

ON APPEAL FROM

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THE SUPREME COURT OF THE BAHAMA ISLANDS

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B E T W E E N THE MONTAGU PARK RACING  
ASSOCIATION LIMITED  
(Plaintiffs) Appellants

- and -

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THE HONOURABLE DR. RAYMOND  
WILSON SAWYER  
(Defendant) Respondent

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CASE FOR THE APPELLANTS

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1. This is an appeal from the judgment of the  
Supreme Court of the Bahama Islands (Campbell  
C.J.) given on the 6th May 1964 and 21st May  
1964.

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2. The action was brought by the Appellants  
against the Respondent by a specially indorsed  
writ issued on 1959 and  
reissued after amendment on the 5th February  
1964 to recover from the Respondent the sum of  
£26,972.16. 7. the balance of monies wrongfully  
withdrawn by him from its funds. In making  
such claim the Appellants have made due  
allowance for a sum of £10,000 which the  
Respondent paid to the Appellants on the 31st  
May 1954 and a sum of £3,000 due in respect of  
salary payable on the 1st July 1957 the 1st  
September 1957 and 1st December 1957.

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Particulars of the withdrawals showing an  
aggregate of £39,972.16. 7. were delivered to  
the Respondent and the Learned Judge found that  
the amount of the withdrawals was not in  
dispute.

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3. The principal questions involved in this  
appeal are whether the Learned Judge was right  
in holding that the drawings made by the  
Respondent and entered in the Appellants'

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	accounts up till the 30th April 1956 were sanctioned retrospectively and if so whether the Respondent was entitled to set off £3,000 part of the said sum of £10,000 against the withdrawals made by him after the 1st May 1956.	5
	4. The Appellants owned a lease which expired in 1959 of a race course in Nassau known as Hobby Horse Hall and held an annual licence from the Government to operate a totalisator. In 1950 Alexis Nihon acquired all the shares in the Appellants other than one share belonging to "the estate of Mr. Robert Murphy".	10
Page 614 Page 622	5. On the 6th May 1953 Mr. Nihon entered into an agreement with the Respondent for the sale to him of 297 shares in the Appellants at a price of £60,000 payable by instalments spread over 5 years.	15
Page 529	6. Also on the 6th May 1953 the directors of the Appellants resolved that Mr. Nihon should be entitled to retain three per cent of the thirteen per cent granted to the Appellants as licensees on the pari-mutuel pool.	20
	7. The Respondent thereafter managed the affairs of the Appellants and made the drawings which the Appellants are seeking to recover.	25
Page 573	8. The balance sheet of the Appellants as at the 30th April 1954 shows "shareholders withdrawals" £24,527.17. 9. such amount included two items namely the 3% paid to Mr. Nihon pursuant to the resolution of the 6th May 1953 and the drawings made by the Respondent before the 30th April 1954.	30
Page 149		35
Page 583	9. The balance sheet of the Appellants as at the 30th April 1955 shows Shareholders withdrawals during the year of £8,184. 9. 2.	40
Page 591	10. The balance sheet of the Appellants as at the 30th April 1956 shows Shareholders withdrawals of £17,499.12. 7.	45
Pages 451-2 Pages 453-4	11. At each of the General Meetings of the Appellants held respectively on the 6th September 1954 the 21st November 1955 and the 12th May 1956 a resolution was passed in	50

the terms:

5 "Resolved that each and all of the acts,  
transactions and proceedings of the  
Directors and Officers of the Company to  
this date be and they are hereby  
sanctioned approved ratified and  
confirmed".

10 12. The Learned Judge held that the  
withdrawals made by the Respondent before the  
30th April 1956 were not recoverable by the  
Appellants and he gave the following among  
15 other reasons for that judgment:

15 "I do not think that these payments were  
ultra vires the Company in the  
circumstances of this case. It is plain  
20 that the sums withdrawn could have been  
called 'dividends' and could have gone  
into no other than the defendant's  
pocket. If a general meeting or a  
directors' meeting had been called once a  
25 week each payment could have been called  
an interim dividend and handed to the  
defendant. What was done was all the  
payments were added together and called  
'shareholders' withdrawals' in the annual  
30 accounts and the shareholders passed this  
method of accounting. On the evidence it  
is clear that they knew exactly what had  
been done. Mr. and Mrs. Nihon, though  
sent notices, did not attend the 1954 and  
35 1955 meetings or send proxies. This  
cannot affect the validity of such a  
meeting: a shareholder cannot abstain and  
then complain about what has been  
resolved at a meeting. If one of the  
40 shareholders had objected to the balance  
sheet and accounts the money would have  
had to be repaid and then paid back again  
to the defendant in the form of a formally  
declared dividend. Article 71 of the  
45 Articles of Association was not violated.  
It allowed payments of dividend. What the  
shareholders did was to confirm the  
payment of dividends which had been paid  
out too soon and without sanction at the  
50 time and without using the word  
'dividend'. They sanctioned the payments

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D.5 -

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being given the name 'shareholders'  
withdrawals' instead of 'dividend'".

Page 44	"I have found that the defendant's withdrawals entered in the accounts up till 30th April 1956 were sanctioned retrospectively".	5
Page 39 B.3	13. The Learned Judge further held that the withdrawals by the Respondent after those sanctioned by the general meeting held on the 12th May 1956 were never sanctioned or confirmed and must therefore be repaid to the Appellants.	10
Pages 4 & 9	14. On the 25th May 1954 the Respondent borrowed £10,000 from Mr. Nihon which he paid into the Appellants' Account. The Appellants in their amended Statement of Claim treated such payment of £10,000 as a partial repayment of the withdrawals then outstanding whilst the Respondent in paragraph 7 of his amended Defence merely claimed to be entitled to set off the said sum of £10,000 without denying that it had been made by repayment of withdrawals.	15 20
Page 23 C	15. On the 25th May 1954 the Respondent signed a letter addressed to Mr. Nihon in which he agreed to place £10,000 to the account of the Appellants and acknowledgment of that sum £7,000 would represent moneys which he realised he should not have withdrawn from the Bank account of the Appellants.	25 30
Page 633	16. Mr. Nihon gave evidence that the Respondent had admitted that he had made some withdrawals from the Appellants and that he, Mr. Nihon, had lent the Respondent £10,000 to be paid by the Respondent to the Appellants.	35 40
Page 53 A 7 Page 69 D Page 85 D 7 Page 120 C 4	17. The Respondent gave evidence that he loaned the £10,000 to the Appellants and took a Promissory Note. The Respondent was cross- examined and was unable to explain why if the £10,000 was in fact a loan it did not appear as such in any balance sheet of the Appellants or why in an agreement of 29th February 1956 which he made with Mr. Nihon in clause 16 he declared that the Appellants were not indebted	45 50

to him personally or to his wife.

18. The Learned Judge said:

5 "I have come to the conclusion that seven Page 41 B 7  
of the ten thousand pounds must be  
credited to Dr. Sawyer as repayment of  
withdrawals. I am satisfied that he  
10 accepted the money for this purpose,  
though perhaps unwillingly, and paid it  
into the company accordingly. I think  
that the making of the promissory note  
was an after-thought and has no effect.  
15 The balance of three thousand pounds I  
find he paid into the company in the form  
of a loan and he must be credited with  
this sum".

20 19. This Appeal is brought by Final leave to  
Appeal granted on the 27th May 1964 by the Page 46  
Supreme Court.

25 20. The Appellants submit that the judgment  
of the Supreme Court should be varied by  
increasing the amount to be recovered by the  
Appellants from £4,481. 1. 6. to £26,972.16. 7.  
or in the alternative to £7,481. 1. 6.

### R E A S O N S

30 (1) The drawings when made by the Respondent  
were ultra vires the Appellants and were  
incapable of ratification by its members.

35 (2) The resolutions passed at the meetings of  
the Appellants held on 6th September 1954 the  
21st November 1955 and the 12th May 1956 on  
their true construction:

40 (a) Were not intended to ratify the  
making of the said drawings.

(b) Were not intended to be a declaration  
of dividend.

45 (c) Were not capable of converting or  
transmitting the unauthorised withdrawals  
made by the Respondent into lawfully  
declared dividends payable to the  
50 shareholders on the Register of the Company.

(3) In the premises the Learned Judge was in error in finding that the Respondent's withdrawals entered in the accounts up till 30th April 1956 were sanctioned retrospectively. 5

(4) On the evidence the Learned Judge ought not to have found that any part of the sum of £10,000 was paid by the Respondent to the Appellants otherwise than in pro tanto reimbursement of withdrawals made by the Respondent. 10

(5) If any part of the said sum of £10,000 was a loan to the Appellants then the first monies withdrawn by the Respondent from the Appellants should have been treated as in repayment of such loan and accordingly that no part of such loan remained outstanding on the 30th April 1956. 15 20

(6) In the premises the Learned Judge was in error in allowing the Respondent to set off £3,000 part of the said £10,000. 25

KENNETH RUBEN

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No. 21 of 1967  
IN THE PRIVY COUNCIL  
ON APPEAL FROM  
THE SUPREME COURT OF  
THE BAHAMA ISLANDS

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ASSOCIATION LIMITED

- v -

THE HONOURABLE  
DR. RAYMOND WILSON SAWYER

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CASE FOR THE APPELLANTS

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BULCRAIG & DAVIS,  
Amberley House,  
Norfolk Street,  
Strand, W.C.2.

Agents for:

PAUL L. ADDERLEY,  
Nassau,  
Bahamas