy of the Jamaican legislature to which the statute was intended to give effect. If, without the added words, the provisions would be clearly inconsistent with other provisions of the statute it falls within the ordinary function of a court of construction to resolve the inconsistency and, if this be necessary, to construe the provision as including by implication the added words. But in the absence of such inconsistency it is a strong thing for a court to hold that the legislature cannot have really intended what it clearly said but must have intended something different. In doing this a court is passing out of the strict field of construction altogether and giving effect to concepts of what is right and what is wrong which it believes to be so generally accepted that the legislature too may be presumed not to have intended to act contrary to them."

and further at page 408:

"To read into the Jamaican statute words that the Jamaican legislature has itself apparently rejected, so as to enable the court to give to the statute an effect which it would not otherwise have, would be a usurpation of the functions of the Jamaican legislature. This is not the function of a court of law least of all, of a court of law which, like their Lordships' Board, is composed of members who are not personally familiar with conditions in Jamaica today or at the time the statute was passed."

In applying this principle to the interpretation of Section 16, I do so being well aware of the fact that Lord Diplock was in that case interpreting an Act of Parliament, and also of the words of Lord Wilberforce in the case of Minister of Home Affairs v. Fisher (1980) A.C. 319 at page 329 when speaking of the proper approach to the interpretation of Constitutions. He adverted to two tests:

"The first would be to say that, recognizing the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. ....  
.....  
The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law."

The Board in that case preferred the second test and applied it in determining the meaning of the word "child" as used in the Bermudian Constitution without reference to the meanings already given to the word, when used in other statutes.

In the instant case, we are not concerned with the meaning of words in Section 16 of the Constitution but with an examination of the section as a whole to determine whether the

legislature having failed to make an express provision, the section, by necessary implication, contains a right to leave Jamaica. In my view, whether a less rigid and more generous interpretation is used or the section is interpreted by principles applicable specifically to the section i.e. a literal interpretation or lastly by using the principles adumbrated by Lord Diplock in Baker v. R. (supra), Section 15 does not (either expressly or) by implication, declare as one of the fundamental rights and freedoms of the individual, the right to leave Jamaica.

#### SECTION 15

The determination of this question depends on the meaning of 'personal liberty' in Section 15, and in particular whether the words include freedom to leave the island.

In the process of reasoning in coming to its decision, the Constitutional Court per Langrin J interpreted Section 15 in this way:

"Personal liberty is used in Section 15 of the Jamaican Constitution as a comprehensive term to include all the varieties of rights which go to make up personal liberty of man other than those dealt with in Section 16. Section 16 deals with certain rights while Section 15 includes all such rights which were not dealt with in Section 16."

In making this statement the Constitutional Court was apparently influenced by the reference to dicta in Kharak Singh v. The State of U.P. (1964) 1 S.C.R. 332 which was cited and followed by the majority judgment in Satwant Singh v. Passport Officer (1967) 3 S.C.R. 525 an Indian case which dealt with the meaning of the words 'personal liberty'. That Court found as follows:

"We ..... consider that 'personal liberty' is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Art. 19 (1). In other words, while Art. 19 (1) deals with particular species or attributes of that freedom, 'personal liberty' in Art. 21 takes in and comprises the residue."

However, in the minority judgment given by Hidayatullah J an elucidation of dicta from the case of Kharah Singh (supra), on which the majority in Satwant Singh (supra) relied, is informative. He stated:

" ..... The majority stated its opinion as follows -  
'Having regard to the terms of Art. 19 (1) (d), we must take it that expression (personal liberty) is used as not to include the right to move about or rather of locomotion. The right to move about being excluded, its narrowest interpretation would be that it comprehends nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison; in other words, freedom from arrest and detention, from false imprisonment, or wrongful confinement. We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that 'personal liberty' is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Art. 19 (1). [similar in term to Section 16 of the Jamaica Constitution] In other words, while Art. 19 (1) deals with particular species or attributes of that freedom, 'personal liberty' in Art. 21 takes in and comprises the residue'. .....  
An invasion of one's house was therefore considered an invasion of personal liberty. The majority, however, did not attempt to add to the right of locomotion, the right to go abroad or to leave India. In fact the majority implies that the right of locomotion possessed by a citizen is all contained in Art. 19 (1) (d) and is guaranteed only with respect to the territories of India."

It appears, then, that the majority in Kharah Singh's case, though recognizing that the expression 'personal liberty' as used in Section 21 of the Indian Constitution, was not limited to circumstances of mere physical restraint, was nevertheless of the opinion that Section 19 (1) (d) of that Constitution dealt exhaustively with all the rights in respect to the freedom of movement of citizens which was one aspect of 'personal liberty' and that consequently Section 21 was not intended to declare any rights in that regard.

I have earlier expressed the opinion that Section 16, being void of any expressed protection of any such right, it is common sense to find that the constitution, if it was the intention to enshrine such a right, would have done so expressly. Any such express provision, would naturally have found its place in that section, which was dealing with freedom of movement, or locomotion as it has been described, and in my view would not have been left to be inferred and found to exist in the expression 'personal liberty' in Section 15. Though agreeing that 'personal liberty' could extend to other areas of a person's freedom, and in keeping with the principles of interpretation set out in the Fisher case (supra) should not be given the narrow meaning confining it to physical restraint, I am of the view that it would not encompass a right to leave the island, that being an aspect of a person's freedom of movement, which is exhaustively dealt with in Section 16, and is confined to movement within the island of Jamaica.

Mr. Campbell in support of the respondent's case also submitted that even before the coming into existence of the Constitution, the Jamaican citizen did not have an untrammelled right to leave the island. He argued that the possession of a passport was, at least since the Passport Act of 1935, a necessary precondition for travel, and in particular since the enactment of the Passport (Amendment) Law, 1962, the

issue of Passports was entirely at the discretion of the Minister. The relevant section of that law is as follows:

- "3. (1) The Minister may, in his discretion, issue passports in Jamaica to citizens of Jamaica, and any such passport may be cancelled by the Minister and the passport shall thereupon become void.
- (2) The Minister may, in his discretion, renew and endorse Jamaican passports and grant visas on any passports requiring Jamaican visas.
- (3) Any such renewal, endorsement or visas made or granted pursuant to this Act may be cancelled by the Minister, and thereupon the renewal, endorsement or visas shall be void."

Under Section 3B, the Minister is given discretion to issue permits to leave the island to non-citizens as also certificates of identity and other travel documents, and may also cancel same.

In the light of these provisions, and as the possession of a passport is now almost always required by the authorities to enable a person to enter a country, [see Halburys 4th Edition page 519 footnote] the Minister in the exercise of his discretion could effectively restrain a Jamaican Citizen from leaving the island. No doubt, however, such a person may bring mandamus proceedings in the event that the discretion is exercised unfairly or without proper reason. The fact, that the Government by virtue of these provisions contained in an Act preceding the coming into effect of the Constitution and consequently under the protection of Section 26 (3) of the Constitution retains the right to refuse the issue of a passport indicates that no absolute right to leave the island existed before the coming into effect of the Constitution.

For those reasons, I would answer the first question in the negative i.e. the right to leave the island is not a fundamental right which is enshrined in either Section 15 or 16 of the Constitution.

**2. Is Section 21 of the Income Tax (Amendment) Act 1970 in breach of Section 15 and/or 16 of the Constitution**

This section of the Act amended the first Schedule to the principal law by repealing Rule 4 paragraph II thereof. Rule 4 provided as follows:

- "4. (1) Subject to the provisions of paragraph (2) of this Rule no person shall leave or attempt to leave the Island nor shall any ticket, voucher or other document entitling any person to leave the Island be issued to such person unless such person has in his possession a certificate duly signed by or on behalf of the Commissioner of Income Tax certifying that such person -
- (a) does not owe any income tax;  
or
  - (b) has made satisfactory arrangements for the payment of any income tax payable by him.
- (2) Paragraph (1) of this Rule shall not apply to -
- (a) any member of the Military, Naval or Air Forces of Her Majesty or of any foreign State;
  - (b) any person in the diplomatic or consular service of a foreign State unless any such person is also engaged in any business or other employment in the Island; and
  - (c) any person temporarily resident in the Island who is not during such temporary residence engaged in any business or employment in the Island. For the purpose of this paragraph a person shall be deemed to be temporarily resident in the Island whose total period of residence in any one year does not exceed six months."

Substituted therefor by Section 21 of the Income Tax (Amendment) Act 1970 is the following:

- "4 (1) If the Commissioner thinks fit he may serve on any person a notice requiring that he shall not leave the Island unless at the time of leaving he has in his possession a certificate issued by or on behalf of the Commissioner within the preceding ninety days stating that he -
- (a) does not owe any income tax, or
  - (b) has made satisfactory arrangements for the payment of income tax payable by him.
- (2) On the application of any person on whom a notice under paragraph (1) has been served, the Commissioner shall issue to him within thirty days after the date of the application, a notice of assessment in respect of all income tax that will be due by him at the date of his intended departure from the Island.
- (3) Where a notice has been served on a person under paragraph (1), and it has not been withdrawn by a further notice served on him by the Commissioner, that person shall, if he leaves the Island in contravention of the notice, be guilty of an offence and liable on summary conviction to a fine not exceeding fifty dollars or to a term of imprisonment not exceeding three months, or to both.
- (4) A person who leaves or attempts to leave the Island in contravention of this Rule may be taken into custody without warrant by an Immigration Officer for a period not exceeding twelve hours."

Having concluded that the right to leave Jamaica is not a fundamental right preserved to the people of Jamaica by virtue of Section 15 and 16 of Chapter III of the Constitution it follows, that there being no such right the State may legislate to place conditions on a person's departure from the island. That being so the simple answer to question 2 is "No". However, Mr. Grant argued thoroughly and with confidence that both Rule 4 of the First Schedule and Section 21 of the Income Tax (Amendment) Act 1970 are unconstitutional as being in breach



of both Sections 15 and 16 of the Constitution. In doing so, he relied on the provisions of Section 4 (1) of the Jamaica (Constitution) Order in Council 1962 which read as follows:

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

He contended that Rule 4 of the First Schedule could not be construed with adaptations and modifications so as to bring it in conformity with Section 15 and or Section 16, as the provisions could not 'harmonize' with the provisions of Sections 15 and 16 and would therefore be caught by Section 2 of the Constitution which reads as follows:

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

Though it is not necessary for the purposes of this judgment having regard to my earlier conclusions on the interpretation of the provisions of Sections 15 and 16, in deference to the submissions of Mr. Grant, I express an opinion on his arguments..

The submission, in my view, is without merit having regard to Section 26 (8) of the Constitution which is as follows:

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

Section 26 (8) refers of course to Chapter III which deals with "Fundamental Rights and Freedoms" part of which is Sections 15 and 16.

Mr. Grant cited many cases to support his contention but the answer lies in two cases from the Judicial Committee of the Privy Council. The first was D.P.P. vs. Nasaralla (1967) 2 A.C. 238, where in examining the effect of Section 26 (8) on Section 20 (8) of the Jamaican Constitution, Lord Devlin who delivered the opinion of the Board said:

"This chapter [Chapter III of which section 20 (8) forms a part] proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed."

The second is Baker v. R. (supra) in which the consideration was whether Section 29 of the Juveniles Law was in breach of Section 20 (7) of the Constitution, and the effect of Section 26 (8), having regard to the fact that the Juvenile Law was already in existence at the coming into effect of the Constitution Lord Diplock delivering the opinion of the Board said:

"Section 2 of the Constitution lays down the general rule that if any law is inconsistent with the Constitution it shall to the extent of the inconsistency be void. Section 26 (8) creates an exception to this general rule if the law alleged to be inconsistent with the Constitution is one that was in force immediately before the appointed day and the alleged inconsistency is with a provision of the Constitution that is contained in Chapter III."

These two cases establish with great clarity that there is no need to examine existing laws to determine whether they are inconsistent with the terms of the various protective provisions in Chapter III and that the Constitution by these provisions protects against any future enactment which may derogate from those rights which are so preserved.

It is to this purpose that Section 26 (8) creates the exception to Section 2, in respect to the provisions in Chapter III, and declares specifically that no law which existed at the coming into effect of the Constitution or anything done thereunder can be held to be in breach of the provisions of Chapter III. Rule 4 of the First Schedule to the Income Tax Act of 1959 being in existence on the 6th August 1962 the effective date of the Constitution would be protected by the provisions of Section 26 (8), and therefore could not be declared to be in breach of either Section 15 or 16, even assuming that one or both sections had enshrined within their provisions the right to travel abroad.

The appellant also contended that assuming he was wrong in his submissions in respect to Rule 4 of the Schedule, in any event Section 21 of the Income Tax (Amendment) Act 1970 was in breach of Section 15 and/or 16 of the Constitution and having come into existence, in the lifetime of the Constitution, its provisions cannot be protected by Section 26 (8). He relied also on Section 26 (9) which reads as follows:

"(9) For the purposes of subsection (8) of this section a law in force immediately before the appointed day shall be deemed not to have ceased to be such a law by reason only of -

- (a) any adaptations or modifications made thereto by or under section 4 of the Jamaica (Constitution) Order in Council, 1962, or
- (b) its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision."

In my view Section 21 of the Income Tax (Amendment) Act would not come within the provisions of Section 26 (8) because it was not an existing law at the time of the coming into effect of the Constitution and although it amended an existing law, it did so by specifically repealing the section under review, and substituted therefor new provisions which gave to the Commissioner of Income Tax greater powers than had been given in the section repealed. It would therefore not come within the requirements of Section 26 (9) and had the right to travel been protected in either Section 15 or 16, I would have held that the provisions of Section 21 would be in breach.

### **3. REMEDY**

Having answered question 1 in the negative it follows that the appellant is not entitled to any redress by virtue of Section 25 (2) of the Constitution, as no constitutional right has been breached. This does not however preclude the appellant from seeking redress elsewhere. He did however on the 15th January 1988 seek, through his application for certiorari, a remedy in respect of the notice served upon him in November 1987, and was in fact rewarded by the quashing of that notice. As already

noted, at the time he was detained at the Airport and prevented from boarding the aircraft, there was no notice of restriction subsisting and therefore no legal basis for preventing the appellant's departure or for detaining him. It is worthy of note, and a matter for concern that in this motion the appellant applied for a declaration that the notice was null and void although that notice had already been quashed by another Court. The question of res judicata should have arisen and would have been bound to succeed (see Privy Council Appeal No. 20 of 1989 - Endell Thomas v. The Attorney General of Trinidad and Tobago).

In relation to what cause or causes of action the appellant would have in order to recover compensation for the wrong allegedly done to him, I note the consideration of false imprisonment, and misfeasance of a public officer, but would leave the question of the chances of success to the tribunal before whom such cases may be tried.

For those reasons, I would dismiss the appeal, allow the appeal filed by way of Respondent's Notice and enter judgement for the Respondent with no order as to costs.

DOWNER, J.A.

Mr. Donald Panton is a Kingston businessman, who is a director of several companies. He has worsted the Revenue on three previous occasions, twice in the Full Court and once in the Revenue Court. Now he challenges the Crown in a suit on the ground that his constitutional rights have been breached, and he has prayed in aid the previous decisions in his favour to vindicate his rights.

On the 11th November, 1988 he was detained by immigration officers at the Norman Manley Airport for three quarters of an hour, on the purported authority of a notice of restriction issued against him pursuant to the Income Tax Act. He was released when he tendered an order of the Supreme Court showing that the relevant notice of restriction issued against him had been quashed. The initial notice of restriction was withdrawn after a guarantee of \$5,700,000 was secured by Panton. The cost of securing this guarantee is part of the financial loss which he claims. Since the Commissioner of Income Tax issued the notice and she was the respondent in the proceedings before the Full Court, she was presumed to have known of the result, and her failure to instruct the immigration officers to remove the stop order from Panton's name was either deliberate, negligent, without reasonable cause, or malicious. Whichever of these bases were relied on, she could have been liable in tort. Moreover, the Attorney General who appeared for her in certiorari proceedings where the notices were quashed, (see Suit Nos. M-64/87 and 88/87) is the principal legal advisor to the Government and if she was not advised to withdraw the notice, the fault lies with him.

It is convenient to set out the relevant part of the order Panton tendered to secure his release from the clutches

of the immigration officers -

" IT IS HEREBY ORDERED:-

1. That the Application for an Order of Certiorari be granted to quash the Notice and/or Order of the Commissioner of Income Tax purporting pursuant to Part II of the Second Schedule to the Income Tax Act to restrict the Applicant, Donald Panton from leaving the Island."

It should also be noted that the following day, 19th of January, 1988 from the same panel, (Zacca, C.J., Bingham & Ellis JJ.), Panton secured an order of certiorari quashing his income tax assessments and an order of mandamus instructing the Commissioner to hear Panton's objections to assessments made on him. These were remedies in public law.

In the light of those orders, the obvious course to take was to secure redress in private law, for deprivation of liberty and for any financial loss that would have been sustained. An action in tort against the Commissioner of Income Tax and the Attorney General, under the Crown Proceedings Act could have been instituted. Instead of this straightforward course which could have been taken up to 10th November, 1989 without any procedural objections based on the Public Authorities Protection Act, Panton on the 19th December, 1988 invoked the original jurisdiction of the Supreme Court pursuant to section 25 of the Constitution in the Constitutional Court. The ground was that his fundamental rights and freedoms protected by sections 15 and 16 of the Constitution had been breached. Even so it would have been an act of prudence to file the alternative claim in tort as a protection, a procedure well known to lawyers, even when there are negotiations with good prospects of an agreement. The Attorney General was named as the sole respondent to this constitutional motion and a feature to note was that there was no

affidavit in response by him to Panton's allegations. One allegation is paragraph 10 of Panton's affidavit which reads as follows -

"10. That by the 24th day of October, 1988, I had fully paid up all the Income Tax that was due to be paid by me as shown by the said Capital Statements and Returns for the relevant Years of Assessment and that I do not owe the Government of Jamaica any Income Tax."

Here also is the letter which Panton's lawyers received from the Chairman of the Revenue Board -

"The Registrar  
Revenue Court  
4 Camp Road  
Kingston 4

Re: R.C.A. No. 2 of 1986  
Donald Panton v. Crown

The Commissioner of Income Tax has been advised to discontinue the assessments, the subject matter of this appeal.

Consequently, the Appeal which is set down to be heard on the 24th to the 28th of October, 1988 will not be opposed by us.

C.C.: Clough, Long & Co.  
81 Harbour Street  
Kingston

Mr. Panton continues his narrative thus -

"11. That on the 21st day of October, 1988, my attorneys-at-law received a letter from the Revenue Board, conceding my appeal; that there is now produced and shown to me and marked 'DP9' a copy of the said letter so that on the 24th day of October, 1988, when my appeal came up for hearing, it was allowed as the Commissioner of Income Tax had conceded that the said Assessments were ultra vires the Income Tax Act; but that the Commissioner of Income Tax has not withdrawn the said Notice of Restriction. That the Commissioner of Income Tax has since appealed against the order of the Revenue Court; That there is now produced and shown to me and marked 'DP10' a copy of the said Appeal."



On the other hand, in the Constitutional Court, there was a significant admission from the Attorney General and it is best to quote it. At page 7 of the reasons for judgment it is recorded that -

".....Mr. Wilkins, Counsel for the respondent is not seeking to deny that the applicant was detained by the Immigration Officers and therefore hinged his submission on the absence of any constitutional protection for the right to travel abroad."

The inference is that from the outset of these proceedings, the Attorney General has admitted that there was an infringement of Mr. Panton's rights, but that the Constitutional Court was not the appropriate forum in which to resolve it. This perhaps explains why there was no affidavit in opposition.

Despite this cogent submission the Court (Ellis, Langrin, S Smith JJ.) granted Panton three of the declarations he had sought and they were as follows -

"1. A DECLARATION

- (a) that notices of restrictions issued on the 2nd day of June 1987, and/or the 2nd day of November 1987, by the Commissioner of Income Tax are null and void and of no effect;
- (b) that section 13 and 15 of the Constitution have been contravened in relation to the applicant in that he has been deprived of his personal liberty by the issuing of the said notices of restriction;
- (c) that the applicant is entitled to compensation for the contravention of his constitutional rights.

2. AN ORDER

- (a) that the applicant's name be removed from the list of persons who are restricted from leaving the island without the permission of the Commissioner of Income Tax in relation to assessments for the years 1981 - 1986 inclusive;

- " (b) that the assessments of the said compensation be set down for assessment in Open Court;
- (c) that the Respondent pays the costs of these proceedings."

The Order of the Court was unusual in that declaration and order granted expressly and impliedly at 1 (a) and 2 (a) was otiose. The notice of restriction was already quashed in certiorari proceedings before (Zacca, C.J., Bingham and Ellis JJ.) on 19th January, 1988 and as a consequence the Stop Order against his name should have been removed. In lawyer's language the issue was *res judicata*: see Privy Council Appeal No. 20 of 1989 Endell Thomas v. Attorney General of Trinidad delivered 13th November, 1990.

Under Rules of Court pertaining to judicial review introduced in 1976 in England damages could also be claimed and this useful reform may no doubt be introduced in our revised Civil Procedure Code. The English rules were later incorporated in a statute The Supreme Court Act (U.K.) 1981.

Langrin, J seems to have had wiser second thoughts on this declaration and order at 1 (a) and 2 (a) for in the reasons of the Court subsequent to the judgment, he wrote at page 20 -

" The failure of the Commissioner of Income Tax to remove the notice of restriction from the Stop List subsequent to January 18, 1988 when the notice was quashed by the Supreme Court which prevented the applicant from leaving the island was an unjustified and arbitrary abuse of power utterly devoid of fair play in action."

Since false imprisonment and abuse of power are torts adverted to in this passage, it was odd that the force of the Attorney General's submission was not realised. To repeat it, it was that Panton had adequate means of redress under other law. The oral judgment and the Order of the Court were handed down on the

26th of January, 1989 while the reasons were delivered on 27th January, 1989. The inference must be that the decision of the Court may well have been different if the judgment had been reserved. That the Court considered that remedies were available, is evidenced in another passage on page 19 where it was held that because of "peculiar circumstances" section 25 (2) of the Constitution was not applicable.

To understand the force of the Court's acknowledgement, it must be recalled that the proviso to section 25, is the constitutional reference to adequate remedies under other law, which precludes constitutional redress. If therefore there were "peculiar circumstances" in this case which made constitutional redress imperative, the Supreme Court ought to have referred to them.

The Court refused to grant a declaration that section 16 of the Constitution was breached and the basis on which this was done was set out at page 55 of the record in the oral judgment. It reads -

"3. The applicant complains that his right under section 16 of the Constitution is contravened. Upon an examination of the section we find that the section deals only with freedom of movement inside Jamaica and does not afford any constitutional protection to someone leaving Jamaica."

In the written reasons, Langrin, J again said that section 16 of the Constitution could not aid Panton.

Since the Court granted Panton one of the declarations he sought and refused the other, the Attorney General appealed against the order which declared that Panton was deprived of his liberty pursuant to section 15 of the Constitution, while Panton in turn has appealed against the refusal to grant him a declaration that his freedom of movement pursuant to section 16 of the Constitution was contravened. Panton instituted the first appeal so it is appropriate to commence with it.

The Panton Appeal

As the Attorney General filed no affidavit in response to Panton, this Court must accept Panton's affidavit and examine the issues of constitutional law in that context. As to the circumstances which led to the restriction on his freedom of movement, here is his proof at page 12 of the record -

"12. That on the 11th day of November, 1988, I was about to board an aeroplane at the Norman Manley Airport for a flight abroad on the business of one of my companies; that I was detained by Immigration Officers, servants and/or agents of the Crown, for about 3/4 hour; that I was informed by them that the reason for the detention was that there was currently a Notice of Restriction against my leaving the Island and that my name is on their list of persons who are restricted from leaving the Island without the permission of the Commissioner of Income Tax. That I was not released until I produced a copy of the Order of the Court. That as a result I suffered great anguish, inconvenience and embarrassment."

To understand the implications of Panton's allegation, it is necessary to take into account Panton's complaints that the notices of restriction of 2nd June, 1987 and 3rd June, 1989 confined him to Jamaica unless he was granted permission by the Commissioner of Income Tax. The combined effect of the notices of restriction and the stop order, he claimed deprived him of his fundamental liberties and compelled him to incur expense. Here is how he advanced his complaint and claimed compensation in his affidavit in the Court below -

"3. That on the said 2nd day of June, 1987, I was also served with a Notice pursuant to Part II of the Second Schedule to the Income Tax Act preventing me from leaving the Island unless I had in my possession a letter from the Commissioner of Income Tax (the Commissioner) stating that I did not owe any income tax or that I had made satisfactory arrangement for the payment of income tax payable

"by me. That there is now produced and shown to me and marked 'DP2' a copy of the said Notice of Restriction.

4. That as a result of the said Notice of Restriction I was unable to travel freely from the Island to conduct the affairs of my several companies in consequence of which they suffered loss and damages. By letter dated the 28th day of August, 1987, addressed to my Attorneys-at-Law, Clough, Long & Company, the Commissioner sent my said Attorneys-at Law a standard format of Guarantee issued by her department to enable me to make satisfactory arrangements guaranteeing the payment of income tax payable by me for the above-mentioned years of assessment and assured my said Attorneys-at-law that when the duly stamped Instrument of Guarantee was received by her department, I would be permitted to travel. That there is now produced and shown to me and marked 'DP3A' and 'DP3B' a copy of the said letter and Guarantee.

5 - 12. ....

13. That by reason of the matters aforesaid i have been deprived of my personal liberty and/or freedom of movement and/or right to travel freely out of the Island and have suffered loss and damage and have been put to great expense:

PARTICULARS

(a) Loss on investments	\$4,000,000
(b) Cost of guarantees	\$ 427,500
(c) Accounting Fees	\$ 50,000
(d) Legal expenses	<u>\$ 300,000</u>
	\$4,777,500."

It would have been a grave defect in our legal system before 1962 if it did not provide redress for such serious allegations if they were proven. The Crown Proceedings Act and the law of torts have always provided adequate means of redress for such wrongs. It was one of the areas where exemplary damages was and is still obtainable. Because the appellant's

case, as presented, ignored the remedies for false imprisonment and misfeasance in public office, Mr. Grant was compelled to argue that the 1954 Income Tax Law, an "existing law", contravened fundamental rights and freedoms enshrined in section 16 of the Constitution. Further, it was said that the 1971 Amendment to the 1954 Law was also in breach of the said section 16. On this interpretation of the Constitution, it was argued that section 4 (1) of the Order in Council obliged this Court to "harmonise" the principal Income Tax Act and its amendment to the provisions of Chapter III of the Constitution. It was further contended that since there was a failure to carry out that harmonisation, the notices of restriction and the stop order were in contravention of Pantan's freedom of movement to leave Jamaica in the pursuit of his business ventures.

The material part of his motion pertaining to the notices of restrictions and sections 13 and 16 of the Constitution will be cited. These notices had already been quashed in certiorari proceedings on the basis that the tax assessments were null and void. This claim goes further and challenges the constitutionality of the legislation imposing the restrictions. Such a claim emphasises that Pantan's fundamental rights were infringed and on that basis there were financial claims for compensation. If the Commissioner of Income Tax acted under statutory powers, which was in contravention of the Constitution, then Pantan's case would have been water-tight. These claims must now be considered.

Sections 13 and 16 of the Constitution in so far as is material read -

"13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say has the right, whatever his race, place of origin, political

"opinions, colour creed or sex but subject to respect for the rights and freedom of others and for the public interest, to each and all of the following, namely;

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law

(b) .....

(c) .....

the subsequent provision of this chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in these provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

It is clear from this preamble that if the liberties accorded to the individual in section 13 (a) of the Constitution are to be secured in an ordered society with good government, that such a Government would have duties for making laws and authorising its servants to impose restrictions so that others too may enjoy equal rights. Additionally the public interest would have to be recognised and protected.

As for section 16 which deals with that aspect of liberty pertaining to freedom of movement, the relevant part reads as follows -

"16. (1) No person shall be deprived of his freedom of movement and for the purposes of this section the said freedom means the right to move freely throughout Jamaica, the right to reside in any part of Jamaica, the right to enter Jamaica and immunity from expulsion from Jamaica.

- " (2) Any restriction on a person's freedom of movement which is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section."

It must be stressed as Mr. Campbell argued that freedom of movement is defined with precision. The provision states that freedom means the right to move freely throughout Jamaica and this must mean the land and territorial waters and the air-space. Also the right to reside in any part of Jamaica be it in Kingston or Portland, the right to enter, and this means that those in Jamaica as contemplated by the preamble have a right to re-enter when they have departed. Further, once in Jamaica there ought to be no expulsion. The State's duties are set out in section 16 (3) and these sub-sections authorise the state to make laws restricting freedom of movement under various heads. It will be sufficient to name two defence and public safety. Comparison with fundamental rights provisions in other Constitutions is always useful. However, in the examination of cases based on those Constitutions, caution must be exercised as although the structure of government may be similar, the words delimiting public powers and those enshrining rights may be markedly different. Take the case of section 14 of Guyana Constitution. It expressly guarantees "the right to leave Guyana": see Ramson v. Barker & Anor. (1982) 36 W.I.R. 183 at 203 so that case is not germane to solving the instant problem. Nor is Jamakana v. Attorney General & Anor. (1983) L.R.C. (Const.) 569 which relates to the construction of section 14 (1) of the Solomon Islands Constitution. For in that Constitution, although section 14 (1) is identical to section 16 (1) of the Jamaican Constitution, the sub-sections have significant differences.



Daly, C.J. puts it thus at p. 573 -

".....However in paragraphs (a), (b) and (g) of subsection (2) of section 14 there are included circumstances in which a law may restrict a right to leave Solomon Islands and, reading that section as a whole, in my judgment the 'right to move freely throughout Solomon Islands' must include a right to board a vessel or aircraft which will cross part of Solomon Islands to reach the frontiers and cross them."

What was the law which authorised the Commissioner of Income Tax to impose a notice of restriction on Panton. It was contended on behalf of Mr. Panton that the only way to determine this was to examine the 1954 Income Tax Law to determine its status subsequent to August 1962 when the Constitution and in particular section 4 (1) of the Order in Council was in force.

What was the effect of section 4 (1) of the Jamaica Constitution Order in Council 1962 on:

- (a) Paragraph 4 (1) of the First Schedule to Part II of the Income Tax Law, 1954
- (b) The Income Tax (Amendment) Act, 1970?

(A) The gist of Panton's complaint was the invalidity of Income Tax Law (1954) and its Amendment of 1970. It was contended that the alteration of the legal system introduced by section 4 of the Order in Council was crucial, so this Order must be examined. It reads in so far as is material --

"4.—(1) All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day,

"but all such laws shall, subject to the provisions, of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order."

The changes in the Jamaican Constitution since 1944 were by way of organic growth. There has been continuity in our constitutional development since then. This pattern of ordered change is reflected in section 4 (1) of the Order in Council - The Order - as it provides for the continuity of existing laws as well as providing that the legislature or other authority can repeal and amend such laws. It recognized that with the new nomenclature accorded to many officers or institutions, it would be necessary to construe the existing laws with modifications and adaptations as would be necessary to bring them in conformity with the provisions of the 1962 Constitution. These existing laws modified and adapted remained part of our legal system.

There is a distinction in the Order between adaptation and modification and repeal and amendment. The power to repeal was made explicit and if there was an amendment, such amendment must be in conformity with the new constitution in form and substance. Insofar as an amendment was concerned, that would be governed by section 2 of the Constitution. As for laws subsequent to the appointed day, the Constitution was the supreme law and amendments to existing laws would have to yield to the supremacy of the Constitution. Section 2 reads -

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

This approach is borne out by section 4 (2) (a) of the Order which reads -

"4.—(1) .....

(2) Without prejudice to the generality of the preceding subsection, in any law which continues in force on and after the appointed day or which, having been made before that day, is brought into force on or after that day, unless the context otherwise requires--

(a) references to the Governor shall, in relation to any period beginning on or after the appointed day, be construed as references to the Governor-General;"

This is an example of modification and adaptation. There are other examples in sub-sections (b), (c), (d), (e), (f), (g), (h). The emphasis on adaptations and modifications is reiterated in section 4 (5) (a) which reads as follows -

"(5) (a) The Governor General may, by Order made at any time within a period of two years commencing with the appointed day and published in the Gazette, make such adaptations and modifications in any law which continues in force in Jamaica on and after the appointed day, or which having been made before that day, is brought into force on or after that day, as appear to him to be necessary or expedient by reason of anything contained in this Order."

One example of this is the Constitution (Variation of Existing Instruments) Order 1964, 1964 Proclamations Rules and Regulation Jamaica Gazette Supplement page 545 where in paragraph 3 there is a general adaptation or modification of all laws so that Minister should replace the word Governor-General and Governor-General in Council. In section 3 Governor-General was to replace Governor. A further example referring to a new office - The Director of Public Prosecutions which took over the criminal jurisdiction of the Attorney

General is section 4 (5 (b)). That sub-section reads -

"(5) (a) .....

(b) Without prejudice to the generality of paragraph (a) of this subsection any Order made thereunder may transfer to the Director of Public Prosecutions any function by any such law vested in the Attorney General."

The nub of Mr. Grant's submission was that it was obligatory for an adaptation and modification exercise pursuant to section 4 (1) of the Order, to be carried out to bring the laws in force - in this case the Income Tax Law, 1954 in conformity with section 16 of the Constitution. In his submission however, adaptation and modification had the same effect as amendment. Paragraph 4 in Part II 1954 Income Tax Law was the legislation impugned. In so far as material it reads -

"4 (1) Subject to the provisions of paragraph (2) of this Rule no person shall leave or attempt to leave the island nor shall any ticket, voucher or other document entitling any person to leave the island be issued to such person unless such person has in his possession a certificate duly signed by or on behalf of the Commissioner of Income Tax certifying that such person -

- (a) does not owe any income tax; or
- (b) has made satisfactory arrangements for the payment of any income tax payable by him."

There was nothing in the Income Tax Law which was in force until it was amended in 1970, which required adaptation and modification because section 16 of the Constitution is specifically governed by section 26 (8), and this later section precludes any challenge to a law in force pertaining to Fundamental Rights enshrined in Chapter III.

That section reads -

"(26) — (1 - 7) .....

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

Section 26 (8) of Chapter III of the Constitution creates a special regime with regard to laws relating to fundamental rights. It is prospective, because the presumption was that those rights were already enjoyed by the people of Jamaica. Chapter III was entrenched to prevent those rights from being abridged in the future by the State. It did not have a retrospective effect. Equally section 4 (1) of the Order in Council, which deals with "adaptations and modifications" of "existing law", does not touch "laws in force" which deal with fundamental rights and freedoms. Section 26 (8) creates an irrebuttable presumption that such laws do conform to Chapter III and if any law does not, it can be amended by the legislature (see Baker v. The Queen (1975) A.C. 774 and the subsequent amendment to section 29 of Juvenile Act). If such a law is part of the common law then the Courts may attend to it or, depending on the circumstances, leave its reform to the legislature.

(B)                    Is Section 21 of the Income Tax (Amendment) Act 1970 ultra vires Section 16 of the Constitution?

It is necessary to emphasise that, if there was a constitutional guarantee to leave Jamaica, it would have expressly been included in section 16 of the Constitution as indeed it was in the constitution of Guyana and Solomon Islands and seems from Jamakana (supra) in Kiribati and Fiji. It was therefore not open to this Court to infer what the framers

of the Constitution excluded. Further, there were no words from which an implication could arise. See Stone v. R. (1980) 1 W.I.R. 870 where there was an unsuccessful attempt to infer that trial by jury was entrenched in section 20 of Chapter III of the Constitution. The framers of the Constitution omitted to include such a guarantee and it would be constitutionally impertinent for this Court to incorporate such a provision under the guise of interpreting it. What is permissible is to examine the legislative provisions and if a fundamental right is curtailed and the matter is brought to the Court to examine how the wrong can be redressed. The legislative powers is conferred by section 42 (1) of the Constitution to "make laws for the peace, order and good government of Jamaica" "subject to the provision of the Constitution." Section 21 of the Income Tax (Amendment) Act amended a law in force. That law in force was protected by section 26 (9) (a) of the Constitution.

Apart from laws in force dealing with fundamental rights and freedoms, the Constitution is supreme over other laws. Section 2 of the Constitution states this supremacy.

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

The importance of this section is that it runs counter to the submission that it is necessary to consider the repealed section in conjunction with the amendment to determine whether it complied with Chapter III of the Constitution. Even if this amendment were invalid, the valid part of the Income Tax Act would be retained and the invalid part be severed. Section 2 has a severance clause built into it, by the words "to the extent of the inconsistency be void." If what remains after the inconsistency is struck down is valid and reflects the intent

of the legislature it will remain enacted law. This was the approach in Hinds v. The Queen (1977) A.C. 195 where part of the Gun Court Act was severed and the remaining sections left intact.

It is now appropriate to turn to section 26 (9) of the Constitution since the Principal Income Tax Act and its 1970 Amendment is being considered. That section reads -

"(9) For the purposes of subsection (8) of this section a law in force immediately before the appointed day shall be deemed not to have ceased to be such a law by reason only of—

- (a) any adaptations or modifications made thereto by or under section 4 of the Jamaica (Constitution) Order in Council, 1962, or
- (b) its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision."

A feature to note is that this subsection implicitly acknowledges that "existing laws" of section 4 of the Order in Council and "laws in force" of Chapter III are the laws before the "appointed day." The existing laws are to be "adapted and modified" to the new legal system. The laws in force dealing with fundamental rights and freedoms are presumed to conform to Chapter III provision and therefore cannot be challenged in the courts on the ground that they do not so conform.

To demonstrate the significance of the "amendment" or "repeal" of section 4 of the Order in Council, it is necessary to set out the amendment contained in section 21 of the Income Tax (Amendment) Act.

"21— The First Schedule to the principal Law is hereby amended by repealing Rule 4 in Part II thereof and substituting thereof the following

"Rule—

4 (1) If the Commissioner thinks fit he may serve on any person a notice requiring that he shall not leave the Island unless at the time of leaving he has in his possession a certificate issued by or on behalf of the Commissioner within the preceding ninety days stating that he—

- (a) does not owe any income tax, or
- (b) has made satisfactory arrangements for the payment of income tax payable by him....".

This is markedly different from Rule 4 in Part II referred to previously in the 1954 Income Tax Law. Since there was no fundamental right enshrined in section 16 to leave the Island, this is permissible legislation. The legislature was careful to provide the defaulting taxpayer with all the information he required to settle his tax. Section 21 (2) reads -

" (2) On the application of any person on whom a notice under paragraph (1) has been served, the Commissioner shall issue to him within thirty days after the date of the application, a notice of assessment in respect of all income tax that will be due by him at the date of his intended departure from the Island."

Sanctions are provided in the criminal law by section 21 (3) which reads -

" (3) Where a notice has been served on a person under paragraph (1), and it has not been withdrawn by a further notice served on him by the Commissioner, that person shall, if he leaves the Island in contravention of the notice, be guilty of an offence and liable on summary conviction to a fine not exceeding fifty dollars or to a term of imprisonment not exceeding three months, or to both."

Further, section 21 (4) gives to Immigration Officers, members of the Constabulary Force, the power to detain for a specific period.



I find that the restrictions on leaving Jamaica are permissible. It is for the legislature to make such provisions and so a notice of restriction from leaving the island and directions for a stop order to enable the Immigration Officer to know those who can be lawfully detained are within the scope of the Income Tax Commissioner's powers.

Are the authorities in accord with

- (a) the contention that the Income Tax Law in force in 1962 did not require adaptation or modification pursuant to section 4 of the Order in Council to make it conform with the Constitution?

and that

- (b) section 26 (8) of the Constitution precluded a challenge to the Income Tax Law on the ground that its provisions contravened section 16 of the Constitution?

(a) Mr. Grant has helpfully brought to our attention numerous authorities and an attractive article - "When is an Existing Law Saved" Public Law (1976) by Francis Alexis which have proved most useful. The first authority was Kanda v. Government of Malaya (1962) A.C. 322. In the Malaya Constitution there is a marked difference in the saving clause which makes it inappropriate to compare it with the Jamaican Constitution in this regard. The differences are emphasized in Lord Denning's opinion. At p. 333 he said -

".....There are elaborate provisions for modification contained in article 162 which run as follows:

'162 (1) Subject to the following provision of this article.....the existing laws shall.....continue in force on and after Merdeka Day, with such modifications as may be made therein under this article..... The Yang di-Pertuan Agong may, within a period of two years beginning with Merdeka Day, by order make such modifications in any existing law.....

" "as appear to him necessary or expedient for the purpose of bringing the provisions of that law into accord with the provisions of this Constitution..... Any Court or tribunal applying the provision of any existing law (which has not been modified on or after Merdeka Day under this article or otherwise) may apply it with such modification as may be necessary to bring it into accord with the provisions of this Constitution. In this article modification includes amendment, adaptation, and repeal." "

It was against that background of these wide provisions that Inspector Kanda could and did legitimately claim that he could only be dismissed by The Public Service Commission and not by the Commissioner of Police who had the power to dismiss before Independence Day.

In Attorney General of St. Christopher, Nevis and Anguilla v. Reynolds (1979) 3 All E.R. 131 the Privy Council had to decide on the status of an existing law which by section 103 of the Constitution stated that existing laws "shall as from the commencement of this Constitution be construed with such modification, adaptation, qualifications and exceptions as may bring them into conformity with this Constitution." In view of this peremptory order, the existing Leeward Islands (Emergency Powers) Order in Council of 1959 was construed so as to conform with the Fundamental Rights provision in the Constitution. It must be pointed out that there was no reference in the opinion of the Board to a clause similar to section 26 (8) of the Jamaica Constitution as a specific saving clause, concerned with provisions contained in laws in force which cannot be scrutinized to see if they may have offended Chapter III provisions relating to Fundamental Rights and Freedoms. It seems that in the St. Christopher Constitution, the law in force must be construed to conform with all the provisions in the Constitution. While in Jamaica, the construction which is appropriate to the words

of both saving clauses taken together, is that "amendment and repeal" by the legislature is necessary to bring laws presumed to be in conformity with the Constitution if they are not in actual conformity. In any event, these laws in force which pertain to fundamental rights and freedoms will not be declared unconstitutional because of the effect of section 26 (8) if they remain unamended. Those laws in force, which do not pertain to Chapter III, and require adaptation and modification provisions are covered by section 4 of the Order in Council. Construction by the Courts will be sufficient to bring them into conformity.

To reiterate, implicit in the Jamaican Constitution development is the process of organic growth. Thus it was left to the legislative and executive organs, the power to repeal and amend so as to conform while in St. Christopher the fundamental change was to be effected by the Constitution itself and no laws were spared from the reach of the Constitution. Although the relevant St. Christopher constitution was not available, the comparison between the constitutions is likely to be correct as in Eaton Baker v. R (1975) 3 W.L.R. 463 such a point would not have escaped a Board consisting of (Lord Diplock, Lord Simon, Lord Cross, Lord Salmon and Sir Thadders McCartney). Further, the Board in Reynolds had Lord Salmon and Lord Simon as members.

To summarize the situation, the existing laws must be interpreted to conform with the Constitution. Where they cannot conform after adaptation or modification then such provisions will be declared invalid if unamended. A special regime is however created for laws in force whose provisions pertain to entrenched fundamental rights and freedoms. They were presumed to have been made in accordance with Chapter III

provisions and where the presumption was not borne out they could not be challenged in the Court. However, they could be amended and repealed by Parliament to conform. On this aspect, therefore, these cases are not in Panton's favour as was submitted by Mr. Grant.

J.S. Olawoyin v. Commissioner of Police (1961)

All N.L.R. 203, was a case from the Federal Supreme Court of Nigeria. The headnote at p. 205 shows both the similarity and difference between the (1960) Nigerian (Constitution) Order in Council and the Jamaican Constitutional Instruments. The scope of the saving clause as regards the Supreme Court would be the same although the wording is different. Here is how the Supreme Court is specifically treated in section 13 of the Order in Council in Jamaica -

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

Here is how the reporter's headnote disposes of the Nigerian situation at p. 205 of the report -

"(5) Section 3 of the Nigeria (Constitution) Order in Council, 1960, saves an existing law only if that law is in conformity with the Constitution; and section 4 of that Order saves existing Courts only insofar as is consistent with the provisions of the Order. Section 59c being not in conformity with the Constitution, in so far as it purports to provide for the sharing of the functions of the High Court or its judges with other persons, is to that extent not saved by section 3 of the Order as such an existing law; and the Native

"Courts Appellate Division of the High Court as created by Section 59c, being inconsistent with the Constitution in so far as it consists in part of non-High Court Judges, is to that extent not saved by section 4 of the Order as such an existing Court."

It is difficult to determine how this case would be helpful to the specific point which has to be determined in this case namely, does the saving clause in the Order oblige this Court to construe all laws in force and their amendments so that they conform with Chapter III provisions. If the saving clause in the Order had the effect as submitted by Mr. Grant, what would be the effect of section 26 (8) of the Constitution which on the face of it, prohibits scrutiny of laws in force on the appointed day to determine whether they were in contravention of the fundamental rights provisions in Chapter III?

Trinidad Island-Wide Cane Farmers' Association Inc. and Attorney General v. Prakash Seereeram (1975) 27 W.I.R. 329 on the other hand illuminates the issue to be decided. The constitutional structure there is similar, so is the wording and the issue to be decided resembles that which is to be decided in the instant case. In Trinidad there was an amendment to the 1965 Ordinance which was reflected in Cane Farmers Incorporation And Cess Act 1973(The Act). It was contended successfully that the 1973 Act was ultra vires the Constitution and the headnote at page 330 accurately reflects the relevant part of the decision. It reads as follows -

"(iii) The 1965 Act as amended by the 1973 Act is not a reproduction in identical form of the 1965 Act included in a consolidation or revision of the laws; and the amendments effected by the 1973 Act are not by way of adaptation or modification to the 1965 Act, but effect a substantial change in the mode of imposition of the cess and an increase in its quantum; and consequently the amended Act is not saved as an existing law under s. 3 of the Constitution."

Bearing in mind that the saving clause in section 4 (1) of the Order in Council in Jamaica is similar to section 4 (1) of the Order in Trinidad and that section 26 (3) of the Jamaican Constitution corresponds to section 3 of Trinidad Constitution, Haytali, C.J. had this to say at page 337 -

" I therefore pass on to consider the two main questions in this appeal, namely whether the 1965 Act as amended by the 1973 Act contravened (a) the applicant's freedom of association and (b) his right not to be deprived of his property except by due process of law.

Before dealing with these questions it would be useful to draw attention to the terms of s 2 of the Constitution. It prescribes, *inter alia*, that:

'Subject to the provision of sections 3 (which relates to the saving of laws in force at the commencement of the Constitution) 4 (which relates to laws passed during a period of emergency) and 5 (which relates to laws at variance with Ch1 of the Constitution) no law shall abrogate, abridge, or infringe or authorise the abrogation, abridgement or infringement of any of the rights and freedoms hereinbefore recognised and declared.....'

The section goes on to particularise acts which may not be done by an Act of Parliament but it is not necessary for present purposes to itemize them.

It is well-settled that the object of this provision is not to authorise the scrutiny of any law in force at the commencement of the Constitution, to detect whether it is consistent with the human rights and fundamental freedoms secured thereunder, but to ensure that no enactment passed after the commencement of the Constitution, that is to say, any future enactment, shall derogate from or infringe any of those rights and freedoms. See the decisions of the Privy Council in DPP v. Nasralla (1967) 10 W.I.R. 299, (1967) 2 All E.R. 161, (1967) 2 A.C. 238, (1967) 3 W.L.R. 13, and especially in De Freitas v. Benny and Others (1975) 26 W.I.R. 523, (1975) 3 W.L.R. 380."

The status of laws in force is governed by section 4 (1) of both Orders which play a relatively minor role in the construction of these and other laws with modification and adaptation so as to bring them in line with the order.

For laws in force which pertain to Fundamental Rights and Freedoms, once the law is amended, it cannot be enforced unless it conforms to the Constitution. The irrebuttable presumption of invalidity no longer applies. Thus in Seereeram's case there were amendments so at p. 333, Hyatali C.J. said -

"The use of the expressions 'reproduction in identical form' and 'inclusion in such consolidation or revision,' fortifies me in this conclusion. When read and construed together as they should be, it will be seen that their clear purport is to preserve the validity of all laws in force, if they are reproduced without alteration and included in any consolidation or revision of the statute laws. To achieve that object the words 'identical form' in the first expression are employed to ensure that the statute intended to be reproduced found its place in such consolidation or revision without amendment or alteration. Hence the provision that adaptations and modifications which were necessary or expedient to effect its reproduction were not to be regarded as amendments or alterations thereto."

This clear statement emphasises the distinction between adaptation and modification from amendment. The first may be preserved even if it does not conform with the provision of the Constitution i.e. it is saved by section 26 (8) because it deals with Chapter III provisions. So here is the conclusion at which Hyatali, C.J. arrives at p. 340 -

" For these reasons, I hold that the provisions of the 1965 Act as amended by the 1973 Act which require a sugar manufacturer to deduct a cess from the price at which the applicant sells his cane to such manufacturer are inconsistent with s 1 (a) of the

"Constitution in that they authorise the deprivation of the enjoyment by the applicant of his property without the payment of compensation. It is therefore a deprivation without due process of law and I so hold."

Phillips and Rees J.J.A., were of the same view as the Chief Justice. There is a passage in the judgment of Rees J.A. which emphasises that the Court did consider the effect of section 3 of the Constitution together with section 4 of the Order. At p. 363, he said -

"In Beckles v. Dellamore (1965) 9 WIR 299, it was held that the expression 'law in force' in s 3 is to be equated with the expression 'existing law' in s 4 of the Order in Council and both expressions comprehend an enactment which by reason of its own commencement prior to the commencement of the Constitution had come into existence as a law and which by reason of its non-repeal or non-expiry has continued to exist as a law. In 1962 when the Constitution commenced the 1961 Ordinance was the only law in force relating to the Trinidad Island-Wide Cane Farmers' Association and for the 1965 Act to be saved by the provisions of s 3 it must be a reproduction in identical form of the 1961 Ordinance in a consolidation or revision of laws."

To return to the point at issue, section 21 of the Income Tax (Amendment) Act 1979 is the provision in issue and it does not offend section 16 of the Constitution it being legitimate for the legislature to impose restrictions on leaving Jamaica for failure to settle outstanding amounts with the Commissioner of Income Tax if there be in force, a valid assessment. This is permissible because freedom to leave Jamaica is not a fundamental right enshrined in the Constitution.

(B) The role of section 25 (8) of the Constitution in precluding a challenge to laws in force at the commencement of the Constitution to determine if they infringed fundamental rights has been frequently stated by the Privy Council in cases



from Jamaica and Trinidad. It is convenient to cite

Eaton Baker & Anor. v. R. (1975) 23 W.L.R. 403 at p. 409 -

" So in order to dispose of the appeal it was necessary for the Board to decide the preliminary question of law: whether Nasralla's rights were governed by s. 20 (8) of the Constitution or by the common law rule. Upon his preliminary question Lord Devlin, who delivered the opinion of the Board, said this about the effect of s. 26 (8) of the Constitution upon the applicability of s. 20 (8).

' This chapter [sc. Chapter III of which section 20 (8) forms part]..... proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed.' "

The principle was reiterated in De Freitas v. Benny & Ors.

(1975) 3 W.L.R. 388 at 391 where Lord Diplock said -

" 'Chapter 1 of the Constitution of Trinidad and Tobago, like the corresponding chapter III of the Constitution of Jamaica (see DPP v. Nasralla (1961) 2 AC 238,) proceeds on the presumption that the human rights and fundamental freedoms that are referred to in sections 1 and 2 are already secured to the people of Trinidad and Tobago by the law in force there at the commencement of the Constitution. Section 3 debars the individual from asserting that anything done to him that is authorised by a law in force immediately before August 31, 1962 abrogates, abridges or infringes any of the rights or freedoms recognised and declared in section 1 or particularised in section 2.' "

When the presumption is rebutted, that is to say, a law in force purports to contravene Chapter III provision, it is not for the Court to amend or repeal those laws. That would be for Parliament. This is in keeping with our organic growth which has been a characteristic of our constitutional development.

The true constitutional role of the judiciary is to interpret the Constitution and statutes and apply and develop the common law. To go outside those functions would be contrary to the Constitution, designed as it was, on the principle of the separation of judicial power from that of the executive and of the legislature.

Be it noted however, that since it has been decided that section 21 of the Income Tax (Amendment) Act could not be saved by section 26 (8) of the Constitution as it is subsequent to 1962, and it is not to be found in a codification or revision so as to be saved by section 26 (9), then it must not be in contravention of the Constitution. As it does not so contravene, that concludes the discussion on this aspect of the matter.

The upshot of all this is that I am in agreement with the Constitutional Court in refusing to grant Panton a declaration that his right to leave Jamaica was enshrined in section 16 of the Constitution and consequently there can be no contention that section 21 of the Income Tax (Amendment) Act was in breach of that provision. Also there is no rule of construction which obliges this Court to refrain from considering the provision in the amendment on its own. It was contended on behalf of Panton that both the repealed paragraphs and the amendment should be considered together to determine whether they complied with section 26 (9) of the Constitution but such a proposition was untenable.

The Attorney General's Appeal

Because the Constitutional Court found that section 15 of the Constitution was breached, they proceeded to grant Panton the declarations he sought. It is helpful to examine section 15 (1). It reads thus -

"15.—(1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law—....".

There are three features which are to be noted. Firstly, the word liberty appears in section 13 of the preamble so it is reasonable to construe liberty as being covered by section 15 where the marginal note is "Protection from arbitrary arrest or detention" and "Protection of Freedom of Movement" in section 16 which has been previously treated.

That this is the reasonable approach, can be seen by examining the other freedoms listed in section 13 (a). There is "life" which is covered by section 14 where the marginal note is, "Protection of right to life," then there is "security of person" which is covered by section 17 where the marginal note is "Protection from inhuman treatment." Thereafter comes "enjoyment of property" which is covered by section 18, where the marginal note is "Compulsory acquisition of property" and concluding 13 (a) is the "protection of the law" where the marginal note is "Provision to secure the protection of law."

The pattern which emerges is that every marginal note pertaining to 13 (a) gives an accurate summary of the scope and limit of rights enshrined. This is of particular relevance for a word of such wide import as liberty. Liberty in section 15, therefore, ought to be limited to general area of "Protection from arbitrary arrest and detention."

Courts of construction now take a liberal attitude to cross-headings or marginal notes and in Director of Public Prosecutions v. Schildkamp (1971) A.C. 1 at 26, Lord Upjohn acknowledges that in some cases they "control the meaning and ambit" of the section to which they refer. Lord Reid at p. 10 takes an equally liberal stance. Such an approach is even more appropriate when construing a Constitution and that has been the approach used to construe section 15.

Another approach which illustrates the scope and limits of personal liberty contemplated in section 15 is to examine the case where it is permissible to deprive anyone in Jamaica of liberty. Because the Constitutional Court gave "liberty" a wide interpretation, it is appropriate to set out the circumstances authorised by law to deprive one of personal liberty. These instances must give assistance how liberty in the main... clause ought to be construed. Sub-section (1) at (a) - (f) reads as follows -

**"15.—(1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law—**

- (a) in consequence of his unfitness to plead to a criminal charge; or
- (b) in execution of the sentence or order of a court, whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted; or
- (c) in execution of an order of the Supreme Court or of the Court of Appeal or such other court as may be prescribed by Parliament on the grounds of his contempt of any such court or of another court or tribunal; or
- (d) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed on him by law; or

- "(e) for the purpose of bringing him before a court in execution of the order of a court; or
- (f) upon reasonable suspicion of his having committed or of being about to commit a criminal offence; or....".

The permissible instances where the state may deprive an individual of liberty are covered by section 15 (1) (a) - (k) Sub-sections (a) - (f); all refer to cases where the court carries out its duties in the criminal or civil law by making orders for the deprivation of liberty or where the police as members of the executive arrest or detain to take someone to court to answer a criminal charge.

The instances listed in (g), (h) and (i) read as follows -

- "(g) in the case of a person who has not attained the age of twenty-one years, for the purpose of his education or welfare; or
- (h) for the purpose of preventing the spread of an infectious or contagious disease; or
- (i) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community; or..."

These pertain to the welfare of minors, instances where deprivation of liberty is to prevent the spread of contagious disease or instances where the person is of unsound mind, addicted to drugs, a vagrant. These deprivations of liberty are to protect the community. As for (j) and (k) they read as follows -

- "(j) for the purpose of preventing the unlawful entry of that person into Jamaica, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Jamaica or the taking of proceedings relating thereto; or

- "(k) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Jamaica or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Jamaica in which, in consequence of any such order, his presence would otherwise be unlawful."

These sub-sections deal with deprivation of liberty in instances of deportation, extradition or the imposition of a curfew.

All these instances, authorised by law, illustrate that liberty in section 15 (1) is a limited concept as defined in the marginal note. Another concept of liberty is freedom of expression which is the concern On Liberty by J.S. Mill is dealt with in other sections of Chapter III.

Section 15 (2) reinforces the construction that this aspect of liberty is controlled. It lays down the procedure as to how the police and others authorised by law are to arrest or detain. It reads thus -

"15. (1) .....

(2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language which he understands, of the reasons for his arrest or detention."

and section 15 (5) (6) and (7) are the conditions which are to apply to those detained during a state of emergency.

Section 15 (4) is important - it reads -

"(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefrom from that person."

This is another instance to illustrate how liberty is to be defined. Section 15 (4) shows that it is limited to those instances where a person is unlawfully arrested or detained. As for compensation, the issue was whether when Panton appeared before the Supreme Court "there were adequate means of redress available to him under other law." It is appropriate to emphasise that the purpose of this guarantee is to preclude any legislative, judicial or executive decision after the appointed day from being implemented which provided for unlawful detention without compensation. If there was such a circumstance then it would be a proper case for redress pursuant to section 25 (2) of the Constitution. It was therefore not sufficient for the Court below to rule that -

"In any event in view, of the peculiar circumstances of this case we are not inclined to view that section 25 (2) is applicable. The failure by the respondent to take the point in limine support our view."

This passage prompts the question as to what were the peculiar circumstances which required suspension of the proviso to section 25 (2) of the Constitution? Further, from whence did the Court derive its jurisdiction to suspend a constitutional provision. Moreover, it seems Calveley v. Chief Constable of Merseyside Police (1989) 1 All E.R. 1025 was cited and that case indicated that there was a tort known to the common law which could provide an adequate remedy.

It is always necessary to examine the basis of the judgment in the Court below to determine whether the principle adopted by the Court was correct and if it was not why they erred. The principle expressed in the celebrated Indian case of Sawhney v. Passport Office (1976) 3 S.C.R. 525 on the right of a Indian citizen to have a passport issued to him was relied on as a guide to construe liberty in section 15 of the Jamaica

Constitution. That right depended primarily on Article 21 and to a lesser extent on Article 14 of the Indian Constitution.

Article 21 at p. 535 of the report reads -

"Art. 21. No person shall be deprived of his life or personal liberty except according to procedure established by law."

Here is how Subba Roa, C.J. treated the matter after considering the case of Kharak Singh v. The State of U.P. (1964) S.C.R. 322, 354, 347 at p. 540 -

" This decision is a clear authority for the position that 'liberty' in our Constitution bears the same comprehensive meaning as is given to the expression 'liberty' by the 5th and 14th Amendments to the U.S. Constitution and the expression 'personal liberty' in Art 21 only excludes the ingredients of 'liberty' enshrined in Art. 19 of the Constitution. In other words, the expression 'personal liberty' in Art. 21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is not covered by it inasmuch as it is specially provided in Art. 19."

Further on p. 542 the learned Chief Justice said -

".....It follows that under Art. 21 of the Constitution no person can be deprived of his right to travel except according to procedure established by law. It is not disputed that no law was made by the State regulating or depriving persons of such a right."

Two features are to be noted about this decision. Firstly, the ample interpretation accorded to the word liberty and secondly, that it may be qualified by procedures established by law. Further, life and liberty are combined in one clause and there was no legislation limiting "liberty" to be granted a passport in the public interest.

Secondly the judgment was by a bare majority and the minority decision shows that limitations could be appropriately



applied to liberty in India. At p. 544 the minority judgment reads -

" Many questions have been raised but they resolve themselves into a single question in two parts which is: is there a fundamental right to ask for a passport and does the Constitution guarantee such a right? It may be stated at once that in limiting the controversy, it is not intended to say that arbitrary action in refusing a passport or evidence of discrimination will not have any redress. Executive action has to comply with the equal protection clause of our Constitution, and a complaint of refusal of a passport on insufficient or improper grounds is capable of being raised, irrespective of whether there is a fundamental right to travel abroad or not. Judging of these cases on the evidence of the affidavits it is possible to hold that the passports were properly refused or impounded; but as the question has assumed a constitutional hue, we express our opinion on the general question."

The crucial distinction between the two approaches is at p. 550 where Hidayatullah, J puts the issue with clarity and skill and this is the approach relevant to the Jamaican Constitution with its controlling words defining the scope of liberty in section 15.

At p. 550 His Lordship said -

".....It seems strange that the Constitution should have guaranteed the right of motion, in one place, limited to the territories of India, and in another, without specifying the right of motion given an added fundamental right to leave India. This, in our opinion, has been earlier noticed indirectly in the two cases of this Court already referred to."

The wording of Article 21 of the Indian constitution seems markedly different from section 15 of our Constitution.

Langrin, J speaking for the Court however, thought there was a close correspondence. Here is what he says at p. 15 of the

judgment of the Court -

" The leading case on this area of the law in the Commonwealth is: Sawney vs. Assistant Passport Officer Government of India 1967 AIR 1836 (V54C 359) a Court consisting of 5 Judges of the Supreme Court of India. In this case the applicant was refused the grant of a passport as an effective method of restraining his movement. The Court in dealing with a similar provision to the Jamaica Constitution decided that the right to travel abroad, being an integral part of the personal liberty of the citizen was protected by the relevant guarantee of personal freedom."

It is this extensive interpretation given to "liberty" despite the controlling words in the marginal note limiting its ambit that may have caused the Court to decide against the Attorney General.

Here is how the Court construed liberty in section 15 in very wide terms as including the right to leave Jamaica. Two passages on page 17 of the reasons will suffice.

The first reads as follows -

" Personal liberty is used in Section 15 of the Jamaican Constitution as a comprehensive term to include all the varieties of rights which go to make up personal liberty of man other than those dealt with in Section 16. Section 16 deals specifically with certain rights while Section 15 includes all such rights which were not dealt with in Section 16.

Mr. Wilkins, for the respondent urged us to give Section 15 its narrowest interpretation which is that the section embraces nothing more than a protection from arbitrary arrest or detention."

To my mind, the Court erred in giving this wide construction to liberty in section 15 because they disregarded the controlling words in section 15 (4) (supra) "unlawfully arrested and detained" as unduly restrictive. So they went on to expand

liberty beyond those words of limitation and stated -

" In our view the right to travel abroad is within the ambit of the expression "personal liberty" as used in Section 15 and personal liberty in the same section was not intended to bear the narrow interpretation of freedom from physical restraint."

This passage reflects the essence of the Court's error.

Did Mr. Panton have adequate redress

- (a) by way of certiorari under other law as regards quashing the Notice of Restriction?
- (b) in the tort of false imprisonment by the Commissioner of Income Tax or misfeasance in public office as regards his detention at Norman Manley Airport?

Crucial to anyone seeking to vindicate his rights is access to the Superior Courts of Record established by the Constitution. Courts are the adjudicating organs of Government to determine rights according to law. Panton had serious complaints to make and it would be a reproach to any legal system where unlawful imprisonment was conceded by the Crown in the Constitutional Court if there were no provisions for redress. His complaints were firstly, that he was detained for three quarters of an hour at the airport while intending to board an aircraft and secondly he alleged that he would suffer financial loss because a notice of restriction was imposed on him by the Commissioner of Income Tax. He has particularised those claims in his motion. When he came before the Constitutional Court, the notice of restriction was already quashed in certiorari proceedings. He then sought compensation for unlawful detention and financial loss.

What does the Constitution say about obtaining redress for such matters? Since Panton has sought to obtain compensation from the Constitutional Court, it is imperative to

examine section 25 of the Constitution -

"25.—(1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

The first point to note is that section 25 of the Constitution is based on the presumption that there are actions available other than those pursuant to section 25 of the Constitution. This is presumed in the words, "then without prejudice to any other action with respect to the same matter which is lawfully available: that person may apply to the Supreme Court." This is not surprising in Constitutions modelled on British constitutional law and practice where the law of torts buttressed by the Crown Proceedings Act provides the principal remedies for complaints in respect of unlawful action by Crown servants. The full range of these remedies was available before the "appointed" day and they continue to be available. Moreover, the legislature and the courts continue to develop the range of remedies to meet new situations.

Section 25 (2) indicates the type of redress available if a constitutional action is sought for enforcing the provisions in section 14 to 24 inclusive. It reads -

"(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled."

In view of the presumption in section 25 (1) that there are other actions available then there may be no need to seek to enforce the provision in section 14 to 24 by a constitutional action, for the constitutional provisions are meant to ensure that there will be statutes and decisions of the courts which can be resorted to in an action to vindicate individual rights according to law. The rights enshrined stated broadly are to be resorted to as a last resort when there is no protection in the statutes and authorities. From the very outset of the Constitution in Chapter I section 1 (9), the courts are accorded the responsibility of determining the constitutionality and the legality of actions by any person or authority. So judicial review is entrenched in the Constitution in addition to the prior supervisory jurisdiction of the Supreme Court.

"Section 1 (9) No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law."

So that courts will review matters on complaint whether the breach be under the Constitution or other law.

Further, the proviso to section 25 (2) reads -

"(2) .....

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

This is a mandatory directive that the Supreme Court shall not exercise its powers under the Constitution if there is adequate means of redress under other law. The Constitution was introduced

into a mature legal system with its statutes and decisions of the court providing the protection of law. The presumption is that this protection would continue and only where there is a failure of the legislature to enact laws on the principles enshrined in Chapter III or there is a gap in the common law that the Supreme Court ought to exercise its powers pursuant to section 25. The proviso to section 25 implicitly acknowledges the principle that the separation of powers governs our constitutional instrument and that courts decide individual rights best in the context of statutes and authorities that are drafted and interpreted in conformity with the Constitution. In developing the common law, the provisions of Chapter III must always be applied. Lord Diplock in three cases emanating from Trinidad stated the principles essayed here in classic language. I cited all three in: Junious Morgan v. The Attorney General (unreported) S.C.C.A. No. 9/88; Maharaj No. 2 (1978) 30 W.I.R. at 321; Harrikissoon v. The Attorney General of Trinidad and Tobago (1979) W.L.R. 64 and above all Chokolingo v. The Attorney General of Trinidad Tobago. In this case Harrikissoon is the most pertinent and was cited below. So I cite the relevant passage at page 10 of the judgment -

" ' The notion that whenever there is a failure by any organ of Government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control in administrative action."

The principle is even more applicable to the Jamaican Constitution with its mandatory provision in the proviso which acts as a kind of estoppel. See D.P.P. v. Feurtado 30 W.I.R. 206. Langrin, J however, treated the proviso as a matter of discretion which could be avoided by "peculiar circumstances." Here is his ruling on page 19 of the judgment -

" In any event, in view of the peculiar circumstances of this case we are not inclined to the view that Section 25 (2) is applicable. The failure by the respondent to take the point in limine supports our view."

Interestingly Blomquist v. Attorney General of the Commonwealth of Dominica (1987) 1 A.C. 489 construed a proviso which is similar to that of section 25 of the Jamaican Constitution, except may in the proviso is the mandatory word rather than shall see DaCosta v. the Queen Privy Council Appeal 37/88 delivered 21st March, 1990. A landowner sought interest at a higher rate under the Constitution rather than the rate under the law in force. The Privy Council applied the rate of interest in the Ordinance in accordance with the direction under the proviso. The Dominican constitution has a saving clause and here is how Lord Mackay puts it at p. 497 -

".....Section 6 (8) of the 1967 Constitution provides: 'Nothing in this section shall affect the operation of any law in force immediately before the coming into operation of this Constitution...' Amongst the laws in force on 1 March 1967 was the Ordinance which was originally enacted on 3 June 1945. In view of the provisions in the Constitutions to which their Lordships have referred nothing in section 6 of either Constitution affects the operation of the Ordinance."

Then on p. 499 Lord Mackay continues -

".....Where, as in this case, there was a law in existence in Dominica at the date of the acquisition of the land which authorised its acquisition there was in their Lordships' opinion a law applicable to that acquisition within the meaning of section 6 of the Constitution. It did not cease to be applicable to the acquisition when the timetable applied in its provisions for the assessment of compensation was not promptly carried out."

That this is a powerful statement of support for the relevance of the proviso was recognized in Junious Morgan (supra). I must expand on that recognition to demonstrate the relevance in this case. The constitutional provision which Blomquist sought to enforce, so as to benefit from a higher interest rate, and at compound interest reads in section 6 (1) -

"(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where provision is made by a law applicable to that taking of possession or acquisition for the payment, within a reasonable time of adequate compensation."

The Board referred Blomquist to the law in force for his rate of interest. Similarly, the Court below by granting Panton compensation must have relied on section 14 (4) which to repeat for emphasis reads -

"(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that person."

But the proviso refers Panton to other law where adequate means of redress is available. This is the law of torts and Panton would be hard put to say adequate compensation would not be provided in area of law where exemplary damages may be available.



Misfeasance in a public office which the Court below rejected and Mr. Grant, in this Court doubted, could have been Mr. Panton's chief corner stone.

It is now appropriate to turn to the authorities establishing the tort of misfeasance in public office. There can be no doubt that the Commissioner of Income Tax is a public officer for the purpose of this tort. There was no valid notice of restriction against Panton when he was detained. The second notice of restriction was quashed and the initial notice of 1987 had been withdrawn. These facts were presumptive evidence for the ingredients of the tort: Brayser v. MacLean (1875) (VI) L.R.P.C. 398 is an example where abuse of power resulted in false imprisonment. It is not proposed to examine in detail the scope of this tort except to say that the essential features are different from the tort of false imprisonment by police officers in Jamaica which require specific pleading in accordance with section 33 of the Constabulary Force Act. The following passage from Brayser v. MacLean (1875) (VI) L.R.P.C. 398 at 406 is instructive -

" It appears, therefore, to their Lordships that the sheriff in this case was guilty of a misfeasance in the exercise of the powers which were entrusted to him by law and in the discharge of his duty as a public ministerial officer, and that in respect of that misfeasance he is liable to an action for the damage which resulted from that act, notwithstanding it was not proved against him that he was actuated by malicious motives. The mere fact of the misfeasance and the damage resulting from it by reason of the attachment issuing upon the return as conclusive evidence against the Plaintiff was sufficient damage to enable the Plaintiff to maintain an action against the sheriff for that misfeasance, and to recover the damage which he has sustained in consequence of it."

The clue to understand this case is that it is a species of action on the case. The Commissioner did not effect the arrest but by causing the immigration officers to arrest Mr. Panton after the Supreme Court quashed the notice of restriction, she could be liable for misfeasance in public office. Since her written instructions caused Mr. Panton's false imprisonment there was no need to prove malice. This is the ratio of Brayser's case. In Bourgoin v. Ministry of Agriculture Fisheries And Food (1985) 3 W.L.R. 1027 where financial loss was the damages claimed, a unanimous Court of Appeal held as recorded in the headnote -

"that in order to establish the tort of misfeasance in public office it was not necessary to prove that the defendant had been actuated by malice towards the plaintiff or had acted in bad faith but it was sufficient to show that the officer knew that he had no power to do that which he did and that his action would injure the plaintiff and subsequently did injure him and that paragraphs 23 and 26 did disclose a cause of action."

This case was decided on a preliminary point of law and the Ministry of Agriculture settled the case. Mann J, at first instance in referring to the mental element in the tort said at the penultimate page of his judgment -

" I do not read any of the decisions to which I have been referred as precluding the commission of the tort of misfeasance in public office where the officer actually knew that he had no power to do that which he did, and that his act would injure the plaintiff as subsequently it does. I read the judgment in Dunlop v. Woollahra Municipal Council (1982) A.C. 158 in the sense that malice and knowledge are alternatives. There is no sensible reason why the common law should not afford a remedy to the injured party in circumstances such as are before me."

This approach was expressly approved by Oliver, L.J. as he was then and both Parker and Hourse, L.JJ. expressly agreed with Oliver, L.J.. The importance of this passage is that as regards

financial loss claimed, if Mr. Panton had proved at a trial, the case made out in his motion that the Commissioner had actual knowledge that the restriction was invalid when she failed to withdraw it and that she knew that financial injury would result, then he would have succeeded in his claim for damages. As in the tort of negligence, financial loss and mental injury are more difficult to prove than physical injury.

As for the House of Lords, it is necessary to refer again to the identical passage cited by Langrin, J in the Court below at page 10 of the judgment. In Calveley v. Chief Constable of Merseyside Police (1989) 1 All E.R. 1025 at p. 1029 Lord Bridge in determining whether there was a cause of action on the pleadings said -

"For the tort of misfeasance in public office to be proved it had to be shown at least that a public officer had done in bad faith or possibly without reasonable cause an act in the exercise of some power or authority with which he was clothed by virtue of the office he held."

This analysis demonstrates that there was a cause of action available to Panton, after he was wrongfully detained. He also claimed financial loss as he alleged that after he was restricted by the first notice he had incurred loss when permission to travel was withdrawn. He alleges that he also incurred expenses in preparing a guarantee at the Commissioner's request. The authorities establish that such a claim will be considered by the courts.

There is also the primary tort of false imprisonment. To reiterate, it was on the basis of the notice of restriction issued by the Commissioner of Income Tax that Panton was imprisoned or detained. The immigration officers were mere ministerial officers and acted on the basis of the notice of restriction. It was therefore essential for the Commissioner

of Income Tax to be joined as a defendant if a serious case were made against the Crown in an ordinary action. That this point was made on behalf of the Attorney General in the Court below is evidenced on page 3 of the judgment of Langrin, J. speaking for the Court. It reads -

" Counsel for the Respondent, contended, inter alia that the original jurisdiction which is vested in the Supreme Court by virtue of Section 25 of the Constitution would not be exercisable if that Court were satisfied that adequate means of redress were or had been available to the person concerned under any other law (See the proviso to sec. 25 (2)). In this regard, he submitted, an action in tort for false imprisonment is available to the applicant. Such a submission undermines the main contention of the applicant which is that he has a constitutional right to travel abroad and that right was contravened by the state. The tort of false imprisonment may not succeed against the Immigration Officers since the Applicant would have to prove the absence of reasonable and probable cause or malice."

The action however, would not be against the police but the Commissioner of Income Tax. Cases as Hopkins v. Crowe (1836) 4 Ad. E. 774 and Austin v. Dowling (1870) L.R. 5 C.P. 534 illustrates the principle that it would not be the immigration officials, who were mere ministerial officers, but the Commissioner of Income Tax who would be liable for false imprisonment.

This case has been argued in terms of whether there is a constitutional right to leave Jamaica. The substance of it however, is that Mr. Panton was wrongfully detained for three quarters of an hour because the Commissioner had not withdrawn her restrictive notice after the notice had been quashed in the Supreme Court. The right to leave Jamaica is dependent on obtaining a passport and that is governed by the Passport Act. The appropriate Minister under that Act has a discretion in the

issuance of a passport. Since the exercise of his discretion affects the rights of those entitled to a passport, his discretion must be exercised in accordance with law, and there is a right at common law to travel: see R. v. Secretary of State for Foreign & Commonwealth Affairs ex parte Everett (1989) 2 W.L.R. 229 where Taylor, L.J. said at p. 231 -

".....But the grant or refusal of a passport is in a quite different category. It is a matter of administrative decisions, affecting the rights of individuals and their freedom of travel. It raises issues which are just as justiciable as, for example, the issues arising in immigration cases."

Thus courts applying the law will require the Minister to act fairly in accordance with principles of natural justice. The Minister must also take into account the provisions of section 24 of the Constitution which gives protection from discrimination. This is the equal protection clause of the Jamaican Constitution. It is against that background that courts give protection to those in Jamaica. As for Panton, it is regretted that he has come to the wrong forum to seek compensation especially since counsel for the Crown, Mr. Wilkins in a gracious admission in the Court below, acknowledged that Panton was wrongfully detained. It is difficult to see how Panton could have failed in an action for false imprisonment against the Commissioner of Income Tax and the Attorney General so the concession was gracious as well as being probably correct.

Panton may have to seek a concession from the Attorney General to institute the proper action in the Supreme Court because of the statutory privileges the Crown enjoys as regards the limitation period or alternatively, he could seek an ex gratia payment. Had counsel on his behalf read Crown counsel's lips correctly, the motion in the Court below could well have

been treated as a writ and a statement of claim could then have been filed and served. As it is, the Attorney General's appeal must be allowed and the orders below set aside. The appeal of Panton must be dismissed.