

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 60 of 1979

Between:

FIJI RESORTS LIMITED

Appellant

- and -

THE COMMISSIONER OF ESTATE
AND GIFT DUTIES

Respondent

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

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

Date of Hearing: 22, 23, 24, 25, 26
September 1980.

Delivery of Judgment: 3.10.80

JUDGMENT OF THE COURT

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

called Yanuca Island Limited (called "the Yanuca shares") and the husband and wife held 37,354 shares of \$1 each in Fiji Mocambo Holdings Limited (called "the Mocambo shares"). The Mocambo shares were held as "tenants in common and not as joint tenants". The Yanuca and Mocambo shares were later converted into shares in appellant. After death, in circumstances which are not material to this appeal, a further 56,281 shares were acquired in appellant's shareholding.

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

"31. (1) If any person takes possession of or in any manner deals with any part of the estate of any deceased person without obtaining administration of his estate within six months after his decease, or within two months after the termination of any action or dispute respecting the grant of administration of the estate, or within such further time as may be allowed by the Commissioner on application, the Commissioner may apply to the Supreme Court for an order that the person so taking possession or dealing as aforesaid deliver to the Commissioner within such time as the Commissioner may determine, a statement as required by subsection (1) of section 28 of this Act, and to pay such duty as would have been payable if administration had been obtained, together with the cost of the proceedings, or to show cause to the contrary.

(2) If no cause or no sufficient cause is shown to the contrary, the person so offending shall, in addition to the duty payable by him as aforesaid, forfeit a sum not exceeding five hundred pounds, in the discretion of the Supreme Court; but if cause is shown, such order shall be as seems just."

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

The husband and the wife were domiciled in the State of California. Administration of the husband's estate was granted in California to The First National Bank of San Jose on May 2, 1972 and re-sealed in Fiji, we are advised from the Bar, in or about November 1976. The administrator was concerned in the assessment of estate duty so its solicitors took part in the inquiries which preceded and followed the assessment of estate duty. This will be discussed later. The relevant history of the spouses is that they were American citizens who married in Seattle in the State of Washington on 14th September 1940. The husband was employed as a pilot by Pan American Airways in 1945. In 1948 they acquired a domicile of choice in the State of California which domicile was thereafter retained. By acquiring a Californian domicile all property then owned and after acquired by either the husband or wife became subject to the law of California which has a statutory system of community property. The present appeal falls for determination of the respective rights and interests of the husband and wife in the said shares according to Californian law and then for the determination of what, upon the true construction of the Fiji Estate and Gift Duties Act (Cap.178), comprises the dutiable estate of the husband in Fiji.

Since the Courts in Fiji cannot take judicial notice of foreign law the relevant law of the State of California must be proved as a fact. Affidavits were made by two experts in that law. There is no conflict of opinion between them so the task of this Court is to

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apply the law as so laid down to the relevant Fiji law. The general law was stated by Mr. Strader, a duly qualified practitioner of law in the State of California, who said :

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

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

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

The following are relevant provisions of the Californian Civil Code :

"5105. Interests in community property

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

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

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

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

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

WITNESSETH:

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

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

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

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

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

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

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

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

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

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

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

Sgd. ALAN E. DAVIS
Sgd. DORIS DAVIS "

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

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

- (e) the beneficial interest held by the deceased immediately before his death in any property as a joint tenant or joint owner with any other person or persons if that property was situate in Fiji at the death of the deceased;
- (h) any property situate in Fiji at the death of the deceased over or in respect of which the deceased had at the time of his death a general power of appointment;
- (i) any property situate in Fiji at the death of the deceased comprised in any settlement, trust or other disposition of property (including the proceeds of the sale or conversion of any such property and all investments for the time being representing the same and all property which has in any manner been substituted therefor) made by the deceased whether before or after the commencement of this Act -
 - (i) by which an interest in that property or in the proceeds of the sale thereof is reserved, either expressly or by implication, to the deceased for his life or for the life of any other person or for any period determined by reference to the death of the deceased or of any other person; or
 - (ii) which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person or for any period determined by reference to the death of the deceased or of any other person; or

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

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

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

A general power of appointment has been defined as a power that the donee can exercise in favour of such person or persons as he pleases, including himself or his executors and administrators: Halsbury's Laws of England 3rd Edn. Vol. 30 para. 368. Section 2 of the Estate and Gift Duties Act defines the term as follows:

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"2. In this Act, unless the context otherwise requires -

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

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

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

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

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- (2) The powers vested in deceased were powers exercisable by a person in a fiduciary capacity and therefore excluded by reason of the definition of a general power of appointment.
- (3) The powers were not exercisable and deceased "thinks fit for his own benefit" and so did not come within subsection (1)(h).
- (4) By reason of the statutory nature of the powers they did not come within subsection (1)(i).
- (5) Subsection (1)(e) applies only to joint interests whilst the property in question was not so held.

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

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

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

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

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

"752. Co-ownership. Concurrent ownership of chattels personal may be either joint or in common, and in this respect resembles concurrent interests in real estate; moreover, expressions contained in any instrument which, at common law, would create a joint tenancy or tenancy in common in realty have an analogous effect when applied to personalty.

753. Joint ownership in personalty. A joint ownership or joint tenancy is distinguished by the four unities of possession, interest, title and time of commencement. The right of survivorship attaches to a joint tenancy of personalty, including choses in possession and in action, as well as to realty until severance."

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

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

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

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

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

Dealing first with (3), namely, that subsection (1)(h) did not apply because the power of the husband was not exercisable "as he thinks fit for his own benefit". Subsection (1)(h) differs from the statement of the law on general powers which expressly includes an exercise in favour of himself, that is the donee of the power. It is clear that the intention at law is that the donee can control the exercise of the power to the extent that he can appoint himself absolutely to the property. There are numerous cases where this has been done to the exclusion of other beneficiaries. Instances need not be cited. This leads to a consideration of the extent of the powers of the husband under California law. It is clear that he cannot appoint himself absolutely to his wife's share or any part of it because he would still hold it as community property. It was not suggested that he had this power. It is true that by Section 5125 it is stated that the husband has absolute power of disposition, but with the important qualification "other than testamentary". But this qualification must also be read in conjunction with the provision that, as long as the husband holds community property it remains community property. This is so even if there is a conversion as, for instance, a change of investment or sale because the converted or resulting funds while in the hands of the husband remain community property. The husband cannot make a gift nor can he dispose of personal property without a valuable consideration. A valuable consideration has been held to require an adequate consideration. Mr. Martin A. Schainbaum, an expert who gave evidence for respondent, said :

" While the husband under community property law principles operative on February 28, 1972 may have powers of management and control such powers are not unlimited. Beard v. Knox, 5 Cal. 252

(1855): Smith v. Smith, 12 Cal. 216 (1859).
 See also, ch. 220 1891 Cal. Stats. 425
 (restricting the husband's right to make a
 gift of community property). Ch. 190 1901
 Cal. Stats. 598 (Requiring wife's consent
 before husband could dispose of or encumber
 home furnishings or fittings, or the wearing
 apparel of his wife or minor children); ch.
 583 1917 Cal. Stats. 829 - 30, Former Civil
 Code SS. 172 and 172a."

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

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

" The distinction between trusts and powers is that, while the court will compel the execution of a trust, it cannot compel the execution of a power. But there are powers which in their nature are fiduciary, in the sense that the donee of the power is a trustee of it, and has an interest extensive

enough to allow of its exercise. These powers may be called fiduciary powers, or powers in the nature of trusts; powers which are not fiduciary are often called bare powers."

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

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

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

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

" (2) Since the husband's control of the community property continues until there has been a division of it by agreement or by court decree, it would follow that the husband would continue to remain a fiduciary in respect to his wife's interest in the community assets until such division was made. Of course, as was the case in Collins v. Collins, 48 Cal. 2d 325, 309 P. 2d 420, the wife may choose not to rely on her husband and release him from the performance of his fiduciary duties.

(3) This fiduciary relationship arises by virtue of the community property system which gives the husband management and control of such property in order that the assets be more efficiently handled, and

exists only as to the community property over which the husband has control. It should be distinguished from the confidential relationship which is presumed to exist between spouses."

Counsel for respondent argued that the words "person in a fiduciary capacity" must be a person to whom such a description would apply in respect of a fiduciary relationship recognised by Fiji law. We can see no reason so to construe the provision, which, as a whole, is clearly wide enough to include powers over property rights governed by foreign law. That is what this case is about. In Commissioner of State Duties v. Livingston [1965] A.C. 694 the Privy Council stated at p. 707 that an administrator was in a "fiduciary position" with regard to assets which are in full ownership, without distinction between legal and equitable interests. Their Lordships held that the carrying out of the functions and duties of administrator would place him in a fiduciary position. Although the husband did, unlike an administrator, necessarily have an interest in the final distribution of the totality of the community property, nevertheless the husband had duties in respect of the preservation of his wife's half share. This would be so in Fiji law. The husband could properly be said to have duties which came within the term fiduciary capacity. As an instance he could be restrained from making a gift of Fiji property.

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

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

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

" This definition provides little assistance in applying s. 7(1)(f) (Fiji s. 5(1)(e)) to the facts of this case. The frailty of the Commissioner's argument in so far as it is based on this paragraph stems not so much from the elements in the statutory definition as from the terms of the paragraph itself. It requires that the power of appointment over or in respect of the property should subsist at the time of the deceased's death.

Although I am reluctant to draw a distinction based on the difference between the expressions 'immediately prior to his death' and 'at the time of his death', the distinction is one which the Act itself

insists upon making. The first of the two expressions, or its equivalent 'immediately before his death', is to be found on no less than four occasions in s. 7(1) - see paras (d), (e), (i) and (j). The second expression appears twice in the same subsection - see paras (c) and (f). The difference cannot be ignored. Indeed, the history of the section requires that it be recognized. The ancestor of s. 7(1)(j), which appeared in s. 104(1) of the Administration and Probate Act 1958, contained the expression 'at the time of his death'. It was altered in the 1962 Act to 'immediately prior to his death'.

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

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

" The husband's testamentary disposition of more than one-half of the community property is not absolutely void as to the wife, but only voidable by her upon proof of the necessary facts (Spreckels v. Spreckels (1916) 158 P. 537, 172 Cal. 775; Estate of King (1942) 19 Cal. 2d 354, 121

P. 2d 716). The wife's right to void such disposition of her one-half community interest survives her death and may be exercised by her personal representative (Estate of Kelley (1953) 122 Cal. App. 2d 42, 264 P. 2d 210). In any event, the testamentary power is not an essential incident to property, and depriving the husband of such power with reference to community estate did not take from him any right of property. (Spreckels v. Spreckels (1897) 48 P. 228, 116 Cal. 339)."

However, be that as it may, the Fiji Act does not have the number of different provisions, some five, in which it, to use the words of Mason J., "the Act itself insists on making". Subsection (1)(e) uses the expression "immediately before his death" for the obvious reason that joint property that at the time of death of one of the joint owners the other remains as sole owner. At that point of time there is no beneficial interest which might attract duty. Subsection (1)(e) is dealing with joint interests which have the peculiarity of the four unities of possession, interest, title and time of commencement and upon death the result noted in Fadden v. Deputy F.C.T. (supra) follows. For property to pass on death to the personal representatives of the deceased there must be some interest which survives the death of the deceased. In Halsbury's Laws of England 4th Edn. Vol. 17 para. 1106 it is categorically stated that the interest of a deceased person under a joint tenancy where another tenant survives the deceased is an interest ceasing on his death. It is clear that such an interest would not be liable to duty as part of the estate unless it is notionally brought within his estate by an expression which pre-dates death. In the case of powers of appointment (subsection (1)(h)) no such considerations arise. So one would expect a different expression as to time to be used. The Fiji legislation is not encumbered with a number of contrasting provisions

on the same topic so that it requires a construction such as that which the High Court felt compelled to adopt. The two differing expressions are apposite for the differing subject matter of each of the subsections (1)(e) and (1)(h). Subsection (1)(e) deals with property interests which cease to exist at the time of death so that latter expression is not apposite to the subject matter of subsection (1)(h).

We proceed to examine subsection (1)(h) further. Section 5(1) reads :

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

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

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

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

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

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

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

Prima facie, (j) above is a right to dispose which might be included in the definition of a general power of appointment. But the legislature in Australia thought it necessary to make such further provision, no doubt, for good reasons. Contrasting expressions as to time were used. This, as well as other provisions as to time, caused Mason J.

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to say in the passage cited earlier that the definition provided little assistance in applying the New South Wales subsection to the facts of the case the Court was then considering. That is not so in Fiji where the use in subsection (1)(e) of the term "immediately before his death" was necessary notionally to preserve a joint interest which would at death cease to exist. Such a consideration did not arise under subsection (1)(h) (Fiji) dealing with a separate type of property where the definition relates to all powers or authorities set out in the definition.

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

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

Subsection (1)(i) reads :

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

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

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When, in 1948, the husband and wife acquired a domicile in the State of California all property which fell within the definition of community property became community property subject to California law without any concurrence or act on their part and without the imputation to them of anything in the nature of an implied contractual relationship in terms of the expression used by Lord Shand in De Nichols v. Curlier [1900] A.C. 21, 37. This case dealt with French law which is in a form different from California law. The creation of the estate by the California statute arose by the act of acquisition irrespective of the wish of the parties unless they agreed to the contrary. The statute did not imply any contract. In no sense does it appear that either the husband or wife made, which implies some express intentional and separate act on their part, any settlement or trust of these shares. They were acquired as a purchase or investment in the manner given in evidence, and, apart from the October 1961 agreement to which we will refer later, all dealings in their acquisition were ordinary acts of acquisition, unaccompanied by any other act or thing done by them in the way of creating a settlement or trust. The general law of their domicile defined and imprinted on the shares, the nature of the estate and interest which each took.

Moreover, by the law of California, the wife took a present, existing and equal share: S. 5107. We are here concerned, not with the husband's interest in his half share because that is liable to duty, but to the wife's interest and whether any reservation, as above defined, was made by the husband in his own favour. Until a final division is made the husband remains a fiduciary in respect of his wife's interest: Vai v. Bank of America

(supra) p. 252. It is true that the statute has given to the husband over his wife's half share, rights of disposal but, as we have shown earlier, this applies to disposals to third parties - he cannot himself acquire any title because so long as the property is in his hands, either converted or otherwise, it remains subject to the statutory title and so is still held in equal interests. The husband did not make, nor was he competent to make, any reservation to himself in respect of his wife's half interest. He can dispose of her half share as we have said but this results from statutory powers imprinted on all community property and not from anything in the nature of a trust or settlement made by him.

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

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

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

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

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

Counsel for appellant strenuously argued that Ochberg's case was overruled by Silk's case which was not discussed in any of the judgments. We find it unnecessary to do more than show that the facts were not comparable and further that the October 1961

agreement did not supersede or alter the statutory provisions which already applied by virtue of California law. The learned judge in the Court below held that, since the Fiji shares were community property, as they were in Ochberg's case, that case applied. But in our view the decision in Ochberg's case depended upon the finding that the husband had, by a trust agreement under the statute, settled a one-half interest in his shares on his wife. That situation is not the fact in the instant case.

It seems to be accepted on the evidence that the wife, in 1958, obtained from her grandmother's estate assets consisting in part of shares in the Seattle First National Bank amounting to \$80,000. The total investment in Mocambo shares was \$28,153.92. On September 5, 1961 a cheque for \$25,000 drawn on a joint bank account by the husband was paid as the first payment for stock or shares in the Mocambo project. The wife claimed that this cheque consisted of \$20,000 borrowed by both from Pan American Credit Union on two promissory notes each for \$10,000 - one being signed by each. The wife pledged or mortgaged in favour of the Pan American Credit Union part of her inheritance consisting of 591 shares in Seattle First National Bank to obtain the loan of \$20,000. This sum of \$20,000 was paid into a joint bank account. The wife provided a further \$5,000 from her separate property. It appears that since the husband, as the learned judge held, had no separate assets and the wife had pledged 591 of her Seattle Bank shares, that again it was her separate property which at least facilitated the loan. These facts distinguish Ochberg's case where the sole source of the bonds arose from funds supplied by the husband.

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

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

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

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

It has not been shown that the husband has brought into account under the October 1961 agreement any property which was his separate property. No new funds have been settled by the husband for the purchase of the shares. The wife has provided at least one-half from her own property. There is no provision of funds by the husband comparable to the bonds contributed solely by the husband in Ochberg's case which resulted in the wife obtaining a half share therein. If the

October 1961 agreement did not settle any new property of the husband resulting in the wife taking an interest therein, then the document does no more than to declare the same rights and interests as those imposed by statute. So far as any free estate of the husband is concerned, he brought no new property into the community property under the October 1961 agreement which was used to acquire the said shares. The learned judge accepted the evidence of the wife when she stated categorically that her husband had no separate property. He was then referring (inter alia) to the October 1961 agreement. It was the wife who provided additional funds which were used in conjunction with community property for the purpose of acquiring the said shares.

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

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

Williams J. said at p. 82 :

" As a result of the transfer he only acquired the same beneficial interest in the property as he already had under the will. He could only create new trusts of his own property. As he did not acquire an absolute interest in any of the property which was transferred to him he could not and did not purport to create new trusts affecting such an interest corresponding to the trusts of

the will. His undertaking was a mere recognition of existing trusts. The case is therefore distinguishable from that of Davidson v. Chirnside 7 C.L.R. 324."

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

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

The appeal also involves a challenge to the learned judge's findings of fact. The basic finding was that the shares both in Mocambo Investments and in Yanuca Island were community property and, in view of our other findings on the appeal, all that is involved in this aspect, is that a finding that part of the shares were the wife's separate property would affect the quantum of shares remaining liable for duty in the estate of the deceased. The learned judge found they were all community property. The notice of appeal includes the following grounds :-

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

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

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

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

" Much has been written as to the position of an appeal court which is invited to reverse on a question of fact the judgment of a judge, sitting without a jury, who has had the advantage of seeing and hearing witnesses.

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

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

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

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

The learned judge's findings were as follows:

1. The shares were purchased with a cheque dated the 5th September, 1961 for US\$25,000, signed by the husband, though the account could be drawn on by either husband or wife.
2. \$20,000 of that amount was a loan from Pan American Credit Union under two promissory notes of \$10,000 "each signed by the husband and wife". (The signed promissory notes dated the 25th August, 1961, appear each to have been signed by one of the parties - the renewal in May 1966, by both).
- 3.. The wife claimed to have deposited 591 Seattle Bank shares as security for the \$20,000. (This is confirmed by documentary evidence). The judge refers also to the wife's claim to have sold 150 bank shares for \$10,050; the proceeds of 100 thereof were paid to the bank to meet the balance of the \$25,000 cheque.
4. The wife held a considerable amount of stock in the Seattle Bank, as her separate property.

5. The judge refers to the wife's affidavit (the first) in para. 7 of which (as amended) she says "We borrowed the \$20,000 so that my husband and I could obtain shares" in Mocambo.
6. There was no doubt that the cheque was used to purchase Mocambo stock. The relevant bank statement however was not produced.
7. It appears that the \$20,000 loan was renewed twice; once on 4.5.66 and again on 13.7.71 or thereabouts "in which stock was again the security". (As will be seen the stock did not enter into the 1971 loan).

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

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

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Ex.P.1 N6 are two Pan Am records showing repayments of the loan to the San Francisco branch. Even the interest on those loans came from the deceased's salary. The conclusion I come to is that the first \$20,000 loan and the second loan for the same amount and the interest thereon were repaid by the deceased from his monthly salary and as is indicated later he was repaying the third \$20,000 loan at the time of his death."

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

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

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

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

On the 26th July, 1971 the balance of the loan owing by the husband and wife to the San Francisco Branch of the above Credit Union was repaid; the husband arranged a loan of \$20,000 from the Seattle Branch of the Credit Union for the purpose of repaying the loan as aforesaid. (A receipt voucher and letter confirms this). The bank stock security provided for the earlier loan was not required by the Seattle Branch which made the advance to the husband solely.

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

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

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

8. There was no evidence that the additional \$5000 was paid into the account in 1961 from which the cheque was drawn.
9. (The criticism of the wife's statement concerning his opportunity for saving. We have referred to this above).
10. The wife's statement in evidence that the marriage agreement of 1961 was entered into because she and the husband were going to invest in Fiji.
11. The wife was a business woman and if she had been purchasing the Mocambo shares for herself she would have done so in her name alone as had been done in Tropical Pools Ltd.
12. She never sold the 591 shares she used as security, and when that \$20,000 loan was renewed for the third time her shares were not required as security. (As has been seen the final loan was in the husband's name alone).

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

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

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

Secondly the facts established concerning the use of the bank shares and the handling of the loans from the Credit Union are more consistent with the concept of a community property dealing. The wife was

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

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

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

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

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

The appeal is allowed and the order made in the Court below is set aside. The case is remitted to the Supreme Court for the assessment of duty on the basis that one-half only of the community property as determined above is liable to duty and for such further or other orders as seem just. Respondent will pay the costs of appeal to be fixed by the Chief Registrar.

Case remitted accordingly.

(Sgd.) T. Gould
VICE PRESIDENT

(Sgd.) T. Henry
JUDGE OF APPEAL

(Sgd.) B.C. Spring
JUDGE OF APPEAL