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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN PROBATE AND ADMINISTRATION

SUIT NO. P. 751 OF 1982

IN THE MATTER of the Estate of  
HORACE AUGUSTUS JONES late of  
2½ Altamont Crescent in the parish  
of Saint Andrew, deceased.

IN THE MATTER of the Interpretation  
of the Last Will and Testament of  
the said HORACE AUGUSTUS JONES,  
deceased.

IN THE MATTER of the Judicature  
(Civil Procedure Code) Act.

|         |                                                                                               |            |
|---------|-----------------------------------------------------------------------------------------------|------------|
| BETWEEN | HUGH E. EARLE and PHYLLIS IRVING<br>(Executors of the Estate of<br>Horace A. Jones, deceased) | PLAINTIFFS |
| A N D   | ICOLYN CHONG and 27 others                                                                    | DEFENDANTS |

W. B. Frankson Q.C. and B. E. Frankson for the Executor and Executrix  
and Howard A. Jones a residuary legatee - Fifth Defendant.

P. J. Patterson Q.C. and Miss Karen Chin-Quee for the First, Sixth and  
Seventh Defendants - Icolyn Chong, Yellow Cab Co. Ltd., and Victor  
Transport Limited.

John Graham for the Third Defendant - Joan Anderson.

Steve Shelton for the Fourth Defendant - Jennifer Smith.

Byron L. Ward for the Ninth Defendant - Claudette Irving.

Heard on: April 30, May 1, 2, & 3, June 12 & 29, 1984

DETERMINATION AND RULING ON CONSTRUCTION OF WILL

CAMPBELL, J:

Horace Augustus Jones died on 13th May, 1982, leaving a Will  
which was admitted to Probate in the Supreme Court of Judicature of  
Jamaica on September 28, 1982. The deceased during his life-time was  
the Managing Director and a Shareholder in Victor Transport Limited,  
Yellow Cab Limited and Mail Bus Company Limited.

The testator's shareholding in Mail Bus Company Limited is not  
disclosed in any of the Affidavits filed. In the case of Victor Transport  
Limited his shareholding is 2,497 shares out of an issued share capital of  
5,000 shares and in the case of Yellow Cab Limited 3,100 shares out of a  
an issued share capital of 6,492 shares.

Victor Transport Limited and Yellow Cab Limited each owned Taxi cabs which were designated "Checker Cabs" and "Yellow Cabs" respectively. Victor Transport Limited in addition to its "Checker Cabs" owned buses described as "Victor Buses". It also owned Real Estates situated at 12 Love Lane and 15 Slipe Road in the city and parish of Kingston. Finally, it owned fixtures, furniture and equipment including inter alia radio equipment used in the operation of the Checker Cabs which were housed in Nos. 17 and 19 Connolley Avenue owned by the testator but used as the operating base for both the Checker Cabs and the Yellow Cabs.

The testator apart from his shareholding in the earlier mentioned companies, owned a fleet of motor vehicles which in his life-time he operated. Some were marked "Checker Cabs", some were marked "Yellow Cabs". These were all operated for the personal benefit of the testator using the facilities of Victor Transport Limited and Yellow Cab Limited. The testator also had considerable Real Estate including Nos. 17 and 19 Connolley Avenue which he disposed of to named devisees.

In respect of Nos. 17 and 19 Connolley Avenue, the devise included not only the premises themselves but:

- " All tools and equipment and other machinery used for servicing of motor vehicles also all furniture, fixtures and office equipment including the radio equipment of Checker Cab and Yellow Cab therein at the time of my death".

By clauses 7, 8 and 10 of his Will, the testator made dispositions which so far as is relevant are as hereunder:

- " 7(a) All my shares in Victor Transport Limited known as 'Checker Cab' to Miss Icolyn Chong;
- (b) My share of property in 12 Love Lane, to Miss Icolyn Chong;
- (c) My share of property in 15 Slipe Pen Road, to Miss Phyllis Irving, Miss Icolyn Chong.
- 8. All my shares in Yellow Cab Limited and all other cabs in the name of Mr. Horace Jones to be operated and the earnings shared as follows -
- 2/6 to Miss Icolyn Chong;
- 1/6 to Mrs. Hannah Jones;
- 1/6 to Mr. Derrick Jones;

1/6 to Mrs. Joan Anderson (nee Jones);

1/6 to Mrs. Jennifer Smith (nee Jones);

all the

This also includes/hirage of all contractor cars which includes all A & B cars with the exception of three cars:

(a) Peugeot Yellow Cab licence No. FN 7104 to Howard Jones;

(b) Morris Station Waggon licence No. NE 7853 to Phyllis Irving;

(c) One cab to be given to Mrs. Claudette Irving.

From the earnings and hirage of the cabs after my death the following bequests must be made .....

10. All buses in Victor Transport Limited known as 'Victor' must be sold. After the sale of the buses, my share must be given to Miss Phyllis Irving and from the proceed the following bequests must be made:

- Henry Blackman - \$2,500.00
- Everald Nelson - 2,500.00
- Donald Kidd - 1,500.00 "

The executors by their Originating Summons dated 29th November, 1983, seek a determination of the true construction of clauses 7, 8 and 10 of the Will and in particular a determination of the undermentioned questions summarised for convenience namely -

(1) With regard to clause 7 -

(a) Whether upon a true construction of the Will "all my shares in Victor Transport Limited known as "Checker Cab" to Miss Icolyn Chong" serves to bequeath any portion of the shares owned by the deceased to anyone and if so;

(i) What number of shares; and

(ii) to whom.

(b) Whether Victor Transport Limited being the registered proprietor of premises known as No. 12 Love Lane and 15 Slipe Pen Road, any estate or interest in the said premises vest in the devisees under clause 7(b) and (c) of the Will.

(2) With regard to clause 8 -

Whether on a true construction of the above clause:-

(i) All or any of the said vehicles vest in the executors;

(ii) Any interest or property in the said cars or any of them vests in the named legatees and if so what interest or property;

(iii) A trust is created in favour of the named legatees;

(3) With regard to clause 10 -

Whether on a true construction of the above clause:-

- (a) A trust is created in favour of the named legatees;
- (b) Any estate or interest is vested in the named legatees.

The joint affidavit of the executors in support of the Originating Summons recites the fact in paragraph 3 thereof namely, that the testator was "the owner of shares in Yellow Cab Limited and in Victor Transport Limited amongst other companies". It recited the fact in paragraph 5 thereof namely, that Victor Transport Limited "in addition to its rolling stock and accessories was the registered owner of premises No. 12 Love Lane in the city and parish of Kingston and No. 15 Slipe Pen Road in the city and parish of Kingston". The matter creating the difficulty is stated thus by the executors in paragraph 6 of their affidavit:

" 6. That the deceased has in paragraphs 7, 8 and 10 of his said Will purported to devise and bequeath certain real and personal estate to named beneficiaries notwithstanding the fact that Victor Transport Limited owns Checker Cab Limited and the Real Estate set out above ".

Having regard to paragraph 6 of the joint affidavit the executors' difficulty stemmed from the fact that in regard to clause 7(b), 7(c) and clause 10 of the Will the testator had purported to devise both real estate namely, No. 12 Love Lane and 15 Slipe Pen Road and personal property namely buses which were not his to dispose of. Also with regard to clause 7(a) he bequeathed shares in Checker Cab Limited which however were all owned by Victor Transport Limited and not by him. With regard to clause 8 the difficulty is not spelled out in any paragraph of the joint affidavit but in the light of the questions raised for determination the difficulty resides in the apparent ambiguity of expression creating doubt as to what if anything is disposed of to the named beneficiaries.

At the hearing before me it was readily conceded by the attorneys representing those defendants affected by the dispositions in clauses 7 and 10 that with regard to the dispositions in clause 7(b), 7(c) and clause 10, these dispositions were void and inoperative inasmuch as the

testator purported to dispose of assets which were owned by Victor Transport Limited in circumstances where the dispositions could not be saved by invoking the equitable doctrine of election.

With regard to clause 7(a) a contest ensued. The affidavit of Miss Icolyn Chong the first defendant deponed to the facts that:

- (a) She is a shareholder and director of Victor Transport Limited and Yellow Cab Limited;
- (b) There is no company by the name of Checker Cab Limited as stated in paragraph 6 of the affidavit of the executors;
- (c) Checker cabs are owned by Victor Transport Limited. The said cabs are operated under the style and name of "Checker Cab". The deceased during his life-time generally referred to the company as "Checker Cab". The main business of the company is the operation of Checker cabs.

The above facts were supported by sample letter-heads of Victor Transport Limited and of the business operation of Checker Cab. The affidavit of Miss Karen Chin-Quee attorney-at-law, states that a search by her at the office of the Registrar of Companies discloses that there is no company registered in the name of Checker Cab Limited.

One would have thought that the difficulty of the executors with regard to clause 7(a) would have been resolved once it was shown that Checker Cab Limited did not exist and that accordingly the testator did not purport to dispose of shares in Checker Cab Limited. This was however not so. Learned attorney for the executors one of whom was also a residuary legatee maintained that it was irrelevant that Checker Cab was not a registered company. The submission by him was that the testator in clause 7(a) by the words "all my shares in Victor Transport Limited known as 'Checker Cab' " intended to dispose not of shares in the sense of share certificates but of chattels namely, the Checker Cabs themselves. Similar argument was made in relation to the words "all my shares in 'Yellow Cab Limited' " in clause 8. In the case of clause 7(a) since the Checker cabs were owned by Victor Transport Limited and in the case of clause 8 the Yellow cabs were owned by Yellow Cab Limited the dispositions fail says learned attorney, for a reason similar to that voiding the dispositions in clause 7(b), 7(c) and clause 10.

In my view the submission of learned attorney for the executors represents a fundamental shift in the gravamen of the conceived difficulty of the executors as disclosed in paragraph 6 of their affidavit when read together with paragraph 3. It will be noted that in paragraph 3, while the executors concede, rightly enough, that the testator owned shares in Victor Transport Limited and Yellow Cab Limited "amongst other companies", it was not conceded that Checker Cab Limited, which the executors believed to exist, was a company in which the testator held shares. They deponed in paragraph 6 that Checker Cab Limited which they believed to exist was owned by Victor Transport Limited. In this paragraph they impliedly conceded that what the executors disposed of in clause 7(a) were shares of Checker Cab Limited in the sense of share certificates, but that as this company was owned by Victor Transport Limited, the gift was invalid as it was Victor Transport Limited and not the testator who owned the shares.

Had there been a registered company by the name of Checker Cab Limited which was wholly owned by Victor Transport Limited there would certainly be at the least some doubt as to whether the testator was bequeathing the entirety of his shareholding in Victor Transport Limited or to the contrary, shares in Checker Cab Limited which he reasonably though mistakenly believed he held by virtue of his shareholding in Victor Transport Limited the holding or parent company.

By this shift in the basis of the conceived difficulty of the executors, the latter are now saying that the testator by the words used in clause 7(a) and clause 8, intended to bequeath chattels namely, Checker Cabs and Yellow Cabs in Victor Transport Limited and Yellow Cab Limited respectively and not a chose in action namely share capital evidenced by share certificates either in the two companies, or in the imaginary company namely Checker Cab Limited which they believed existed.

Learned attorney for the executors submitted that this intention of the testator in clause 7(a) is unmistakeably clear when one considers the following:

- (a) That the testator went onto qualify the words "all my shares in Victor Transport Limited" with the words "known as 'Checker Cab'";

- (b) That the testator in fact set out to distribute his share of the actual assets of Victor Transport Limited which assets were of three categories namely, Checker Cabs, Buses and Real Estate. He disposed of his share of the Real Estate in clause 7(b) and (c) and of the buses in clause 10. Thus the irresistible inference is that he was disposing of his share of Checker Cabs in clause 7(a);
- (c) That the testator used the word "share" in a consistent manner and with a consistent meaning throughout the Will. By the word "share" he meant "portion" in the sense of an individual part of a physical asset;
- (d) That the juxta-position of the words "and all other cabs" with and immediately after the words "all my shares in Yellow Cab Limited" shows that the testator meant by "all my shares" his portion of Yellow Cabs which was similarly what he meant in clause 7(a).

To the contrary Mr. Patterson submitted that since it is not what a testator thought he was doing which is relevant in interpreting his Will but rather his intention as gathered from the meaning of the words which he uses, the meaning of the words of clause 7 admit of no doubt or ambiguity as to the intention of the testator because the language used by him is clear and precise. The subject matter of each bequest or devise is accurately described and admits of clear identification. The only basis on which clause 7 can be faulted is that it manifested a misapprehension on the part of the testator namely his competence not only to dispose of his shares in Victor Transport Limited but also of the physical assets of the company which he erroneously believed to be his also to dispose of.

A necessary and integral part of Mr. Frankson's submission is that the words "Checker Cab" appearing in clause 7(a) qualifies the words "all my shares" and are not used as a colloquial or popular name for Victor Transport Limited. Mr. Frankson concedes that had the testator said "all my shares in Victor Transport Limited" and stopped there, no difficulty would have arisen as the manifest intention shown from the words used, would be to dispose of the shareholding in the company of which shareholding the testator was competent to dispose. The difficulty Mr. Frankson submits, arises from the fact that the testator added the words "known as Checker Cab" which words a Court of construction cannot ignore. I have been reminded by him of the rule of construction of Wills namely, that words of devise or bequest are to

receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative. This I accept. It was re-echoed with the necessary caution by Uthwatt, J. in Re Hooper 1944 1 All. E.R. P.227 at P.229 in these words:

" It is no doubt a sound rule of construction that, where words are susceptible of several interpretations, that interpretation should be adopted which will give effect to every expression rather than one which will render any of the expressions inoperative. This must however, not be pressed too far, for, as Lord Selbourne L.C., pointed out in Giles v. Melsom (1873) L.R. 6 H.L. 24 at P.33:

' Nothing can be more mischievous than to attempt to wrest words from their proper and legal meaning only because those words are superfluous' ".

Thus it becomes necessary for me to consider what the testator meant when he added the words "known as 'Checker Cab' " to the disposition "all my shares in Victor Transport Limited".

Mr. Patterson for three of the defendants namely Victor Transport Limited, Yellow Cab Limited and Miss Icolyn Chong submits that in the light of the affidavit of Miss Icolyn Chong there is evidence that Victor Transport Limited was popularly known as "Checker Cab". It was so popularly known because the taxi cab business became the main business of the company even though the company had started out as the operator of Victor buses and still operates such buses. The words "known as 'Checker Cab' " therefore relate to the company and not to the shares. The executors in further affidavits filed, challenge the assertion of Miss Icolyn Chong that the main business of Victor Transport Limited comprised the operation of taxi cabs. To the contrary they asserted that the main business from the inception of the company to the date of death of the testator was the operation of Victor buses.

Implicit in this challenge is the veiled but timorous suggestion that if the company had a popular name it would be "Victor" and not "Checker Cab".

Paragraphs 4 and 5 of the affidavit of Hugh Earle which are identical with paragraphs 6 and 7 of the affidavit of Mr. Howard Jones a defendant residuary legatee are, so far as is relevant, as hereunder:

"4. That the said Horace Augustus Jones was the Managing Director and a shareholder in Victor Transport Limited which said company

operated the business of omnibus and taxi cabs. That the said Victor Transport Limited operated the taxi cabs under the name 'Checker cabs' and operated the business of omnibus under the name 'Victor'

5. That the main business of Victor Transport Limited is the operation of 'Victor buses' and I am reliably informed and verily believe that the said Victor Transport Limited was incorporated in or about the year 1953 where its only business was the operation of 'Victor buses', and I am further reliably informed and verily believe that the said company commenced operating taxi cabs known as 'Checker Cab' in the year 1958 ".

I have already referred to the affidavit of Miss Icolyn Chong in which she asserted that firstly the main business of Victor Transport Limited was that of operating taxi cabs under the style and name of "Checker Cab", secondly that the company came to be popularly known as "Checker Cab".

She had exhibited to her affidavit a letter-head of Victor Transport Limited on which is clearly printed as part of the rubric the words "operators of Checker Cab". She had similarly exhibited a letter-head of the business of Checker Cab on which is clearly printed as part of its business name identifying its proprietor the words "owned and operated by Victor Transport Limited". She had further exhibited an impression of an old stamp of the company in relation to which she deponed that the old stamp had been impressed on cheques received by the company not in the name of Victor Transport Limited but in the name of "Checker Cab" which cheques the company thereafter lodged to its account with its bankers. Miss Icolyn Chong has further deponed that she was a secretary of Victor Transport Limited from as far back as 1956 and that she was appointed a Director in 1979. Her appointment as a Director is supported by one of the documents exhibited to an affidavit of Mr. Hugh Earle an executor. Neither he nor his co-executrix Miss Phyllis Irving has challenged the status of Miss Chong in the company from which status it may reasonably be inferred that the basis of her knowledge of the facts to which she deponed would be direct and intimate in contradistinction to the position of both executors and Mr. Howard Jones neither of whom deponed to facts showing any connection

whatsoever with the company on the basis of which they could depone to facts relating to the operations of the company. Nor did they depone to alternative bases of knowledge from which it could be inferred that their version of facts on which they differed from Miss Chong was as credible or more credible than the version of Miss Chong.

It is significant that though the executors and Mr. Howard Jones each challenged and denied the assertion of Miss Chong that the taxi cab operation constituted the main business of Victor Transport Limited, neither of them expressly challenged her assertion that Victor Transport Limited was popularly called "Checker Cab". This absence of express challenge is even more significant when one notes that the assertion was made from as early as 17th February, 1984, and further affidavits of the executors were deponed to as late as 2nd May, 1984, and 11th June, 1984, that is to say after Mr. Patterson had made submissions based on the affidavit of Miss Chong as providing the circumstances known to the testator against the background of which he made his Will.

Is there anything in the Will in the context of which the words "known as 'Checker Cab' " can reasonably be said to relate to "all my shares" and not to "Victor Transport Limited" ? Mr. Frankson says yes, because firstly in the context of the Will as earlier stated the testator showed that he was disposing of his share of the physical assets of the company. Secondly, in clause 8 by the juxta-position of the words "and all other cabs" (emphasis mine) with the words "all my shares in Yellow Cab Limited" the testator showed that he meant by "shares" his portion of the Yellow Cabs owned by the company. Thirdly, the principles of construction are that not only should the words of a devise or bequest be construed within the context of the Will construed as a whole, but also that a word when used more than once in a Will, is prima facie construed as used in one consistent sense throughout unless the context in which the word is used in a particular part of the Will shows that it must have been used in a different sense. Fourthly, there is nothing in any particular provision of the Will which shows that the word "shares" was used by the testator other than in the consistent sense of his "portion" of a physical asset which he owned or believed he owned.

Considering this aspect of the matter the testator in my view manifested the unmistakeable intention to achieve inter alia the following objectives with regard to Victor Transport Limited and Yellow Cab Limited:-

- (1) By his disposition in clause 3 of the Will of Nos. 17 and 19 Connolley Avenue, which are his own, together with the tools, machinery for servicing of motor vehicles, office equipment and radio equipment of Checker Cab and Yellow Cab which are not his own, to the very same persons who with the addition of Mrs. Hannah Jones his widow are the beneficiaries under clause 8 of his Will, the testator intended that the taxi cab business of Victor Transport Limited should be continued by these persons operating from the same premises at which the Checker Cab business of Victor Transport Limited and the business of Yellow Cab Limited were being operated. Further that as these persons would need the office equipment, and radio equipment for the continued operation of the two business, he sought to give these also to the same beneficiaries in the mistaken belief that such office equipment and radio equipment were his to dispose of;
- (2) By the disposition in clause 10, the testator intended to curtail the business of Victor Transport Limited by putting an end to the bus operation which was conducted at a different location namely, at 36 Upper Elletson Road Kingston. Thus he designed, though legally ineffectively, to have all the buses sold and his share of the proceeds thereof given to Miss Phyllis Irving as compensation no doubt for her service as manager of the bus operation;
- (3) By the disposition in clause 8, the testator again manifested the intention that Yellow Cab Limited should continue to operate; that Checker Cab should also be operated and that all his personal taxi cabs should equally be operated.

Though the testator does not expressly say that Victor Transport Limited and Yellow Cab Limited shall continue to operate, the intention is clear having regard to the subsequent directions in the said clause 8 namely:

" One (1) cab to David DaCosta, any Checker Cab or Yellow Cab. He must also be employed as long as there are Yellow or Checker Cabs operating at 17 and 19 Connolley Avenue. (emphasis mine).

Winston Fairweather must also be employed as long as there is a Yellow Cab or Checker Cab operating and as long as he keeps to the Rules of the company.

Miss Icolyn Chong must be the Manager for life and fully in charge at all times at a salary to be decided by her (she was always reasonable that way) and she must take no orders from anyone that is bequeathed. "

The executor Hugh Earle in his further affidavit admitted that Icolyn Chong was at all material times a shareholder and the manager of Yellow Cab Limited which managed the operations of "Checker Cab" owned by Victor Transport Limited.

Such being the intention of the testator namely that the Checker Cabs of Victor Transport Limited should continue to be operated, would he consistently with that intention proceed to reduce the rolling stock of this company by bequeathing nearly half of the vehicles being his "portion" to Miss Icolyn Chong even if he were competent to do so? By bequeathing such taxi cabs aliunde he would be entitling the person bequeathed to withdraw the vehicles from the company. In the light of the testator's shareholding viz-a-viz the issued share capital, he would be entitled in specie on a liquidation to about fifty per cent of the Checker Cabs, buses, real estates, rolling stock and bank balances of the company remaining after all debts have been paid.

The devising of his share in the property of the company situate at Love Lane and 15 Slipe Pen Road, even on the assumption that the devises were valid, and that they would necessitate a sale of the properties, would not necessarily weaken or stymie the company in its operation of the Checker Cabs as would a disposal of half the Checker Cabs, because the company was not operating from any of these premises. Similarly the sale

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of the Victor buses directed in clause 10 would not contradict the intention manifested in clause 8, because Yellow Cab Limited did not operate these buses on behalf of Victor Transport Limited. But the disposition of Checker Cabs to Miss Icolyn Chong instead of shares in the sense of equity in Victor Transport Limited and of "Yellow Cabs" to the beneficiaries named in clause 8 instead of shares in the sense of equity in Yellow Cab Limited would undoubtedly in my view and for the reason stated earlier, be wholly inconsistent with the manifest intention that Yellow Cab Limited which operated its own cab as also the Checker Cabs on behalf of Victor Transport Limited should so continue to operate.

Mr. Frankson submitted that the word shares in clause 7(a) means "portion" since that is the meaning it has in clause 6, clause 7(b), 7(c) clause 9(a) and clause 10.

With regard to clauses 6, 7(b) and 7(c) it is clear that the testator by the use of the word "share" meant "portion" in the sense of a definite part of a physical asset. Used as the word was in relation to the real estate itself, it could not possibly have any other meaning. However in the case of clause 9(a) the words used are "share of Mail Bus Company that is given to Phyllis Irving and Howard Jones". It is thus necessary to ascertain what was given to these persons in order to ascertain what the testator meant by the word "share" which he used. In clause 9 to which clause 9(a) relates the testator devised and bequeathed in the following terms:

- " 9 All my shareholding interest in Mail Bus Company Limited to Phyllis Irving and my son Howard Jones together with all vehicles and all spare parts and anything that goes with buses of the said company wherever they may be found;
- 9(a) To my dear cousin..... an allowance must be given to her every month for her allowance from 'the share of Mail Bus Company' that is given to Phyllis Irving and Howard Jones " .

What the testator gave in clause 9 was his shares in Mail Bus Company Limited. In addition he designed to give them the whole of the vehicles of the company, the spare parts and anything that goes with buses which rolling stock was not his to give. It was thus his share-

holding and the rolling stock of the company which he referred to as "the share of Mail Bus Company". The word "share" is thus used not in the same consistent sense as meaning portion of a physical asset as in clause 6 or in clause 7(b) and 7(c) but as embracing shareholding and physical assets. True enough the latter is a portion of the assets of Mail Bus Company Limited because the company in addition to its rolling stock has premises at No. 4 Bowery Road. The testator however, was not giving a portion of any asset of his nor his portion of the vehicles in Mail Bus Company Limited. In clause 10 the words "my share" clearly and manifestly mean portion in the proceeds of sale of the buses and not portion in the sense of an individual part of physical assets namely, the buses.

Thus even if it can be said that the word "share" has a common meaning namely, "portion", the word "portion" does not consistently connote portion of a physical thing. In clause 6, 7(b) and 7(c) the word share in the sense of "portion" meant a part of the real estate specifically mentioned. However in clause 10 it meant a part of the proceeds of sale, which is not the same as a portion of the physical assets namely the buses. Finally in clause 9(a) the word "share" even if it could be said to mean "portion", meant, when read with clause 9, more than portion of physical assets, it meant also shareholding in the company itself. Thus it cannot be said that the word share was used consistently to mean portion in a physical asset.

As aids to ascertaining what the testator meant by "all my shares in Victor Transport Limited" and "all my shares in Yellow Cab Limited", it is permissible to consider the following:

1. The testator used the word "share" in the singular when he was disposing of physical assets in clause 7(b) and 7(c), this was after using the word "shares" in clause 7(a). He had many shares in the company. He thus must be taken to have understood that he was dealing with a different specie of property in clause 7(a) from those in clause 7(b) and 7(c);

2. The testator in clause 9, showed clearly that he understood the difference between shares or shareholding interest in a company and the physical assets of the company albeit erroneously believing he owned these also. Thus when he wanted to give not only his shares in the company but some of the company's assets also, as in the said clause 9, he used clear express words of gifts both of the shares and of the physical assets.
3. The testator in clause 10 when he intended to deal with the company's assets, specifically referred to the assets. Thus he used the words "all buses" in Victor Transport Limited known as "Victor". Whether the word "Victor" qualified the words "Victor Transport Limited" or the words "all buses" is academic and irrelevant because the testator specifically mentioned the physical assets. It is not unreasonable to infer that had he meant to deal with Checker Cabs in clause 7(a) he would have used **some such words as** "all my Checker Cabs" or all Checker Cabs in Victor Transport Limited as he did in clauses 9 and 10.

I accept the evidence of Miss Icolyn Chong that the main business of Victor Transport Limited was the operation of a taxi cab service under the style and name of Checker Cab. I further accept her evidence that the company was popularly known as "Checker Cab". I find nothing in the Will construed as a whole from which it can reasonably be said that the testator used the word "share" in the singular and "shares" in the plural as consistently meaning portion or portions of a physical asset or assets. To the contrary the testator showed a clear appreciation of the distinction between "shares" or "shareholding interest" in the company on the one hand and the assets themselves. When he was referring to the shares in the sense of share certificates he consistently used the words "all my shares in Victor Transport Limited", "all my shares in Yellow Cab Limited" and "all my shareholding interest in Mail Bus Company Limited together with all vehicles of the said company". I accordingly find as a fact that

when the testator used the words "known as 'Checker Cab' " in clause 7(a) he used them with reference to the company that is to say to describe it by its popular name. The words were not used by the testator to describe, modify or qualify the words "all my shares" in Victor Transport Limited. I further find that on a true construction of these words both by themselves and within the context of the Will as a whole they mean the testator's share capital or equity, that is to say shares in the company represented by share certificates or other indicia of ownership of shares. It was his share capital in the respective companies mentioned in clause 7(a) and clause 8 that the testator intended to dispose of.

With regard to clause 8, the provision is not perfectly expressed but in consonance with the settled principles of construction no material or insoluble difficulty arises. As I have earlier said, the manifest intention of the testator was that Yellow Cab Limited should continue to operate. The testator's own fleet of taxi cabs were also to be operated by Yellow Cab Limited. The apparent difficulty arises as to the disposition of his shares in Yellow Cab Limited. I have already found that he meant to deal with "his shares" in the same sense as he used the expression in clause 7(a) namely as referring to share capital and not as meaning "portion in Yellow Cabs".

Either the testator meant that his share capital was to be given to the named beneficiaries in the proportions specified, in addition to the earnings from his fleet of taxi cabs which he impliedly directed Yellow Cab Limited to operate, or he meant that the earnings from the shares and the earnings from his aforesaid fleet of taxi cabs were to be divided proportionately among the aforesaid beneficiaries. It is however difficult to imagine how the testator's shares in Yellow Cab Limited could be operated to provide "earnings" on the assumption that the words "to be operated" related to the shares as well as to the testator's taxi cabs which he undoubtedly intended should be operated. But two things are clear, firstly the testator intended to benefit the beneficiaries either by giving them the corpus of the shares or the income therefrom together with the earnings from the operation of his

own taxi cabs. Secondly in so far as the bequests are of the income from the shares and the earnings from the taxi cab, they are bequests of income for an indefinite duration that is to say indefinite gifts of income.

The case law of respected and dignified antiquity have established the principle that where there is a gift of the interest, profit or income from property without limitation, the gift operates to pass the corpus or capital unless a contrary intention is expressed, and the mere appointment of a residuary legatee or devisee does not manifest such a contrary intention.

In Boosey v. Gardner (1854), Beavan's Report Vol. 18 P.471 the testatrix being possessed of some "Three-and-a-half per cents", by her will, dated 1831, bequeathed as follows:

" I will and bequest to my brother, Samuel Boosey, if living, the interest of my property in the three-and-a-half per cents; if not living at my decease, I will and bequest the interest of that property to my niece Elizabeth Stone (my sister Mary Stone's daughter) for her natural life; in case of her leaving child or children, that property to be divided between them at her decease." (emphasis mine)

The testatrix died in 1840 and Samuel Boosey survived her. The question that arose was whether Samuel Boosey took the three-and-a-half per cents absolutely or for life only, with remainder to Elizabeth Stone.

The Master of the Rolls held thus at page 473 -

" I think at present that Samuel Boosey took an absolute gift of the principal, for the testatrix has given him the interest without limitation".

In Watkins v. Weston (1863) 32 Beavan's Report 238 there was a bequest of certain leasehold properties to trustees upon trust to receive the rents and profits therefrom and to pay the same unto and for the sole and separate use and benefit of the testator's daughter, but in case the daughter died before the expiration of the lease, the rent and profits were to be invested in public securities of Great Britain, the dividends accumulated and paid to the daughter's children as each attained the age of twenty-one. The daughter died without issue. The leaseholds brought in £112 per year. The personal representative of the daughter claimed these sums. The residuary legatees also made claim to the accruing sums

for the unexpired duration of the leases.

The Master of the Rolls said thus at page 240:

" I am of the opinion that the daughter took an absolute interest in the leaseholds. There is an absolute gift in the first instance to trustees, in trust to pay her the rents, and I cannot doubt that if the Will had stopped here she would have taken an absolute interest in the leaseholds, and that it would have been impossible to say that any interest in the leaseholds was left undisposed of".

In Penny v. Peppin (1867) 15 W.R. 306 the Will of Thomas Aylett dated February 2, 1811, contained inter alia a bequest of £3,000 Navy Five per cents to the trustees in trust to pay the interest of \$1,000 each, unto the testator's three grand daughters, Elizabeth Thoms, Frances Mary Peppin and Mary Holloway, as they severally arrived at the age of twenty-one years, and in case of the death of any one of them before they arrived at the age of twenty-one, and without leaving lawful issue, then to pay the interest to the survivors or survivor of them share and share alike.

The Will contained a gift of the residue of the estate in trust to be divided between the children of Elizabeth Holloway in equal shares.

The testator died on 31st October 1825, leaving a son who later died without lawful issue, and a daughter Elizabeth Holloway. The daughter died in 1828 having had three sons and three daughters namely the abovementioned grand daughters of Thomas Aylett.

On behalf of the surviving daughters and the representative of the deceased daughter of Elizabeth Holloway it was contended that the £3,000 Navy Five per cents vested absolutely in them in equal shares as daughters of Elizabeth Holloway mentioned in the Will on their attaining twenty-one.

On behalf of the representatives of the sons of Elizabeth Holloway who were residuary legatees, it was contended to the contrary, that the daughters of Elizabeth Holloway only took life interest and that on their decease the £3,000.00 Navy Five per cents sunk into the residue.

Malins V.C. in giving judgment said at P.307:

" As to the gift of the £3,000, there is an indefinite gift of the interest, which, it was very properly admitted, carried the principal, unless there was a contrary

intention. Here, so far from that being the case, it was not to go over, and therefore, as under the old law in case of land, the fee would have passed, so here there is an absolute gift".

In Re Tandy (1886) 34 W.R. P.748 - the Will gave the whole of the testator's property to his executors on trust as to £1,200 in favour of the testator's daughter and her issue and continued thus:

" And with regard to the residue of my estate, my executors shall pay the interest in equal parts half-yearly to my sons Francis, Edward and Alfred. The share of a predeceator to be equally divided to the survivors or survivor".

The testator died in 1880 leaving only his son Alfred who claimed the whole of the residue. The daughter as one of the next of kin, contended that the son was only entitled to the income of the residue, and that the capital of it was undisposed of.

Cotton L.J., in delivering judgment on appeal, said thus at page 749:

" We have to decide whether the sons take an absolute interest or only for life. Chitty, J., has decided that they take the capital, and I cannot dissent from him. The legal effect of an indefinite gift of income is that it is an absolute gift if no intention is shown to give only a life interest".

Finally in Re L'Herminier (1894) L.R. 1 Ch. 675, North J., had to deal with the scope of a power given to a donee by Deed to make testamentary appointments to the income of personal estate. At page 676 he expressed himself in trenchant language thus:

" Suppose an absolute owner of personal property to give the income of his property to a person, what does that person take? He has a right to receive the income forever, and, having the right to the whole income, he has the right to dispose of the capital which produces that income. There is no difference between a disposal by a person having the absolute ownership of the income of a fund and the exercise of a power over the income of a fund in this respect. The power of appointing the income or fruit of a fund is, in my opinion, equivalent to a power over the tree which produces the fruit. If the words are clear that the income may be appointed forever, no intention to the contrary can be inferred without other words to show that the power is intended to be cut down".

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I think I have sufficiently demonstrated by the above cases that clause 8 though couched in confusing and ambiguous language is capable of determination by applying thereto the principle of the aforesaid cases. Clause 8 is capable of only two alternative meanings in so far as the bequest of the shares are concerned. Either it is a gift of the corpus of the shares or it is an indefinite gift of the income therefrom. In the case of the testator's taxi cab it is an indefinite <sup>gift</sup> of the earnings or income from these cabs. Applying the principle of the above mentioned cases the beneficiaries named in clause 8 namely, Miss Icolyn Chong, Mrs. Hannah Jones, Mr. Derrick Jones, Mrs. Joan Anderson (nee Jones) and Mrs. Jennifer Smith (nee Jones) having been bequeathed either the corpus of the shares in Yellow Cab Limited or the income therefrom indefinitely they take the shares absolutely on either postulate. They also <sup>take</sup> absolutely among themselves. The taxi cabs of Horace Jones in the proportions stated by the testator. Whether they decide to operate the said cabs is a matter to be decided among themselves as co-owners of the cabs.

In conclusion my determination and ruling on the questions posed in the Originating Summons are summarized thus:

- (1) With regard to clause 7(a) of the Will all the shares of the testator in the sense of his share capital in Victor Transport Limited have been bequeathed to Miss Icolyn Chong;
- (2) The disposition in clause 7(b), 7(c) and clause 10 are invalid and inoperative because the properties disposed of do not belong to the testator;
- (3) The bequests in clause 8 comprise a bequest of the corpus of the share capital in Yellow Cab Limited and of the taxi cabs themselves in the name of Horace Jones to the named beneficiaries subject to the payment from the earnings from the taxi cabs of the pecuniary legacies;
- (4) No residuary right or interest in either the shares or in the taxi cab vests in the executors on behalf of the residuary devisees and/or legatees;
- (5) The bequests in clause 8 are direct bequests to the named beneficiaries without the intervention of any trust.