12 of 1975

IN THE PRIVY COUNCIL No. 20 of 1974

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND TOBAGO

- and -

IN THE MATTER OF THE APPLICATION OF MICHAEL DE FREITAS ALSO CALLED MICHAEL ABDUL MALIK

BETWEEN:

MICHAEL DE FREITAS also called Michael Abdul Malik — Appellant

- and -

(1) GEORGE RAMOUTAR BENNY
(2) THE ATTORNEY GENERAL
(3) TOM ILES, Commissioner of Prisons — Respondents

CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from the judgment of the Court of Appeal of Trinidad and Tobago (Hyatali, C.J., Phillips and Corbin, JJ.A.), dated the 30th April, 1974, which dismissed the Appellant's appeal from a judgment of the High Court of Trinidad and Tobago (Braithwaite, J.), dated the 8th and 15th February, 1974, which held that a sentence of death (and the execution thereof) passed upon the Appellant on the 21st August, 1972, was lawful and did not contravene the Constitution of Trinidad and Tobago or the Bill of Rights, 1689.

pp.80-81 and pp.73-79

pp.26-27 and pp.28-40

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p.44,ll.7-11
p.33,ll.27-29

2. The Appellant was tried before Rees, J. and a jury at the Port-of-Spain Assizes for the murder of one Joseph Skeritt sometime between the 7th and 22nd February, 1972.

p.3,ll.21-26
p.44,ll.11-15

On the 21st August, 1972, the Appellant was found guilty of the said murder and in accordance with section 4(1) of the Offences Against the Person Ordinance, he was sentenced to suffer death as a felon.

3. The Appellant thereafter appealed to the Court of Appeal of Trinidad and Tobago

p.44,ll.15-17

against his conviction but on the 17th April, 1973, his appeal was dismissed. The Appellant's later Petition for Special leave to appeal to

p.74,ll 18-20

the Privy Council was dismissed on the 26th November, 1973.

pp.1-4

4. By an Amended Notice of Motion dated the 20th December, 1973, filed in the High Court of Trinidad and Tobago, the Appellant

p.2,ll.11-end

sought declarations, inter alia, that the said sentence of death and/or the execution thereof constituted the imposition of cruel and unusual punishment contrary to law and/or the Constitution of Trinidad and Tobago and/or the Bill of Rights, 1689. The Appellant further

p.3,ll.1-18

sought orders inter alia that the said sentence of death be set aside and a less severe form of punishment substituted.

5. Four affidavits were sworn in support of the Appellant's Notice of Motion: one by the

pp.4-6

Appellant himself on the 31st January, 1974,

pp.7-9 and pp.10-13

two by one Conrad Joseph Sanguinette on the 5th and 6th February, 1974 and one by one Fatner

pp.14-24

Tiernan on the 7th February, 1974. An affidavit was sworn by the Third Respondent on the 7th

pp.25-26

February, 1974, setting out the circumstances of the execution of prisoners sentenced to death.

6. On the 8th February, 1974, the Appellant's Motion was heard by Braithwaite, J. in the

pp.26-27

High Court of Trinidad and Tobago. Braithwaite, J. dismissed the Motion with no order as to costs.

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7. On the 15th February, 1974, Braithwaite,J. delivered a written judgment. The learned Judge said that the Appellant sought redress under Section 6(1) of the Constitution. After setting out the terms of Section 3(1) of the Constitution, Section 4(1) of the Offences Against the Person Ordinance (which came into force on the 3rd April, 1925) and section 59 of the Criminal Procedure Ordinance (which came into force on the 2nd June, 1925), the learned Judge concluded that both Ordinances of 1925 were laws in force at the commencement of the Constitution (namely, the 31st August, 1962) within section 3(1) of the Constitution. It followed, in the learned Judge's view, that Sections 1 and 2 of the Constitution did not apply to the two Ordinances of 1925, with the result that the expression "cruel and unusual punishment" did not apply to the passing or execution of the said sentence of death.

pp.27-40
p.28,11.20-23
p.28,11.26-34
p.29,11.7-10
p.29,11.17-19
p.29,1.33-p.31,1.9
p.31,11.12-24

8. In the learned Judge's view, the decisions of the American Courts on "cruel and unusual treatment or punishment" as contemplated by the Constitution of the United States had no application to the execution of penalties provided for by laws which came into force in Trinidad and Tobago before the 31st August, 1962, because such laws were expressly preserved by Section 3(1) of the Constitution of Trinidad and Tobago.

p.31,11.24-35

9. In relation to the Appellant's application for an order substituting a less severe form of punishment, the learned Judge held that he could not and should not interfere with a penalty for a crime which had been fixed by law if the law, whether Act or Ordinance, had been properly passed by the legislature.

p.33,11.13-26
p.37,11.6-19

10. The learned Judge rejected the submission that the Court was vested with powers under the Constitution to make a recommendation of mercy. In the learned Judge's view, the only judicial authority with any constitutional position in the exercise of the prerogative of pardon was the trial judge himself and his function in such

p.33,1.47-p.34, 1.6
p.34,11.6-12

RECORD

connection was restricted to furnishing a report to the Advisory Committee on the

p.34,ll.15-25 Prerogative of Mercy. The learned Judge then
p.34,l.27- cited Section 72(1) of the Constitution,
p.35,l.3 followed by Sections 70(1) and 71 and concluded
p.35,ll.12-23 that the power given to the Minister was purely ministerial and not subject to challenge on
p.36,ll.23-28 constitutional grounds. In the learned Judge's view, the "due process of law" referred to in Section 1 of the Constitution was completed when the Courts of Law had finished their respective
p.36,l.34- tasks and, save for any wrong done to anyone
p.37, l.5 incarcerated in the prisons or for the infringement of any constitutional right in relation to him, the Court could not take cognisance of the operations of the prisons, their executioners or their staff or be burdened with the day to day problems or administration of a prison.

11. In the learned Judge's view, the exercise
p.38,l.20- of the prerogative of Mercy rested with the
p.39, l.6 Executive arm of Government and had never been, and was not, vested in the Courts. The learned Judge was satisfied that the Court had no power
p.39,ll.7-9 or jurisdiction to grant any of the relief sought by the Appellant. The learned Judge could not
p.39,ll.16-25 hold that the death penalty as imposed and executed in Trinidad and Tobago was unconstitutional. He adverted to Section 72 of the Constitution which by the clearest possible implication recognised the existence, validity and constitutionality of the sentence of death.

p.39,l.40- 12. The learned Judge then considered the
p.70,l.16 three affidavits filed on behalf of the Appellant and expressed the view that the matters of complaint therein should be referred to a Commission such as the Royal Commission On The Abolition Of Capital Punishment in the United Kingdom or to the attention of the Advisory Committee on the Prerogative of Mercy as well as the Minister designated under Section 70(2) of the Constitution. The learned Judge said that
p.39,ll.35-40 he was satisfied by the affidavit of the Third Respondent that weighing and measuring of the condemned prisoner was necessary in his own interest, that the actual execution was painless and that death was instantaneous.

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13. The learned Judge concluded that in the circumstances he was left with no alternative but to dismiss the application. p.40,ll.17-18

14. The Appellant appealed to the Court of Appeal of Trinidad and Tobago. The appeal was heard by Hyatali, C.J., Phillips and Corbin, JJ.A. and judgment was given on the 30th April, 1974, unanimously dismissing the Appellant's appeal. pp.73-79 pp.80-81

15. Hyatali, C.J. summarised the facts giving rise to the appeal and set out the terms of the Appellant's Notice of Motion dated the 20th December, 1973. The learned Chief Justice said that the Appellant's application was made under Section 6 of the Constitution and set out the relevant parts of Sections, 1, 2, 3(1), 70, 71 and 72 of the Constitution. The learned Chief Justice then summarised in the form of six propositions, the reasons given by Braithwaite, J. for dismissing the Appellant's Motion on the 8th February, 1974. Hyatali, C.J. then set out the propositions which in the final analysis were the basis of the Appellant's case and said that the claim by the Appellant that the passing of the sentence of death was contrary to the Constitution had not been pursued in the Court of Appeal. Nor had the claim that the judgment sentencing him to death contravened the common law principle that the person convicted on the evidence of an accomplice ought to be recommended to mercy. p.44,ll.7-20 p.44,ll.24-p.45, l.34 p.45,ll.35-end p.46, l.2-p.48, l.33 p.48, l.41-p.49, l.40 p.50, l.2-p.51, l.29 p.51,ll.30-34 p.51,ll.34-39

16. As to the Appellant's first and second propositions (which related to the alleged unconstitutionality, first, of administrative actions in carrying out the sentence of death and, secondly, of inordinate delays in carrying out such sentence), Hyatali, C.J. said that the action of officials in carrying out the sentence of death was expressly authorised by two warrants issued under Section 59 of the Criminal Procedure Ordinance and set out the terms of both warrants. The learned Chief Justice said that the two warrants had not only the same force and authority as the Ordinance itself but imbued the acts p.50,ll.2-11 p.50,ll.12-20 p.52,ll.15-29 p.52,l.30 - p.54, l.39 p.55,ll.6-11

RECORD

performed by the appropriate officials thereunder in compliance with the commands addressed to them with a like force and

p.55,ll.18-30 authority. In considering the question of alleged inordinate delay (which Counsel for the Appellant defined as "more than five months") the learned Chief Justice said that the Appellant's

p.55,ll.31-48 submissions amounted to this: that the administrative acts, which if performed within five months would be beyond impeachment as falling within the authority of the Offences Against the Person Ordinance and the Criminal Procedure Ordinance, after five months fell outside those Ordinances whether or not the Appellant was then still

p.55,l.48 - p.56, l.3 pursuing his right of appeal against conviction. It further made no difference, according to the Appellant's submission, that Section 51 of the Supreme Court of Judicature Act, 1962 (a law in force on the 31st August, 1962) prohibited the execution of a death sentence while an appeal

p.56,ll.4-10 was pending. The learned Chief Justice rejected the Appellant's submission as untenable and said that whether the death sentence was executed before or after five months from its imposition it would be executed in both instances under the authority of the two warrants issued under Section 59 of the Criminal Procedure Ordinance. It could

p.56,ll.10-20 not be demonstrated that there was no authority to issue the warrants under Section 59 after the passage of five months or if issued within five months that they had no validity thereafter.

17. Hyatali, C.J. then considered the Appellant's submission that the framers of the Constitution

p.56,ll.22-27 did not intend to preserve from impugninent as unconstitutional administrative actions performed at any time after the relevant date in purported pursuance of legislation subsisting at such date.

p.56,ll.27-30 It was submitted that support for the Appellant's

p.56,ll.31-37 submission was to be found in the omission from the Constitution of a saving clause to be found in the Constitutions of Southern Rhodesia and

p.56,l.73 - p.57, l.5 Guyana. The learned Chief Justice said that this submission was inconsistent with the Appellant's concession that administrative acts performed to carry out a sentence of death within five months of its imposition did not contravene the Constitution because they were authorised by

legislation preserved by Section 3(1) of the Constitution. In any event, the learned Chief Justice did not accept that administrative acts to carry out a sentence of death had an existence independently of the legislation preserved by Section 3(1) of the Constitution. In the learned Chief Justice's view the saving clause omitted was not necessary to give validity to acts performed after the relevant date in pursuance of and within the authority of legislation in force at the relevant date. By necessary implication such acts were perfectly valid. To hold otherwise would have the effect of either repealing such legislation or depriving it of efficacy: such a construction of the Constitution would defeat the clear intention of Section 3(1) of the Constitution. Hyatali, C.J. therefore rejected the Appellant's submission. The learned Chief Justice considered that there was a further barrier to the Appellant's showing an infringement of Section 2(b) of the Constitution: he would have to show, which he was not able to do, that the administrative acts complained of were performed not under the two Ordinances of 1925 but under a law or Act of Parliament passed after the relevant date which imposed or authorised the imposition of cruel and unusual treatment or punishment.

RECORD
p.57,ll.6-14, 24-31
p.57,ll.31-42
p.57,ll.43-end
p.58,ll.1-6
p.47,ll.16-35

18. The learned Chief Justice then considered the Appellant's third proposition, namely, that the Bill of Rights, 1689, had rendered nugatory section 4(1) of the Offences Against the Person Ordinance and Section 59 of the Criminal Procedure Ordinance. The learned Chief Justice set out the terms of Section 12 of the Supreme Court of Judicature Act, 1962, and held that in accordance with the plain language of that section the two Ordinances of 1925 must be taken and read as having repealed or rendered nugatory any provisions of the Bill of Rights which were inconsistent with or repugnant to them or, conversely the Bill of Rights must be read subject to any provisions to the contrary in the two Ordinances of 1925. The learned Chief Justice therefore rejected the Appellant's third submission.

p.58,l.36-p.60,l.10
p.50,ll.21-40
p.59,ll.2-9
p.59,ll.16-25
p.59,ll.34-43
p.59,l.46-p.60,l.10

RECORD

p.50,l.41 - p.51, l.9

19. Hyatali, C.J. then dealt with the Appellant's fourth proposition that the reprieve procedure in Trinidad and Tobago operated in

p.60,ll.12-17

an arbitrary and discriminatory fashion and thereby infringed the provisions of Section 1 of the Constitution. After citing certain

p.60, l.20- p.61, l.14

passages from the American case, Furman v. Georgia, the learned Chief Justice said that these two basic points of distinction between

p.61,ll.15-19

that case and this. Firstly, the death penalty considered in Furman v. Georgia was not one fixed by law for murder, as it was in Trinidad and Tobago under a law expressly preserved in the Constitution. Secondly, the question in

p.61,ll.19-29

Furman v Georgia was whether the imposition of the death penalty under a discretionary system in the United States was offensive and contrary to the Eighth and Fourteenth Amendments of the American Constitution. The learned Chief

p.61,l.40 - p.62, l.1

Justice found the case of Furman v Georgia to be wholly inapplicable to the present case.

p.62, ll.1-9

He considered that the reprieve procedure in Trinidad and Tobago was essentially a procedure for the exercise of mercy or of extending pardons to convicted criminals already sentenced. Such procedure could not, in the learned Chief Justice's view, be successfully attacked as a system of law and justice which invested those concerned in operating it with a discretion to impose a sentence of death on persons convicted of the crime of murder. As to the

p.62,ll.13-25

Appellant's application for the substitution of a term of life imprisonment, the learned Chief Justice said that the Court could not amend or repeal a subsisting law which would necessarily follow if it acceded to the application.

20. As to the Appellant's fifth proposition

p.51,ll.10-23

the learned Chief Justice said that the basis of the proposition was that the proceedings of the Advisory Committee on the Prerogative

p.63,ll.36-end

of Mercy established under Section 71 of the Constitution were either judicial or quasi-judicial or that the Committee sat as a statutory body to exercise a discretion. The

RECORD

Appellant went on to contend, firstly, that the presence of the Minister and the Attorney General on the Committee tained its proceedings with an appearance of bias and, secondly, that contrary to the rules of natural justice he was given no opportunity of being heard before the Committee. The learned Chief Justice said that the basis of the Appellant's fourth proposition was erroneous in every respect. In the learned Chief Justice's view, the Advisory Committee did no more than advise; it had no power to deprive any person of his life. It exercised no prerogative. The exercise of mercy was an absolute executive act which was not subject to review or control by the courts. The learned Chief Justice concluded that neither the "due process" provision in Section 1(a) of the Constitution nor the rules of natural justice applied to the proceedings of the Committee.

p.63,ll.28-35
p.64,ll.4-5
p.64,ll.5-7
p.64,ll.13-15
p.64,ll.26-31

21. As to the sixth and last proposition of the Appellant that the Appellant should be medically examined to determine whether he was sane since he had the right not to be hanged if he was insane, the learned Chief Justice said that there was absolutely no evidence to show that the Appellant was insane or had manifested any signs indicating that he was or might be inflicted with a disease of the mind. The learned Chief Justice reviewed the Appellant's affidavit and the letter dated the 5th February, 1974, exhibited to the said Sanguinette's affidavit sworn on the 6th February, 1974, and concluded that there was no ground for entertaining the Appellant's request for a medical examination.

p.51,ll.24-29
p.64,l 32-
p.65,l 21
p.64,ll 32-37
p.64,l.46-
p.65, l.2
p.65,ll.6-21
pp. 5-6
pp.10-11
Exhibit "H" p.13

22. The learned Chief Justice said that he would dismiss the appeal with no order as to costs.

p.65,ll.22-25

23. In his Judgment, Phillips, J.A. having set out the terms of Section 2(b) of the Constitution, the main contentions of the Appellant, the terms of Section 1(a) of the Constitution, the relevant provision in the Bill of Rights, 1689, the terms of Section 12 of the Supreme Court of Judicature Act, 1962, Section 3(1) of the Constitution, Section 4(1) of the Offences Against the Person Ordinance and Section 59 of the Criminal Procedure Ordinance, then considered the Appellant's arguments based upon

pp.67-75
p.67,ll.18-28
p.67,ll.30-end
p.68,ll.1-14
p.68,ll.24-34
p,68,ll.28-38
p.68,ll.42-end
p.69,ll.5-6
p.69,l20-
p.71, l.4

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p.71, l.4 — the Bill of Rights. The learned Judge said that
p.71,ll.19-26 — the Constitution, which recognized the continuing validity of existing laws, by enacting in Section 2(b) that no future law should do what was already forbidden by the Bill of Rights, had by implication recognized that death by hanging as a result of a judicial order was neither cruel nor unusual. The learned Judge
p.71,ll.27-33 — referred to the retention in England of the death penalty for the offences of high treason and piracy with violence.

24. The learned Judge then considered the Appellant's submission that Section 59 of the
p.71,ll.34-42 — Criminal Procedure Ordinance related only to the form of the death warrant issued to the Marshal and conferred on him no authority to perform the "purely administrative" act of carrying out any penalty that was cruel and unusual. The learned
p.71,l. 42- p.73, l.16 — Judge referred to Furman v Georgia and other American cases and said that in the Appellant's submission Section 3 of the Constitution of Trinidad and Tobago referred only to laws and not to purely administrative acts. After
p.73,ll.21-29 — referring to Section 105(1) of the Constitution which defined "law" as including "any instrument having the force of law and any unwritten rule of law," the learned Judge concluded that a warrant for the execution of the Appellant duly issued by the Governor-General under the provisions of Section 59 of the Criminal Procedure Ordinance would be an instrument "having the force of law" and as such would not be caught by the provisions of Section 2(b) of the Constitution.

p.74, l.29 — 25. The learned Judge was unable to accept the Appellant's submissions in relation to the Advisory Committee on the Prerogative of Mercy and concluded that the exercise of mercy was a
p.74,ll.42-43 — purely executive act which was properly exercisable in the manner provided for by the
p.74,l.44 - p.75, l.2 — Constitution and as such was not open to challenge in the courts. The learned Judge was of opinion
p.75,ll.17-19 — that the Appellant's appeal should be dismissed with no order as to costs.

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26. In his Judgment, Corbin, J.A. after summarising the relevant facts, the terms of the Appellant's Notice of Motion and the relevant statutory and constitutional provisions. said that there were two answers to the Appellant's contention that the Bill of Rights rendered nugatory the provisions of the relevant sections of the two Ordinances of 1925. Firstly, the two Ordinances of 1925 being passed after 1848 prevailed over the Bill of Rights, 1689, in accordance with the terms of Section 12 of the Supreme Court of Judicature Act, 1962. Secondly, Section 3(1) expressly preserved laws in force so that Sections 1 and 2 of the Constitution could not affect the two Ordinances of 1925. It was to be noted that the death penalty had stood side by side with the Bill of Rights as a permissible and unobjectionable punishment for murder for more than two and a half centuries.

pp.76-79
p.76,ll.27-end
p.77, l.10 - p.78, l.11
p.78,ll.16-17
p.78,ll.17-20
p.78,ll.20-23
p.78,ll.24-29

27. As to the argument that the carrying out of the death sentence infringed the Appellant's rights, the learned Judge agreed with Phillips, J.A. that the warrants issued under Section 59 of the Criminal Procedure Ordinance were instruments having the force of law and falling within the definition of "law" in Section 105(1) of the Constitution. As to the argument concerning inordinate delay, in the learned Judge's view that matter did not arise since it had not been demonstrated that there had been any inordinate delay in relation to the Appellant. Further, the learned Judge held that it had not been shown, in relation to the application for a medical examination, that there existed any need for such an examination. The learned Judge agreed with Hyatali, C.J. and Phillips, J.A. that the American case of Furman v Georgia was distinguishable and that the Advisory Committee on the Prerogative of Mercy did not perform any judicial or quasi-judicial function and its proceedings did not call for the observance of any provision relating to due process of law. The learned Judge noted that the Appellant's position could not be worsened by any decision of the Advisory Committee. The learned Judge agreed with the judgments and conclusions of Hyatali, C.J. and Phillips, J.A. and accordingly dismissed the appeal with no order

p.78,ll.30-36
p.78,ll.37-43
p.78,l.43 - p.79, l.3
p.79,ll.11-26
p.79,ll.26-28
p.79,ll.29-32

RECORD

as to costs.

pp.81-82 p.83

28. On the 22nd May, 1974, the Appellant was granted Conditional Leave to Appeal to the Privy Council and on the 16th October, 1974, was granted Final Leave to Appeal.

29. The Respondents respectfully submit that this appeal ought to be dismissed and the judgments of Braithwaite, J. in the High Court of Hyatali, C.J., Phillips and Corbin, JJ.A. in the Court of Appeal are right. It is respectfully submitted that the passing and execution of a sentence of death pursuant to the two Ordinances of 1925 does not contravene any principle or rule of law whether as set out in the Constitution of Trinidad and Tobago, in the Bill of Rights or otherwise. It is respectfully submitted that such a sentence and the execution thereof is fixed and authorised by laws which are expressly preserved by the Constitution, which laws are therefore not open to challenge as contravening Sections 1 and 2 of the Constitution.

30. It is respectfully submitted that the reprieve procedure and the proceedings of the Advisory Committee on the Prerogative of Mercy are not open to challenge in the courts. It is further respectfully submitted that there is no jurisdiction in the courts to substitute a term of life imprisonment or any other penalty for a sentence of death passed upon a conviction of murder or in the circumstances of this case to grant any of the relief sought by the Appellant.

31. The Respondents respectfully submit that the judgments of the High Court and of the Court of Appeal of Trinidad and Tobago are right and ought to be affirmed and this appeal ought to be dismissed with costs, for the following (among other)

R E A S O N S

1. BECAUSE the sentence of death passed on the Appellant on the 21st August, 1972, and the execution thereof is lawful and does not contravene any provision of law whether as set out in the Constitution, the Bill of

Rights or otherwise.

2. BECAUSE no provisions of the Constitution or of any other law have been infringed in relation to the Appellant whether by any punishment imposed upon or to be executed against him or by any treatment of him.

3. BECAUSE the operation of the reprieve procedure and the proceedings of the Advisory Committee on the Prerogative of Mercy are not subject to challenge in, or review or control by, the Courts.

4. BECAUSE the Courts do not have jurisdiction to vary, or substitute another sentence for, a sentence of death passed upon a conviction of murder or to grant any of the other relief sought by the Appellant in the circumstances of this appeal.

5. BECAUSE of the other reasons given in the judgments of Braithwaite, J. in the High Court and of Hyatali, C.J., Phillips and Corbin, JJ.A. in the Court of Appeal.

STUART N. McKINNON

24/3/75

No. 20 of 1974

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND TOBAGO

- and -

IN THE MATTER OF THE APPLICATION OF MICHAEL DE FREITAS ALSO CALLED MICHAEL ABDUL MALIK

BETWEEN:

MICHAEL DE FREITAS
also called Michael
Abdul Malik — Appellant

- and -

(1) GEORGE RAMOUTAR BENNY
(2) THE ATTORNEY GENERAL
(3) TOM ILES, Commissioner of Prisons

Respondents

CASE FOR THE RESPONDENTS

CHARLES RUSSELL & CO.,
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Lincoln's Inn,
London, W.C.2.

Solicitors for the Respondents