

O N A P P E A L

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

B E T W E E N

RAMESH DIPRAJ KUMAR MOOTOO

Appellant

- and -

THE ATTORNEY GENERAL OF TRINIDAD AND
TOBAGO

Respondent

CASE FOR THE RESPONDENT

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1. This is an appeal by leave of the Court of Appeal granted the 14th July, 1976 from a judgment of that Court comprising Hyatali C.J. Phillips J.A and Corbin J.A. given the 26th March, 1976, allowing the appeal of the Respondent with costs, from a decision of the High Court of Trinidad and Tobago (Braithwaite J.) given the 13th December, 1974. Upon a motion by the Appellant, the learned judge declared that the Unemployment Levy Act, 1970 (Act No. 4 of 1970) ("The Act") was ultra vires the Constitution of Trinidad and Tobago (being the Second Schedule to the Trinidad and Tobago constitution) Order in Council 1962 ("the Constitution") - now replaced by the Constitution of the Republic of Trinidad and Tobago Act, 1976 - and was null and void and of no effect, and that the Appellant was not liable for any sums levied under that Act. The Court of Appeal set aside the order of Braithwaite J. and ordered the Appellant to pay the costs of the Appeal and of the Motion in the Court below.

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2. The grounds of the Appellant's motion were that the Act:

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(a) was ultra vires the Constitution;

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- (b) in divers respects was in conflict with and in breach of the provisions of the Constitution; and
- (c) constituted an unwarranted invasion of the democratic rights and freedoms of the Appellant and other citizens and could not be reasonably justified in a society that has a proper respect for the rights and freedoms of the individual.

The last ground invokes the exception provision of Section 5(1) of the Constitution. This section permits the enactment of laws derogating from sections 1 and 2 (the fundamanetal rights sections) provided: 10

- (i) the Act concerned expressly declares that it is to have effect notwithstanding sections 1 and 2;
- (ii) it is passed by a stipulated majority.

If these conditions are satisfied an enacted law shall have effect except in so far as its provisions may be shown to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual. 20

3. The provisions of the Act and the relevant provisions of the Constitution are set out in the Judgment of Braithwaite J. The Act is annexed hereto as an Appendix and the relevant Constitutional provisions are fully set out later in this Case.

pp.3-4 4. In support of the Motion, the Appellant filed one affidavit sworn by himself. In the said affidavit the Appellant alleged (inter alia) that he was liable to the levy imposed by the Act; that the levy is for the benefit of a fund called the Unemployment Fund established by the Act; that the use to which the fund may be put has not been determined by law; that he was advised that the Act was ultra vires the Constitution and was violative of the fundamental right of the citizen to the employment of property guaranteed by Articles I and II. (i.e. sections 1 and 2) of the Constitution; and that the Act was not passed in accordance with section 5 of the Constitution. 30

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11.34-38
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5. The Respondent filed four affidavits including an affidavit by Lancelot Busby in which he desposed (inter alia) that he was Senior Statistician in the Ministry of Planning and Development and in charge of the Central Statistical Office at the

10 material time; that he performed the duties of Director of Statistics which included the publication of statistics compiled, tabulated and analysed; that a publication (a copy of which was annexed and marked "A" to his affidavit) was issued by him under the relevant Ordinance, containing (inter alia) analyses of the Labour Force in Trinidad and Tobago, the said analyses being based on a continuous sample survey of the population. From the said publication it appears that during the period January - June 1970, of a total labour force of 366,200 the number of persons unemployed was 45,800 the percentage of unemployed persons in relation to the labour force being 12%.

20 6. On the hearing of motion in the High Court, Counsel for the Appellant objected to all the affidavits filed by the Respondent, and the trial judge struck them out as being irrelevant. On the hearing of the Appeal, counsel for the Respondent did not complain of the exclusion by Braithwaite J, of three of the Respondent's affidavits, namely, those of Vindar Dean Maharaj, George Rex Latour and Joseph Emmanuel Carter. He argued, however, that the affidavit of Lancelot Busby was admissible, and the Court of Appeal upheld this submission and admitted the Affidavit as part of the record.

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30 7. The provisions of the Act, all of which are relevant, are contained in the Appendix. The relevant provisions of the Constitution are as follows :-

"CHAPTER I"

"The recognition and Protection of
Human Rights
and Fundamental Freedoms"

40 Section 1. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following human rights and fundamental freedoms, namely:-

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

- (b) the right of the individual to equality before the law and the protection of the law;

Section 2: Subject to the provisions of sections 3, 4, and 5 of this 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

Section 3(1): Sections 1 and 2 of this Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution. 10

(2) For the purposes of subsection (1) of this section a law in force at the commencement of this Constitution shall be deemed not to have ceased to be such a law by reason only of -

- (a) any adaptation or modifications made thereto by or under section 4 of the Trinidad and Tobago (Constitution) order in Council 1962 or - 20
- (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.

Section 5(1): An Act of Parliament to which this section applies may expressly declare that it shall have effect notwithstanding sections 1 and 2 of this Constitution and, if any such Act does so declare, it shall have effect accordingly except insofar as its provisions may be shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual. 30

(2) An Act of Parliament to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House. 40

(3) For the purposes of subsection (2) of this section the number of members of the Senate shall, notwithstanding the appointment of temporary members in accordance with section 27 of this Constitution, be deemed to be the number of members specified in

subsection (1) of section 23 of this Constitution.

10 Section 6(1): For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of the foregoing sections or section 7 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 High Court for redress.

(2) The High Court shall have original jurisdiction -

- (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and
- (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) thereof,

20 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 foregoing sections or section 7 to the protection of which the person concerned is entitled.

30 (3) If in any proceedings in any court other than the High Court or the Court of Appeal any question arises as to the contravention of any of the provisions of the said foregoing sections or section 7 the person presiding in that court, may and shall if any party to the proceedings so requests, refer the question to the High Court unless in his opinion the raising of the question is merely frivolous or vexatious.

(4) Any person aggrieved by any determination of the High Court under this section may appeal therefrom to the Court of Appeal.

40 (5) Nothing in this section shall limit the power of Parliament to confer on the High Court or the Court of Appeal such powers as Parliament may think fit in relation to the exercise by the High Court or the Court of Appeal, as the case may be, of its jurisdiction in respect of the matters arising under this chapter.

Section 36: Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Trinidad and Tobago.

Section 44(1): Subject to the provisions of this Constitution, the power of Parliament to make laws shall be exercised by Bills passed by the Senate and the House of Representatives and assented to by the Governor General on behalf of Her Majesty.

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(2) When a Bill is presented to the Governor-General for assent, he shall signify that he assents or that he withholds assent.

(3) A Bill shall not become law unless it has duly passed and assented to in accordance with this Constitution.

Section 45(1): A Bill other than a Money Bill may be introduced in either House; a Money Bill shall not be introduced in the Senate.

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(2) Except on the recommendation or with the consent of the Cabinet neither House shall -

(a) proceed upon any Bill (including any amendment to a Bill) which, in the opinion of the person presiding, makes provision for any of the following purposes;

(i) for imposing or increasing any tax;

(ii) for imposing or increasing any charge on the revenues or other funds of Trinidad and Tobago or for altering any such charge otherwise than by reducing it; or

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(iii) for compounding or remitting any debt due to Trinidad and Tobago;

(b) proceed upon any motion (including any amendment to a motion) the effect of which, in the opinion of the person presiding, would be to make provision for any of the purposes aforesaid; or

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(c) receive any petition which, in the opinion of the person presiding, requests that provision be made for any of the purposes aforesaid.

Section 46(1): If a Money Bill, having been passed by the House of Representatives and sent to the Senate at least one month before the end of the session, is not passed by the Senate without amendment within one month after it is sent to the Senate the Bill, shall, unless the House of Representatives otherwise resolves, be presented to the Governor-General for assent notwithstanding that the Senate has not consented to the Bill.

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(2) There shall be endorsed on every Money Bill when it is sent to the Senate the certificate of the Speaker signed by him that it is a Money Bill, and there shall be endorsed on any Money Bill that is presented to the Governor-General for assent in pursuance of subsection (1) of this section, the certificate of the Speaker signed by him that it is a Money Bill and that the provisions of that subsection have been complied with.

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Section 85(1): All revenues or other moneys raised or received by Trinidad and Tobago (not being revenues or other moneys payable under this Constitution or any other law into some other public fund established for a specific purpose) shall, unless Parliament otherwise provides, be paid into and form one Consolidated Fund.

(2) No moneys shall be withdrawn from the Consolidated Fund except to meet expenditure that is charged upon the Fund by this Constitution or any Act of Parliament or where the issue of those moneys has been authorised by an Appropriation Act or Act passed in pursuance of section 87 of this Constitution.

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(3) No moneys shall be withdrawn from any public fund other than the Consolidated Fund unless the issue of those moneys has been authorised by an Act of Parliament.

(4) No moneys shall be withdrawn from the Consolidated Fund or any other public fund except in the manner prescribed by or under any law.

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8. The relevant provisions of section 16 of the Interpretation Act, 1962 are as follows:-

(1) Where an enactment confers a power or

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imposes a duty, the power may be exercised and the duty shall be performed from time to time, as occasion requires.

(6) Where an Act or Ordinance confers upon any person or authority power to make a statutory instrument, the statutory instrument so made shall be read and construed subject to the Act or Ordinance under which it was made and so as not to exceed the power of that person or authority, to the intent that where any such statutory instrument would, but for this subsection have been construed as being in excess of the power conferred upon that person or authority, the statutory instrument is nevertheless valid to the extent to which it is not in excess of that power.

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9. The proceedings before Braithwaite J., in the High Court were instituted by Notice of Motion under section 6 of the Constitution.

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10. The said motion was heard on 15th and 22nd November, 1974. The trial Judge struck out the affidavits filed by the Respondent as irrelevant, on objection taken thereto by the Appellant, and after hearing counsel for the parties reserved his judgment which was delivered on 13th December, 1974.

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11. In his judgment, Braithwaite J. held that the affidavits filed by the Respondent ought to be struck out on the ground that they were irrelevant to the application. The learned judge stated that he could not allow the court to be influenced by anything that had gone before the enactment of the Act or by the purported exercise of the powers under the Act, or by what took place in Parliament.

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12. The learned Judge then stated the facts he considered relevant to the matter, and said that the first issue he had to consider was whether or not the Appellant had been deprived of the enjoyment of his property otherwise than by "due process of law". He did not consider that the proper approach to the matter was to determine whether the levy imposed by the Act was a tax or not and thereafter to conclude that if the levy was a tax it automatically became constitutional and valid for all purposes. The proper approach, said the trial Judge, was to examine the provisions

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11 11-21

of the Act itself and to ascertain whether or not those provisions met the requirements of the Constitution, and if they did not, then the Act would be unconstitutional.

13. The learned Judge then proceeded to consider the provisions of (inter alia) section 36 and section 5 of the Constitution. He said that it seemed to him to follow that unless the special procedure provided for in the sections referred to was followed implicitly and the law purporting to be made was one which infringed, abrogated or abridged any of the rights and freedoms, whether or not the law was for the peace order and good government of the country, it must be regarded as unconstitutional and of no effect. More particularly, if that law deprived the citizens of the right to the enjoyment of property it must be passed in accordance with the provisions of the Constitution whether or not that law sought to impose taxation or any other type of deprivation of the citizen's property; otherwise such law must be arbitrary and possibly ~~oppressive~~. The learned Judge then quoted the provisions of section 5 of the Constitution, and concluded that on the face of the Act there was no express declaration within the meaning of section 5, nor was there any indication by what majority the Act was passed. There was no question, he said, that the Act had deprived the persons to whom it applied of their property, and was without the sanction of the appropriate process prescribed by the Constitution. Since the Act did not have the sanction and authority of section 5, said the learned Judge, it seemed to him that the Act was both arbitrary and oppressive and offended the concept of "due process of law".

pp. 35-38
ll 18-43
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p. 36
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ll 11-18

p. 40
ll 40-44

p. 41
ll 1-8
p. 42
ll 8-12

p. 41
ll 36-39

14. The learned Judge then proceeded to consider whether the Act declared the purpose which it intended to effect and whether the imposition of the levy was for public purposes. The learned Judge set out the definition of un-employment levy in section 2 of the Act, and stated that the only other reference to "purpose" was in section 14(3). He considered the function of an interpretation section in a statute, and stated that it was not sufficient to use terms like "relief of unemployment and training of unemployed persons" and to expect by the mere use of the terms to imply that they cannot be for public purposes. These words, he said, standing as they did in splendid isolation, were not sufficiently explanatory of the nature and quality

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p.42 ll 45-48	of the relief. He held, however, that the relief of unemployment was a public purpose provided that the nature and quality of the relief was such that benefits are paid directly to ascertained unemployed individuals. He concluded that the Act did not set out the purposes, public or otherwise, which it intended to effect, and that the Act was both arbitrary and oppressive and consequently offended the concept of "due process of law".	10
p.43 ll 1-2		
p.42 ll 23-35		
p.43 ll 35-50	15. As to section 19 of the Act, the learned Judge concluded that this section was in collision with section 85(3) of the Constitution. Only an Act of Parliament, he said, could direct an issue of money from the fund, and this power he considered had been delegated to the Governor-General by the section. He could not apply the doctrine of severability and remove section 19 from the Act.	
p.44 ll 1-4		
p.45 ll 25-30	16. The learned Judge concluded that the Act failed to show that its purport and intent was to benefit the common weal; that the Act imposed a levy on the property of citizens for purposes which were neither defined nor definable; that the mention of the purposes of the levy in the definition section of the Act was not sufficient to show that the levy was imposed for public purposes; and that the levy did not therefore fail within the definition of a tax.	20
ll.31-36		
pp.45-46	17. The learned Judge accordingly declared the Act to be unconstitutional and the Appellant not to be liable to the levy imposed by the Act.	30
pp.48-50		
p. 100	18. The Respondent appealed to the Court of Appeal of Trinidad and Tobago on various grounds. The appeal was heard by Sir Isaac Hyatali, C.J., Phillips J.A., and Corbin J.A., and judgment was given on 26th March, 1976, the Court unanimously allowing the Respondent's appeal with costs and setting aside the declarations and orders made by Braithwaite J.	40
	19. Before the Court of Appeal the Appellant (rightly in the view of the Chief Justice) did not support the decision of the trial judge insofar as he decided that an Act imposing a tax was invalid unless it was passed in accordance with the requirements of section 5(1) of the Constitution. It was conceded that if the Act was a taxing Act, its constitutionality could not be questioned. The	

main argument at first instance and in the Court of Appeal was whether the purposes for which the levy was imposed were public purposes, and whether the purpose was sufficiently declared by the Act.

10 20. Sir Isaac Hyatali, C.J., in his judgment (with which Corbin J.A. agreed) said that the Appellant claimed that the Act was in conflict with the Constitution and in any event "constituted an unwarranted invasion of the democratic rights and freedoms of the applicant and its enactment could not be reasonably justified in a society that has proper respect for the rights and freedoms of the individual". He considered that the latter claim of the Appellant to be misconceived, since, as the Act had not been enacted under section 5 of the Constitution, that question could not arise. p.53
11 1-12

20 21. The learned Chief Justice then summarised the affidavit. Counsel for the Respondent at the appeal confined his objection to the learned Judge's exclusion of Busby's affidavit only. The Chief Justice agreed with the learned trial Judge in the exclusion of all the affidavits except that of Busby, stating that in the light of the issues raised, it was necessary to identify the evil which the Act sought to remedy; to ascertain the reasons for its provisions; to negative the suggestion of bad faith on the part of Parliament in enacting the Act; and to refute the claim that Parliament in enacting the Act had employed a colourable device to evade the restrictions of the Constitution. He found that the booklet attached to Busby's affidavit established that there was massive unemployment in the country when the Act was passed on 4th June, 1970. However, he said it was a matter of common knowledge that it was enacted in the wake of a period of social unrest in the society of such gravity that in order to contain it, a State of Emergency was declared on 20th April, 1970, and that Parliament continued the emergency for a period of six months thereafter. The learned Chief Justice said that judicial notice could be taken of matters of common knowledge and that Busby's affidavit was relevant and admissible. p.53
11 13-24
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11 45-50
p.54
11 1-51

30 22. The learned Chief Justice then stated what he considered to be the functions and the responsibilities of a Court and the canons by which it should be guided when it is called upon to determine the constitutional validity of an enactment and adopted the following passage from p.56-61

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Black on the Construction and Interpretation of
Laws -

"Every act of the legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favour of the validity of the Act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the Constitution and avoid the consequence of unconstitutionality".

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The learned Chief Justice then referred with approval to various authorities which establish the principles that the legislature must be presumed to be innocent of a constitutional violation until it is proved guilty beyond all reasonable doubt; that any reasonable doubt concerning a statute's validity must be resolved in favour of the statute; and that the burden was on him who challenges the constitutionality of a statute to show that there has been a clear transgression of the constitution.

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pp 61-62
ll 43-49

23. The learned Chief Justice then summarised the learned Judge's judgment. He stated that the learned Judge appeared to hold that in order to be intra vires the Constitution a statute which imposes a tax on income or an additional tax on income or which has survived the inroads of normally accepted taxation, had to be passed under section 5 thereof. But the learned Chief Justice stated that the power to tax for purposes of Government or for public purposes rests upon necessity and is inherent in every sovereignty, and held that the imposition of a tax for such purposes does not violate the right to property unless it could be established that the Statute imposing the tax is so arbitrary as to compel the conclusion that it does involve an exertion of a different and forbidden power, as for example the confiscation of property. The Chief Justice concluded (as was conceded by Counsel for the Appellant) that if the Act was a taxing statute, it was not necessary for the Act to have been passed under section 5 of the Constitution.

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p. 62
ll 1-31

p.62;
ll 41-43

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ll 41-45

ll 45 -50

p.63
ll 1-6

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24. The Chief Justice then stated that there were three elements of a tax, namely:-

- (i) it must be imposed by the state or other public authority;

(ii) it must be compelled; and

(iii) it must be imposed for public purposes.

He pointed out that there was no ^{contention} that the levy satisfied the first two requirements, and that the point in dispute was whether the Act had declared the purposes for which the levy was imposed and whether the purposes were public purposes. The learned Chief Justice concluded that there could be no doubt that the statutory objective which the draftsman of the Act had in mind was to tax the prosperous section of the society to raise a special fund for the relief of unemployment and the training of unemployed persons. The draftsman referred to the purposes in the definition of levy in section 2 of the Act and the question was whether the purposes mentioned in the definition may properly be taken as declaring the purposes of the levy and, if so, whether they constitute public purposes. The learned Chief Justice then stated that the provision in section 2 of the Act that "unemployment levy" or "levy" means the levy imposed thereby for the purpose of the relief of unemployment and the training of unemployed persons raises the irresistible inference that the purpose of the levy is to relieve unemployment and train unemployed people, and the next question is whether those two purposes are public purposes and the learned Chief Justice concluded that they were public purposes. The Chief Justice after considering the judgment of the trial Judge, concluded that the levy was imposed for the public purposes of the relief of unemployment and the training of unemployed persons, and held that the Act was consequently a taxing statute.

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p.64

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25. The learned Chief Justice then considered the trial Judge's conclusion that section 19(c) of the Act was in direct collision with section 85(3) of the Constitution. The Chief Justice concluded that the unemployment fund created by section 14(2) of the Act was a public fund other than the Consolidated Fund, and that there was nothing in section 85(3) which prohibited or disabled Parliament from conferring in a statute which itself creates a public fund the necessary authority to issue moneys therefrom. He considered sections 14(2) and 14(3) of the Act and stated that the former created the fund and mandated the Minister to administer it, while the latter in the plainest possible terms conferred

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11 2-6

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p.67 11. 34-41	authority on the Minister to issue moneys from the fund. He further considered the provisions of section 19(c) of the Act and stated that he could not agree that those provisions authorised the Governor-General to issue moneys from the fund, nor could he accept that Parliament thereby delegated to the Governor-General the sole or indeed any authority to declare the purposes of the levy. The learned Chief Justice stated that while no regulations had been made under section 19 of the Act, this omission was no warrant for saying that the regulations were necessary to give the Act validity. It was manifest, he said, that the levy imposed by the Act fulfilled all the requirements of a tax and that the making of regulations was not a condition precedent either to the imposition and taking of the levy or to the identification of its purpose or to the establishment of the fund or to the making of advances under statutory authority from the fund. He referred to section 16 of the Interpretation Act, 1962 and stated that regulations could not exceed the purposes declared by the Act and were intended to do no more than to provide the necessary machinery to promote and facilitate the execution of the objects and purposes of the Act. The learned Chief Justice rejected the argument that an Appropriation Act was required to authorise the issue of moneys from the fund.	10
p.69 11 39-49		20
p.70 11. 36-40		30
11 43-45	26. He accordingly allowed the appeal and set aside the declarations and orders made by the trial judge.	
pp 71-73 p.74 11 1-19	27. Phillips J.A. (with whom Corbin J.A. agreed) stated the facts and quoted sections 5, 6, 7, 2(1), 14, 17 and 19 of the Act. He pointed out that no regulations had been made under the Act. He then stated the grounds upon which the Appellant relied, and the effect of the judgment of the trial Judge. He pointed out that the trial Judge had rejected the four affidavits filed by the Respondent, but that at the hearing of the appeal counsel for the Respondent urged the admissibility of only Busby's affidavit. He did not think it necessary to decide the issue of admissibility of Busby's affidavit because of the presumption in favour of the constitutionality of the Act.	40
p.91 11 1-7 pp.74-75	28. Phillips J.A., then quoted from the judgment of Braithwaite J. indicating what the trial judge considered to be the primary issue in the case, and proceeded to set out sections 1 and 2 of the Constitution. Phillips J.A. stated that the learned	50
pp.75-76		

Judge's approach to the matter was premised on the assumption that any taxing statute must prima facie be regarded as authorising a deprivation of property in contravention of section 1(a) of the Constitution, otherwise referred to as "the due process clause", and referred to certain extracts from the learned Judge's judgment. He observed that counsel for the Appellant did not contend that the Act necessarily violated the due process clause because of non-compliance with section 5 of the Constitution. The learned Justice of Appeal stated that the object of section 5 was to save from the taint of unconstitutionality any Act which would otherwise be unconstitutional as being in contravention of sections 1 and 2 of the Constitution. The necessity, he said, for considering whether the Act was passed in accordance with section 5 could arise only after it had been determined that the Act infringes or authorises the infringement of the due process clause. The first question therefore to be considered was whether the Act, purporting to be a taxing statute, could properly be held to authorise a deprivation of property without due process of law within the meaning of section 1(a) of the Constitution. He pointed out that counsel for both parties took a similar stand on this question at the hearing of the appeal.

29. Phillips J.A. then proceeded to consider whether the passing of the Act was a valid exercise of the power of taxation which is inherent in the nature of a sovereign state. He referred to Cooley's Constitutional Limitations pp. 479 and 487 (1972) (reprint), and pointed out that by section 36 of the Constitution Parliament was empowered to "make laws for the peace, order and good government" of Trinidad and Tobago. He stated that the true nature of the right to impose taxation that emanates from this section was aptly described in the passages quoted from Cooley, and it was imperative not to lose sight of the fact that tax legislation was essential to the very existence of the state. He quoted with approval the following passage from Mason and Beaney, American Constitutional Law, 4th Ed. p.267.

"A government, like its individual citizens, must have regulav income to pay bills and maintain credit. In addition a government must have coercive power to collect taxes".

He considered the hypothetical situation of a government without the majority necessary to pass an Act under section 5 of the Constitution. He said it was useful to contemplate the hypothetical

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situation of a government which has a bare majority of members in Parliament and might therefore be unable to pass a taxing law by a three-fifths majority as is required by the section. The absurdity of such a situation led him to theirresistible conclusion that the "deprivation of property" which results from the enforcement of a taxing statute was not within the purview of section 1 (a) of the Constitution. Alternatively, he stated, on the assumption that a taxing statute authorises a deprivation of property within the meaning of section 1(a), it was carried out by due process of law by reason of its emanating from the taxing power of the state. The learned Justice of Appeal further pointed out that before the date of the commencement of the Constitution it was an accepted constitutional principle that no right of the individual was infringed in consequence of the passing of taxing legislation by a simple majority of members of the Legislature, and that this principle was in no way altered by the coming into force of the Constitution.

p.80
ll 30-47

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p.81
ll 22-31

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p.81
ll 32-35

30. Phillips, J.A. then stated that the main issue was whether the Act complied with the definition of a taxing statute and was not a mere colourable device for depriving citizens of the enjoyment of their property. He quoted section 44(1) and (3) of the Constitution and stated that the Act was duly passed by Parliament and had been assented to. He stated that the crucial question for decision was whether the Act which otherwise bore all the attributes of a taxing statute, could properly be held to have disclosed the public purposes for which the levy sought to be imposed was to be used.

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31. Phillips J.A., then considered the question whether the definition of unemployment levy in the Act was a sufficient declaration of its purposes. He quoted a passage from the trial judge's judgment and concluded that if it is accepted that the definition of unemployment levy in section 2 of the Act was capable of being interpreted as indicative of a public purpose the Respondent was entitled to rely upon the presumption of constitutionality and require the Appellant to prove that some other purpose was intended. He pointed out that no such attempt had in fact been made by the Appellant, and that counsel for the Appellant had conceded that the term "relief of unemployment" may be referable to a public purpose, viz, the assistance of indigent unemployed

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- 10 persons by direct financial payments. He rejected the submission that this could be the only possible meaning of that expression, and said that the alleviation of the unemployment situation by the provision of employment by the State might also properly be described as "the relief of unemployment", and that the provision of work for the unemployed and the training of unemployed persons with a view to making them employable were for better means of dealing with the situation than the mere handing out of a dole. Further, he pointed out that it was conceded by counsel for the Appellant that the training of unemployed persons was capable of being considered to be a public purpose. p.87
11 7-14
- 20 32. Phillips J.A. stated that no contention had been put forward by the Appellant that the rate of levy imposed by the Act was so manifestly excessive as to render the Act a mere colourable device to achieve some purpose other than that stated, and that there was nothing in the circumstances of the cases to make the presumption of constitutionality inapplicable to the Act. It was therefore unnecessary for the respondent to produce evidence by affidavit to show that there was an unemployment problem in the country at the time the Act was passed, and that the Court was entitled to take judicial notice of the existence of such a state of affairs. p.90
11 40-44
- 30 33. The Justice of Appeal therefore held that the statement contained in section 2(1) of the Act that the levy was imposed for the "relief of unemployment and the training of unemployed persons" was a sufficient declaration of public purposes in order to stamp the Act with the character of a taxing statute, and that the Act did not contravene the provisions of section 1 and 2 of the Constitution. He accordingly concurred in allowing the appeal with costs. p.91
11 8-18
- 40 34. Corbin J.A. agreed with the judgments of the learned Chief Justice and Phillips J.A. but added some observations of his own. He stated that the imposition was not made mala fide. The booklet published by the Central Statistical Office annexed to the affidavit of Lancelot Busby, he said supported the contention that there was need for such a levy, and the affidavit was relevant and admissible. The learned Justice of Appeal stated that the learned trial Judge had failed to give sufficient consideration to the issue whether or not the Appellant had established beyond a reasonable doubt that the Act had not met the requirements of a taxing statute. Corbin J.A. dealt with the presumption in favour of validity pp.92-99
- 50 p.92 1 42
p.93 11 1-6

p.99
11 10-14

of the Act and the inherent right of a sovereign state to tax. He considered that the Act satisfied all the requirements of a taxing statute and that it was perfectly valid and constitutional. He therefore was in favour of allowing the appeal with costs and setting aside the declarations and orders made by the learned trial Judge.

THE PRINCIPAL QUESTIONS ARISING IN THIS APPEAL ARE:

35. (a) Whether the Act is a taxing statute, that is to say whether the levy imposed thereby was for a public purpose, and whether the Act contained a sufficient declaration of the purposes for which the unemployment fund was established. 10

(b) Whether the Act violates the provisions of section 5(3) of the Constitution, that is to say, whether on the true construction of section 14 of the Act authority is thereby conferred upon the Minister to issue moneys from the fund established by the Act, or whether such authority was, in the light of the provisions of section 19 of the Act, left to be conferred upon him by Regulations to be made by the Governor General under the Act. 20

(c) Whether the Act, being a taxing statute, nevertheless, authorised the deprivation of property without due process of law within the meaning of section 1(a) of the Constitution, and had to be passed under section 5 of the Constitution in accordance with the procedure thereby prescribed. 30

(d) Whether in the circumstances of the case the Appellant had discharged the burden of showing beyond a reasonable doubt that the Act was unconstitutional in any respect.

36. The Respondent respectfully submits that this Appeal should be dismissed and that the judgment of the Court of Appeal is correct. The Respondent respectfully submits that for the reasons stated in the judgments of Hyatali C.J. and Phillips J.A. and Corbin J.A. the power to impose taxation is inherent in the sovereign State of Trinidad and Tobago, and that the due process clause (section 1(a) of the Constitution) was not violated by the Act. 40

37. The Respondent respectfully submits that the Appellant had failed to show that the Act was a colourable device that was resorted to by

the Legislature in order to deprive citizens of their property without due process of law within the meaning of section 1(a) of the Constitution. The Respondent submits that the affidavit of Lancelot Busby was relevant to show (if necessary) that the Act was passed to deal with a pressing unemployment problem in the country and was not a colourable device, and was therefore admissible.

10 38. The Respondent respectfully submits that since the Act did not violate the due process clause (section 1(a)) of the Constitution it was unnecessary to enact it under section 5 of the Constitution.

20 39. The Respondent respectfully submits that the purposes for which the levy was imposed by the Act are sufficiently declared therein, and that the purposes so declared, namely, the relief of unemployment and the training of unemployed persons, are public purposes. Further, the Act properly established a public fund, namely, the unemployment fund, for specific purposes, within the meaning of section 85(1) of the Constitution. The Respondent therefore respectfully submits that the Act fulfilled all the requirements of a taxing statute and was valid and constitutional.

30 40. The Respondent respectfully submits that by section 14(3) of the Act the Minister was authorised to issue moneys from the fund established by the Act; that such authority was not left to be conferred upon the Minister by Regulations to be made by the Governor General under section 19(c) of the Act; and that there was consequently no violation of the provisions of section 85(3) of the Constitution. It is submitted that a clear distinction must be made between the imposition of the levy (resulting in the establishment of the Fund) and the issue of the moneys from the Fund. Even if (contrary to the Respondent's submission) it could be successfully contended that the Act conferred no authority on the Minister to issue moneys from the Fund. This would not invalidate the Act. Further, it is submitted that the Appellant is not entitled on a Section 6 application or at all to raise the issue of violatio of Section 85(3) of the Constitution, or to complain of the manner in which the Fund was or was to be expended.

40 41. The Respondent respectfully submits that the failure of the Governor General to make regulations under section 19(c) of the Act did not affect the constitutionality of the Act, since the Act properly imposed the levy and established the fund for public purposes. Such regulations could, it is submitted, be made from time to time

as occasioned required by virtue of the provisions of section 16(1) of the Interpretation Act, 1962 and could not exceed the purposes for which the levy was imposed by the Act.

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42. The Respondent respectfully submits that there is a strong presumption of constitutionality in favour of the Act; that if any doubt arises in the construction of the Act such doubt must be resolved in favour of its constitutionality; and that the burden is upon the Appellant clearly to establish that the Act violated the Constitution. The Respondent respectfully submits that the Appellant failed to discharge this burden.

42A. In the alternative, the Respondent respectfully submits that if (contrary to the Respondent's submission) the Act was invalid when passed on the ground that it was inconsistent with any of the provisions of the Constitution, the Act was validated from the date on which it was passed by the provisions of Section 18 of the Constitution of the Republic of Trinidad and Tobago Act, 1976 (hereinafter called "The 1976 Act") which provides as follows:-

"All enactments passed or made by any Parliament or person or authority under or by virtue of the former Constitution and not before the appointed day declared by a competent Court to be void by reason of any inconsistency with any provisions of the former Constitution including in particular sections 1 and 2 thereof and that are not repealed, lapsed, spent or that had not otherwise had their effect, shall be deemed to have been validly passed or made and to have had full force and effect as part of the Law of Trinidad and Tobago immediately before the appointed day, even if any such enactments were inconsistent with any provision of the former Constitution including in particular Sections 1 and 2 thereof."

The 1976 Act repealed the former Constitution and introduced a new Constitution as from the appointed day, namely, 1st August, 1976. The Act was declared a valid enactment by the Court of Appeal on 26th March, 1976, so that by the appointed day there was no judgment of a Court of competent jurisdiction in force declaring the Act to be void. The provisions of Section 18 of the 1976 Act therefore validated the Act as from the date on which it was enacted.

43. The Respondent respectfully submits that the judgment of the Court of Appeal of Trinidad and Tobago is right and ought to be affirmed, and that this appeal ought to be dismissed with costs, for the following (among other):

R E A S O N S

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1. BECAUSE the Act is a taxing statute. The Act sufficiently declares the purposes for which the levy was imposed and the purpose declared therein are public purposes sufficient to stamp the Act with the character of a taxing statute.

2. BECAUSE section 5(1) of the Constitution had no application to the Act and is therefore irrelevant.

3. BECAUSE the fact that regulations had not been made under section 19(c) of the Act in no way affected the constitutionality of the Act.

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4. BECAUSE the Act does not violate section 85(3) of the Constitution.

5. BECAUSE the Appellant has not discharged the onus of showing that the Act was unconstitutional in any respect, and the presumption of constitutionality ought therefore to prevail.

6. BECAUSE specifically the Appellant has failed to show that the Act was a colourable device to deprive citizens of their property without due process of law within the meaning of section 1(a) of the Constitution.

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7. BECAUSE of the other reasons given in the judgments of the learned Chief Justice, Phillips J.A. and Corbin J.A.

8. BECAUSE even if the Act was invalid when passed as being inconsistent with any of the provisions of the Constitution, the Act was validated by the provisions of Section 18 of the 1976 Act.

T. HOSEIN, Q.C.

G. DAVIES

1970



4th Session Second Parliament Trinidad and Tobago
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TRINIDAD AND TOBAGO

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[L.S.]

AN ACT to provide for the imposition of an unemployment
levy upon the chargeable income or profits of persons.

[Assented to 4th June, 1970]

BE IT ENACTED by the Queen's Most Excellent Majesty, ^{Enactment.}
by and with the advice and consent of the Senate and
House of Representatives of Trinidad and Tobago, and
by the authority of the same, as follows:—

1. This Act may be cited as the Unemployment Levy ^{Short title.}
Act, 1970.

Preliminary

Interpretation.

2. (1) In this Act—

“assessment” means an assessment to income tax or corporation tax, as the case may be;

“chargeable income” or “chargeable profits” or “chargeable income or profits” means subject to this section the chargeable income or profits ascertained under the provisions of the Ordinance or of the Corporation Tax Acts respectively;

“financial year” means the period of twelve months commencing on the 1st of January, in each year for which the levy is raised;

Ch. 33. No. 1.

“the Ordinance” means the Income Tax Ordinance;

“profits or gains” means the income of an individual or a company that is charged to income tax or corporation tax, respectively;

“unemployment levy” or “levy” means the levy imposed by this Act as from time to time amended, for the purpose of the relief of unemployment and the training of unemployed persons.

(2) Except as otherwise expressly provided expressions used in this Act have the same meanings as in the Ordinance or the Corporation Tax Acts, as the case may be.

(3) For the purposes of this Act the chargeable income or profits shall be increased by the amount of any loss that was allowed to be carried forward and set off under section 13 of the Ordinance in computing the chargeable income or profits for income tax or corporation tax purposes in the year of income.

(4) Subsection (1) of section 4 shall be read and construed so as to include within the charge to the levy the income of a person that is exempt from income tax by virtue of section 18B of the Ordinance as well as the profits of approved mortgage and other companies exempt from corporation tax under Schedule VII of the Finance Act, 1966.

No. 29 of 1966.

Administration
of Act.

3. (1) The Board of Inland Revenue shall be responsible for the due administration of this Act and for the computation, collection and recovery of the levy.

(2) Any function conferred by this Act on the Board shall be exercised, as may be necessary, by any officer authorised by it according as the Board may direct and references in this Act to the Board shall be construed accordingly.

4. (1) Notwithstanding any rule of law to the contrary, the profits or gains of a person that would, but for the provisions of any enactment (other than the Ordinance or the Corporation Tax Acts) conferring exemptions from income tax or corporation tax, be charged to income tax or corporation tax, shall be within the charge to the levy imposed by this Act.

Application of Act to certain exempt profits or gains.

(2) The Board of Inland Revenue shall, for the purposes of computing the levy, ascertain the chargeable income or profits of a person referred to in subsection (1) in accordance with the provisions of the Ordinance or the Corporation Tax Acts, as if the profits or gains of such person were charged to income tax or corporation tax, respectively.

(3) Notwithstanding any rule of law to the contrary, the profits or gains of a company that are brought within the charge to the levy by subsection (1) shall, for the purpose of the distribution thereof as income or profits that is exempt in the hands of the members of the company, be taken to be reduced by the amount of the levy borne by the company, and accordingly no exemption from income tax or corporation tax shall be allowed to such members of the company in respect of any part of a distribution representing the levy.

5. Subject to this Act for the financial year 1970 and for each subsequent financial year there shall be charged, levied and collected on the profits or gains of a person an unemployment levy at the rate or rates hereinafter specified.

Charge of unemployment levy.

6. Subject to this Act, the levy shall be charged in accordance with section 7 on the chargeable income or profits of every person for the financial year coinciding with the year of income in respect of which the chargeable income or profits for income tax or corporation tax purposes are ascertained.

Basis of charge of levy.

Rates of levy.

7. The levy shall be at such rate or rates as are prescribed, save that until any other rate is provided for the following rates shall have effect :

(a) in the case of a company, on the full amount of the chargeable profits.....5%;

(b) in the case of an individual:—

(i) on the first \$10,000 of chargeable income ... Nil;

(ii) on the remainder of chargeable income ... 5 per cent.

Due date,
interest and
administration.

8. (1) Subject to this Act, the levy shall be made upon the assessment of a person, and shall be payable by that person.

(2) Subject to sections 9 and 10, the levy shall be payable on or before the 30th April in the next year or, within thirty days next following the service of the assessment, whichever is the later.

(3) If all or any part of the levy, is not paid by the 30th April, in the next year whether an assessment is already made or not, it shall carry interest at the rate of fifteen per cent per annum from that date to the date of payment.

(4) Every person who has income or profits that is within the charge to the levy for the financial year shall deliver to the Board together with his return of income for the year of income required by section 36(1) of the Ordinance a statement of the full amount of the chargeable income or profits for the purposes of this Act in a form approved by the Board and shall, if absent from Trinidad and Tobago, give the name and address of an agent residing therein.

Payment in
advance by
instalments.

9. (1) Subject to this section and in the case of an individual to section 7(b), every person shall pay to the Board on or before the 31st March, the 30th June, the 30th September, and the 31st December respectively, in each financial year an amount equal to one-quarter of the levy upon the chargeable income or profits as disclosed in his statement if any, of income for the preceding year of income, and the remainder of the levy as disclosed in his statement for the year of income on or before 30th April, in the next year.

(2) The Board may estimate the amount of the levy payable by any person where—

(a) that person fails to make the statement or the return for the immediately preceding year of income required by subsection (1) of section 36 of the Ordinance or both;

(b) no income tax or corporation tax was payable in the immediately preceding year of income,

and upon making demand therefor in writing, of such person, subsection (1) shall apply accordingly, as if the Board's estimate was the estimate of such person.

(3) For the financial year, 1970, the instalments required by subsection (1) to be paid in advance shall be paid upon the chargeable income or profits determined for the purposes of the levy from the return of income for the year of income 1969 required by section 36(1) of the Ordinance and shall be made as follows :—

(a) on or before 30th June ... one third;

(b) on or before 30th September ... one third;

(c) on or before 31st December ... one third,

and the remainder of the levy as disclosed in his statement for the year of income, on or before 30th April in the next year.

(4) Where an individual is in receipt of emoluments, within the meaning of section 53C of the Ordinance, in a year of income, the provisions of subsection (1) shall not apply to that individual in respect of that part of his income arising or accruing to him from emoluments received by him in the year of income, if but only if, section 10 applies in respect of the emoluments paid to such individual.

(5) In addition to the interest payable under section 8(3), where any person, being required by this Act to pay a part or instalment of the levy, has failed to pay all or any part thereof as required, he shall, on payment of the amount he failed to pay, pay interest at twelve per cent per annum from the day on or before which he was required to make the payment to the day of payment or the beginning of the period in respect of which he becomes liable to pay interest thereon under section 8(3), whichever is earlier, unless the Board, on being satisfied that

the failure to pay did not result from the taxpayer's own default, directs a reduction in the rate of interest payable.

(6) In this section "statement" means the statement referred to in section 8(4).

Deduction on
payment of
emoluments.

10. (1) On the making of any payment on or after the 31st day of May, 1970, to any employee or the holder of any office of, or on account of, any emoluments during the financial year 1970 or any other financial year thereafter, the levy shall, subject to section 7(b) and subject to and in accordance with any regulations made hereunder, be deducted or withheld by the person making the payment; and the provisions of sections 53A, 53B(2) to (12) inclusive and 53C and any regulations made under the Ordinance for the purpose shall, with such adaptations or modifications as are necessary or expedient, have effect for the purpose of this Act.

(2) For the financial year, 1970, the employer shall deduct or withhold under subsection (1) the annual amount of the levy in seven equal (as far as possible) monthly instalments commencing in the month of June.

(3) An individual in receipt of income that includes emoluments (within the meaning of section 53B of the Ordinance) shall compute the amount of the levy payable for the financial year and submit notice of the proportionate part of the levy attributable to the emoluments to his employer and to the Board; and the provisions of subsection (1) shall apply to such part thereof accordingly, save that the Board may revise the computation of the levy and upon giving notice of such revision, and making demand therefor to, and upon, the individual and his employer, subsection (1) shall apply as if such revision was the computation of the employee. In this subsection "proportionate part of the levy" means that part of the levy that bears to the full amount thereof the same proportion as the income from emoluments bears to the full amount of the income of the individual before making any deductions and allowances under the Ordinance other than deductions authorised by section 10 thereof.

(4) Nothing in this section shall apply to an employee or the holder of an office who by notice signed by him and sent to the Board and the employer elects to pay the levy in accordance with section 9(1).

11. Where on the assessment of a person it appears that the levy computed upon his chargeable income or profits for the year of income falls short of or exceeds the amounts paid during the financial year in respect of the levy, and such shortfall or excess is less than three dollars, no adjustment thereof shall be made and the Board shall not demand payment or make refund in any such case. Small adjustments.

12. For the removal of doubt it is hereby declared that in ascertaining the chargeable income or profits of a person for the purposes of income tax or corporation tax no deduction or allowance shall be made of, or on account of, the levy imposed by this Act. Saving for income tax and corporation tax.

13. Subject to the provisions of this Act, the provisions of the Ordinance in the table below shall apply in relation to the levy as they apply in relation to income tax chargeable under the Ordinance but subject to any necessary modifications and adaptations: Application of certain provisions of the Ordinance.

TABLE

Income Tax Provisions applied to Levy

- Sections 25 to 31 (Trustees, agents, &c).
- Sections 43 to 43H (Appeals).
- Sections 46 (1) and (2) (Repayments of Tax).
- Sections 56, 57, 58, 59 and 62 (Collection).
- Sections 63, 64, 64A and 64B (Recovery).
- Sections 65 and 66 (Notices).
- Section 67 (Imprisonment of defaulters).
- Sections 68, 68A, 68B and 69 to 74 (General provisions).

14. (1) In this section "Minister" means the member of the Cabinet to whom responsibility for Finance is assigned. Unemployment Fund.

(2) There is hereby established for the purposes of this Act an unemployment fund which shall be administered by the Minister. ✓

(3) Subject to this Act and to any regulations made thereunder the Minister is authorised to make advances on the fund for any of the purposes thereby provided. ✓

15. All accounts relating to the fund shall be kept separately by the Comptroller of Accounts but shall be ~~over~~ Accounts. in the general accounts of Trinidad and Tobago and ~~of~~ of ~~there~~ of ~~with~~ of before Parliament.

- Audits.** **16.** The accounts shall be audited annually by the Director of Audit in accordance with Part V of the Exchequer and Audit Ordinance as if the fund was established under section 48 of that Ordinance.
- No. 20 of 1959.**
- Levy to be paid into fund.** **17.** All monies collected pursuant to this Act shall be paid into the unemployment fund.
- General penalty.** **18.** A person who contravenes or fails to comply with any of the provisions of this Act or of any regulations made hereunder is guilty of an offence and liable on summary conviction therefor to a fine of two thousand, five hundred dollars and in the case of a continuing offence to a further fine of fifty dollars for every day on which any default continues after conviction therefor.
- Regulations.** **19.** The Governor-General may make regulations generally for giving effect to this Act, and in particular—
- (a) for the management and control of the fund;
 - (b) for prescribing the accounts, books and forms to be used;
 - (c) as to the projects and other matters concerning which advances from the fund may be made;
 - (d) for prescribing anything by this Act required to be prescribed.

Passed in the House of Representatives this 22nd day of May, 1970.

G. R. LATOUR

Clerk of the House.

Passed in the Senate this 2nd day of June, 1970.

J. E. CARTER

Clerk of the Senate

No.12 of 1978

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF TRINIDAD
AND TOBAGO

B E T W E E N:

RAMESH DIPRAJ KUMER MOOTOO

Appellant

- and -

THE ATTORNEY-GENERAL OF
TRINIDAD AND TOBAGO

Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.,