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CASES
DETERMINED IN THE
SUPREME COURT OF BRITISH GUIANA.

SAMAROO, Plaintiff,

v.

WOO SAM, Defendant.

[1929. No. 21.—BERBICE.]

BEFORE SAVARY, J.

1930. OCTOBER 24, 25, 27; NOVEMBER 3, 5. 1931. JANUARY 20.

Nuisance—Thatched house—Damage to—Rice mill—Escape of sparks from chimney of—Rule in Rylands v Fletcher—Absolute liability—Local Government Board Ordinance, 1907. s 278 (now cap. 84, s. 267)—By-laws made under—By-law 39—Effect of—Negligence—Natural user of house—Special user as rice mill—Volenti non fit injuria—Non-applicability of.

The rule in *Rylands v. Fletcher* (1866) L.R. 3 H.L. 330 applies to sparks escaping from the chimney of a rice mill.

The defendant before erecting a rice mill on his land obtained the consent of the local authority in accordance with By-law 39 made under section 278 of the Local Government Board Ordinance, 1907, (now section 267 of chapter 84). The said section enacts that “every local authority may make bylaws for regulating the mode in which any trade or manufacture shall be carried on within its district, and may provide that no machinery shall be erected without its consent and under such conditions as it imposes.” By-law 30 provides that “no machinery shall be erected in any township lot without the consent of the local authority.”

Held, that the Local Government Board Ordinance afforded no statutory protection to the owner of a rice mill in an action brought against him in respect of sparks escaping from the chimney of the rice mill.

A thatched house was erected with the permission of the local authority. Subsequently, a rice mill was erected also with the consent of the local authority. Sparks escaped from the chimney of the rice mill and damaged the thatched house. The owner of the thatched house sued the owner of rice mill for damages.

Held, that the maxim *volenti non fit injuria* did not apply. The plaintiff was using his land in a natural way, and was not bound to take extraordinary precautions; he was entitled to rely on his neighbour also using his land in a natural way, or if he used it otherwise, taking extraordinary precautions to prevent damage to others therefrom.

Action for damages to the plaintiff’s house caused by the escape of sparks from the chimney of the defendant’s rice mill. The facts and the arguments appear from the judgment.

L. A. Hopkinson, for the plaintiff.

J. A. Luckhoo, K.C., for the defendant.

Cur. adv. vult.

SAVARY, J.: This action which raises a question of importance, arises out of a claim by the plaintiff against the defendant for

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damages occasioned by a fire which destroyed, on the 8th November, 1929, a house occupied by the plaintiff and his family, which fire the plaintiff alleges was caused by sparks that escaped from the chimney of a steam engine erected on premises where the defendant carried on a rice mill.

The plaintiff is a farmer and lives at Letter Kenny, Corentyne, a part of the district of Letter Kenny, Bloomfield and Auchlyne, which is under the Local Government Board and is controlled by a local authority. The building that was destroyed was in a part of the district gazetted as a township.

The defendant carries on a rice milling business on premises in the same district to windward of plaintiff's house, eleven feet therefrom, and the steam engine on those premises is about 28 to 29 feet from the said house.

This house was built of wattle covered with mud and had a roof of trash, and I am satisfied from the evidence of Iloo, the Sanitary Inspector of the district, and Exhibit F.A.I. 1, that plaintiff duly gave notice of his intention to erect a building under By-Law 7 of the District By-Laws, 1911, and obtained in 1928 the sanction of the local authority required by By-Law 35 (2) of the said District By-Laws, 1911, to cover this building with trash.

A witness for the defence, one Sam, overseer of the district, admits that the house that was built was on lot 4 and Exhibit F.A.I. 1 refers to a building to be erected on lot 4.

It is admitted that the building for the rice mill was erected some time after plaintiff built his house, and that the steam engine was installed at a later date in the same building. It is not disputed that, in October, 1929, defendant obtained the consent of the Local Government Board to install a 20 h.p. boiler and engine, which is the steam engine in question in this case. This consent is required by By-Law 39 of the said District By-Laws.

On the 8th November, 1929, plaintiff went to New Amsterdam in the early morning with one Jhola Persaud, a neighbour whose house had been destroyed by fire on the previous day, to make a report to the Inspector of Police. This arose out of an incident on the preceding day when a spark or sparks escaping from the same chimney, it is alleged, had fallen on the head of his (plaintiff's) child. On plaintiff's return to the village in the afternoon between 3 and 4 p.m. he found his house partially burnt down. His wife who had been left in the house had gone to her brother's house near by later on that same morning. On returning to her home some time in the day she saw some bags, which had been spread outside her house, on fire, and quickly went to the rice factory to report the matter. Persons from the factory went and put out the fire. One of the witnesses, Ramlochan, says he saw burnt rice husks on the bags after the fire, so that there is a very strong presumption that this fire was caused by sparks escaping

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from the chimney in question. She returned to her brother's house and subsequently heard shouts of fire. On coming out she saw the roof of her house burning. Persons from the factory and others succeeded in putting out the fire which damaged the house to a substantial extent. The claim for damages arises out of this fire.

It is important to note that before defendant began lighting the fire in the furnace of the steam engine, he sent for plaintiff and informed him that he intended to start working his engine, and that his (defendant's) house would be in danger of catching fire from sparks from it, and offered to pay one-half the cost of substituting a roof of galvanised iron for the trash one then existing. Owing to difficulties over the question of plaintiff having to pay a half share the trash roof remained on his house. These facts are substantially admitted by defendant. It is also very significant that either on that same day or shortly after, two carpenters Ramnath and Ramdharri, together with one Antoo, who was employed at defendant's factory as his engineer, on instructions from defendant, went to plaintiff's house, took measurements of same and also examined the material the house was made of. This was about two to three weeks before the fire that resulted in this action took place and on the same day of this visit to plaintiff's house or the day following the engine was started. After the fire, plaintiff went to defendant to complain of his house having been burnt by sparks from his (defendant's) chimney, and defendant states that he told him that he had made him an offer, presumably about the galvanized roof, and it holds good, a reply I am unable to appreciate, and it is a matter to be considered that defendant did not suggest that the fire had not been caused by sparks from his chimney.

Antoo, defendant's engineer, states that for the first few days after the engine was started only wood was used as fuel, and I have no reason to disbelieve plaintiff's story that at first no sparks were seen. Afterwards, wood and rice husks, called "boussi" by the various witnesses, were used as fuel, and the case is that, at any rate, from that time sparks were seen coming from the chimney in appreciable quantities, and were the cause of the fire on the plaintiff's roof. All the witnesses from that locality, including defendant and his witnesses, admit that sparks fell from the chimney. Indeed, defendant states that he saw dust on the ground around the factory, and that it was likely to fall in plaintiff's compound and on his roof. This dust, the cause of which was not explained by defendant, was evidently the residue left by sparks or cinders escaping from the chimney. These facts show that sparks were escaping and falling from defendant's chimney before and at the time of the fire, and I am satisfied that the fire on the roof of plaintiff's house was caused in this manner. Having come to this conclusion, it becomes necessary to consider the

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question of defendant's liability, if any. Plaintiff originally based his claim on negligence, but at the trial, as the result of an amendment, plaintiff, on an alternative claim, seeks to make defendant also liable on the ground of nuisance, based on the doctrine laid down in *Fletcher v. Rylands*, (1866) L.R. 1 Ex. 265, (1868) L.R. 3 H.L. 330, I Smith's L.C. (13th Ed.) p. 865, that defendant brought on his land or premises a dangerous thing, to wit, fire, which caused damage to plaintiff's property.

Defendant's answer is (1) that no liability attaches to him as he had obtained the consent of the Local Government Board to instal this engine and had exercised reasonable care and skill in using and running it, and (2) in the alternative, that plaintiff voluntarily submitted himself to the danger, or was guilty of contributory negligence, and is not entitled to succeed in his action.

It therefore became necessary for me to consider and decide (1) whether the doctrine in *Fletcher v. Rylands* applies to the facts of this case, which involves consideration of the question whether defendant had statutory authority, within the meaning of the cases cited (which will be discussed later), and could claim statutory protection; (2) whether, if he had statutory authority, defendant used reasonable care and skill in the user and running of the engine; and (3) whether plaintiff voluntarily submitted himself to the danger, or was guilty of contributory negligence such as would preclude him from recovering.

In approaching consideration of the first point for decision, I mention that my attention was not called to any Ordinance, nor am I aware of any, which deals with the question of liability for fire, and it becomes necessary to ascertain the rule of the common law on the subject. I will deal shortly with this as the law is not disputed. *Fletcher v. Rylands* is the leading case on the maxim *sic utere tuo ut alienum, non laedas*, and the rule laid down at pages 279 and 280 in the judgment of the Exchequer Chamber, delivered by Blackburn, J., and approved in the House of Lords is to this effect: "We think that the true rule of law is that the person, who for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape and it seems but reasonable and just that the neighbour who has brought something on his own property, which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property." This rule has been held to apply, for instance, to sparks escaping from the engine of a locomotive, *Jones v. Festiniog Railway Co.*, (1868) L.R. 3

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Q.B. 738, or a traction engine or steam roller. *Mansel v. Webb* (1919), 88 L.J. K.B. 323, and to the escape of electricity, *Eastern and South African Telegraph Co., Ltd., v. Capetown Tramways Companies, Ltd.*, (1902), A.C. 381.

The making of a fire involves the bringing on land of something not naturally there, and therefore the owner of the fire is bound to keep it at his peril: see *Clerk and Lindsell on Torts* (8th Ed.) 396, and the cases there cited. In my opinion, therefore, this doctrine would clearly apply to sparks escaping from defendant's chimney, and he would be liable in damages unless I find that he is entitled to claim the statutory protection previously referred to as the question of contributory negligence can only arise, if at all, when defendant can be said to have statutory authority to instal and use this engine.

Defendant's counsel put this part of his case in this way, that his client had the consent of the Local Government Board to instal this engine and would not be liable so long as he exercised reasonable care and skill in using and running it. Although counsel's submission was made in this form I do not think it was disputed that the question of the condition of the engine and of its installation in that locality was involved in the application of the above principle, and in fact these points formed the subject of part of this argument. For this proposition reliance was placed on the cases of *Vaughn v. Taff Vale Railway Co.*, (1860) 29 L.J. Ex. 247 where it was decided that a railway company authorized by statute to employ locomotive engines is not responsible for damage caused by sparks falling from the engines if they have taken all the precautions which science can suggest to prevent injury, in other words, they are not liable unless guilty of some negligence in fact, and *Canadian Pacific Railway Company v. Roy* (1902) A.C. 220, where a similar principle was laid down following the *Taff Vale* and other cases.

Accordingly it becomes necessary to consider the scope and nature of the Local Government Board Ordinance, 1907, under which the Local Government Board is constituted. The Ordinance is divided into eight parts and confers powers and imposes duties extending over a wide range of matters, and, *inter alia*, deals with central administration by the Board, the division of the Colony into districts, local administration in those districts and in villages, and public health and sanitary matters affecting them. Part V., sections 275 to 360, contains general provisions as to local administration. Section 278, under the heading "Regulation of Trades," is the material section in this case, and gives power to every local authority to make By-Laws for regulating the mode in which any trade or manufacture shall be carried on within its district.

By-Law 39 made under the provisions of this section 278 enacts that "No machinery shall be erected in any township lot

without the consent of the local authority.” It is this By-Law which forms the basis of the argument of counsel for defendant, and he contends that, in effect, it authorises the defendant to instal an engine on his premises within the meaning of the rule in the *Taff Vale* case, and that, therefore, his client has the necessary statutory protection. The decision in *Vaughn v. Taff Vale Railway Co.*, which had been questioned, was finally confirmed by the House of Lords in *Hammersmith Railway Co. v. Brand*, (1868) L.R. 4 H.L. 171, and it becomes necessary to examine the grounds of the decisions in these cases.

In the *Hammersmith Railway* case, Baron Bramwell at page 188 of the Report states: “For this nuisance the occupiers would from time to time be entitled to maintain actions, unless some statute has legalised the nuisance” and then proceeds to deal with the *Taff Vale* case. Blackburn, J., at page 196, lays down the principle in these terms: “And I think that it is agreed on all hands that if the Legislature authorizes the doing of an act (which if unauthorized would be a wrong and a cause of action) no action can be maintained for that act, on the plain ground that no Court can treat that as a wrong which the Legislature has authorized Now the Legislature has thought fit to authorize the defendants to make a railway, and by 8 Vict. c. 20, s. 86, ‘to use and employ locomotive engines and other moving power’ And the first question is, whether this is such a legislative authorization of the use of such power as to render all such consequences as inevitably attend it no longer wrongful.” He then deals with *R. v. Pease* (1832) 4 B, and Ad, 30, and the *Taff Vale* case as laying down the principle enunciated by him. Lords Chelmsford and Cairns advance another reason as justifying the decision in the *Taff Vale* case. The former at page 202 says: “The right given to use the locomotive would otherwise be nugatory, as each time a train passed upon’ the line and shook the houses in the neighbourhood actions might be brought by their owners, which would soon put a stop to the use of the railway. I therefore think that the cases of *R. v. Pease* and *Vaughan v. Taff Vale Railway Company* were rightly decided.” And Lord Cairns, although delivering a dissenting judgment, agreed with the opinions of the other Law Lords on this point, and proceeded at page 215 as follows: “It is clear to demonstration that the intention of Parliament was that the railway should be used. If, therefore, it could not be used without vibration, and if vibration necessarily caused damage to the adjacent landowner, and if it was intended to preserve to the adjacent landowner his right of action, the consequence would be that action after action would be maintainable against the railway company for the damage which the landowner sustained; and after some actions had been brought, and succeeded, the Court of Chancery would interfere by injunc-

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tion and would prevent the railway being worked—which, of course, is a *reductio ad absurdum*, and would defeat the intention of the Legislature.”

Similar views were expressed in the speeches of the Law Lords in *Metropolitan Asylum District v. Hill*, (1881) 6 A.C. 193—a case I will deal with more in detail later on—when distinguishing the *Taff Vale* case from the case then under decision: see per Lord Selborne, L.C., at page 201, Lord Blackburn at page 203, and Lord Watson at page 211.

In *Canadian Pacific Railway v. Roy* (1902) A.C. 220, the Privy Council followed the *Hammersmith* case and expressed approval of the opinion of Lord Cairns previously set out, and at page 231 of the judgment the following passage occurs: “The Legislature is supreme, and if it has enacted that a thing is lawful such a thing cannot be a fault or an actionable wrong.”

In *Charlesworth’s Liability for Dangerous Things*, page 41, the author states that it is assumed that the benefit to the public as a whole outweighs the detriment to any particular individual.

Two passages in Lord Watson’s judgment in the *Metropolitan Asylum* case show the basic reasons for the decision in the *Taff Vale* line of cases, and indicate what matters are to be considered on an examination of the question whether statutory protection arises or not. At pages 211 and 212 he uses these words: “The judgment of this House in the *Hammersmith Railway Company v. Brand* determines that where Parliament has given express powers to construct certain buildings or works according to plans and specifications upon a particular site, and for a specific purpose, the user of those works or buildings, in the manner contemplated and sanctioned by the Act, cannot, except in so far as negligent, be restrained by injunction, although such user may constitute a nuisance at common law.” And at pages 212 and 213 he states: “On the other hand, I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature, lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good these two propositions—in the first place, that such are the imperative orders of the Legislature; and in the second place, that they cannot possibly obey those orders without infringing private rights.” This passage was quoted with approval

in the latest case on the subject, to which I regret I was not referred by either counsel, *Manchester Corporation v. Fernworth*, (1930) A.C. 171. All the authorities previously referred to by me and others as well, were cited in this case, and Viscount Dunedin, at page 183, summarises their effect as follows: "When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation which cannot be rigidly defined, of practical feasibility in view of situation and of expense."

Now it seems to me that it cannot be argued that the installing and using of an engine to operate a rice mill by a private party on his property for his gain is a matter of such benefit to the public that it ought to outweigh the detriment of private individuals, especially where the owner can choose his own site and is not limited to any particular place or limit of space, and can decide under what conditions he is to run it. The installing of an engine by an owner or occupier on his premises is not, if unauthorized, a common law nuisance or an actionable wrong *per se*. The consent that is required from the Board is, in view of the scope and purport of the Ordinance, to give the Board an opportunity of dealing with the matter from the point of view of public health, sanitation, or village administration, not for the purpose of making lawful what would otherwise be unlawful at law. Furthermore, as a matter of construction, I fail to see how it can be said that the Ordinance expressly authorizes the defendant to instal the engine, since it deals only very indirectly with the matter by means of By-Laws regulating trades generally. Lastly, I can find no express words or necessary implications in the Ordinance, nor has my attention been called to any, that suggest the defendant was authorized to interfere with private rights or that his common law liability was restricted.

Lord Selborne, at page 201, in the *Metropolitan Asylum* case says: "But the case is different when (as here) no interference at all with any private rights is authorized, and no place, or limit of space, is defined within which the establishment of such an asylum is made lawful." Lord Blackburn, at page 208, of the same case states: "It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an intention appears," And Lord Watson, at page 213, puts it in this way:

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“Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose.” See also per Lindley, L.J., at page 599 in *Rapier v. London Tramways Company*, (1893) 2 Ch. 588. Viscount Sumner in the *Manchester Corporation* case at pages 194 and 195 sums up the matter tersely as follows: “I do not know by what authority, short of the express direction of the Legislature, the interests of the public are thus summarily to override the rights of the individual.” Again, it seems to me that it can hardly be seriously contended in this case that the intention of the Legislature would be defeated if an injunction were granted against the defendant running the engine.

It seems to me that this case is more analogous to that referred to in *Clerk and Lindsell* (8th Ed.) 398 as to the storage and sale of explosives which is regulated by the Explosives Act, 1875, 38 and 39 Vict. c. 17, under which gunpowder stored in larger quantities than thirty pounds, or for purposes of sale, can only be lawfully stored in specially licensed or registered premises. The learned authors express their view as to liability as follows: “Even should an explosion occur in premises duly licensed under the Act, the owner would still be liable for damage accruing to his neighbours therefrom, for there is nothing in the statute to take away private rights of action for injuries arising from the keeping of explosives.” These words seem to me to apply with much force to the position of the defendant in this case, the consent required from the Board being not unlike the licence referred to above; and I venture to suggest that the principle underlying the above proposition is that the statute is permissive merely and not imperative or mandatory. This principle was first laid down by Lord Watson in the *Metropolitan Asylum* case in a passage at page 213, previously quoted by me, and was affirmed by the Privy Council in *Canadian Pacific Railway v. Parke*, (1899) A.C. 535. Lord Watson who delivered the judgment of the Privy Council states at page 544: “Wherever, according to the sound construction of a statute, the Legislature has authorized a proprietor to make a particular use of his land, and the authority given is, in the strict sense of law, permissive merely, and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others.” And at page 547 this passage occurs: “The real question, therefore, in this case comes to be whether these provisions ought to be construed as being in their substance, as well as in their form, permissive merely,

and subject to the obligation, which in that case is implied at common law, that the irrigator must use his water supply so as not to do damage to adjacent lands; or, whether they are to be construed as imperative, and therefore as empowering the irrigator, so long as he is not convicted of negligence, to inflict any amount of injury upon his neighbour without incurring responsibility. . . . Their Lordships have been unable to discover, in the statutory provisions submitted to them, any sufficient ground for holding that the privilege of irrigating his own soil with foreign water was meant by the Legislature to be imperative, and was intended to exclude all right of action by neighbouring proprietors for injury done to their lands, save in the case where such injury was occasioned by the negligence of the irrigator.” See also *Charlesworth’s Liability for Dangerous Things*, pages 41, 42. And at page 548 the language used suggests one of the tests for determining this question: “In the present case the irrigator is at liberty, subject only to the consent of a commissioner, who is not charged with the duty of seeing that no injury results to lands adjacent to those which are to be irrigated, to determine the quantity of water he desires to appropriate, the means by which it is to be conveyed to his land, and the means by which surplus or waste water is to be discharged. When the water has been conveyed to his land, he is authorised to use it for purposes of irrigation; but it is left to his discretion to determine whether, as circumstances permit, he will use in irrigation, the whole, or part, or none of it. These provisions are certainly consistent with the view that no part of it was meant to be employed to the injury of neighbouring lands.” These words seem to me applicable to the position of the Local Government Board and the defendant in this case. I have not been referred to any provision in the Ordinance nor am I aware of any, that imposes any duty on the Board to see that the engine proposed to be erected will not or is not likely to damage neighbouring property. It is also interesting to point out that, in the course of the judgment, Lord Watson makes it quite clear that, in his opinion, the railway cases come within the principle of imperative statutory enactments and gives that as the reason for their statutory protection. See on this point pages 545, 546 and 548.

In conclusion, I confess that I can find no analogy between a person having to obtain the consent of a local authority to instal an engine for his own benefit and to be run or not as he pleases and without any obligations to the public, and on any site chosen by him, and a railway company or other public utility body obtaining the authority of Parliament to run a railway or to carry out works or buildings which entail obligations to the public and which must be run or erected within specified limits and whose powers and duties are circumscribed by the four corners

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of the statute. I hold, therefore, that defendant is liable for the damage done to plaintiff's house by virtue of the common law rule, and that the Local Government Board Ordinance, 1907, affords him no statutory protection.

Since the trial I have been referred by counsel for defendant to the following cases: *York and North Midland Railway Company v. R.* (1853) 22 L.J. Q.B. 225, *Edinburgh, Perth and Dundee Railway Company v. Philip*, (1857) 5 W.R. 377, and *R. v. Great Western Railway Company*, (1893) 62 L.J. Q.B. 572. The principle deductible from these cases is that the question whether an Act of Parliament compels or merely permits a railway company to make a railway is one that depends on the construction of the statute. See per Lord Wensleydale at page 379 in *Edinburgh, Perth and Dundee Railway Company v. Philip*, and in the last case referred to, *R. v. Great Western Railway Company*, where the two other cases were cited, Lord Esher, M.R., at page 577 states: "Therefore, one must look at the Act to see whether there are words of compulsion; but if enabling words only are there to be found, then they are not words of compulsion according to the ordinary construction of the English language; and therefore, if the Act only empowers people to do things, then it does not thereby, by necessary implication, compel them to do those things. Mr. Justice Erle said that if you find in an Act of Parliament which constitutes a railway company, with power to make a railway, compulsory words compelling them to make the railway, then, when they accept the Act of Parliament, from that moment they are compellable to make the railway, and this does not depend on whether they have taken the land or not." It is instructive to point out that in all these three cases the Act of Parliament was dealing with local or branch railways, and this should be borne in mind to appreciate the words used by Kay, L.J., in the same case at page 581: "The Act itself is peculiarly framed. There is nothing in the preamble which is at all like 'the usual words to be found in railway Acts referring to the importance of making or maintaining the railway for the benefit of the public, but by section 18 it is provided that 'the maintenance of the railway is hereby sanctioned. That is all. . . . So far there are no imperative words as to making or maintaining or reinstating the railway.'" I am unable to see anything in these cases that affects the views of the House of Lords or Privy Council in the cases previously referred to, and which are adopted by me, and in fact, it seems to me that they amply support them. This disposes of the question of defendant's liability, but as the question of negligence was argued, on the assumption that I might hold the defendant entitled to statutory protection, I propose to deal with it.

Paragraph 4 of the Statement of Claim gives particulars of

negligence, to wit, that defendant knew of the inflammable material on the roofs of the neighbouring buildings and did not equip his engine with such devices as would ensure against setting fire to those buildings. Defendant's answer is that he exercised reasonable care and skill in the use of the boiler, erected a chimney and installed a spark arrester for the due protection of the several houses in close proximity to the mill. It is unnecessary to repeat the details of my findings that the fire on plaintiff's roof originated from and was caused by sparks escaping from defendant's chimney, and that the defendant knew of the existence of two houses, including plaintiff's, within a short distance of his rice mill with roofs covered with trash. Plaintiff further gave in evidence a conversation by defendant with him and also various acts of conduct showing that defendant was very much alive to the possibility of fire occurring from his operations. This would appear to raise a *prima facie* case of negligence against defendant, but in my opinion it was unnecessary for plaintiff to do so in the opening stages as the burden is on defendant to prove that he carried out his operations without negligence. That position is clearly established by the cases cited previously, but I will content myself with referring to certain passages in the *Manchester Corporation* case. Viscount Sumner at page 195, states: "My Lords, the conclusion to which a close examination of the evidence has forced me is that the defendants have not shown that a generating station, such as the Legislature contemplated in 1914, whatever that may have been, could not have been erected then, and cannot be used now without causing a nuisance, but that they have failed to show that they have used all reasonable diligence and taken all reasonable steps and precautions to prevent their operations from being a nuisance to their neighbours, and this for two reasons."

In an earlier passage at page 187 Viscount Sumner says this: "What is required of them is to use all due and reasonable means and precautions to avoid a nuisance. The burden of proving that they have done so is on them." And in dealing with the course of the action he states at page 189: "The plaintiff's counsel, having been dispensed from giving further proof of a nuisance in fact, called his expert evidence and closed his case instead of asking leave, as he might have done, to call it in reply; and thus a turn was given to the case, which almost amounts to a reversal of the burden of proof." Lord Blanesburgh takes a similar view at page 206: "The Corporation in my judgment have not, so far, established that in the conduct of their station there is on their part that absence of negligence which can alone relieve even them from liability to the plaintiff. With the judgment of my noble friend opposite on this matter I am in entire agreement. I think with him that the burden which lies upon the Corporation to satisfy

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the Court that their generating station cannot be carried on without subjecting the plaintiff to the admitted nuisance of which he complains has not so far been discharged.”. Now let us examine the evidence tendered on behalf of defendant on this point. The evidence of defendant and of one Antoo, described as an engineer, is that this engine was bought second hand by defendant, and that there was a steam pipe installed in it with one end in the chimney where jets of steam are discharged. Antoo states that this was the only device in the shape of a spark arrester on this engine, but he was unable to give any evidence as to its value or effect, or to state that no other contrivance would give better results. I have no evidence that Antoo has any scientific knowledge, and, in fact, he is merely a person who has a certain practical experience in running a steam engine. The other witness, Bell, a clerk in Bookers’ Hardware Department, where these engines are sold, stated that they were made by a well known firm and produced their catalogue. He stated that the engines were not sent out by the makers with any steam jet pipe in the chimney, and that they had never had an order for a boiler specially constructed to burn wood and rice husks. He also stated that the grate or bars in the fire box is differently designed according to the fuel used, and that the steam jet device is introduced locally, primarily to create a greater draft in the chimney but that it also helps to put out sparks. That is the only evidence placed before me in discharge of the onus on the defendant, and accepting it even at its full value, I fail to see how it satisfies the burden cast on the defendant. It is merely evidence as to the nature of this contrivance, and the circumstances in the case show it was not very effective. It does not amount to evidence that an efficient spark arrester cannot be installed on this engine bearing in mind the fuel used, a mixture of wood and rice husks, nor does it show that some other means do not exist for abating this nuisance. It may be that increasing the height of the chimney may have the desired effect. It is significant to point out at this stage that Griffith, a witness for plaintiff who had measured the chimneys of other rice mills, it is true, in a rough fashion, was not allowed by defendant to measure his.

Counsel for defendant, at a very late stage of the proceedings in fact after the evidence was closed and during his speech, applied for an adjournment to enable him to call expert witnesses, but his application was opposed and was not persisted in. In view of the pleadings this evidence, if available, should have been called and I was not even informed that it was in fact available, when the application was made.

The standard of care and skill required in cases of this nature is high, and that is evident from a perusal of the various cases cited. In the *Taff Vale* case, Crompton, J., at page 248 states: “It is found

that the defendants took all the precautions which science could suggest.” Blackburn, J., on the same page uses similar language. A passage in the judgment of Viscount Dunedin in the *Manchester Corporation* case at page 183, previously quoted, also supports this view. And Viscount Sumner in the same case at page 194 uses this language: “If, in a plant, to which the Legislature has given a general sanction without prescribing any particular design, coal is burnt so as to emit into the lower strata of the atmosphere sulphur dioxide in such conditions as are likely to cause considerable mischief, I think that, in proportion as the undertakers are free to use such a mischief-working process, their obligation to find some correlative means of protecting their neighbours becomes more exacting. The nature and degree of the plaintiff’s suffering and the cost, trouble, and inconvenience to the defendant Corporation of saving him from it are elements on the two sides of the case, which must be considered in deciding what is reasonable, but I cannot see that either on principle or on authority it is a sufficient answer to a criticism, otherwise sound, to say that, if so, Manchester’s electricity would cost it more.” And at pages 200 and 201 he proceeds: “As it is, the appellants have never put themselves in a position to say that a nuisance by sulphur is necessarily incidental to the emission of fumes nor that prevention is only possible by some extraordinary means or at the price of defeating the enterprise which the statute authorises.”

It was contended that in deciding what are reasonable precautions or the standard of care, the Court considers what is usually done by others in a similar business. I agree, but it must be shown that the others use reasonable precautions and that the circumstances are more or less similar: see *Blenkiron v. Great Central Gas Company* (1860) 2 F. & F. 437. The evidence before me points to the fact that in the case of Murray’s rice mill, wood and boussi were used to fire the boiler, and there are no buildings within 50 feet, and those beyond are covered with galvanized iron and are to windward of the rice mill. See evidence of Griffith, one of plaintiff’s witnesses. Casual reference was also made to a Bush Lot rice mill in the cross-examination of Ramlochan, one of the plaintiff’s witnesses, but no evidence has been given of the surrounding circumstances or properties, and as the witness states that wood only is used, and this is not contradicted, it does not appear to assist defendant. Furthermore, I have no evidence of the construction of either of these engines with reference to any devices used to arrest the escape of sparks. A conclusion in favour of the defendant on this point would be the result of my venturing into the region of conjecture, and would not be a reasonable inference from the evidence.

I accordingly find that, even if defendant could claim the protection of the Ordinance, he has not discharged the onus cast on

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him of satisfying the Court that he carried on his operations without negligence, in other words, that he had taken all reasonable steps and precautions to prevent them from being a nuisance to the plaintiff.

The last two submissions on behalf of defendant were that even if he was guilty of negligence, the plaintiff cannot complain, (1) because he voluntarily submitted himself to the risk of injury by fire when he continued to have the trash roof on his house, (2) because he was guilty of contributory negligence as the trash roof was the proximate cause of the accident.

In support of the first, reliance was placed on *Sayer v. Hatton*, (1885) 1 Cab. & El. 492, and *Aldridge v. Western Railway Co.*, (1841) 3 M. & G. 515. The latter case is not in point, and the first is merely an exemplification of the well known maxim, *volenti non fit injuria*. The authorities cited for the second submission lay down the principles of law which are not in dispute. But I am unable to see the application of either set of authorities to the facts and circumstances of this case. The simple answer to these contentions is that plaintiff's user of his land was natural whilst defendant's was not. The result of the application of these principles would be most extraordinary to plaintiff and would create a serious hardship on him who erected his house, complying with the requirements of the Ordinance, as stated previously, at a time when no such danger was in existence, whereas defendant chose this site for his rice mill and engine with his eyes open to the danger and after plaintiff had erected his house. It is not necessary for me to decide this as a matter of first impression, as I have fortunately been able to find two cases where similar contentions were unsuccessfully advanced.

In the *National Telephone Co. v. Baker*, (1893) 2 Ch. 186, Kekewich, J., at page 201 deals with a similar submission thus: "The first answer is, to my mind, without foundation. The man who complains of his land being thrown out of cultivation by the incursion of water escaping from his neighbour's reservoir, must not be told that he has no right of action because if he had interposed a wall, or otherwise taken care to protect himself, the water would not have reached his land. He is using his land in a natural way, and is not bound to take extraordinary precautions, and is entitled to rely on his neighbour also using his land in a natural way, or, if he uses it otherwise, taking extraordinary precautions to prevent damage to others therefrom." And in the Privy Council case of *Eastern and South African Telegraph Co. v. Cape Tramways Companies*. (1902) A.C. 381, previously referred to, Lord Robertson delivering the judgment says at page 393: "A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure."

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In my opinion all the submissions made on behalf of the defendant fail, and he is liable to compensate the plaintiff for the damage he has sustained as a result of the fire. The claim for damages, as frequently happens, is somewhat exaggerated, but, giving the matter my best attention, I assess the damages at \$280. Accordingly there will be judgment for the plaintiff for \$280 and the costs of the action, such costs to include those of the witness Barrington.

Judgment for plaintiff.

Solicitors: *H. B. Fraser; H. de Mendonca.*

AGNES PERSAUD v. W. E. DINALLY.

AGNES PERSAUD, Appellant (Defendant).

v.

W. E. DINALLY, Respondent (Complainant).

[1932. No. 131.]

BEFORE FULL COURT: JOSEPHS, C.J., (ACTING) AND DE FREITAS,
J., (ACTING).

1932. MAY 24; JUNE 17.

Criminal Law—Conviction—Sentence on—Previous conviction—Not proved by evidence or admission—Not to be taken into consideration by Court—Previous convictions—Manner of proof of.

A conclusion that a person has been previously convicted can be founded only on evidence or admissions in the proceedings duly recorded by the Court. Manner of proof in a magistrate's court of previous convictions explained.

Appeal by the defendant from a sentence imposed on her by Mr. C. R. Browne, Acting Stipendiary Magistrate, Georgetown Judicial District.

J. A. Luckhoo, K.C., for appellant.

S. E. Gomes, for respondent.

Cur. adv. vult.

The Chief Justice delivered the judgment of the Court.

This is an appeal by the defendant against a sentence imposed by a learned Magistrate for the Georgetown Judicial District. The defendant was charged under section 6 of the Sale of Food and Drugs (Consolidation) Ordinance, Cap, 102, with gelling to the complainant, a sanitary inspector, on the 17th of January, 1932, an article of food, to wit, milk, not being of the nature, substance and quality demanded.

The appellant, who was represented by a solicitor, on the 8th February, 1932, pleaded not guilty to the charge. Apparently, the further hearing was adjourned to enable a sample of milk to be taken from the cow and tested. In the Magistrate's reasons there is a statement that this was done and the result is mentioned; but there is no record before this Court either of evidence of the facts or of any admissions by the parties as a ground for the statement.

On the 13th of February, 1932, the appellant changed her plea to one of guilty and called a veterinary surgeon, who gave evidence that the majority of cows are incompletely milked in the Colony and naturally a decrease of fat ensues. The Magistrate properly disregarded this evidence as having no bearing on the particular case; he imposed a fine of \$150 and costs, 90 cents and, in default of payment, imprisonment with hard labour for three months.

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In his reasons the Magistrate writes: "The Analyst's certificate showed that 50 per cent. of the fat had been abstracted, and as the defendant had three previous convictions under the Ordinance I consider the offence an extremely serious one and fined her \$150 and costs 90 cents, or three months' imprisonment with hard labour."

From this sentence the defendant appealed on the ground that no previous convictions were proved, and that, therefore, it was not competent for the Magistrate to impose a penalty exceeding \$50.

Subsection (1) of section 6 of Cap. 102 makes it an offence to sell, to the prejudice of the purchaser, any article of food or drug not of the nature, substance and quality demanded by the purchaser, subject, however, to the proviso that an offence shall not be deemed to be committed where the standard does not fall below that of the cases in the first schedule. Section 6 (3), for contravention of the section, prescribes a maximum penalty of \$50, and in the case of milk, for a second or subsequent conviction a maximum penalty of \$250, or imprisonment with or without hard labour for six months. The jurisdiction to impose a penalty in excess of \$50, or peremptory imprisonment, does not arise unless there is a previous conviction.

There is nothing in the record of the present case showing that there has been any previous conviction. In the passage in the reasons already quoted the statement is made that there are three previous convictions against the defendant. This conclusion of fact can be founded only on evidence or admissions in the proceedings duly recorded by the magistrate.

When about to ascertain the fact of previous convictions the Magistrate should himself put the particulars of the conviction to the defendant and ask him if he admits them. His answers, admitting or denying them, should be noted. If he admits any previous convictions then there is ground for the exercise of the jurisdiction to award the higher penalty. If he denies all or any of these, then production of a copy of the order of any magistrate's court in respect of the former offence, certified by the clerk of that court, and proof of the identity of the defendant shall be deemed sufficient evidence—section 96 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 14, which is now amended by section 13 of Ordinance 21 of 1932. Evidence of identity should be given by some person who can swear that the defendant is the person mentioned in the order and he (witness) was present when he was so convicted. The case of *Commissioner of Police v. Donovan* (1903) 1 K.B., 895, is authority that the minute or memorandum kept under subsection (3) of section 35 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 14 may be used as evidence by a magistrate in the same Judicial District; it also decides that the register kept under

section 22 of the Summary Jurisdiction Act, 1879, may be used for similar purposes in the courts referred to in the section. Subsections (1) and (2) of that section correspond to subsections (1) and (2) of section 106 of Cap. 14, but the operation of the local provision is more extensive than the English, for the register or an extract therefrom shall “in any court be *prima facie* evidence of the truth of all matters stated therein.” It follows, therefore, that the register or an extract recording a previous conviction may be received in any court of summary jurisdiction as evidence of the previous conviction. Evidence of identity from which it can reasonably be inferred that the defendant is the person previously convicted, is, of course, necessary.

There is not before this Court any evidence of any previous convictions and the Magistrate therefore had no jurisdiction to impose a penalty based on the existence of previous convictions. The sentence of the court below is set aside and the case is remitted to the magistrate to impose such penalty as he may think fit, not exceeding \$50.

If there were no previous convictions against the appellant, who was represented at the trial by a solicitor, the Magistrate’s attention should have been directed to the fact when he imposed the penalty. The magistrate would thus have had an opportunity to fix the correct penalty. In the circumstances we make no order as to costs.

Solicitor for appellant: *M. S. Fitzpatrick.*

AGNES PERSAUD v. C. ST. C. ROMAN.

AGNES PERSAUD, Appellant, (Defendant),

v.

CHARLES ST. CLAIR ROMAN, Respondent, (Complainant).

[1932. No. 132.]

BEFORE FULL COURT: JOSEPHS, C.J., (ACTING) AND DE FREITAS,
J. (ACTING).

1932, MAY 27; JUNE 17.

Criminal law—Second conviction—Increased penalty on—Meaning of “second conviction”—Conviction for an offence which occurred subsequent to first conviction—Sale of Food and Drugs (Consolidation) Ordinance, cap. 102, s. 6 (3).

Section 6 (3) of the Sale of Food and Drugs (Consolidation) Ordinance, chapter 102, provides that “everyone who contravenes this section shall be liable to a penalty not exceeding fifty dollars, and, in the case of a sale of milk, on a second or subsequent conviction to a penalty not exceeding two hundred and fifty dollars or to imprisonment with or without hard labour for any term not exceeding six months.”

Held, that a magistrate’s jurisdiction to award the increased penalty for a second or subsequent offence comes into existence only on the conviction of a person for an offence which has been committed after a conviction or convictions for an offence under the same enactment.

The appellant was twice convicted on the 13th February, 1932, for selling adulterated milk, firstly, for a sale on the 17th January, 1932, and, secondly, for a sale on the 24th January, 1932.

Held, that inasmuch as the sale of the 24th January, 1932 preceded the conviction in respect of the sale of the 17th January, 1932, the conviction in respect of the sale of the 24th January, 1932, was not a second conviction within the meaning of section 6 (3) of chapter 102.

Appeal by the defendant from a sentence imposed on her by Mr. C. R. Browne, Acting Stipendiary Magistrate, Georgetown Judicial District.

J. A. Luckhoo, K.C., for appellant.

P. N. Browne, K.C., for respondent.

Cur. adv. vult.

The Chief Justice delivered the judgment of the Court.

This is an appeal by the same defendant as in the case of *Dinally v. Persaud* against a sentence of the same magistrate. The defendant was charged with selling to the complainant on the 24th of January, 1932, milk not being of the nature, substance and quality demanded. The prosecution was under section 6 of the Sale of Foods and Drugs (Consolidation) Ordinance, Cap. 102.

This case was heard on the same day as, but after, that at the instance of *Dinally*. The defendant pleaded guilty. The magistrate in his reasons stated: “I consider this an equally bad case, and that the defendant who had the week before on the 17th of January, 1932, abstracted 50 per cent, of fat was either indifferent to the offence she was committing on the inhabitants of the city,

or that she willingly ran the risk of being detected. She had three previous convictions for offences under the Ordinance. I accordingly fined her \$100 and costs 90 cents, or two months hard labour.”

There is no evidence that any previous convictions were proved or admitted. The reasoning in *Dinally v. Persaud* therefore applies to this case.

It was, however, argued on behalf of the respondent that the magistrate had authority to take cognizance of the fact that the appellant was the same person whom he had just convicted on her plea of guilty and sentenced in the *Dinally* case; that he was entitled to consider the present as a second conviction, and he therefore had jurisdiction to impose the sentence appealed against. It is immaterial to consider whether the magistrate could have taken such cognizance, as we are of opinion that there was no second conviction within the meaning of the statute.

The final clause, subsection (3) of section 6 of Cap. 102 is as follows:

“(3) Everyone who contravenes this section shall be liable to a penalty not exceeding fifty dollars, and, in the case of a sale of milk, on a second or subsequent conviction to a penalty not exceeding two hundred and fifty dollars or to imprisonment with or without hard labour for any term not exceeding six months.”

In English Acts of Parliament where an increase of penalty is provided by an enactment in respect of a second or subsequent contravention thereof, the expression “offence” is generally used; a penalty is imposed for a “first offence” and a heavier penalty for a “second or subsequent offence.” The meaning of these words was considered and determined in *R v. South Shields Licensing Justices*, (1911) 2 K.B. 1.

Counsel, in support of a rule which had been granted calling upon the licensing justices to show cause, cited from 2 Co. Inst., p. 468, note 5, dealing with the Statute of Westminster the Second the following statement:

“Though this branch saith *et, super hoc convicti fuerint*, and may seem to refer to the third offence, yet cannot he be convicted of the third before he be convicted of the second, nor of the second before he be convicted of the first; and the second offence must be committed after the first conviction, and the third after the second conviction and several judgments thereupon given; for so it is to be understood in other Acts of Parliament, where there be degrees of punishment inflicted, for the first, second, and third offence, &c., there must be several convictions, that is to say, judgements given upon legall proceeding be for every several offence, for it appeareth to be no offence until judgement by proceeding of law be given against him.”

It follows, in accordance with this reasoning, that a magistrate’s jurisdiction to award the increased penalty for a second or

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subsequent offence, comes into existence only on the conviction of a person for an offence which has been committed after a conviction or convictions for an offence under the same enactment. Lord Alverstone, C.J., who delivered the judgment of the Court, the other two Judges being Ridley and Channell, JJ., said at p. 8:—

“It seems to me that it is quite impossible to give a reasonable construction to the various clauses of the section (section 3 of the Licensing Act, 1872, 35 and 36 Vict. c. 94) unless the words ‘second offence,’ and ‘third and any subsequent offence’ are read as meaning an offence after a previous conviction or convictions, as the case may be, for an offence under the section.”

The Lord Chief Justice points out that the enactment aims at a persistent breach of the law after a previous conviction, and continues:

“Apart therefore from the assistance which is to be derived from the weighty authority of 2 Co. Inst., p. 468, note 5, I have come to the conclusion that in this particular part of the section a ‘second offence’ means an offence committed after a previous conviction for an offence under the section.”

The authorities referred to make it clear that in these cases “offence” means “conviction of an offence.” and “second offence” means “conviction of an offence which has been committed after a previous conviction under the same section.” The language used in the local section under consideration is only another way of stating the same thing and it must, therefore, be construed in the same way.

The sale of adulterated milk by the appellant on the 24th of January, 1932, followed a similar sale on the 17th January. The later sale was not subsequent to, but preceded a conviction for, the sale on the 17th; when the appellant, on the 13th of February, 1932, after being convicted in respect of the first sale pleaded guilty to the second sale and was again convicted, this latter conviction was not a second conviction within the meaning of the Ordinance and there was no jurisdiction to impose the heavier penalty.

It is worthy of note that in the Road Traffic Act, 1930, wherein an increased penalty is prescribed for a second or subsequent breach of a section, there is employed the same expression as in the local Ordinance.

The sentence of the court below is set aside and the case is remitted to the magistrate to impose such penalty as he may think fit not exceeding \$50.

For the reason given in *Dinally v. Persaud* we make no order as to costs.

Solicitor for Appellant: *M. S. Fitzpatrick.*

J. I. FERREIRA v. G. GONSALVES & J. DODDS.

J. I. FERREIRA, Plaintiff,

v.

GABRIEL GONSALVES AND JOHN DODDS, Defendants.

[1932. No. 39.]

BEFORE JOSEPHS, C.J., (ACTING).

1932. MAY 30, 31. JUNE 1, 2. AUGUST 12.

Assignment—Legal—Equitable—No fund in hand of person sought to be charged.

On the 19th September, 1931, the defendant Dodds owed the sum of \$201.10 for board and lodging at the Regent Hotel. His room with his belongings was locked against him that day, and his only means of releasing them was to pay up or give security. Dodds went to the defendant Gonsalves, told him of the circumstances, and asked him to accept an order on his commissions to which Gonsalves agreed. Dodds then produced a document in the following terms:—

“Superintendent,
Demerara Mutual Life,
Georgetown,
19.9.31.

Dear Sir,

I would appreciate your consenting to deduct the sum of two hundred and one 10/100 dollars from all commissions earned by me from date and pay to order of J. I. Ferreira payments to be on any business due me Wednesday, 23rd inst. \$100. Balance on all or any commissions earned from then on until the completion of payments.

Yours faithfully,

JOHN DODDS.”

Gonsalves wrote on the top left-hand corner on the same day “accepted,” signing below “G. Gonsalves.”

The defendant Gonsalves was superintendent of The Demerara Mutual Life Assurance Society Limited, and the defendant Dodds was a canvasser. While the superintendent had the right of appointing and controlling canvassers, they were the servants of and paid by the Society. The mode of payment of the commissions to canvassers was that the accounts were made out by the Chief Clerk of the Society and signed by the canvassers, they were then initialled by the superintendent in verification of their correctness. Payment was made by means of the Society’s cheques drawn to the order of the canvassers. The only part performed by the defendant Gonsalves in connection with the payment was the verification of the account, and this was in accordance with an agreement made between the superintendent and the Society. The money payable for commissions was a debt due from the Society and paid by it to each canvasser as the servant of the Society; Gonsalves had no liability to any canvasser and the latter received his money and was at liberty to dispose of it as he chose. On the 1st and 17th October, 1931, the defendant Gonsalves paid to the plaintiffs solicitor \$13.18 and \$31, leaving the amount due to the plaintiff on Dodds’ account at \$156.92, the sum claimed by the plaintiff from the defendants Gonsalves and Dodds in this action. Gonsalves in his evidence deposed that the amounts paid by him were given for that purpose by Dodds out of his commission as a consequence of his reminding Dodds of his liability.

Held, (1) that as the commissions to which Dodds was entitled were due from and payable to him by the Society alone, there was no fund belonging to Dodds existing or accruing due in the hands of the defendant Gonsalves on which the letter of the 19th September, 1931, could operate, and that the said letter was not effectual as an engagement by the defendant Gonsalves to pay the plaintiff; and

J. I. FERREIRA v. G. GONSALVES & J. DODDS.

(2) that as the defendant Gonsalves never owed any debt and was not liable to pay commissions to Dodds, and there being no liability on his part to Dodds, the letter did not create an equitable assignment of commissions payable to Dodds, and, consequently, did not create a liability to the plaintiff.

This was a claim by the plaintiff for the sum of \$156.92. The facts and arguments appear from the judgment.

Carlos Gomes, solicitor, for plaintiff.

A. V. Crane, solicitor, for defendant Gonsalves.

Cur. adv. vult.

JOSEPHS, C.J. (Acting): This is an action on a specially indorsed writ in which the plaintiff seeks to recover a balance of a debt of \$156.92 incurred for board and lodging by the defendant Dodds. The defendant Dodds was in default of appearance while the defendant Gonsalves was given leave to defend. The question which was fought at the trial and is now to be decided is whether in the circumstances the defendant Gonsalves is liable. At the time the debt was incurred the plaintiff, who has sued in his own name, was Manager of the Regent Hotel in Georgetown for Mr. J. P. Santos who was owner of the business.

The defendant Dodds, prior to and in September, 1931, was employed as a canvasser by the Demerara Mutual Life Assurance Society, Ltd., of Georgetown. The defendant Gonsalves, by an agreement in writing dated the 11th of December, 1926, between the Society and him, was appointed "Superintendent for the Society." The relevant provision in the agreement, so far as this action is concerned, is contained in clause 8, which is as follows:—

"8. The superintendent shall have the sole right of appointing canvassing agents in British Guiana and the West Indian Islands and the rates of remuneration shall be fixed by him and the Society will enter into agreements with such agents at any time after the terms of such agreements have been mutually agreed on between the Society and the Superintendent and will pay the agents the amounts due on their accounts after the same have been made up by the Society and duly certified as correct by the Superintendent. The Superintendent will have the sole control of all agents in the employment of the Society."

This clause clearly defines the relation between the Superintendent and the Society in respect of the agents. While the Superintendent had the right of appointing and controlling the agents, they were the servants of and paid by the Society, the latter accepting the verification of their accounts by the Superintendent. It appears from the evidence that this arrangement was actually carried out in practice with respect to the defendant Dodds.

On the 19th of September, 1931, the defendant Dodds owed the sum of \$201.10 for board and lodging at the Regent Hotel. His room with his belongings was locked against him that day,

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and his only means of releasing them was to pay up or give security. Dodds went to Gonsalves, told him of the circumstances and asked him to accept an order on his commissions to which Gonsalves agreed. Dodds then produced a document in the following terms:—

“Superintendent,
Demerara Mutual Life,
Georgetown,
19.9.31.

Dear Sir,—I would appreciate your consenting to deduct the sum of two hundred and one 10/100 dollars from all commissions earned by me from date and pay to order of J. I. Ferreira—payments to be on any business due me on Wednesday, 23rd inst. \$100. Balance on all or any commissions earned from then on until the completion of payments.

Yours faithfully,

JOHN DODDS.”

Gonsalves wrote on the top left-hand corner on the same day “accepted,” signing below “G. Gonsalves.”

The plaintiff relied on this letter in support of his case and claimed that it operated as an assignment of future commissions to be earned by Dodds, or, in the alternative, that Gonsalves had engaged to pay to the plaintiff’s order according to the tenor of the letter, and that in either case he had received the necessary funds.

It appeared in evidence that between the 18th of September and the 31st of December, 1931, twelve payments amounting to \$470.27 were made to Dodds by the Society for commissions, and that on the 1st of October, 1931, a cheque for \$231.67 for commissions was drawn in favour of another canvasser, Joseph Gonsalves, and of this \$137.97 belonged to the defendant Dodds, and that the defendant Gonsalves kept this sum in part payment of a much larger debt of \$388.11 then owing to him by Dodds. The mode of the payment of the commissions to canvassers was that the accounts were made out by the Chief Clerk of the Society and signed by the canvassers, they were then initialled by Gonsalves in verification of their correctness. Payment is made by means of the Society’s cheques drawn to the order of the canvassers. Sometimes a canvasser receives his cheque himself, sometimes he indorses it and the Society pays him in cash and lodges the cheque to its own account, the only part performed by the defendant Gonsalves in connection with the payments was the verification of the account. The money payable for commissions was a debt due from the Society and paid by it to each canvasser as the servant of the Society; Gonsalves had no liability to any canvasser and the latter received his money and was at liberty to dispose of it as he chose.

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During the period from the 18th of September to the 31st of December, Dodds cashed six cheques for commission amounting to \$161.75 and kept the money for himself and paid to one creditor a cheque for \$39.50. Dodds admitted that he could not say how many cheques he used himself.

On the 1st and 17th of October the defendant Gonsalves paid to the plaintiff's solicitor \$13.18 and \$31, leaving the amount due to the plaintiff on Dodds' account at \$156.92, the sum claimed. Gonsalves says that the amounts paid by him were given to him for that purpose by Dodds out of his commissions as a consequence of his reminding Dodds of his liability.

Having regard to the facts of the case I am of opinion that the document of the 19th of September, 1931, did not operate as an engagement by Gonsalves to pay the plaintiff, or an assignment by Dodds to the plaintiff of a debt due by Gonsalves.

On behalf of the plaintiff it was contended that by writing the word "accepted" on the letter of the 19th of September, 1931, the defendant Gonsalves had undertaken to pay the debt of Dodds out of the commissions due to him and was therefore liable to the plaintiff to pay accordingly. In support of this *Walker v. Rostron* (1842) 9 M. & W., 411, 152 E.R., 174 was principally relied on. In that case the plaintiff held certain acceptances of one Bull, the latter wrote to the defendant "I hereby authorize and direct you, from out of the remittances that you may receive against net proceeds of any consignments made by me to either of your above firms, subsequent to the 1st of May last, to pay such acceptances upon and as they become due, or afterwards, if previously to the receipt of such net proceeds of such consignments the said bills are not honoured by me." The result of the transaction was that the defendant engaged, on Bull's direction, to pay such proceeds as should come to his hands from the goods consigned as, were necessary to satisfy the bills of exchange in case they were not paid at maturity. Bull became bankrupt before the bills became due. The defendant, having received the proceeds of the goods, paid out of them what was due to himself from Bull, and then paid to the assignees the sums that the plaintiff contended ought to have been paid to him. The principle is stated by Lord Abinger C.B., thus:—"This is a case of a party engaging himself to appropriate the proceeds of the goods according to certain directions of the owner, and appears to us to fall within that class of cases where, when an order has been given to a person who holds goods to appropriate them in a particular manner, and he has engaged to do so, none of the parties are at liberty, without the consent of all, to alter that arrangement. We are therefore of opinion that the acceptance of that arrangement made on the part of the bankrupt was binding on the defendant."

Walker v. Rostron was cited in *Griffin v. Weatherby* (1868)

L.R., 3 Q.B., 753, where the principle governing this class of cases is stated by Blackburn. J., at page 758 thus:—"Ever since the case of *Walker v. Ros-tron*, it has been considered as settled law that where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise; and the money becomes a fund received or to be received for and payable to the transferee, and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holder." Other cases were cited in argument, but nowhere is the principle better stated than by Mr. Justice Blackburn.

Now in order that the present case should come within the above class of cases, it is essential that there should be a fund belonging to Dodds existing or accruing due in the hands of Gonsalves. But no such fund existed so far as Gonsalves was concerned. Dodds was the servant of the Society, and the commissions to which he was entitled were due from and payable to him by the Society alone. In this aspect of the case it follows that there was nothing in the hands of Gonsalves on which the letter could operate.

In the alternative it was claimed that the letter was an equitable assignment of commissions payable to Dodds. The doctrine of equitable assignment is stated by Lord Truro, L.C., in *Rodick v. Gandell* (1852) 1 De G. M. and G., 763; 42 E.R., 749, as follows:—"an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor will create a valid equitable charge upon such fund, in other words, will operate as an equitable assignment of the debt or fund to which the order refers" This was cited with approval in *re Gunsbourg* (1919) 88 L.J., K.B., 479. A necessary element to constitute an assignment is the existence of the subject matter which is intended to be assigned, there must be either a debt due or accruing due from or funds in or accruing in the hands of a person who is liable to pay to the assignor. Gonsalves never owed any debt and was not liable to pay commissions to Dodds, and there being no liability on his part to Dodds the letter could not create a liability to the plaintiff.

I therefore give judgment for the defendant with costs.

Judgment for defendant Gonsalves.

RUTH SMARTT v. T. M. CARRINGTON.

RUTH SMARTT, Appellant, (Defendant).

v.

T. M. CARRINGTON, Respondent, (Complainant).

[1932. No. 106.]

BEFORE FULL COURT: JOSEPHS, C.J., (ACTING) AND
DE FREITAS, J. (ACTING).

1932. JUNE 25; JULY 1; SEPTEMBER 9.

Principal and agent—Power of attorney—Construction—Whether power to make a promissory note.

The appellant appointed an attorney “during her intended absence and all future absences from the Colony in all circumstances, matters and things, and on all occasions to carry on, manage, and conduct all her affairs and business, to purchase movable and immovable property and to accept transport thereof to pass a mortgage on her behalf to any person or persons or any company on her property lot 255, Forshaw Street, Queenstown, with all the buildings and erections thereon for a sum not exceeding \$1,800 (eighteen hundred dollars) and to cancel any mortgage or mortgages existing on any of her property on satisfaction of the same . . . and generally, in and about the premises to do, perform, transact, and accomplish all and whatever shall and may be requisite and necessary, and whatever further the appearer may from time to time direct by letter or letters, or other written instructions as fully and effectually as she could herself do and perform the same if personally present and acting therein . . . (the appellant) hereby ratifying and confirming, and promising to ratify and confirm all and whatsoever the said attorney . . . shall or may lawfully do or cause to be done in and about the premises under and by virtue of these presents.”

The appellant’s attorney, purporting to act for and on behalf of the appellant, borrowed the sum of \$100 from the respondent and made a promissory note for \$104 in the latter’s favour. The money borrowed or \$91.35 of it, was used by the attorney to pay the taxes and sewerage rates, the interest on the mortgage and the insurance on the appellant’s property in Georgetown. There was no evidence as to whether or not the attorney had funds of the appellant to meet these demands. The appellant did not carry on any business in the Colony.

Held (1) that the power of attorney did not include a power to make a promissory note; and

(2) that as the appellant did not carry on any business, a power to borrow money could not be implied.

Appeal by the defendant from a decision of Mr. F. McDowell, stipendiary magistrate, Georgetown Judicial District.

K. S. Stoby, for appellant.

S. L. Van. B. Stafford, for respondent.

Cur. adv. vult.

Mr. Justice de Freitas delivered the Court’s decision.

This is an appeal by the defendant from a decision of one of the magistrates of the Georgetown Judicial District. The action is to recover the amount of \$52 being the balance of an amount of \$104 for which Arnold Griffith, the appellant’s attorney, had given to the respondent a promissory note signed by him in the name of the appellant, as her attorney.

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The appellant by power of attorney dated the 14th of September, 1928, appointed Arnold Griffith to be her attorney during her then intended absence and all future absences from the Colony. During her absence from the Colony in 1931 Griffith borrowed from the respondent \$100, giving a promissory note for \$104. The note was as follows:—

“7th April, 1931.

\$104.

On demand I promise to pay to Mr. T. M. Carrington or his order the sum of \$104 (one hundred and four dollars) for value received.

RUTH SMARTT,
by her Attorney
ARNOLD GRIFFITH.”

Griffith was the only witness called for the respondent, and the effect of his evidence, in addition to what has already been stated is that as attorney he borrowed the money to pay and did pay rates and interest on a mortgage and fire insurance, and that at the date of the trial \$38 was owing to the respondent. It does not appear whether Griffith had on behalf of the appellant sufficient funds to meet these outgoings.

The defence is that Griffith had no authority under the power to sign the note and that he had sufficient resources to meet demands.

The question therefore turns on the construction of the power of attorney. It appears that a printed stock form (which it was stated has been in use for several years), notarially executed, was employed on this occasion, some of the blanks being supplied. The appellant appointed Griffith her true and lawful attorney to represent her

“during her intended absence and all future absences from said Colony in all circumstances, matters and things, and on all occasions to carry on, manage, and conduct all the affairs and business of her the appearer to purchase movable and immovable property and to accept transport thereof to pass a mortgage on my behalf to any person or persons or any company on my property lot 255, Forshaw Street, Queenstown, Georgetown, with all the buildings and erections thereon for a sum not exceeding \$1,800 (eighteen hundred dollars) and to cancel any mortgage or mortgages existing on any of my property on satisfaction of the same”

then follows authority to sue for and recover debts and property generally, to settle and adjust accounts, to institute actions,

“and generally in and about the premises to do, perform, transact, and accomplish all and whatever shall and may be requisite and necessary, and whatever further the appearer may from time to time direct by letter or letters, or other written instructions as fully and effectually as she the appearer could herself do and perform the same if personally present and acting therein. the

RUTH SMARTT v. T. M. CARRINGTON

appearer hereby ratifying and confirming, and promising to ratify allow and confirm all and whatsoever the said attorney shall or may lawfully do or cause to be done in and about the premises under and by virtue of these presents.”

The learned magistrate was of opinion that the power did not give a specific power to make a promissory note, but the attorney had wide powers as regards the management and finance of the estate; that under such authority it would be the duty of the attorney to raise money for rates and mortgage interest and, if necessary, to borrow money for these purposes; that the power giving wide power of effecting mortgages and carrying on other financial operations was wide enough to enable the making of a promissory note for the benefit of the estate. He therefore gave judgment for the plaintiff.

Against that judgment this appeal is brought.

For the appellant it has been contended that her attorney had no authority to make promissory notes in her name, nor to borrow any money on her behalf, and that the learned magistrate should therefore have dismissed the plaintiffs claim.

On the other hand counsel for the respondent admits that the power of attorney did not expressly or by implication confer any authority to make promissory notes, but he contends that the attorney had authority to borrow on behalf of the appellant and that the learned magistrate might have amended the claim and entered judgment for the plaintiff as for money lent. He therefore asks this Court to be allowed so to amend the claim and that the magistrate’s judgment for the amount awarded be confirmed.

If the power of attorney could be fairly construed to give authority to borrow, it would, we think, have been within the power of the learned magistrate—even without any application by the plaintiff—to amend the claim so as to do complete justice between the parties, and we should in that case be disposed to refer the case back to be re-heard.

The action was on a promissory note, no application was made for any amendment and no authorities were cited on either side in the Magistrate’s Court. Before us, the case has been fully and well argued and had the same assistance been rendered to the learned magistrate there might have been no necessity for an appeal.

The sole question now for our decision is whether the appellant’s attorney was authorised to borrow money on her behalf.

It is not disputed, that the money borrowed or \$91.35 of it was used by the attorney to pay the taxes and sewerage rates with interest for the year 1930, the interest on the mortgage and the insurance on the appellant’s property in Georgetown, but the appellant in her defence alleged that her attorney had sufficient resources from which to meet demands on her behalf. Before the magistrate the attorney said in cross-examination that he informed

the appellant of the promissory note given for the loan he had made in April, 1931 on her return to the Colony in January, 1932, and that she refused to acknowledge it.

It does not appear from the evidence whether or not the attorney had funds of the appellant to meet these demands. Neither the appellant nor her attorney in their evidence affirms or denies that there were funds or that the account rendered by the attorney was correct, nor is there any evidence that there was immediate danger of the appellant's property being sold at execution. Possibly, as the action was on a promissory note and not for money lent, that evidence was not thought necessary.

In these circumstances it is difficult to see how any question of agency of necessity can arise, even assuming that the payments if made when there were no funds of the appellant in the hands of the attorney could be justified on that ground.

It is a well recognised rule that powers of attorney are to be construed strictly—*Attwood v. Munnings* (1827) 7 B & C. 278: *Withington v. Herring* (1829) 5 Bing. 443, and that it is incumbent upon any one seeking to fix liability upon a principal for the act of the agent under a power of attorney to show that the agent was acting within the powers conferred on him either expressly or by necessary implication. In *Bryant, Powis & Bryant, Ltd., v. La Banque du Peuple* (1893) A. C. 170 on appeal to the Privy Council from the Court of Queen's Bench for Lower Canada, Province of Quebec at p. 177, Lord Macnaghten in delivering the judgment of the Judicial Committee of the Privy Council explains the rule thus:

“Nor was it disputed that powers of attorney are to be construed strictly—that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication.”

We are satisfied, and it is admitted by counsel for the respondent, that the power of attorney given by the appellant does not in express terms or by implication authorise her attorney to make promissory notes in her name: therefore the appellant was not liable on the note (see section 25 of the Bills of Exchange Ordinance, Cap. 56, *Colonial Bank v. Ho-a-Hing*, decided by the Full Court 22.12.1899 and 30.3.1900). Now, did it authorise the attorney to borrow money on the appellant's behalf? It certainly does not in express terms, but Mr. Stafford contends that it is to be implied on a fair construction of the deed by the general words used at the beginning, namely: “to represent her during her absence from the Colony *in all circumstances matters and things and on all occasions to carry on, manage and conduct all her affairs and business,*” and by the general power at the end,

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namely: “generally in and about the premises to do, perform, transact and accomplish all and whatever shall and may be requisite and necessary.”

The appellant does not appear to have carried on any business, nor has it been suggested that she did so; so far as can be gathered from the notes of evidence she owned a property in Georgetown, and being about to leave the Colony she appointed an attorney to represent her during her absence. The words at the beginning of the power “to represent her in all circumstances, matters and things and on all occasions to carry on, manage and conduct all her affairs and business” and the concluding general power mentioned above form part of the printed form used by the appellant and are to be found in most powers of attorney executed in this Colony whether on printed or other forms. The identical words appear in *Ho-a-Hing’s* power of attorney in the case cited above of the *Colonial Bank v. Ho-a-Hing*, where notwithstanding a specific power granted to make, draw, endorse and negotiate Bills of Exchange and cheques in connection with his said business (which was interpreted to mean his retail spirit shop business and not his general provision business) yet the Full Court held that the attorney had no power to make promissory notes although the note in question was given for a just debt in connection with the principals general provision business.

It is clear that the word “business” as used by the appellant merely refers to her private affairs and not any commercial business. If by the use of these words alone a power of attorney such as we are considering is to be construed as suggested by learned counsel for the respondent, it seems to us in the words of Lord Atkin in the recent case of *Midland Bank. Ltd., v. Reckitt* (1932) 37 Com. Cas. at p. 212, that such a construction “would make powers of attorney a danger instead of a business facility.”

We have considered all the cases cited at the hearing and several others not referred to, but there is nothing in any of them which justifies the conclusion that the loan made by the appellant’s attorney was authorised.

Powers not specially enumerated in a power of attorney may be implied where they are necessary to carry the principal purpose of the letter of attorney into effect, but we do not agree that the power to borrow was necessary to enable the appellant’s attorney to manage and look after her property. Taxes or interest on mortgages are not sudden or unexpected demands to be met, and a careful and prudent agent who undertakes an agency of this kind should be in the position to estimate in advance what liabilities he has to meet and what funds he can expect to have available to pay them with, and if he finds that the income will be insufficient, his obvious duty is to bring that fact to the notice of his principal and obtain the necessary instructions; but he cannot assume authority to borrow—see *Hawtayne v. Bourne*, (1841) 7 M.&W

595; 151 E.R. 905; *in re Cunningham and Co. Ltd., Simpson's claim* (1887) 36 Ch. D. 532, at p. 539; *Burmester v. Norris*, (1851) 21 L.J. Ex. 43, 155 E.R. 767; and *Jacobs v. Morris* (1902) 1 Ch. 816.

The case of *Montaignac v. Shitta* (1890) 15 A.C. 357 was referred to by counsel for the respondent as showing that the power to raise money is necessary to carry on business. An agent appointed to carry on a commercial concern may have an implied authority to borrow money to carry it on under ordinary circumstances and in the ordinary manner, if the raising of money is necessary for the proper carrying on of the business. In the present case, however, as already pointed out there was no commercial concern to be carried on, and the principle in those cases where the power to borrow has been held to be implied on the ground that such a power is necessary for carrying on a business has no application to the case of a private individual appointing an attorney for the purpose of looking after his private interests during his absence from the Colony. It is not at all necessary to infer in such a case a power to borrow.

In *Esdaille v. La Nauze* (1835) 1 Y. & C. Ex. 394, 160 E.R., 160 the principal by a power of attorney authorised his attorney to oversee, let, manage and improve his several estates in Ireland, specifying them by name, and every other property belonging to him, wheresoever situate, or of whatsoever description, or however called or known, and for the purposes aforesaid, in the name of his principal to execute agreements, &c. (mentioning other specific powers) and concluded thus: "And in my name, to give, and further to do all lawful acts and things whatsoever concerning all my business and affairs of what nature or kind soever in the said United Kingdom; and generally to act for me on my behalf in all matters as fully and amply in all respects as I might or could do therein, were I personally present and had done the same." No specific power to endorse bills was given. A bill having been endorsed by the attorney in the name of his principal and the question of authority having arisen, Alderson, B. in giving judgment said: "But looking at that instrument (*i.e.* the power of attorney) I am clearly of opinion that it confers no such power. The general words are not sufficient for they must be construed with reference to the antecedent matter, which states the purpose for which the letter of attorney was given. Perhaps they would be sufficient to confer all powers not specifically enumerated, but necessary to carry the principal purpose of the letter of attorney into effect. But a power to endorse bills is not necessary, and being in truth an almost unlimited authority to pledge the credit of the principal it would be very dangerous to infer it, unless the power were very clearly to be inferred or expressly given."

It has also been argued that the power to borrow is necessarily

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implied from the fact that the appellant gave her attorney the specific power to “pass a mortgage on her behalf to any person or persons or any company on her property lot 255, Forshaw Street, Queenstown, for a sum not exceeding \$1,800.” The appellant’s property was already mortgaged to the British Guiana Building Society and it may well be that this power was given to enable the attorney to give effect to any contemplated transfer of the mortgage from one mortgagee to another, but however that may be, assuming she conferred a power to borrow, it was a special power to borrow in a particular way and on a particular security. The mortgage could not be passed without cancelling the existing mortgage. We are, however, of opinion that the power to pass a mortgage is not a power to mortgage nor a power to borrow money. The “term pass a mortgage” is peculiar to this Colony and means nothing more than execute the deed of mortgage.

For these reasons this appeal must be allowed. The decision in the Court below is set aside and judgment entered for the defendant. The respondent must pay the taxed costs of this appeal and of the Court below.

Appeal allowed.

Solicitors: *A. McL. Ogle; E. A. W. Sampson.*

PEARL CHARLES v. ISAAC N. BAIRD.

PEARL CHARLES, Appellant, (Defendant).

v.

ISAAC N. BAIRD, Respondent (Plaintiff).

[1932. No. 144.]

BEFORE FULL COURT: JOSEPHS, C.J., (ACTING), AND
DE FREITAS, J. (ACTING).

1932. JUNE 17; JULY 11; SEPTEMBER 9.

Mining—Necessity for superintendence over registered labourers—Foreman and superintendent of registered labourers—Not a labourer—Mining Regulations, 1924, regs. 94, 95 (1)—Registration of servants other than labourers—Regulations as to—Not authorised by statute—Ultra vires—Mining (Consolidation) Ordinance, cap. 175, s. 98 (1), (n), (3).

Master and servant—Servant not registered under Mining Regulations—Contract of service—Not illegal—May be enforced by servant—Common law.

Regulation 95 (1) of the Mining Regulations, 1924 is as follows: “The holder of a claim shall not employ any person other than an Aboriginal Indian in a Mining District as a labourer, artisan or in any capacity whatsoever, save as a licensed prospector, tributor, qualified civil, mechanical or mining engineer, mine manager, assistant manager, dredge master, assayer or surveyor, unless such person has been registered by the Commissioner or by any person appointed by the Governor in that behalf under the Employers and Labourers Ordinance, 1909” (now section 21 of chapter 261). Regulation 94 provides that no labourer shall be deemed to be employed by the holder of a claim unless he is actually working under the supervision and control of such holder or *of some person authorised by such holder* in the locality where the operations are actually being carried on.

The respondent was engaged by the appellant to be the foreman and superintendent of her registered, or “Contract” labourers and he performed these duties at her placer at Turesi.

Held, (1) that regulation 94 contemplates the necessity for such superintendence;

(2) that the respondent was a person authorised within the meaning of the said regulation; and

(3) that the respondent was not a labourer within the meaning of regulation 95 (1).

Section 2 of the Mining (Consolidation) Ordinance, chapter 175, defines a “servant” as meaning any one who has entered into and is subject to a contract of service to be performed on or in respect of a claim and includes a registered labourer”.

By section 98 (1) of chapter 175 (formerly section 100 (1) of Ordinance 34 of 1920 as amended by section 2 of Ordinance 14 of 1929) the rule making authority “may alter, amend or revoke regulations with respect to . . . (n) employment and registration of labourers, the payment of wages and the duties of employers . . . (z) all matters not hereinbefore specially mentioned connected with the search or mining for or dealing with gold, silver, valuable minerals . . . and generally all matters connected with the proper carrying out of the provisions of this Ordinance”.

In 1924 the rule-making authority was the Governor and Court of Policy.

Held, (1) that the scope of paragraph (n) is expressly limited to labourers, and it gives no authority to require the registration of other servants;

(2) that the registration of servants who are not labourers is not a matter connected with the proper carrying out of the section and that there was no good reason why a clerk, an accountant, a skilled foreman or other person, not a labourer, or not excepted by regulation 95 (1) should be required to be registered as if he were a labourer;

(3) that when the Court of Policy was exercising rule making authority conferred upon it by a statute it was not competent for the Court to intro-

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duce or deal with matters outside the scope of the statute, for, the statute being the source of authority, any regulation dealing with extraneous matters, being unauthorised would necessarily be *ultra vires*;

(4) that the Mining (Consolidation) Ordinance, 1920 did not by direct words or by implication give to the Governor and Court of Policy any power to regulate the registration of persons other than labourers, and that regulation 95 (1) of the Mining Regulations, 1924, in so far as it purports to do so, was therefore *ultra vires* of the statutory power;

(5) that where a person to whom regulation 95 (1) properly applies, is not registered as required by that regulation, his contract of service is not illegal, but can be enforced by him under the common law.

Appeal by the defendant from a decision of Mr. F. McDowell, Stipendiary Magistrate, Georgetown Judicial District. The facts and arguments appear from the judgment.

P. N. Browne, K.C., for appellant.

R. S. Miller, for respondent.

Cur. adv. vult.

The Chief Justice delivered the judgment of the Court.

This is an appeal from the decision of a Stipendiary Magistrate for the Georgetown Judicial District who entered judgment in favour of the plaintiff (respondent) for the sum of \$32.96 with costs on a claim of \$49 being the balance alleged to be due by the defendant (appellant) to the plaintiff for work done and services rendered as a foreman at Turesi at a salary of \$15 a month from the 25th day of May, 1931, to the 24th day of October, 1931.

The defendant pleaded in defence to this claim a general denial and that if any services were rendered the claim was based on a contract which was illegal and void on the ground that the plaintiff, not being one of the persons designated or described in the exception to Regulation 95 (1) of the Mining Regulations, 1924, could not be legally employed in a mining district by the holder of a claim unless registered as required by the Regulation, and that, as the plaintiff was not so registered, he could not in law recover any wages in respect of services rendered under such contract.

The learned Magistrate found that "the plaintiff was employed to work on a mining claim erecting sluices and superintending labour" and that in his opinion the plaintiff was not a labourer but was doing skilled work and that Regulation 95 did not apply. He also held that the plaintiff was a tributor as defined by Regulation 46 (2), being the holder of a mining privilege and did not therefore require registration under Regulation 95 (1). As to the plea of illegality, the learned Magistrate was of opinion that Regulation 95 (1) could not be said to be in the interest of the public generally in the sense that the decided cases connote, and that therefore the contract was not illegal.

From this decision the appellant now appeals. An interesting and somewhat important question which seems to us to be by no means free from difficulty is raised by this appeal on the interpretation of Regulation 95 (1) of the Mining Regulations, 1924.

For the appellant it is contended by Mr. Browne that although the respondent was the holder of a mining privilege he was employed as a labourer and not as a tributor and therefore was not within the excepted class mentioned in Regulation 95 (1); and that as he was not registered in accordance with the requirement of the regulation he could not recover for work and labour done under a contract which was expressly forbidden.

Regulation 95 (1) is as follows:—

“The holder of a claim shall not employ any person other than an Aboriginal Indian in a Mining District as a labourer, artisan or in any capacity whatsoever, save as a licensed prospector, tributor, qualified civil, mechanical or mining engineer, mine manager, assistant manager, dredgemaster, assayer or surveyor, unless such person has been registered by the Commissioner or by any person appointed by the Governor in that behalf under the Employers and Labourers Ordinance, 1909.”

Regulation 94 provides that no labourer shall be deemed to be employed by the holder of a claim unless he is actually working under the supervision and control of such holder or of some person authorised by such holder in the locality where the operations are actually being carried on.

The appellant’s contention involves the consideration of the following questions:—

1. Was the respondent employed by the appellant as a labourer within the meaning of Regulation 95 (1) of the Mining Regulations, 1924?
2. If he was not employed as a labourer was he employed as a tributor?
3. If not as a tributor or as labourer does the penalty on the claimholder under Regulation 95 (1) for the employment of persons in any capacity, save as in the said regulation provided without registration, render the contract of service illegal so as to preclude the respondent from recovering his wages?

As to the first question, we are of the opinion that the respondent was not employed as a labourer. The evidence as to the exact nature of the work actually performed by the respondent is meagre, but such as it is, it is not contradicted by the appellant. The respondent’s evidence, so far as material to this question, is that he was foreman over contract labourers working a sluice at the placer at Turesi: that he first made the sluice and after he finished he superintended the erection and working and “cleaned up” every day. In cross-examination he said “was foreman,” he claimed “as such” and “he was not registered to work on the claim.” Arthur Dey said he was the appellant’s “manager and book-keeper” and that the respondent “came up as a foreman sent by” the appellant. In cross-examination he said “the respondent did not work as a tributor,” and in re-examination that he had “asked the respondent to help cleaning scales and

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packing” and that he “had sent for a relief.”

The learned Magistrate states in his reasons for decision that in his opinion the plaintiff was not a labourer but was doing skilled work. The respondent was engaged by the appellant to be the foreman and superintendent of her registered labourers, or “contract labourers” as the respondent prefers to call them, and it is clear that he did perform these duties. Regulation 94 seems to contemplate the necessity for such superintendence. The respondent was in our opinion a person authorised by the appellant within the meaning of the regulation and not a labourer. But it was urged by the learned counsel for the appellant that a foreman is only *primus inter pares*, and therefore the respondent was as much a labourer as those of whom he claimed to be foreman. There can be no such rule, as in each case there must be considered the nature of the employment and the work performed by the foreman. In the present case the evidence, as we have already indicated, justifies the finding of the learned Magistrate, in which we concur, that the respondent was not a labourer.

In view of the evidence led for the respondent, and of the admission that he claimed for services rendered as foreman and that he did not work as a tributor, there is no necessity to discuss the second question as to whether he was employed as a tributor. Having regard to the fact that the qualification to be a tributor is the mere possession of a mining privilege as described in Regulation 46 (2), some difficulty is presented in understanding employment in the capacity of a tributor as indicated in Regulation 95 (1).

Assuming, therefore, that the respondent was not employed as a tributor there remains to be dealt with the third question as to the illegality of the contract.

The respondent was, as we have decided, not a labourer within the meaning of Regulation 95 (1), and as he was not within the excepted class of employees, the regulation would nevertheless seem to require him to be registered. Mr. Browne argued that the contract of employment with him, an unregistered person, was illegal because prohibited. This leads to a consideration of the validity of this regulation in so far as it purports to require registration of any person (other than one within the excepted class) whom a claim-holder might employ. The power to make regulations is given by section 98 (1) of the Mining (Consolidation)

Ordinance, Chapter 175, with respect to all or any of the matters mentioned in the paragraphs thereof, and is conferred on the Governor in Council. This section was, prior to the recent revision of the Ordinances, section 100 (1) of Ordinance 34 of 1920, the rule-making authority being the Governor and Court of Policy; by section 2 of Ordinance 14 of 1929 the Governor in Council was substituted for the Governor and Court of Policy. The Mining Regulations, 1924, were therefore made by the last-

named body.

The paragraphs relevant to this case are—

“(n) employment and registration of labourers, the payment of wages and the duties of employers,” and

“(z) all matters not hereinbefore specially mentioned connected with the search and mining for or dealing with gold, silver, valuable minerals, etc., and generally all matters connected with the proper carrying out of the provisions of this Ordinance.”

With respect to paragraph (n) reference is necessary to the definition of “servants” in section 2 of the Ordinance, which

“means anyone who has entered into and is subject to a contract of service to be performed on or in respect of a claim, and includes a registered labourer.”

The Ordinance therefore clearly contemplates the employment on claims of servants generally, some being labourers for whom only regulations as to employment and registration are to be made; illustrations of provisions relating to servants and to labourers are found in sections 77 and 85. Section 77 provides a penalty for harbouring, employing or enticing the servant of another, which expression, of course, includes a labourer. On the other hand, section 85 makes two documents *prima facie* evidence, (a) “a certificate of registration issued under the regulations,” and (b) “an account of salary or wages of a servant employed on a claim certified by the holder of a claim”; while the account refers to all servants, the certificate of registration can relate to labourers only, being the only class in respect of which power is given to make regulations for registration. The scope of paragraph (n) is expressly limited to labourers, and it gives no authority to require the registration of other servants.

But it is argued that the power to require registration of servants is given in paragraph (z); that registration of all persons employed, whether as labourers or otherwise, on a claim is a matter connected with the proper carrying out of the provisions of the Ordinance; and section 77 of the Ordinance is referred to as an example of such a provision with the proper carrying out of which registration of servants is connected. It does not appear how the registration of servants who are not labourers is a matter connected with the proper carrying out of the section. No good reason has been put forward why a clerk, an accountant, a skilled foreman or other person, not a labourer or not excepted by the regulation, should be required to be registered as if he were a labourer.

It was contended that this Court could not consider any question as to the validity of the Mining Regulations, 1924, because, though made the authority of a statute, they were made by the Court of Policy, which was then the Legislature; and the regulations so made were of the same effect as if contained in a

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statute. The answer to the argument is that when the Court of Policy was exercising rule-making authority conferred on it by a statute it was not competent for the Court to introduce or deal with matters outside the scope of the statute, for, the statute being the source of authority, any regulation dealing with extraneous matters, being unauthorised would necessarily be *ultra vires*. The position is the same where a statute empowers the Legislature, by resolution, to make provision for certain purposes: if a resolution passed in pursuance of the statute includes other purposes it is at least *pro tanto* ineffective. In the case of *Minister of Health v. The King* (1931) A.C. 494, where a statute provided that an order of the Minister of Health confirming a scheme should have effect as if enacted in the Act, it was contended that such an order necessarily made a scheme inviolable, and reliance was placed on *Institute of Patent Agents v. Lockwood*, (1894) A.C. 347. In *Lockwood's case* the Legislature had by section 1 (2) of the Patents, Designs and Trade Marks Act, 1888, delegated power to the Board of Trade to "make such general rules as are in the opinion of the Board required for giving effect to this section" (namely, a section providing for the registration of patent agents). and such rules were to be of the same effect as if contained in a previous Act relating to the registration to trade marks and to be judicially noticed. It was held that the validity of a rule imposing fees on registration could not be questioned. Lord Warrington of Clyffe in the case of the *Minister of Health*, at p. 515, points out that the decision in *Lockwood's case* "was on the footing that the rules were within the statutory authority, as being rules which the Board of Trade thought reasonable and necessary for giving effect to the section in question." He also quoted the statement of Lord Herschell, L.C. at (1894) A.C., p. 360, of the difference between a rule and a statute that "you may canvass a rule and determine whether or not it is within the power of those who made it, you cannot canvass in that way an Act of Parliament." Lord Thankerton at pp. 532 and 533 states the principle thus, "in my opinion the true principle of construction of such delegation of Parliament of its legislative function is that it only confers a limited power on the Minister, and that, unless Parliament expressly excludes the jurisdiction of the Court, the Court has the right and duty to decide whether the Minister has acted within the limits of his delegated power"; and, "where, however, the power delegated to the Minister is a discretionary power, the exercise of that power within the limits of the discretion will not be open to challenge in a Court of Law." These principles apply in cases where the rules which are to have the same effect as if contained in the Act authorising them are laid before Parliament and might be annulled by a resolution by either House within a limited period;

they necessarily apply to rules made by the Court of Policy, and these, be it observed, are not stated to have the same effect as if contained in an Ordinance.

Another ground on which was based the inviolability of the Regulations of 1924, is that, as it was provided by the repealed subsection (4) of section 100 of Ordinance 34 of 1920 that "all such regulations shall be published in the *Gazette* and shall have the force of law," the effect of the expression "force of law" was to confer the same immunity from being canvassed as an Ordinance. The words are superfluous, and therefore do not give any over-riding power to a particular rule. Lord Herschell, L.C., in *Lockwood's case, ubi supra*, puts the distinction between a statute and a rule thus: "The effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule, if validly made, is precisely the same—that every person must conform himself to its provisions, and, if in each case a penalty be imposed, any person who does not comply with the provisions, whether of the enactment or the rule becomes equally subject to the penalty."

We are therefore clearly of the opinion that the Mining (Consolidation) Ordinance, 1920, did not by direct words or by implication give to the Governor and Court of Policy any power to regulate the registration of persons other than labourers, and that Regulation 95 (1) of the Mining Regulations, 1924, in so far as it purports to do so is therefore *ultra vires* of the statutory power.

The third point was, in effect, that if Regulation 95 (1) properly applies to the respondent, his contract was illegal as it was prohibited by the regulation. This argument proceeds on the assumption that the Mining (Consolidation) Ordinance, 1920, authorised the making of a regulation to prevent or prohibit the making of certain contracts, which contracts are in conformity with the Ordinance relating to Masters and Servants, Cap. 261. The latter part of Cap. 261 is composed of Ordinance 26 of 1909, as amended by 10 of 1914 and 20 of 1925, and states the special rights and obligations which are the result of a contract where the labourer who is to serve under it has been registered; it is expressly provided by section 25 (formerly section 10 of No. 26 of 1909) that the general provisions relating to servants shall not affect those relating to registered labourers, and both sets of provisions, in so far as not inconsistent, shall be construed together. The position is that the unregistered labourer retains his right to accept employment and has his remedies against his employer. The power conferred by section 98 (1) (n) of the Mining (Consolidation) Ordinance is to "make . . . regulations with respect to . . . the employment and registration of labourers. . . ." This certainly does not contemplate any power to prohibit so as to

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make illegal the employment of an unregistered labourer; it goes only to regulating "the employment and registration of labourers." A regulation cannot prohibit and make unlawful a contract lawful at common law and by statute unless the Ordinance authorises regulations to that effect. *Brightman v. Tate* (1919) 1 K.B. 463 and *Mahmoud v. Ispahani* (1921) 2 K.B. 716 were cited to us. Those were cases arising out of Orders made under the Defence of the Realm Regulations; it was held or admitted that these Regulations and orders had the same effect as a statute and were made for public purposes and for public reasons under the Defence of the Realm Act, 1914, which authorised the issue of regulations for securing the public safety and the defence of the realm and to prevent the successful prosecution of the war being endangered. The contract in each of these cases was held to be absolutely prohibited and therefore illegal. The Mining (Consolidation) Ordinance confers no power to make regulations with such far-reaching consequences as are contended for. The object of the penalties imposed for an infraction of Regulations 95 (1) and 97 is merely to deter a claim-holder from employing an unregistered labourer and the latter from working on claims. The regulation, we think, is primarily in the interests of the labourer, having regard to the fact that the statute appears to be solicitous to protect him in the enjoyment of his wages and by other benefits consequent on registration.

With reference to absconding labourers, it is observed that in the revised edition of the laws there has been omitted in error from section 20 (1) of Cap. 261 the minimum penalty of \$48 imposed by section 1 of Ordinance 26 of 1909.

The appeal is therefore dismissed with costs.

Appeal dismissed.

D. T. A. JONES v. FANNY McRAE.

D. T. A. JONES, Appellant (Defendant),

v.

FANNY McRAE, Respondent (Complainant).

[1932. No. 153.]

BEFORE FULL COURT: JOSEPHS, C.J. (ACTING) AND DEFREITAS, J.
(ACTING).

1932. SEPTEMBER 9, 16, 22.

Magistrate's court—Petty debt recovery—Title to immovable property in question—Bona fides of defendant—Evidence as to—Necessity for—Jurisdiction—Ouster of—Summary Jurisdiction (Petty Debt) Ordinance, cap. 15, s. 3 (2).

Section 3 (3) of the Summary Jurisdiction (Petty Debt) Ordinance, chapter 15, enacts that “the (magistrate’s) court shall not have cognizance of any action in which any incorporeal right, or the title to any immovable property, is or may be in question.”

Held (1) that it is the duty of the magistrate before adjudicating upon any case in which the title to land is raised by the defence, to ascertain whether the defence is *bona fide* with some evidence to support it, and for that purpose he must enquire into so much of the case as is necessary to satisfy him upon that point.

(2) that the mere belief that the land in question is the property of the defendant without some evidence of title to support it is not sufficient to oust the magistrate’s jurisdiction.

The plaintiff was erecting a building on a piece of land when the defendant came and broke it down. In respect of this act she sued the defendant for damages for trespass.

The plaintiff had no conveyance for the said piece of land, but she was in possession for a number of years. She was the mother of James Taite who died intestate in 1921, leaving as his widow Amelia Taite who died on the 4th January, 1931, leaving the defendant as her executor. The defendant gave evidence that the name of James Taite appeared in the village assessment book as the owner of the piece of land in question and that he therefore claimed the land as executor of Amelia Taite who was the lawful wife of James Taite, deceased, and who died intestate.

The magistrate gave judgment for the plaintiff. The defendant appealed on the ground that the magistrate’s jurisdiction was ousted by section 3 (3) of chapter 15.

Held that the magistrate’s jurisdiction was not ousted inasmuch as there was no evidence of title to support the defendant’s belief that his testatrix was the owner of the land.

Appeal from a decision of Mr. V. C. Dias, acting Stipendiary Magistrate, East Demerara Judicial District.

R. S. Miller, for appellant.

A. B. Brown, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by the acting Chief Justice.

The sole question to be decided in this appeal is whether the Magistrate exceeded his jurisdiction by adjudicating on a claim by the respondent (plaintiff in the Court below) for damages for trespass, the appellant (defendant in the Court below) having set

up by way of defence a title to the land in respect of which the trespass was alleged.

By section 3 (3) of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 15, the Court shall not have cognizance of any action in which the title to any immovable property is or may be in question.

It is therefore clearly the duty of the Magistrate before adjudicating upon any case in which the title to land is raised by the defence, to ascertain whether the defence is *bona fide* with some evidence to support it, and for that purpose he must enquire into so much of the case as is necessary to satisfy him upon that point. If he wrongly assumes jurisdiction where the title to land is in question and proceeds to adjudicate, his decision is subject to review by this Court.

The appellant in this case stated at the hearing that he was the executor under the will of Amelia Taite who died on the 4th January, 1931, the widow of James Taite; that James Taite died in 1921, but he did not know whether James Taite had a transport or Letters of Decree for the land, and that he only knew the land to be his (James Taite's) from the village assessment book. In answer to the Magistrate he said: "I am claiming the piece of land as the executor of the estate of Amelia Taite who was the lawful wife of James Taite, deceased, and who died intestate—because the name of James Taite appears in the village assessment book as being the owner of the said land."

The plaintiff, who is the mother of James Taite, was proved to have been for a number of years in possession of the land and was so at the time of the alleged trespass. She had paid taxes all the time. She states that she was erecting a building on the said land and that the defendant "came and broke it down." Her claim was in respect of this alleged wrongful act of the defendant.

As a result of the Magistrate's investigation he came to the conclusion that there was not a *bona fide* question of title involved and he awarded the plaintiff damages and costs.

Counsel for the appellant contended that having proved that the appellant was the executor of the estate of Amelia Taite, deceased, and that he had included the land in question in the assets of that estate, he had given sufficient proof to satisfy the Magistrate that the appellant's claim of title was *bona fide*.

The mere belief that the land was the property of the appellant's testatrix, without some evidence of title to support it, is not in our opinion sufficient to oust the Magistrate's jurisdiction.

In *Lilley v. Harvey* (1848) 17 L.J.Q.B. 357 on a claim for use and occupation the defendant objected to the jurisdiction of the County Court upon the ground that he claimed the premises as his own and that consequently the title was in question. The Judge of the County Court directed the defendant to be sworn

and examined; the defendant swore that the premises were in his belief his own, and that he had bought them at a sale by auction. No evidence of title was adduced and the Judge proceeded to hear the case and decided in favour of the plaintiff, being of opinion that the title did not really come in question. Upon a rule to show cause why a writ of prohibition should not issue Wightman, J. in discharging the rule said:— “I am of opinion that there was not any real ground for the objection, and that the question of title was not raised *bona fide* by the defendant. The defendant did not pretend to have any conveyance of the premises, or to have paid for them or to have had possession, etc. On the other hand it appeared that the plaintiff had been in possession of the premises and in receipt of the rents and profits for upwards of twenty-five years, that he had a conveyance of them, and had paid the purchase money. It was however contended for the defendant that it was enough for him to state upon oath that he believed the premises were his to bring the case within the proviso, and to take it out of the jurisdiction of the County Court, and that the judge had no authority to enquire further. It appears to me that if the Judge has authority to ascertain whether the title is in question, it is very difficult to define the limit to which his enquiry may go. It can hardly be intended by the statute that the mere assertion of the defendant that he claims title, or that it is in question, will suffice to take away the jurisdiction Each case must depend upon its own circumstances.”

In the present case the plaintiff did not hold any conveyance of the premises, but her possession was proved and admitted. We are of opinion, therefore, that the conclusion arrived at by the learned Magistrate was correct and that his jurisdiction was not ousted—see also *Emery v. Barnett* (1858) 27 L.J.C.P. 216, *Mountney v. Collier* (1853) 22 L.J.Q.B. 124, and the local case of *Wilson v. Boodhoosingh* (24.7.08).

The appeal was dismissed with costs which we fix at \$15.

Appeal dismissed.

MARY v. PERSAUD

MARY v. PERSAUD.

[1932 No. 265.]

BEFORE FULL COURT: JOSEPHS, C.J. (ACTING) AND DEFREITAS, J.
(ACTING).

1932. SEPTEMBER 16, 21, 22.

Criminal law—Assault causing actual bodily harm—Conviction for—Reprimand and discharge—Not proper order—Substituted conviction—Common assault—Summary Jurisdiction (Procedure) Ordinance, cap. 14, ss. 40, 42 (a), 42 (b)—Probation of Offenders Ordinance, cap. 21, s. 2 (1).

The defendant was charged under section 34 (a) of the Summary Jurisdiction (Offences) Ordinance, chapter 13, with assault causing actual bodily harm. He was convicted and discharged with a reprimand. The complainant appealed.

Held, (1) that the magistrate had DO jurisdiction merely to reprimand the defendant; and

(2) that in the circumstances a conviction for common assault should be substituted for the conviction for assault causing actual bodily harm.

Appeal by the complainant from an order made by Mr. D. E. Jackson, Stipendiary Magistrate. Georgetown Judicial District reprimanding and discharging the defendant on a complaint for assault causing actual bodily harm.

E. G. Woolford, K.C., (S. L. van B. Stafford with him) for appellant.
J. A. Luckhoo, K.C., for respondent.

Cur. adv. cult.

The judgment of the Court was delivered by the acting Chief Justice.

This is an appeal from the decision of the Stipendiary Magistrate for the Georgetown Judicial District who upon a charge laid by the appellant under section 34 (a) of the Summary Jurisdiction (Offences) Ordinance, Cap. 13, convicted the respondent and discharged him with a reprimand.

The appellant now appeals on the ground that the decision is erroneous in point of law inasmuch as the learned Magistrate having convicted the respondent of assaulting the appellant so as to cause her actual bodily harm, had no alternative but to impose a term of imprisonment which is the only punishment prescribed by the section under which the complaint was laid, and that he was in error in reprimanding and discharging the respondent.

At the hearing counsel for the respondent submitted at the close of the address by the counsel for the appellant that the appellant had no right of appeal inasmuch as he could not be said to be a person dissatisfied with the decision within the meaning of section 3 of the Summary Jurisdiction (Appeals) Ordinance,

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Cap. 16. He contended that the dissatisfaction in that section was limited to the adjudication by the Magistrate, and that after conviction the appellant as complainant ceased to have any further interest and could not therefore be dissatisfied.

This point does not appear to have arisen before and was not sufficiently or properly argued at the hearing. There are instances, however, in which the Court of Appeal has entertained appeals by complaints against penalties following on conviction.

Without deciding the point, we propose to follow the practice hitherto observed in this Court, and deal with the appeal.

It is clear that the learned Magistrate did not consider the offence as of a serious nature as appears from his reasons for decision. He has however convicted the respondent of assault occasioning actual bodily harm, and although the only punishment prescribed is imprisonment, he reprimanded and discharged him.

Where a person has been convicted and the Magistrate thinks that the case is not one for a personal or pecuniary penalty, the procedure is provided by section 42 (b) of Cap. 14 if the case comes within the provisions of that section, otherwise he may order a short term of imprisonment which may be for a day or until the rising of the Court or such a nominal penalty as is permissible.

If on the other hand the charge is proved, and the case falls within section 42 (a) of Cap. 14, or section 2 (1) of the Probation of Offenders Ordinance, Cap. 21, the Magistrate may exercise the powers of dismissing the charge or of discharging the offender conditionally in compliance with the terms of those enactments.

It follows, that where there has been a conviction, the Magistrate has no jurisdiction merely to reprimand the defendant.

The Magistrate might, by virtue of section 40 of Cap. 14, have found the respondent guilty of common assault and dealt with him accordingly. In the circumstances of the case, justice will be served by substituting for the present conviction, one of common assault; and we so order and impose a penalty of (\$5) five dollars and in default seven days' imprisonment.

There will be no order as to costs.

Sentence varied.

SAMUEL KIDNEY v. N. B. FRASER.

SAMUEL KIDNEY v. N. B. FRASER.

[1932. No. 220.]

BEFORE MCDOWELL, J. (ACTING.)

1932. NOVEMBER 4.

Limitation of actions—Lex fori—Procedure—Servant—Sailor—Limitation Ordinance, cap. 184, s. 7.

A sailor is a servant within the meaning of section 7 of the Limitation Ordinance, chapter 184.

A. C. Brazao, for plaintiff

J. A. Luckhoo, K.C., for defendant.

MCDOWELL. J. (Acting.): In this case the preliminary objection has been taken that the action is out of time owing to the provisions of section 7 of the Limitation Ordinance, Cap. 184, which reads as follows:

“Every action and suit for the wages of labourers, artisans, or servants shall be brought within one year next after the time when the wages have become due”

and it is submitted that the plaintiff Samuel Kidney is a “servant” within the meaning of the Ordinance and so the action is barred by the Ordinance.

The Law of Merchant Shipping Ordinance. Cap. 121, reads thus:

Sec. 3—“All questions arising within the Colony relating to . . . all rights, liabilities, claims, contracts, and matters arising in respect of a ship . . . shall be adjudged, determined, construed and enforced according to the law of England applicable to that or the like case.” and

Sec. 4—“All the questions and matters aforesaid . . . shall be cognizable and determined in the Colony by or before the Supreme Court in its civil or criminal jurisdiction according to the course and practice thereof.”

In other words, the Common Law principle that the *lex contractus* affects the rights and merits and the *lex loci fori* affects the remedy is applied to these cases.

The question then arises as to whether the plaintiff is to be considered as a “servant.”

The Limitation Ordinance, Cap. 184, originally passed in 1856 contains no interpretation section but in an earlier (1853) Ordinance, the Employers and Servants Ordinance, now Cap. 261, “servant” for the purpose of that ordinance comprises “persons employed in droghers, vessels, or boats, or otherwise.”

“Vessel” is not defined but the English Statutory Definition in the Merchant Shipping Act, 1894, is a “ship or boat or any other description of vessel used in navigation.”

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I agree with Mr. Brazao on the following points:

- (1) Limitation Acts and Ordinances are matters of positive law and should not be extended.
- (2) That Ordinances should not be construed by the authority of dictionaries but that the object of the Ordinance should be considered.
- (3) The word "wages" is not conclusive in the case, it is admitted that the master of an ocean liner receives "wages."

Now great care should be exercised before reading the interpretation of a word in one Ordinance into that of another, yet it appears to me that the Legislature, at the time, contemplated in these Ordinances locally registered vessels, which then were and are still generally of small tonnage making short voyages.

Section 3 of Cap. 261 applies some of the provisions of that Ordinance to "any . . . sailor or boatman employed on colonial vessels or boats," and I am of opinion that Cap. 184 merely carries on the same definition and so that section 7 of Cap. 184 applies.

I should like to point out that this opinion only applies to the question of wages, and has no bearing whatever on any other questions that may arise on these transactions. It is simply a question of the *lex fori* as regards the remedy and on the authority of *Slavonski v. La Pelleterie de Roubaix Societe Anonyme*, (1927) 137 L.T. 645, would be no bar to further action, even on this matter, in any place where such limitations did not exist.

Judgment for the defendant. No order as to costs.

Judgment for defendant.

Solicitor for plaintiff: *F. I. Dias*.

A. FRANCOIS v. C. RAM.

ALEXANDER FRANCOIS, Appellant (Complainant).

v.

CHARLES RAM, Respondent (Defendant).

[1932. No. 177.]

BEFORE FULL COURT: DE FREITAS, C.J., DE FREITAS, J.,
(ACTING), AND JOSEPHS, J., (ACTING).

1932. OCTOBER 15; NOVEMBER 5.

Spirits—Bush rum—Possession of—No knowledge that substance is bush rum—No offence committed—Spirits Ordinance, cap. 110, s. 93 (5). Appeal—Decision from—Not from reasons.

An appeal is from a decision and not from the reasons given for it.

The defendant was in possession of bush rum. The rum was purchased by the defendant from a licensed spirit shop in Georgetown under a proper permit. The defendant did not know that the rum he so purchased was bush rum. The Magistrate dismissed a complaint brought under section 93 (5) of the Spirits Ordinance, chapter 110, against the defendant for possessing bush rum. The Complainant appealed.

Held, that as the defendant did not know that the thing of which he was in possession was bush rum the dismissal of the complaint by the magistrate was right.

Baboo Ballack v. Hill, 19. 2. 1909, followed.

Appeal by the complainant from an order of Mr. J. A. Veerasawmy, Stipendiary Magistrate of the West Demerara Judicial District dismissing a complaint brought against the defendant for unlawful possession of bush rum.

S. E. Gomes, for appellant.

E. G. Woolford, K.C., for respondent.

The Chief Justice delivered the judgment of the Court as follows:—

This is an appeal by a Sergeant of Police from a decision of a Stipendiary Magistrate dismissing a complaint against the respondent, Charles Ram.

2. In his written “Reasons for Decision” the Magistrate says: “In this case the defendant was charged under section 93 (1) of Chapter 110, the Spirits Ordinance, repealed by section 2 (1) of Ordinance 22 of 1931, with being in the unlawful possession of spirits, to wit, the substance known as bush-rum.” Section 2 of 22 of 1931 repealed subsection (1) of section 93 of Chapter 110 (at page 2008 of volume 3 of the 1930 edition of the Laws of British Guiana) and it enacted a new and different subsection (1) in substitution for the repealed subsection. In his “Reasons” the Magistrate sets out verbatim the terms of the new subsection (1) and also the terms of subsection (5) of section 93. It is clear that he heard a complaint for an offence under subsection (5), punishable under the new subsection (1) and not under the

repealed subsection to which he inadvertently referred. Neither in the Court below nor in this Court was any question raised as to the complaint being made under a repealed enactment.

3. We disagree with much of what is said in the Magistrate's "Reasons" but we are dealing with this appeal in accordance with the rule that an appeal is from a decision and not from the reasons given for it.

4. In our view Chief Justice Sir Henry Bovell settled the question now before us, in the appeal case of *Baboo Ballack v. Hill*, in which he delivered his decision in writing on the 19th of February, 1909. He decided that question under the same subsection (5) of section 93 of the Spirits Ordinance. His decision was that unlawful possession of bush-rum, within the meaning of that subsection (5), is not established if the person in possession of a bottle of bush-rum proves that he did not know that the bottle contained bush-rum. In the *Baboo Bollock* case the Magistrate's 'Reasons for Decision' began with the statement that "The only question in this case is whether the defendant's account of his possession of the bush-rum is to be believed or not." It was the quality of the possession and not the fact of possession that was in issue. The same issue was before the Judge who heard the appeal. The Magistrate did not believe Ballack's account and he therefore held that his possession of the bush-rum was unlawful possession within the meaning of the statute. It was common ground that Ballack—at a time when he was the driver of a van—was found in possession of a parcel of bush-rum under his seat; and his account (or explanation) was that the parcel had been put there by another person and that he did not know it contained bush-rum. There was corroborative evidence of another person having put the parcel under the driver's seat. The question for the Judge was, whether the Magistrate should have accepted Ballack's account that the parcel was put under the seat in circumstances which showed that the defendant had no knowledge of the contents of the parcel. He held that the Magistrate should have accepted Ballack's account and that as Ballack did not know that the parcel contained bush-rum his possession of it was not unlawful possession, and he quashed the conviction.

We accept Sir Henry Bovell's interpretation of the enactment—that it does not impose an absolute prohibition, because it is a sufficient defence if the defendant proves that he did not know that the thing of which he was in possession was bush-rum. To reject his decision would be to set aside a judicial interpretation of subsection (5) that is 23 years old. His decision should not be overruled unless it is clearly wrong, which it is not. The Legislature is presumed to know the existing state of the law on the subject about which it legislates. In its amending Ordinance 22 of 1931, the Legislature enacted a different subsection (1) of section 93, without amending subsection (5) of the

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same section 93, which is left in exactly the same terms as were interpreted by Sir Henry Bovell's decision 22 years before. If his interpretation is to cease to prevail, that must be effected by an amending Ordinance of the Legislature.

6. In the case before us the Magistrate has found that the defendant (now the respondent) was in possession of bottles of bush-rum and he has accepted the defence that the defendant did not know it was bush-rum but believed it was the same rum (not bush-rum) which he had bought from a licensed spirit-shop in Georgetown under a proper permit. The Magistrate held that the defendant's possession was not unlawful possession within the meaning of subsection (5) and that the charge was therefore not established.

That defence having been accepted, the dismissal of the complaint was right.

The appeal is dismissed with \$30 costs to the respondent, including \$25 for counsel's fee.

Solicitor for appellant: *Percy W. King*, Crown Solicitor.

JAMES KHAN v. BENJAMIN HARMAN.

JAMES KHAN, Appellant (Defendant).

v.

BENJAMIN HARMAN, Respondent (Complainant)

[1932. No. 306.]

BEFORE FULL COURT: DE FREITAS, C.J., & SAVARY, J.

1932. DECEMBER 2.

Criminal law—Conviction—Bad in part—Bad as a whole.

A conviction bad in part is bad as a whole.

Appeal by the defendant from an order made by Mr. F.O.Low, acting Stipendiary Magistrate, West Demerara Judicial District convicting him of unlawful possession.

A. V. Crane, solicitor, for appellant.

S. E. Gomes, for respondent.

The Chief Justice delivered the judgment of the Court as follows:

The Magistrate convicted the appellant of being in unlawful possession of some things found in his room and of other things found buried in the ground outside that room. There is one conviction in respect to both lots of things. It is clear to us, and counsel for the respondent agrees, that there is insufficient evidence to establish that the appellant was in possession of the buried articles, so the conviction in respect to those articles is bad.

The conviction being bad in part is bad as a whole and it must be quashed.

NELSON CANNON, v. A. A. THORNE

NELSON CANNON, Petitioner,

v.

ALFRED ATHIEL THORNE, Respondent,

[PETITION 1932. No. 108.]

BEFORE DE FREITAS, C.J.: 1932. DECEMBER 19.

Election—Return of—Petition questioning—Three persons nominated—Ballot paper—Only two on—Person not nominated on—Votes for him thrown away—Election void.

A. A. Thorne, A. J. Hohenkerk and A. Railton Crum Ewing were nominated as candidates for election to the Georgetown Town Council. On the ballot papers the name "A. Railton Crum Ewing" did not appear: instead, there was the name "A. Frederick Crum Ewing," the father of A. Railton Crum Ewing. At the election A. A. Thorne received 63 votes, A. J. Hohenkerk 51 votes and A. Frederick Crum Ewing 19 votes. The returning officer made a return to the Council that A. A. Thorne had been elected a member of the Council.

On an election petition being filed questioning the return—

Held (1) that the placing upon the ballot-paper of the name of a nonexistent candidate was a transgression of the enactments in Chapter 86 requiring the nomination of candidates for election and requiring the exhibition of the names of the duly nominated candidates on the ballot papers issued to voters;

(2) that it could not be said that it did not affect the result when A. A. Thorne's majority was 12, and the number of votes given for A. Frederick Crum Ewing, the non-existent candidate was 19; and

(3) that the election was void and that A. A. Thorne was not duly elected and returned.

Election petition questioning the return of Alfred Athiel Thorne as Councillor for Ward No. 4 of the City of Georgetown.

The facts appear from the judgment.

G. J. de Freitas, K.C., for petitioner, Nelson Cannon.

C. V. Wight, for respondent, A. A. Thorne.

DE FREITAS, C.J.: This is an election petition presented by the Hon. Nelson Cannon. It questions the validity of the election on the 7th of December, 1932, of a councillor of The Mayor and Town Council of the City of Georgetown for Ward No. 4 of the City. It prays a declaration that the respondent, Mr. Thorne, was not duly returned as elected councillor for that Ward and a declaration that the election was null and void.

2. The Georgetown Town Council Ordinance, Chapter 86, by section 34, provides for the nomination of any duly qualified candidate for a councillor's seat. Section 35 provides that if more candidates than one are nominated the returning officer shall appoint a day for holding the election. Section 39 provides that in case of a poll at an election votes shall be given by ballot, by means of a ballot-paper showing the names of the candidates. On the fifth of December, 1932, (1) Alfred Athiel Thorne,

(2) Alexander John Hohenkerk and (3) Alfred Railton Crum Ewing were duly nominated as candidates for election to be the councillor for Ward No. 4. On the seventh of December, 1932, the returning officer issued to the voters a ballot-paper showing the names of three candidates for election: (1) Alfred Athiel Thorne, (2) Alexander John Hohenkerk and (3) Alfred Frederick Crum Ewing. Mr. Thorne and Mr. Hohenkerk were duly nominated candidates, but Mr. Alfred Frederick Crum Ewing was not a nominated candidate. The name of Alfred Frederick Crum Ewing appears in the List of Voters and is numbered 69. He is the father of Alfred Railton Crum Ewing, whose name so appears as No. 70 in the same List. At the close of the election the returning officer (under section 60 of Chapter 86) declared the result of the poll to be that Mr. Thorne was elected with 63 votes, that Mr. Hohenkerk had received 51 votes and that Mr. Alfred Frederick Crum Ewing had received 19 votes; and the returning officer thereupon made a return to the Council of Mr. Thorne having been elected the member of the Council for Ward No. 4.

4. Section 13 of the Ballot Act 1872 (35 and 36 Vict. c. 33) provides that no election shall be declared invalid by reason of non-compliance with the rules or forms in the schedules to the Act, if the Court finds the two facts (1) that the election was conducted in accordance with the principles of the enactments in the statute law and (2) that the non-compliance did not affect the result of the election. It has been said that this section was inserted *ex abundanti cautela* and that the same provisions at Common Law would be applied if the section did not exist (*Woodward v. Sarsons* (1875) L.R. 10 C.P. 733).

The question now before me relates to a non-compliance with the enactments in Chapter 86 requiring the nominations of candidates for election and requiring the exhibition of the names of the duly nominated candidates on the ballot papers issued to voters. At Common Law an election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or any of his subordinate officers in the conduct of an election, where the Court is satisfied that the election was in substance conducted under the existing law, and that the result (*i.e.* the success of the one candidate over the other) was not, and could not have been, affected by those transgressions; but an election will be declared void where it is open to reasonable doubt whether the transgressions may not have affected the result and it is uncertain whether the candidate has really been elected by the majority of the voters, voting in accordance with the existing law relating to elections; and the onus is on the respondent to prove that such transgressions of the law did not and could not affect the result (*Islington* (1901) 5 O'M. and H. 125; *Woodward v. Sarsons* (1875) L.R. 10 C.P.

733). In the *Islington* case the transgressions were that 14 ballot-papers had been given out by the official at a prohibited time, after 8 p.m., and the numbers on the counterfoil of these papers were irregularly given to an agent of one of the candidates to show him how many were so given out. That election was not avoided, the respondent being in a majority of 19. The result could not have been affected, for fourteen more votes given to any other candidate would still have left the respondent with a majority of five votes. In the case now before me all the ballot-papers contravened the statute by notifying every voter that he was free to vote for a person who was not a candidate but whose name was illegally upon the ballot-paper, and there was a contravention of the statute by the omission from each of the ballot-papers of the name of one of the duly nominated candidates. It is obvious that the result of the election (the majority of 12 for Mr. Thorne) may have been affected by a transfer of the 19 votes. It cannot be said that the mistake in the ballot-papers did not and could not affect the result.

6. I think it is clear that my decision should be that the returning officer or his subordinate officer caused the election for Ward No. 4 to be void. He made it appear that a person was a duly nominated candidate for election, for whom votes may be given, when that person was not a candidate at all. I am supported in that view by the decision in *Wilson v. Ingham* (1895) 64 L.J., Q.B. 775. In that case at an election of urban district councillors the ballot-papers by a mistake of a clerk of the returning officer, contained the name of a candidate who had withdrawn. A petition having been presented to avoid the election of those candidates who had been elected by a majority of votes less than the number given to the candidate who had withdrawn, it was held that the election of those candidates was void. The votes were, Scott 243, Robson 235, Ingham 132, Hikeley 129 and Wilson 128. Meek, the candidate who had withdrawn, received 34 votes. The returning officer declared Scott, Robson, Ingham and Hikeley duly elected. The unsuccessful candidate, Wilson, presented a petition alleging that the election was not conducted in accordance with the principles of the existing law and that Ingham and Hikeley (who together with the returning officer were made respondents to the petition) were not duly elected by a majority of lawful votes and that their election was void. It will be observed that Scott and Robson were not made respondents. Their majorities of 111 and 103 over Ingham could not be affected by any transference of the 34 votes for Meek. Counsel for the respondents there urged that the election of Ingham and Hikeley was protected by section 13 of the Ballot Act, 1872, as construed in *Woodward v. Sarsons*. Day, J., said: "I am of opinion that the election of the respondents Ingham and Hikeley must be declared to be void upon the ground that

it was not carried out in accordance with the provisions of the Ballot Act 1872. The name of a candidate was put upon the ballot-paper and voters were invited to vote for him when he was not a candidate." Wright, J., said *inter alia*: "It is impossible to say that the result of the election was not affected by the name of the candidate who had withdrawn being placed upon the ballot-paper. The placing of the name of a person who was not a candidate upon the ballot-paper was a violation of the Ballot Act, and it cannot be said that it did not affect the result of the election. In my judgment, therefore, by the principles of the common law as applied to the Ballot Act, the election is void." In the election now under review the placing upon the ballot-paper of the name of a non-existent candidate was an equivalent transgression of the statute, and it cannot be said that it did not affect the result when Mr. Thorne's majority is 12 and the number of votes given for the non-existent candidate is 19.

7. In the present circumstances it is appropriate for Mr. Justice Grove in the *Hackney* case to be followed by me in saying that although it may be a matter which one cannot view without regret, that a candidate who is not to be blamed should be deprived of his success and be put to inconvenience, nevertheless a judge cannot allow consequences to deflect him from the correct course as he sees it. A judge has to pronounce the law to the best of his judgment, and in my judgment the Common Law fairly applied is that the recent election for Ward No. 4 of the City of Georgetown is void and that Mr. Thorne was not duly elected and returned as the member for that ward.

8. Mr. G. J. de Freitas, K.C., counsel for the petitioner informed the Court that he was instructed by his client not to claim any costs from the respondent, because it was clear that the petition was caused by a mistake of the returning officer or of one of his subordinate officers. I agree that there should be no order as to costs.

9. It was an interesting effort that was made by Mr. Vibart Wight, counsel for the respondent, to overcome obstacles that are insurmountable.

Election declared void.

Solicitor: *V. D. P. Woolford*, for petitioner.

AMIHABIBAR v. THE REGISTRAR OF DEEDS.

[No. 188 OF 1932—DEMERARA.]

BEFORE SIR ANTHONY DE FREITAS, C.J. 1933. FEBRUARY 7.

Barrister practising as a solicitor—Grounds to be stated in record—Consent order—Valid until set aside.

A barrister cannot act as a solicitor if there is no allegation in the statement of claim, or in the indorsement of claim, showing the ground under the Legal Practitioners (Definition of Functions) Ordinance, 1931, (No. 15), for representation by a barrister only, without a solicitor.

An order by consent is binding unless and until it has been set aside in proceedings duly constituted for the purpose of setting it aside.

B. B. Marshall, for the plaintiff.

J. F. Henderson, solicitor, for the defendant.

The Chief Justice said:—

This action is so irregular that I do not see how it can be allowed to proceed.

The indorsement of the writ is signed by the plaintiff and the statement of claim is signed by a barrister as “of Counsel.” That barrister now comes before the Court and states that he appears for the plaintiff and proposes to present her case, without being instructed by a solicitor. It is a mistake to suppose that a party to a suit can act as a solicitor in it. There is no duly authorised solicitor for the plaintiff on the record in this action; and there is no allegation in the statement of claim (or in the indorsement of the writ) showing the ground, under Ordinance 15 of 1931, for representation by a barrister only, without a solicitor. It would appear, therefore, that I cannot hear counsel.

I can hear the plaintiff in person. I can hear her counsel if, in the particular circumstances, he has the necessary right of audience. But the plaintiff’s cause of action, if any, is based on a claim which cannot be tried in the present action; the fundamental issue for decision, raised by the statement of claim, is a question of the invalidity of a consent order of the Supreme Court which has been duly signed and entered. I have no jurisdiction in this action to hear such an *ex parte* appeal, or any appeal, against that consent order. It has been definitely settled by the Judicial Committee of the Privy Council, in *Kinch v. Walcott*, that an order by consent is binding unless and until it has been set aside in proceedings duly constituted for the purpose of setting it aside. The consent order which is questioned in the pleadings here has not been set aside, and it is still binding.

The only course open to me is to order this irregular action to be discontinued; and I order accordingly, with liberty to the plaintiff to pursue any remedy she may have in respect to any matter in her pleadings.

The plaintiff must pay the defendant’s costs fixed at \$20.

RAMDHANNIE v. J. H. DYER.

RAMDHANNIE v. JAMES H. DYER.

[No. 53 of 1933—DEMERARA.]

BEFORE FULL COURT: SAVARY, J., AND MCDOWELL, J. (ACTING)

Assault causing actual bodily harm—No plea thereto—Plea of guilty to common assault—No trial—Conviction for common assault only—Summary Jurisdiction (Procedure) Ordinance, Chapter 14, s. 40—Summary Jurisdiction (Appeals) Ordinance, Chapter 16, s. 26 (a).

Where a defendant pleads guilty to the commission of an offence which is included in the offence charged, and no trial takes place, the only conviction that can properly be recorded by a magistrate is one in respect of the offence to which the defendant pleaded guilty.

The judgment of the Full Court was delivered by Mr. Justice Savary as follows:—

This is an appeal from the decision of Mr. McCowan, Stipendiary Magistrate of the Berbice Judicial District, who convicted the appellant of an assault occasioning actual bodily harm and sentenced him to three months hard labour.

Before the magistrate the appellant, through his solicitor, pleaded guilty to common assault in the hope that the charge of assault occasioning actual bodily harm would be reduced. After some evidence had been taken, presumably with a view to deciding whether the charge should be reduced, and certain facts brought to the notice of the magistrate he did not reduce the charge to one of common assault but proceeded to deal with the matter as if the appellant had pleaded guilty to the more serious charge.

From the record sent up to this Court it does not appear that the appellant ever pleaded to the charge of assault occasioning actual bodily harm. This was no doubt done through inadvertence and the question arises whether this Court can correct the error.

Mr. Woolford, counsel for appellant, submitted that, on the facts before the magistrate and in view of the course the trial took, only a conviction for common assault could have been recorded.

The Assistant to the Attorney-General informed the Court that in the circumstances he was not prepared to uphold the conviction as recorded, but urged that the Court could substitute a conviction of common assault for the one recorded by the magistrate. He based this contention on the joint effect of s. 40 of the Summary Jurisdiction (Procedure) Ordinance, Ch. 14, which gives a magistrate jurisdiction to convict for a minor offence under certain conditions, and s. 28 (a) of the Summary Jurisdiction (Appeals) Ordinance, Ch. 16, which empowers the Full

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Court to enter any judgment or make any order which the magistrate ought to have made. He also referred the Court to the case of *Mary v. Persaud* decided by the Full Court on the 22nd September, 1932, in which the Court invoked the provisions of s. 28 (a) aforesaid, and substituted a conviction of common assault for one of assault occasioning actual bodily harm under the circumstances of that case. In other words, his point is that as the only plea before the magistrate was one of guilty of common assault, the magistrate could on that plea have convicted him only of that offence, and not of the more serious offence to which he had not pleaded. We are of opinion that this is a proper course for this Court to take and we accordingly vary the magistrate's decision and order that a conviction for common assault be recorded against the appellant.

In view of the opinion we have formed it is unnecessary to discuss the question as to whether the evidence before the magistrate was sufficient to justify the conclusion that the assault was one occasioning actual bodily harm.

We order the appellant to pay a fine of \$10 and in default to be imprisoned for one month and also order him to pay to the woman Goomtie \$30 by way of compensation. We make no order as to the costs of this appeal.

Appeal allowed.

A. G. C. GONSALVES v. DEM. LIFE ASS.

A. G. C. GONSALVES v. THE DEMERARA
MUTUAL LIFE ASSURANCE SOCIETY, LIMITED.

[No. 70 of 1932.]

BEFORE SAVARY, J.

1932. DECEMBER 8, 13, 14, 15, 16, 20, 21.

1933. JANUARY 3, 4, 5, 6, 10, 11, 13, 17, 18, 19, 20, 25, 31;

FEBRUARY 1, 2, 3; MARCH 2, 16, 17, 21, 22, 23; MAY 15.

Plaintiff's case—Close of—No case to answer—Objection taken—Scintilla of evidence—Insufficiency of—Defendant not called upon—Judgment for defendant—Fraud—General allegations—Not sufficient.

If on the close of a plaintiff's case there is no evidence upon which a jury might reasonably come to a conclusion in his favour, a defence must not be called for, and there must be judgment for the defendant.

General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud.

SAVARY, J., in the course of his judgment, said:—

At the close of the plaintiff's case, Mr. deFreitas, on behalf of the defendants, submitted that the plaintiff had failed to prove his case and there was no case for the defendants to answer. He contended that, should his submission be sound, his clients ought not to be put to further expense in this long trial by having to put their defence before the Court. I think it is right that I should give due consideration to the submission, and give my opinion on it, especially in view of the fact that, in my opinion, the material figures have been either admitted by the plaintiff in cross-examination, or produced by the defendants and admitted by the other side. . . .

Now, what test do I have to apply in considering the question whether a case has been made out? On this point it is useful to bear in mind the words of Viscount Finlay in *Everett v. Griffith* (1921) 1 A.C. 668: "The question as to what constitutes evidence fit to be left to the jury is a question of law for the Court. For this purpose a mere scintilla is not enough. There must be evidence on which the jury might reasonably come to a conclusion in favour of the plaintiff. . . . If the evidence lead only to conjecture it is not for the consideration of the jury," I take it the same principle applies where a Judge sits alone and performs the functions of Judge and jury. . . .

It is a well settled principle that general allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice: see Lord Selborne, L. C. in *Wallingford v.*

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Mutual Society & Anor. (1880) 5 A.C., 697, and Lord Watson in *Lawrence v. Norreys*, 15 A.C. 221.

But assuming that it is my duty to deal with it, I should like to call attention to the well known words of Lord Westbury in *McCormick v. Grogan*, (1869) L.R. 4 H.L., at p. 97, as to proof of fraud: "Now being a jurisdiction founded on personal fraud, it is incumbent on the Court to see that a fraud, a *malus animus*, is proved by the clearest and most indisputable evidence. It is impossible to supply presumption in the place of proof, nor are you warranted in deriving these conclusions in the absence of direct proof, for the purpose of affixing the criminal character of fraud. . ."

Judgment for defendant.

Solicitors: *A. V. Crane; G. R. Reid.*

LIONEL LICORISH v. WILLIAM ALBERT DANDRADE.

[No. 58 OF 1933—DEMERARA.]

BEFORE FULL COURT: SAVARY, J., AND MCDOWELL, J. (ACTING).

1933. MAY 12, 19.

Customs Ordinance, Chapter 33—Section 168 (b)—Unshipping of goods — Removal from ship to ship moored alongside wharf—Whether amounts to unshipping.

The appellant who was the captain of the schooner, "Fredem" arrived in Georgetown and tied up alongside the schooner "Blue Jacket" which was moored alongside a city wharf. The appellant called for someone; a boy came back up on the deck of the "Fredem," and he and the boy went down below. Shortly after, the boy, followed by the appellant, came up with parcels under his arm. The boy then crossed to the "Blue Jacket," opened the door of the storeroom, put the parcels inside, left the door open, and returned to the "Fredem." Shortly after, the appellant went to the storeroom himself, looked in, and closed the door. He then got into a shore boat, and soon after, returned to the "Fredem." The next morning the appellant told the master of the "Blue Jacket" not to allow anyone to go to the storeroom. Later that morning on a search being made, there were found in the store-room of the "Blue Jacket" two parcels containing 12 pounds of saccharine.

Held, that the saccharine had been unshipped from the "Fredem" and that the appellant was concerned therewith.

J. A. Luckhoo, K.C., for the appellant.

Percy W. King, Crown Solicitor, for respondent.

The following judgment of the Full Court was read by McDowell, J. (Acting):—

In this case the appellant was charged under section 168 (b) of the Customs Ordinance, Chapter 33, with "being concerned in

the unshipping” of twelve pounds of saccharine on which the duty had not been paid.

The facts as found by the learned Magistrate are as follows:

On the morning of September 4th, 1932, the appellant who is the captain of the schooner “Fredem” arrived in Georgetown and tied up alongside the schooner “Blue Jacket” which was moored at the Demerara Wharf and Storage Company.

The vessels were watched by Customs Watcher Bascom and Customs Boatman Bollers in compliance with instructions given to them.

About 3 p.m., these men heard appellant call for someone, when a boy came up on the deck of the “Fredem” and the two then went down below. Shortly after the boy came up with a parcel or parcels—the watchers differ on this point—under his arm followed by the appellant.

The boy then crossed to the “Blue Jacket”, opened the door of the store-room, put the parcels inside, leaving the door open, and returned to the “Fredem.” Shortly after the appellant went to the store-room himself, looked in and closed the door, then got into a shore boat and soon after returned to the “Fredem.”

The next morning (Monday) appellant was heard to tell the master of the “Blue Jacket” not to allow anyone to go to the storeroom.

At 9.45 a.m. Custom Officers searched both the “Fredem” and the “Blue Jacket” in the order named when Bollers found in the store-room of the “Blue Jacket” two parcels containing altogether twelve pounds of saccharine.

Mr. Luckhoo urged first that there was no “unshipping” in removing the saccharine from the “Fredem” to the “Blue Jacket”

If any assistance had been necessary to enable us to hold that this was a clear case of being concerned in unshipping, *Attorney-General v. Tomsetts* (1835) 2 Cr. M. & R. 170; 150 E.R. 73; and *Attorney-General v. Catt* (1837) 3 M. & W. 7; 150 E.R. 1033 would be conclusive.

He further urged the following points—

- (a) that there was no evidence that the parcels taken on board were the same as those found by the searchers on the Monday, as other persons might have had access to the store-room, and in fact the steward of the “Blue Jacket” had placed stores therein and another man had at least looked in;
- (b) there was no proof that the cabin boy and the appellants were acting in concert;
- (c) that the evidence only raised a mere suspicion; (d) that there was proof that the appellant knew that the parcels contained saccharine.

Apart from the evidence of the watchers who are certain that with the exception of the sewn bag of provisions put in by the

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steward no further parcels were placed in the store-room, it would be a strain on one's credulity to believe that the parcels put in by the cabin boy were removed and two other parcels containing saccharine substituted.

Considering the relative positions of the captain and cabin boy, it is impossible to resist the conclusion from the evidence that they were acting in concert and that the captain was well aware of the contents of the parcels.

Mr. Luckhoo also urged that the prosecution had not proved any intent to defraud and quoted *Frailey v. Charlton* (1920) 1 K. B., p. 147.

Now the defendant (appellant) was charged under section 168 of the Customs Ordinance, Chapter 33. This section save for some slight grammatical changes and local emendations is the same as section 186 of the Customs Consolidation Act, 1876.

Under that section it was held in *Frailey v. Charlton* that words of similar import to those in our sub-paragraph (h). "with intent to defraud His Majesty or the Colony of any duties thereon" applied to all the various offences created in the earlier part of the section.

Section 203 of the Customs Ordinance enacts that "on the hearing or trial of any information or complaint under this Ordinance or any Ordinance amending it, it shall not be necessary to prove guilty knowledge, unless otherwise expressly enacted, but the onus of guilty knowledge shall be on the defendant."

The effect of this is that though the act must be done with an intent to defraud before an offence can be committed, yet the onus lies upon the defendant to prove the absence of such intent, which is, in effect, the decision in *Frailey v. Charlton*. In this case the only answer made by the defendant was a blank denial of the facts which the Magistrate and this Court consider proved.

In our opinion the learned Magistrate was justified in his findings, and we think the charge against the appellant was made out. The appeal is dismissed, and the conviction is affirmed. The appellant will pay the costs of the respondent, and the fee to the Crown Solicitor is fixed at \$20.

Appeal dismissed.

VICTORINE KISSOON v. A. GOOD.

VICTORINE KISSOON v. ARTHUR GOOD.

[No. 75 OF 1933—DEMERARA.]

BEFORE FULL COURT: SAVARY, J., AND MCDOWELL, J.
ACTING).

1933. MAY 19, 26.

Sale of Food and Drugs—Chapter 102, ss. 6 and 18—Sale to prejudice of purchaser—Sample taken for analysis—Not purchased—Notional sale—Whether offence created under section 6.

By section 6 (1) of Sale of Food and Drugs (Consolidation) Ordinance, Chapter 102, no one shall sell, to the prejudice of the purchaser, any article of food or drug not of the nature, substance and quality demanded by the purchaser.

By section 18 (1) of the said Ordinance any officer of the Mayor and Town Council of Georgetown may procure for examination, at any time or place before it is delivered to the consumer, a sample of milk and if he suspects that sample to be about to be sold or delivered, contrary to any provision of this Ordinance, may submit the sample to be analysed by an analyst.

The respondent, the Chief Sanitary Inspector of the City of Georgetown, saw in the road a handcart containing milk cans. A girl, the daughter of the appellant, then came out of a shop with one empty milk can in her hand and went to the cart. She refused the respondent's request to sell him a pint of milk for analysis as she said she was delivering milk and not selling. The respondent thereupon took a pint of milk from one of the cans on the cart and divided it in the usual way. The girl refused to accept payment for the sample taken. On analysis it was found that the milk was adulterated.

Held, that as there was in fact no actual sale to the respondent or to any other person, but only a notional sale, the offence of selling to the prejudice of the purchaser was not committed.

J. A. Luckhoo, K.C., (*A. E. Seeram* with him), for the appellant.

S. J. Van Sertima, K.C., for the respondent.

The following judgment of the Court was read by Mr. Justice Savary:—

This is the considered decision of the Full Court. The appellant was convicted by Mr. Low, Magistrate for the Georgetown Judicial District, of selling milk to the prejudice of the purchaser inasmuch as it contained 17.7 per cent., of added water contrary to the provisions of sections 6 and 18 of the Sale of Food and Drugs Ordinance, Ch. 102. The complaint and conviction contained words, by way of recital, which were unnecessary and are mere surplusage.

The facts may be stated shortly. On the 21st of September, 1932, the respondent, the Chief Sanitary Inspector of the Municipality, was out taking samples of milk when he saw in Camp Street a handcart containing two to three milk cans. A girl was then seen coming out of the shop of one Catherine

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Spooner with an empty milk can in her hand and go to the cart. She refused the respondent's request to sell him a pint of milk for analysis, as she said she was delivering milk and not selling, and he thereupon took a pint from one of the cans on the cart, which sample was divided in the usual way. This milk, on analysis, was found adulterated to the extent previously stated.

The girl was delivering the milk and refused to accept payment for the sample taken. She is the daughter of the appellant. The Magistrate, on these facts, took the view that milk had been sold to the prejudice of the purchaser.

The case raises an interesting question on the construction of the Ordinance which empowers the officers named therein to procure samples of milk in course of delivery.

On the invitation of the Court the grounds of appeal were amended in order to allow to be argued the question whether procuring a sample of milk under the circumstances of this case amounted to a sale under the Ordinance.

Section 6 of the Ordinance, which corresponds to section 6 of the Sale of Food and Drugs Act, 1875, creates the offence of selling any article of food or drug to the prejudice of the purchaser, and provides penalties for a contravention of the section. Section 18 (1) of the Ordinance enables certain officers, therein mentioned, to procure for examination, at any time of place before it is delivered to the consumer, a sample of milk, and if he suspects that sample to have been sold to him, or to be about to be sold or delivered, contrary to any provision of this Ordinance, to submit the same for analysis. This section is a blend of sections 13 and 3 of the Sale of Food and Drugs Acts, 1875, and 1879, respectively, with certain modifications, which were intended to extend the ambit of the English provisions so far as the obtaining of samples is concerned. But there is, in our opinion, an important omission, in that the last paragraph of section 3 aforesaid is not re-enacted in the local section 18. This paragraph creates an offence based on a notional sale in certain circumstances, and provides the same penalties as in the case of an actual sale under the principal Act of 1875. In other words, the effect of the paragraph is that where the officer obtains a sample of milk in the course of delivery, under circumstances not amounting to a sale, the law of England deems it to be a sale for the purposes of a prosecution under the Act : see *Fecitt v. Walsh* (1891) 2 Q.B. 304. From the facts narrated above, it is clear that there was no sale in fact to the respondent, and the local enactment does not create a notional sale under the circumstances.

In our view, the omission is fatal to the validity of the conviction in this case, where there was no sale in fact.

Although other questions that might arise under the provisions of section 18 were mentioned to the Court by Mr. Van Sertima,

counsel for the respondent, it is unnecessary to express our view on them as he frankly stated that he was unable to support the decision of the Magistrate in this case. But perhaps it may be useful to call attention to the fact that section 3 of the Act of 1879 refers to milk in course of delivery to a purchaser or consignee under a contract of sale, whilst section 18 aforesaid speaks of milk "about to be sold or delivered." *i.e.*, not under a contract of sale, but in contemplation of a contract being made.

To sum up: (1) there was in fact no sale to the respondent or to any other person: (2) no provision is made in the Ordinance for a notional sale when in fact no actual sale takes place.

The difficulty is caused by the local enactment increasing the extent of the authority of the officers mentioned in the Ordinance to take samples of milk without due provision having been made to create an offence in cases where there is no actual sale.

It is only fair to the Magistrate to mention that this point was not brought to his notice which is perhaps not surprising, in view of the fact that it appears to have escaped attention for forty odd years.

For these reasons the conviction cannot be sustained and it is set aside and the appeal is allowed, with the consequences stated on the day of hearing.

Appeal allowed

J. N. PEREIRA, LTD., v. J. DE MATTOS.

J. N. PEREIRA, LTD., v. JOSE DE MATTOS.

[No. 217 OF 1932—DEMERARA.]

BEFORE MCDOWELL, J. (ACTING).

1933. MAY 19, 20, 26.

Practice—Issues—Pleadings—To be raised in—Defence—Release—Plaintiff not bound thereby—Facts in support—Reply—To be pleaded in.

Where a release is pleaded in the defence, and the plaintiff contends that, even if the release was entered into, by reason of certain facts he was not bound thereby, he should specially plead those facts in his reply.

The points argued in this matter appear in the judgment.

S. J. Van Sertima, K.C., for plaintiff.

A. V. Crane, solicitor, for defendant.

MCDOWELL, J. (Acting): On December 16, 1931, the defendant was indebted to his trade creditors in the sum of \$933.12 in which amount was included a sum of \$273.46, due to the plaintiff Company. On or about that day a verbal arrangement was made whereby Mr. Santos, the Managing Director of C. de Abreu, Ltd.,—another principal creditor—with the assistance of the defendant, was to realise the debtor's assets, collect the book debts, and distribute the proceeds *pro rata* amongst the creditors.

There is considerable conflict of evidence as to the terms of this arrangement. The story of both the plaintiff Company and Mr. Santos is that after realisation of the assets the defendant was to give promissory notes for the full amount of the balance. The defendant on the other hand says that the realisation of the assets was to act as an absolute release. This is denied by Mr. Pereira and Mr. Santos who deny that there was any mention or intention of releasing the debtor on the realisation and distribution of his property.

Somewhat unfortunately, the defendant was one of those witnesses who foolishly deny everything that is put to them by opposing counsel, regardless of the fact that some of such denials are palpably untrue, and little or no reliance can be placed on his evidence.

The plaintiff states that the arrangement was made to avoid the expense of insolvency proceedings, a good one, from his point of view, but what the defendant was to gain by such a harsh bargain, whereby he suffered all the disadvantages of bankruptcy without its reliefs, is difficult to see. Mr. Santos' explanation, that it would satisfy his creditors, strikes me as somewhat unconvincing.

In my opinion though there may have been no specific mention of release or non-release, as Mr. Santos says, I think the intention was to realise everything possible and wipe off the remainder as a bad debt. The stock, utensils, etc., were sold and some of

the book debts collected with the assistance of the defendant; no accounts have been rendered to the debtor, and although there has been correspondence as late as June, 1932, no further mention has ever been made, either verbally or in writing, of the promissory notes for the balance which the plaintiff alleges to have been promised.

In March, 1932, Mr. Santos discovered that the defendant had a policy in the B.G. and Trinidad Mutual Fire Insurance Coy., and asked the defendant to assign his rights for the benefit of the creditors. Defendant refused on the grounds that there was a debt of \$60 for rent of one of the shops due to his wife, whereupon Mr. Santos, with the assent of the creditors, offered to pay this amount on obtaining the bonus, which offer the defendant refused. On the 19th April a dividend on the defendant's estate was received by the plaintiff Company and duly credited to him. Incidentally, in making this distribution the preferent claim for rent was totally ignored.

On July 18, 1932, plaintiff filed a specially indorsed writ against the defendant for the original debt less the dividend on April 19, and this was admittedly in the hope of garnishing the amount in the hands of the Insurance Company.

Counsel for the plaintiff urged that (*a*) burden of proof is on the defendant to prove release, (*b*) debtor having failed to hand over part of the assets, the parties revert to their original cause of action. The solicitor for the defendant said: (*a*) breach of

contract entitling plaintiffs to revert to their original rights should have been pleaded; (*b*) composition was new and entire agreement embodying entirely new term; (*c*) the acceptance of the dividend in April after full notice in March of the refusal to assign the policy rights acts as a waiver.

The action was brought in the first place on a specially indorsed writ obviously in order to obtain a quick judgment in order to garnish the Fire Insurance policy money, but the plaintiff Company must indeed be of an optimistic nature if it imagined it could resist an application for leave to defend. The defence pleaded a release and in the reply plaintiff merely specifically denied the release. I am of opinion, with great respect to the very learned counsel for the plaintiff, that the facts giving rise to a reversion to the original position by operation of law should have been specially pleaded; and, as, I said, I would have been quite willing to have allowed Mr. Crane an adjournment to study the authorities quoted. As it is, I think the reply can be amended, the chief sufferer being the Court which has had to listen to an amount of somewhat unsatisfactory evidence on an equally unsatisfactory transaction without first having its mind directed to the questions of law involved.

Apart from the difficulty of obtaining the absolute facts one of the difficulties in applying the law is the fact that the cases

quoted all related to arrangements made in proper legal form between debtors and their creditors.

As Mr. Santos says the arrangement was for the benefit of all the creditors, I must assume that the interests of the smaller creditors were, in fact, taken care of by him, although they do not appear to have been consulted in the matter. *Newell v. Van Praagh* (1874) 43 L.J. C.P. 94, in *re Stock, ex parte Amos* (1896) 66 L.J. Q.B. 146, and in *re Hatton* (1872) 42 L.J. Bankruptcy 12, quoted by the plaintiff show that the law is clear that in the case of a composition under section 126 of the Bankruptcy Act, 1869, default in payment of an instalment by the debtor restores the creditors to the position they held before such composition, and entitles them to sue for the balance of their original debt.

The principle to be deduced from these cases is thus laid down by Brett, J., in *Newell v. Van Praagh* (supra) at p. 98, following Bramwell. B. in *Slater v. Jones*, "either the resolution is equivalent to an accord and satisfaction defeasible by matter subsequent, and when the matter happens whereby it is defeated (*i.e.*, the debtor's default) a cause of action accrues, or else the composition resolution contains two implied terms, one by the creditors that all will forbear to sue until default, the other by the debtor that in case he fails to pay the composition at the time agreed he will pay the whole debt."

Now though throughout this case the term "composition" has been somewhat loosely applied to this transaction, it is not a composition at all. The meaning of a composition is, that instead of transferring all the debtor's property as to a trustee in bankruptcy, the debtor is to keep his property and to get free by paying the composition which the creditors resolve to accept. This is only a sort of hybrid arrangement which should have been made in a proper way under the Deeds of Arrangement Ordinance, Chapter 181, when adequate safeguards would have been provided for both parties.

As the quotation from Brett, J., (supra) shows, compositions are a very specialised form of contract and the principle of cases under section 126 of the Bankruptcy Act, 1869, will have to be applied with great caution and we should rather look to see if any of the principles of law applicable to Deeds of Arrangement are applicable.

Now, I think it is clear that the Fire Insurance policy should have been declared and given to the creditors. Although the bonus had not matured there was an assignable value attached thereto. The difficulty seems to be that though it was not in the fact given up, there is no allegation of any fraudulent concealment. It is not pleaded and the correspondence shows that it was never alleged and in fact it was admitted that Mr. Santos attempted to obtain it by a bargain that he would first pay the rent due out of any moneys received thereon.

No cases have been quoted to me as to the effect of non-production of assets under a Deed of Arrangement. Mr. Santos who was the agent of the plaintiff, discovered the existence of this policy in March and his demand for the assignment was made in the form of a bargain, *i.e.*, he would pay the rent due to the defendant's wife out of any moneys received. Totally neglecting the landlord's debt for rent, which of course was independent of the policy amount, he paid a dividend to the creditors including the plaintiff, on April 19, 1932. The exact date on which defendant refused to assign the policy is not clear; it might have been any time between March and June.

The plaintiff filed his writ on July 18, 1932, and Mr. Crane urges that if the keeping back of the policy was a breach of contract, yet as such breach was discovered in March, the payment in April would act as a waiver, as would also the negotiations in March carried on by Mr. Santos with his knowledge, and relies on *Watts v. Hyde* (1848) 17 L.J. (N. S.) Eq. 409, where a debtor, who had covenanted to pay £1,500 to Trustees and to insure for the like amount paid £500 and the insurance for £1,000 and it was held that a creditor who had full knowledge of the transaction and who conducted himself in such a way as to show acquiescence was restrained by injunction from bringing an action against the debtor.

Owing to the unsatisfactory nature of the evidence. I have no absolute proof as to when the defendant's refusal to assign took place, whether before or after April 19, but the negotiations to obtain the policy moneys on terms appear to me to be not only a waiver of any breach, but a confirmation of the original contract. If the plaintiff Company had taken the view that the holding back of the policy paid was a breach of contract, the dividend should obviously have been received clearly "without prejudice." It seems to me that the plaintiff Company is endeavouring to approbate and reprobate almost in the same breath.

I have discussed the case from the point of view that the law incident to regular compositions and Deeds of Arrangement apply as the plaintiff's case has rested throughout that this was of that nature, but it appears to me to be nothing of the kind. It appears to have been a purely private transaction whereby the debtor handed over his property and service to the three principal creditors, and although the evidence is conflicting, the only consideration there could be was a promise, expressed or implied, of a release.

Such agreement was in substitution of these three creditors' individual rights which do not revive, even if the withholding of the policy money was a breach thereof. Judgment for defendant with costs to be taxed.

Solicitor for plaintiff: *Carlos Gomes*.

Judgment for Defendant.

R. BASCOM v. M. F. DASILVA.

ROBERT BASCOM v. M. F. DASILVA.

[No. 257 OF 1932.—DEMERARA.]

BEFORE MCDOWELL, J. (ACTING),

1933. MAY 23, 29, 30, 31; JUNE 14.

Trespass to person—False imprisonment—justification—Property obtained by indictable offence—Reasonable suspicion that—Must exist at time of arrest.

Of person found in possession—Criminal Law (Procedure) Ordinance, cap. 18, s. 196 (3)—Criminal proceedings for personal ends—Abuse of process of Court.

Section 196 (3) of the Criminal Law (Procedure) Ordinance, chapter 18, provides that “everyone who finds anyone in possession of property which he on reasonable grounds suspects to have been obtained by any indictable offence, may arrest that person without warrant and take possession of the property.”

Held, that the reasonable suspicion must exist at the time of the arrest.

Disapproval expressed of the abuses of the law by using threats of criminal proceedings for purely personal ends.

E. F. Fredericks, for the plaintiff.

McLean Ogle, for the defendant.

Cur. adv. vult.

MCDOWELL, J. (Acting): This is an action for damages for false imprisonment. The plaintiff, Robert Bascom, is an assistant Forest Ranger who has been employed in Government Service for 23 years, and for the purposes of his duties he uses a Government boat on the Essequibo River. The defendant Manoel Ferreira DaSilva is the owner of a saw mill at Bartica. In 1915 the defendant brought a steam boiler from the Corentyne down to his mill. The boiler was then dismantled and has remained unused.

Some time in 1931, the defendant’s engineer, a Mr. Henderson, chipped the boiler, the man-hole covers with their clamps, &c., in order to clean them. He is not certain of the date, but thinks it was anything from one to three months before December.

He states that he is certain that he chipped both the man-hole covers and clamps, the latter being heavy curved were worth, it is said, about \$25 each.

In December, 1931, or January, 1932, he started to assemble the boiler, when it was found that one man-hole clamp was missing. No complaint was made to the police at this time.

On Sunday, February 21st, the plaintiff, who with Forest Ranger Welch had camped the night at Bartica, was pulling up the anchor chain, and Henderson saw a clamp at the end of it which he says he recognised as the one missing. He called out the men, and though this is denied by plaintiff and Welch, claimed the clamp as Da Silva’s property. Welch who had only arrived that month and knew nothing about the matter, returned a mildly

facetious answer to the effect that they couldn't stop and the boat went off. Henderson reported the matter to Da Silva at once, and after that seemed to have taken no further part, with the exception of giving evidence in the Magistrate's Court at the subsequent trial.

The defendant then reported the matter to police Sergeant Green, at that time Sgt-Major in charge of Bartica, who sent a policeman; by that time defendant's boat was crossing the river and defendant sent the policeman back as he says he was afraid that if the plaintiff saw a policeman coming he would throw the clamp into the river.

He then returned to Sgt. Green who said that as he had taken the matter into his own hands the police would not take any further steps.

The defendant said that subsequently the Sergeant promised to send a man on the Tuesday, the Sergeant denies this, and in view of subsequent events I see no reason to doubt the word of the latter.

On the following day, Monday, the defendant sent his foreman, Lopes De Gracia, to Macaria on the other side of the river to try and obtain the clamp. Lopes says he offered them a piece of iron or an anchor as a substitute, but says in Court he had no intention of carrying out his promise. The plaintiff says he threatened him with the police. Lopes denies this but as defendant had complained to the police the day before, I think one can take it that at any rate some mention of police action was made

The plaintiff refused to give up the clamp and stated he had found it some three years previously on an abandoned grant.

The next day, Tuesday, Lopes accompanied by one Licorish, a man who was then a Rural Constable, went across the river in a boat hired by the defendant, and Licorish at once arrested plaintiff who was brought down under arrest to Bartica stopping the night at India Creek and taking about 20 hours on the journey.

At the Police Station the Sergeant sent for the defendant where, according to his own evidence, the defendant said "Hullo, Bascom, you wouldn't deliver my property" to which plaintiff replied "Lopes didn't bring the anchor." Defendant then goes on to say "The Sergeant asked if I were going to charge him, I said, if he would not deliver my property." It is obvious from this that Mr. de Silva has an entirely erroneous idea of the functions and application of our criminal law.

The Sergeant says, and I believe him, that he refused to go any further unless defendant charged him, and Sergeant Green then drew up a charge of larceny which defendant signed.

I don't know how long plaintiff was detained after this, presumably only such time as was necessary to draw up the bail bond in his own recognizance.

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The case was heard on March 31st, before the Stipendiary Magistrate, who without calling on the plaintiff for a defence, dismissed the case with costs against the complainant but gives no reason for his decision.

The first question is, was Licorish sent up by Sergeant Green, then Sgt.-Major in charge of Bartica Police District, or was he sent by defendant?

Both defendant and Lopes swear that the former was the case. Licorish who was produced from hospital at the end of the trial gave very positive evidence corroborating the defendant. Unfortunately nothing was put in cross-examination to the Sergeant which might have tested his evidence, but it may be noted that Lopes says that Licorish was sent for, and he met him in the upstairs gallery whilst Licorish says it was in the guard-room, whilst the Sergeant denies absolutely that the man was sent for at all and also that he had any knowledge that he was employed in the matter until after the arrest.

I believe Sgt. Green in this matter; and the admitted facts of defendant complaining to the police and the refusal of their help, of sending Lopes up, with, I believe, a mixture of threats and bribes, his hiring the boat, his paying wages of \$2 to Licorish and providing him with rations together with his own evidence as to what took place at Bartica Police Station leaves no doubt in my mind that the defendant did employ Licorish as his agent and servant to effect the arrest and what makes it worse, with no desire that the matter should come before the Magistrate but only as a means of recovering what he thought was his property.

I also find as a fact that had the defendant not signed the charge sheet Sgt. Green would not have proceeded with the case.

With regard to this latter point it was argued that the signing of the charge sheet was not a false imprisonment and reliance was placed on *Grinham v. Willey* (1889) 4 H. N. 496 and *Sewell v. National Telephone Coy., Ltd.* (1907) 1 K.B. at 559, but in my opinion these cases are very easily distinguished. In *Grinham v. Willey* per Bramwell, B., at p. 499 "An offence was committed; the defendant sent for a policeman who made enquiry and on his own authority arrested the plaintiff. The defendant signed the charge sheet; but in doing so he did nothing but obey the direction of the police." In *Sewell v. National Telephone Coy., Ltd.* per Collins, M.R. "The defendants in this case had nothing to do, so far as appears in the evidence, with the initiation of the charge against the plaintiff. The man had been taken into custody and not till he was in custody at the Police Station did the defendant appear on the scene. At that stage their representative signed the charge sheet on their behalf and the case of the plaintiff is bare of everything but that fact."

In view of my acceptance of Sgt. Green's evidence "I didn't

charge him but sent for da Silva who came and found Licorish there.” “Defendant asked me to charge him, I said I wouldn’t do it” and “I didn’t charge Bascom, he was already under arrest and I decided it was not a case for the police,” this case appears not to be within the abovementioned cases but rather within *Austin v. Bowling* (1870) 5 L.R.C.P. where defendant’s wife gave plaintiff in charge on an unfounded charge of felony and the defendant subsequently signed the charge sheet. Willes, J., says at page 539: “If the defendant had merely signed the charge sheet, that according to *Grinham v. Willey* would not have amounted to more than making a charge against one already in the custody of a minister of the law who intended to keep him there. But it is found in the case that though the defendant gave no express direction for the plaintiff’s detention, he was expressly told by the Inspector on duty that he (the Inspector) disclaimed all responsibility in respect of the charge and that he would have nothing to do with the detention of the plaintiff except on the responsibility of the defendant; and that the Inspector would not have kept the plaintiff in custody unless the charge of felony was distinctly made by the defendant. Signing the charge sheet with that knowledge therefore was the doing of an act which caused the plaintiff to be kept in custody.”

I have commented on this point as it was raised during the hearing but it is only of academic interest as the claim is for damages for false imprisonment through the medium of the Rural constable Licorish.

Now the common law power of arrest without warrant possessed by a constable *quâ* constable and that possessed by a private individual differ in an important way.

Briefly, a constable may arrest on reasonable suspicion of felony whereas “a private individual is justified in himself arresting a person or ordering him to be arrested where a felony has been committed and he has reasonable ground of suspicion that the person accused is guilty of it”: *Walters v. W. H. Smith & Son, Ltd.* (1914) 1 K.B. per Sir Rufus Isaacs, C.J., at page 605, and as the learned Chief Justice says at page 607: “When a person instead of having recourse to legal proceedings by applying for a judicial warrant for arrest, or laying an information or issuing other process well known to the law, gives another into custody, he takes a risk upon himself by which he must abide, and if in the result it turns out that the person arrested was innocent, and that therefore the arrest was wrongful, he cannot plead any lawful excuse unless he can bring himself within the proposition of law which I have enunciated in this judgment,” that is, the proposition quoted *supra*.

In my opinion the defendant has failed to prove the existence of either of the two things which together would justify his action.

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That the clamp does in fact belong to the defendant is extremely probable.

The boiler had been lying in a dismantled condition at the defendant's mill for over 16 years and it was only at the end of that period, when the boiler was being assembled that the clamp was missed.

Henderson says that he chipped and oil-painted the boiler and parts a month or so before this when he says the clamp was there. He admits however that lost parts might not be missed until assembly.

The defendant produced the fellow clamp in Court, it was rusty and old looking whereas the one in the possession of the plaintiff was cleaned polished and altogether newer looking. Henderson's theory, that the difference in appearance was due to the abrasive action of the sand and water whilst in use as an anchor for a few weeks only, appears a little far-fetched, and if the polish were caused as suggested it would appear to be more consistent with the defendant's story that he had had it for some years: and if so it is impossible to say now how or when it got separated from the other parts. In other words there is no proof of felony.

That it is part of da Silva's boiler is very probable indeed, on it are the letters X 639 in clear cut casting, which it would seem impossible to miss.

On the companion clamp the letters were rusted and totally illegible and it was only by carefully picking them out with a sharp pick that the same number was revealed.

Henderson states that this is a manufacturer's mark to facilitate replacement. It fixes the type of boiler and the manufacturer, and Henderson says that as far as he knows there are few, if any of this type by the same manufacturers, in the Colony. It is curious that he never mentioned the existence of this mark either in this or in the Magistrate's Court, and it was apparently only on examination by this Court that it became known. This seems to throw doubt on the accuracy of his memory as to chipping and painting the clamps so shortly before February, 1932, and the condition of the marks themselves seem to confirm the argument against a recent asportation by anyone.

Under these circumstances and in view of the fact that all the defendant had to rely on was the, at the time, somewhat hasty recognition of the clamp, and the report of Lopes to whom plaintiff had given a reasonable explanation.

I am of opinion that the defendant had no reasonable grounds of suspicion.

Now the Common law of arrest by private persons has been enlarged both in England by various statutes and here by virtue of section 70 of the Summary Jurisdiction (Procedure) Ordinance. Cap. 14, and section 196 of the Criminal Law (Procedure) Ordinance, Cap. 18. Section 70 of the Summary Jurisdiction (Pro-

cedure) Ordinance reads: "Anyone who is found committing any offence against the person, or against property, which is punishable on summary conviction may be taken into custody without warrant, by any police or other constable or may be apprehended by the owner of the property on or with respect to which the offence is committed, or by his servant or any other person authorised by him, and shall in the latter case be delivered as soon as possible into the custody of some police or other constable, to be dealt with according to law." And Mr. Fredericks urges that defendant is entitled to the benefit of this section, providing he had an honest belief of such a state of affairs and quotes *Davis v. Swift* (1845) 7 J.P. 672 and *Griffith and wife v. Taylor* (1877) 46 L.J.C.P. 152.

Davis v. Swift was an action for false imprisonment in which justification was pleaded under statute 7 & 8 Geo. IV. c. 29, section 63, which empowers the owner of the property on or in respect of which an offence shall be committed to apprehend without a warrant any person found committing any offence punishable by virtue of that Act. The case turned largely on questions of pleading, and is not of much assistance, but it appears to have been doubted,—though not decided,—if the mere possession of stolen goods was insufficient; and Coleridge, J. also says "The Legislature could only have meant to give the power of apprehending a person actually committing an offence when there was no means of getting the assistance of a constable."

In *Griffith and Wife v. Taylor* where a statutory defence under the Larceny Act, 1861 (24 & 25 Vict. c. 96), section 103, was set up the words "any person found committing any offence" were considered by the Court of Appeal. The facts were that the defendant was travelling from Oxford to Reading. At Oxford he left a box of eggs on the bookstall while he went to get his ticket. On his return he missed the eggs and at Reading he searched the train and found the plaintiffs endeavouring to conceal the box. The station master at Reading refused to take the plaintiffs into custody and the train went on to London. The defendant remained behind and telegraphed to Paddington and had them arrested there. They were subsequently tried and acquitted. The case largely turned on whether they were "immediately" apprehended and "forthwith" brought before the magistrate, as required by the Act; words which do not appear in our Ordinance; but the Court considered the words "found committing." Cockburn, C.J., says: "If a felony had been committed no doubt he would have been entitled to apprehend the plaintiffs, and a mistaken but honest belief on the part of the defendant that he found the plaintiffs committing the offence would justify him in apprehending them, though no felony had actually been committed. . . Now if the bag had been feloniously taken, there was an *asportavit* at Oxford and

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the offence was complete at Oxford; for any removal, however slight, with a felonious intent is an asportavit. But if the article is removed over any considerable space the asportavit continues, as long as the thing stolen is in the course of removal. If then the plaintiffs had feloniously taken the bag as the defendants might most reasonably have supposed, and were then carrying it off to London, they were continuously committing a felony till they arrived at their destination.”

Can it be seriously suggested that there was an asportavit still going on when the plaintiff in this case was arrested?

So far from aiding the defendant they appear to me to define the limitations of the protection afforded by section 70 of the Ordinance.

Counsel did not rely on any protection under section 196 (3) of the Criminal Law (Procedure) Ordinance, Chapter 18 on which I invited comment. The subsection reads as follow:

“Everyone who finds anyone in possession of property which he, on reasonable grounds suspects to have been obtained by any indictable offence, may arrest that person without warrant and take possession of the property.” The whole of section 196 is taken with slight differences in the wording from section 205 of the Indictable Offences (Procedure) Ordinance, 1893, and. as regards subsections (1), (2) and (4) is drafted with considerable modifications on section 103 of the Larceny Act, 1861, but I can find no trace whatever of the origin of subsection (3) unless it were a piece of original drafting in the Ordinance of 1893.

I am of opinion that the words “which he on reasonable grounds suspects” should have the same construction placed on them as the words “reasonably suspected in section 97 (1) of the Summary Jurisdiction (Offences) Ordinance which deals with unlawful possession and mean that “a reasonable suspicion must exist at the time of arrest or detention:” per Berkeley, J. in *Collins v. Young* (1918) B.G., L.R. at page 87.

It is remarkable that in none of the cases reported in the B.G.L.R. does either of these two statutory defences appear to have been set up.

In conclusion I should again like to express strong disapproval of the abuses of the law by using threats of criminal proceedings for purely personal ends.

It is far too common and though in this case I think it was an unintentional impertinence due entirely to ignorance, yet many magistrates have a suspicion that summonses are sometimes obtained and the matter then compromised in a manner strongly representing a species of blackmail.

There will be judgment for the plaintiff with damages assessed at \$350 and costs to be taxed. Certified for Counsel.

Judgment for plaintiff.

Solicitors: *Carlos Gomes; Albert McLean Ogle.*

MALCOLM WOMACK v. I. G. REBEIRO

MALCOLM WOMACK, Appellant,

v.

IGNATIUS GONSALVES REBEIRO, Respondent.

[1931. No. 4.]

BEFORE FULL COURT: GILCHRIST AND SAVARY, JJ.

1931. FEBRUARY 13.

Intoxicating liquor licensing—Application for a transfer—Opposition to—Duly opposed—Meaning of—Intoxicating Liquor Licensing Ordinance, cap. 107, ss. 14, 21 (7), 25 (1)

A person who has not duly opposed an application under section 25 (1) of the Intoxicating Liquor Licensing Ordinance, 1929 (No. 1) (now section 25 (1) of chapter 107) that is to say, a person who has not opposed in the manner and within the time prescribed by the Ordinance, has no right of appeal against the decision of a board granting such certificate.

Appeal from a decision of the District Licensing Board, Essequibo, granting a certificate for the transfer of a spirit shop licence under the Intoxicating Liquor Licensing Ordinance, 1929, (No. 1) from one place to another. In the *Gazette* of October 4, 1930, the annual general licensing meeting was fixed for November 4, 1930. On the 10th October, 1930, the application for transfer was received by the Commissary: it was, however, not advertised in the *Gazette* until the 25th October, 1930, when it appeared for the first time. The application was opposed by the

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appellant on the 31st October, 1930, by notice in writing. The application was advertised for the second time in the *Gazette* of the 1st November, 1930. At the meeting held on the 4th November, 1930, no objection was made that the opposer had not duly opposed the application. The meeting was not adjourned to enable proviso (b) to section 14 (1) of Ordinance 1 of 1929, which provides that “the notice (of objection) shall be served on the applicant and on the district commissary at least seven days before the meeting at which the application is to be heard.” to be complied with. The application for a transfer was granted. The opposer appealed. On the hearing of the appeal a preliminary objection was taken that the opposer had not “duly opposed” the application, and that he therefore had no right of appeal.

C. Shankland, for the appellant.

E. F. Fredericks and *S. J. Van Sertima*, for respondent.

No written judgment was delivered, but the formal order was as follows:—

Upon hearing counsel for the opposer (appellant) and for the applicant (respondent) upon the objection of the respondent that the appellant did not have a right of appeal inasmuch as he did not duly oppose the said transfer it is ordered that the said objection be upheld.

Solicitor for appellant: *W. I. Sousa*.

R. R. CHUNG v. W. R. WEBER.

R. R. CHUNG, Appellant,

v.

W. R. WEBER, Respondent.

[1933 No. 226—DEMERARA.]

BEFORE SIR ANTHONY DEFREITAS, KT., CHIEF JUSTICE, AND
SAVARY, J.

1933. SEPTEMBER 19.

Bush rum—Possession of—Quantity—Whether material ingredient of offence—Spirits Ordinance, Chapter 110, Section 93 (5)—Samples—Division of article into three parts—Chapter 110, Section 121—Whether applicable to bush rum—Analyst's report—Prima facie evidence.

Quantity is not a material ingredient in a complaint for possessing bush rum.

Taking a sample carries with it an implication that the rest of the article is left with the owner. Where an article, suspected to be bush rum, is seized it is not required that any portion of it should be left with the person from whom it is seized.

Wellington v. Headley (1916) L.R.B.G. 105 followed.

The Analyst's certificate that a substance is bush rum is conclusive of the fact that the substance is bush rum, though it is always open to the defendant to show by other means that it is not bush rum.

The Analyst's certificate is substituted for his personal evidence in prosecutions for possessing bush rum.

A. V. Crane, solicitor, for appellant.

Iris de Freitas, for respondent.

The judgment of the Court, which was delivered by Mr. Justice SAVARY, was as follows:—

In this appeal from a decision of Mr. Hill, Stipendiary Magistrate of the Essequibo Judicial District, three points of interest in respect of the law affecting bush rum cases were argued.

The Magistrate convicted the appellant, a shopkeeper in his district, of unlawfully possessing bush rum on the 30th of August, 1932, and ordered him to pay a fine of \$1,000 and, in default, to be imprisoned with hard labour for six months.

The first point submitted for the appellant by Mr. Crane was that the complaint and conviction were defective because particulars of the quantity of bush rum seized were not stated therein. Section 93 (5) of the Spirits Ordinance, Chapter 110, makes it an offence for anyone to possess *any quantity* of the substance known as bush rum, and it seems to us that quantity does not become a material ingredient of this offence, nor is the statement of such quantity a necessary averment in the complaint.

It was next urged that Sergt. Francois, who made the seizure of bush rum, being an officer within the meaning of the Ordinance, failed to comply with the procedure laid down in section 121 of the said Ordinance for the taking of samples for analysis,

in that he had not divided the bush rum that was seized by him into three parts.

This section enacts that where an officer takes a sample of anything for analysis he shall then and there divide the sample into three parts, one of which shall be kept by him, one shall be delivered to the owner of the thing, and the third shall be sent to the Government Analyst.

We have come to the conclusion that the provisions of section 121 do not apply to cases where bush rum is seized. Any officer may be authorised by a warrant issued under section 93 (3) to search for and seize spirits unlawfully possessed, and it seems to us that the question of taking a sample does not arise in such cases. Taking a sample carries an implication that the rest of the article is left with the owner.

It is satisfactory to note that as far back as 1916, His Honour the Chief Justice, Sir Charles Major, sitting as a Judge of appeal, came to a similar conclusion in the case of *Wellington v. Headley*, (1916) L.R.B.G., 105.

The third submission made for the appellant was that the certificate of the analyst is not conclusive, and that he can be cross-examined as to his reasons for his opinion.

What strikes us at once is that a defendant who calls the analyst as a witness is not entitled to cross-examine him as to his reasons for coming to his conclusion, and therefore, unless the complainant calls the analyst as a witness for some other purpose, the opportunity for cross-examination does not arise. It appears to us that the Legislature intended the Analyst's certificate to be substituted for his personal evidence in prosecutions under this section. But apart from that it seems to us that the law has placed the certificate of the Analyst for the purposes of this section on a high plane.

Section 93, subsection 5, enacts that a report under the hand of the Government Analyst certifying that the substance is bush rum shall be *prima facie* evidence of that fact, and thereupon the onus of proving that it is not bush rum shall be on the defendant, it seems to us to follow from this enactment that for ordinary practical purposes the Analyst's certificate is conclusive of the fact that the substance is bush rum, though it is always open to the defendant to show by other means that it is not bush rum.

Where it is intended that the Analyst may be called as a witness, liable to be cross-examined like any other expert witness on the reasons for his conclusion, the Legislature so enacts. For instance, section 23 (1) of the Sale of Foods and Drugs (Consolidation) Ordinance, chapter 102, enacts that the Analyst's certificate shall be sufficient evidence of the facts therein stated *unless the defendant requires that the Analyst be called as a witness*. In other words the defendant is entitled to insist on

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the Analyst giving personal evidence instead of evidence by certificate, should the defendant consider such a course advisable for the purposes of his case.

The same section expressly enacts that the certificate of the Analyst may be supplemented by his personal evidence, by that of experts or other witnesses.

There appears to us to be a material difference between these latter provisions and the clear words of section 93 (5) aforesaid as to the position of the Analyst in bush rum cases.

That being our view, this third point also fails.

The appeal is dismissed, the conviction is affirmed, and the appellant pays the cost of the appeal, including fee to counsel fixed at \$20.

Appeal dismissed

R. THOMPSON v. E. C. THOMPSON

R. THOMPSON (Appellant)

v.

E. C. THOMPSON (Respondent)

[No. 203 OF 1933.—DEMERARA.]

BEFORE FULL COURT.

SIR ANTHONY DE FREITAS, KT., CHIEF JUSTICE, AND SAVARY, J.

1933. SEPTEMBER 21, 22.

Landlord and tenant—Tenancy for a term—Whether such term includes tenancy at will—Rent and Premises Recovery Ordinance, Chapter 92, s. 15 (1).

A tenancy for a “term” does not include a tenancy at will.

A tenant at will cannot be ejected from possession by means of proceedings under section 15 of the Rent and Premises Recovery Ordinance, Chapter 92. If the landlord wishes to recover possession he must take proceedings in the Supreme Court.

A. V. Crane, solicitor, for the appellant.

K. S. Stoby, for the respondent.

The judgment of the Full Court was delivered by Mr. Justice SAVARY as follows:—

This is an appeal from a decision of Mr. Browne, Stipendiary Magistrate of the Georgetown Judicial District, who made an order for ejectment against the appellant.

Assuming but not deciding that the appellant is a tenant at will of the respondent, the question for decision is whether the Magistrate had jurisdiction to make an order of ejectment in a case when the defendant is a tenant at will of the plaintiff.

The proceedings were instituted under the provisions of section 15 of the Rent and Premises Recovery Ordinance, Chapter 92,

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which confers jurisdiction on a magistrate to make such an order in cases where the term or interest of any tenant of a tenement held by him for a term has ended or been determined.

The material words for consideration of this point are “held by him for a term” and in our opinion those words do not include a “tenant at will,” because such a tenancy imports that the tenant does not hold for a term but merely at the will of the landlord. The Small Tenements Recovery Act, 1838, which obviously served as the model for this Ordinance, contains in section 1, which corresponds to section 15 of the Ordinance, the words “held by him at will or for any term,” and it seems to us that this Court must pay regard to the omission of the words “at will” in the local enactment when called upon to construe it. The Privy Council in a recent case repeated that the best and safest guide to the intention of the Legislature is afforded by what the Legislature has itself said, and it would be idle for us to speculate as to the intention of the draftsman in rejecting the words “at will” which occur in his presumed model.

Our attention was called to certain local decisions in which a contrary view appears to have been expressed but, as far as we can gather after studying the reports, the view that a tenancy at will was within the jurisdiction of a magistrate was assumed, without discussion, to have been settled.

In our opinion the view is incorrect and we regret to have to differ from it.

We have therefore come to the conclusion that the provisions of section 15 of the Ordinance have no application to a case of a tenancy at will, and it follows from our decision that a landlord who seeks to obtain an order for possession against a tenant at will, will have to bring proceedings in the Supreme Court unless the Legislature deems it necessary to amend the Ordinance ^(a).

The appeal is allowed, the judgment in the Court below is set aside, and judgment must be entered there for the defendant with costs.

The respondent must pay the appellant’s costs of appeal fixed at \$30.

Appeal allowed.

(a) The Ordinance was amended by Ordinance 33 of 1933 which came into force on the 30th December, 1933.—EDITOR’S NOTE.

PETITION BY S., J. AND A. M. BENJAMIN.

PETITION BY SAMUEL BENJAMIN, JOHN BENJAMIN AND ANNA MARIA BENJAMIN FOR A DECLARATION OF TITLE TO $S\frac{1}{2}$, AND $\frac{2}{3}$ OF $N\frac{1}{2}$, OF LOT 25, ALBERTTOWN, GEORGETOWN.

[PETITION No. 25 OF 1933.—DEMERARA.]

BEFORE VAN SERTIMA, J. (ACTING). 1933. OCTOBER 10.

Prescriptive title—Undivided interest—Circumstances under which declaration may be made.

There are at least three sets of circumstances in which there can be granted title by prescription to an undivided interest in land, that is to say—

- (a) where one or more co-owners have been in exclusive possession for the required period of the share or shares of the other co-owner or co-owners.
- (b) where the claimant is a purchaser of an undivided share from the true owner thereof who goes out of, while the purchaser goes into, possession thereof for the prescribed period.
- (c) where the true owner of the whole being out of possession, two or more persons take possession in the name of co-owners, *i.e.*, not adversely to each other but each enjoying the rights of a true co-owner, for the prescribed period. In this case the parties became entitled to the ownership of the whole and each, it follows, to title to his undivided share thereof.

Carlos Gomes, solicitor, for petitioners.

C. V. Wight, for the opposers, Percy C. Wight and the Investment and Loan Association of British Guiana, Limited.

VAN SERTIMA, J. (Acting): This petition for a declaration of title by prescription to two undivided third shares in the north half of lot 25, Cummings and Second Streets, Alberttown, coming on for hearing Mr. C. V. Wight, counsel for the opposers, took the objection *in limine* that the Court could under no circumstances grant title by prescription to an undivided interest in land, basing his contention on the authority *In re Downer* (1919) L.R.B.G. 165. I pointed out at the time that the local decisions were not uniform for it appeared from Mr. Duke's Treatise on the Law of Immovable Property in British Guiana (at p. 62)—and I verified the statement by a perusal of the record—that Sir Charles Major, C.J., had in the year 1920 in the *Petition of Broodhagen, et al*, granted title for such an interest.

It was therefore agreed that the hearing of the petition should proceed and the point be reserved for argument at the conclusion of the evidence.

The opposers, however, ultimately abandoned all opposition and I eventually granted title in terms of the prayer of the petition.

The following are my reasons for having done so:—

I am of opinion that the proposition that title by prescription to an undivided share in land cannot be granted in any circumstances

whatever, is too wide, and that whether such title can be granted depends upon the facts of each particular case.

An examination of the following authorities seems to negative the universality of the proposition.

In the case of *Ward v. Ward* (1871) 6 Ch. App. 790 it was held that, where two persons, who between them were entitled only to two undivided third shares of property remained in possession of the whole property for the statutory period, the title of the true owner of the remaining undivided third became extinguished and the two persons in possession became joint tenants *quoad* that undivided third.

In the case of *Thornton v. France* (1897) 2 Q. B. 143, the facts were as follows:—In 1886 the owner of one undivided moiety of premises which had been during the previous eleven years in the sole possession of the owners of the other moiety mortgaged his moiety and in 1890 the premises having in the meantime continued and still continuing to be in the sole possession of the owners of the other moiety he executed a conveyance of that moiety subject to the mortgage, to the plaintiff, who subsequently paid off the mortgage. It was held that the plaintiff's claim to the property had been barred by the Real Property Limitation Act, 1837, 7 Will. 4 and 1 Vict. c. 28. In the result, the owners of the other moiety who had been in possession acquired title to the undivided moiety of the owner out of possession.

In the case of *Glyn v. Howell* (1909) 1 Ch. 666 the undivided interest of one tenant in common of minerals was barred by the possession of another to the extent to which such possession had been actual.

Now the principle underlying these three cases seems to be this, that one or more co-owners can acquire by prescription title to the undivided shares of another co-owner out of possession for the prescribed period. And if that be so, it at once creates an exception to, and renders impossible the universality of, the proposition propounded by Counsel for the opposers. The following two cases decided in Ceylon seem to establish that the rights of an owner of an undivided share in land can be acquired by prescription by a purchaser from that co-owner where subsequent to such purchase the co-owner goes out of, and the purchaser enters into and remains in, possession for the prescribed period. The cases are *Silva v. Letchiman Chetty* (1922) 23 N.L.R. (Ceylon) 372 and *Damoris v. Basnayake, et al* (1930) 32 N.L.R. (Ceylon) 289. In the first mentioned case the facts were as follows:—A. agreed to sell to B. by deed in 1893 his undivided share (one-twelfth) and the share of his two minor children (one-twelfth) of a garden and undertook to get the minors to convey when they came of age. The deed recited that the two shares of the garden were given over to B. for possession and improvement from the date of the execution of the agreement, and that A. had received the full consideration. B. had

had possession ever since 1893 to date of action. The minors attained the age of majority twenty-one and fifteen years before date of action, but did not make any claim during these years. It was held that B.'s possession was adverse and that he had acquired title by prescription to the shares of the minors. In the second-mentioned case the facts were as follows:—In 1917 A. agreed with B. to sell to him either the half share of certain land or the whole of it according to the share which would be allotted to him in a partition action which was pending. The deed further recited that B. was to possess the land and that he should be entitled to all the right, title and interest of A. in the land. In 1918 the partition action was withdrawn. B. and his successors in title possessed a half share of the land from the date of the agreement. It was held that such possession was adverse to the title of A. and his heirs and the Court decreed that B.'s successors in title were entitled to be declared entitled to an undivided half share of the land sought to be partitioned.

In *Downer's* case the contest was between a person admittedly the owner by title of an undivided half share and an utter stranger and I can quite understand how it was that the learned judge found it difficult, when the owner of a half share was in possession exercising rights over the whole to predicate of the petitioner that he had been in sole and uninterrupted possession of an undivided share of the property. That case, in my opinion, is distinguishable from the facts in this case which were as follows. At the time when the petitioners' predecessor in title first possessed the land there was no one having title to same and therefore no one to interrupt his possession as there was in *Downer's* case. His possession was sole and uninterrupted for a period exceeding twenty years and by his will he devised to the petitioners and others his interests in the said land, and the devisees remained in possession after his death for a considerable time so that the aggregate number of years during which the testator and his devisees possessed the land exceeded the period then required by law for acquisition of title, to wit, one-third of a century. At that point of time they became the owners of the land in question and I confess I could see no difficulty in awarding them title.

While it is true that their possession would in England be joint and in this colony, be by way of tenancy in common, it was certainly exclusive to all the world including the true owner and the English case of *Ward v. Ward (ut supra)* having established that two persons in joint possession for the prescribed period of the undivided share of co-owner (to which share *ex hypothesi* they had no title) can become joint owners thereof, it seems to me that by a parity of reasoning, two or more persons in possession for a like period of the whole of a parcel of land can acquire and be granted title thereto, at any rate if all the parties interested are before the Court. For here there is no contest

PETITION BY S., J. AND A. M. BENJAMIN.

between any true owner and the parties claiming to have acquired by prescription as there was in *Downer's* case. In this case the true owner, whoever he may have been, was always out of possession and there was therefore no one to interrupt or disturb the possession of the petitioners and their predecessor in title. And if title can be granted to all the persons thus acquiring by prescription, it follows that each of them thereby acquires until partition of a title to an undivided share.

To sum up, I have come to the conclusion that there are at least three sets of circumstances in which there can be granted title by prescription to an undivided interest in land, that is to say:—

1. Where one or more co-owners have been in exclusive possession for the required period of the share or shares of the other co-owner or co-owners.

2. Where the claimant is a purchaser of an undivided share from the true owner thereof who goes out of, while the purchaser goes into, possession thereof for the prescribed period.

3. Where the true owner of the whole being out of possession two or more persons take possession in the manner of co-owners, *i.e.*, not adversely to each other but each enjoying the rights of a true co-owner, for the prescribed period. In this case the parties become entitled to the ownership of the whole and each, it follows, to title to his undivided share thereof.

Solicitors: *Carlos Gomes; A. G. King.*

REX v. S. S. M. INSANALLY.

REX v. S. S. M. INSANALLY.

[INDICTMENT NO. 12103.—DEMERARA.]

OCTOBER CRIMINAL SESSION.

BEFORE SAVARY, J. 1933. OCTOBER 12, 13.

Jury—Juror related to prisoner—Discovery during progress of case—Discharge of jury—No ground for.

A trial must proceed, although in the course of the proceedings it is discovered that one of the jurors is related to the accused person.

E. G. Woolford K.C., for the Crown.

S. L. Van B. Stafford, for Insanally.

SAVARY, J.: Mr. Woolford, counsel for the prosecution, during the course of his opening of the case to the jury, called the attention of the Court to the fact that one of the jurors was closely related to the prisoner and invited me to discharge that particular juror or the whole jury.

Under the Common Law of England a trial Judge has power to discharge a jury (1) where a necessity arises, (2) in case of death of a juror, (3) for misconduct. In *Winsor v. R.* (1866) L.R. 1 Q.B. 390, necessity was defined as “irresistible compulsion” or “or high degree of need.”

In 1842 in the case of *R. v. Wardle* (1842) C. & M. 647, Erskine, J., after conferring with Chief Justice Tindall, held that a trial must proceed although in the course of the proceedings it was discovered that one of the jurors was related to the prisoner. This case seems to cover the point raised, and is quoted in the latest edition of Archbold. The principle I extract from it is that such a discovery after the jury has been sworn is not a ground for discharging the jury.

Do the local enactments extend the powers of a trial Judge? Section 165 of the Criminal Law (Procedure) Ordinance, Chapter 18, lays down the powers of a Judge to discharge the whole jury or one or more Jurors. The words used in subsection one of that section are “in case of any emergency or casualty,” and in subsection three “becomes or become, in the opinion of the Court, incapable of continuing to perform his or their duty.” It seems to me that the words used refer to some supervening cause after the jury has been sworn, and not to a cause which was pre-existing and which could have been made a ground of challenge.

Relationship to a prisoner does not disqualify a juror from sitting on a panel, although it may be a ground of objection to his sitting on a particular case.

Similarly, the words of section 16 of the Criminal Justice Ordinance, No. 21 of 1932, merely give power to a Judge to discharge

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one or two jurors under similar circumstances and enable the trial to proceed with eleven or ten jurors. I am unable to accept the view that the words of this section enlarge a Judge's powers and they merely prevent a trial *de novo* in cases where formerly a Judge would have had to discharge the whole Jury, and enable the trial to proceed with a smaller number of Jurors. If the legislature had intended to give an unfettered discretion to a trial Judge to discharge a jury in the interests of justice, apt and precise words would easily have been found to give expression to their views. The qualifying words in section 165 of Chapter 18 seem to negative any such intention, and, in my opinion, the words are merely declaratory of the Common law. That being my view, the trial must proceed.

Re JONATHAN DA COSTA SHOREY, Debtor.

Ex Parte THE KRAKOWSKY BROS. B.G. DIAMOND CO.,
LTD., Creditors.

INSOLVENCY No. 13 OF 1933.]

BEFORE VAN SERTMA, J. (ACTING).

1933. OCTOBER 2, 6, 11. 16.

*Claim licence—Right to—Levy on—Nullity—Claim licence—Right to—
Advertisement of intended sale—Levy not complete before.*

A levy on a right to obtain a claim licence is a nullity.

The proper method of seizing a debtor's interest under a claim licence is publication in the *Gazette* of the intended sale—this being the closest equivalent from the point of view of the necessity for publicity, to actual entry upon the land.

Brown v. Wieting et al, L. J. 3.6.1901 followed.

J. A. Luckhoo, K.C., for petitioners.

S. L. Van B. Stafford, for debtor.

VAN SERTIMA, J. (Acting): This petition for a receiving order against the debtor coming on for hearing, Mr. Stafford, counsel for the debtor, took the following objections *in limine*:—

(1) That the petition itself disclosed that no act of bankruptcy had been committed because—

(a) The alleged levy upon mining claim Mabel No. 3. right bank, Potaro River, etc. (claim licence not yet issued) and upon mining claim Mabel No. 4, etc. (claim licence not yet issued) was a nullity inasmuch as the debtor could have no exigible interest in land in respect of which no licence had been issued.

(b) The alleged levy upon the right, title and interest of the debtor in and to claim licences No. C575 and C576 was a nullity inasmuch as it was a levy not upon the interests of the debtor conferred by the licences, but upon the licences themselves, *i.e.*, the mere documents, and these being in the nature of title-deeds could not be taken in execution.

2. That the filing of the petition was premature inasmuch as the seizure in the circumstances of this case would be complete only on the date of the advertisement of the intended sale, to wit, the 9th of September, 1933, alternatively, only on the day of the sale at execution, and that therefore on the 13th day of September when the petition was filed the debtor had not allowed his property to remain in execution after seizure for seven days so as to constitute an act of bankruptcy under the provisions of section 3 (1) (e) of the Insolvency Ordinance, Chapter 180.

To deal with each of these objections consecutively. An examination of the relevant Mining Regulations, 1931, discloses that no rights in the land itself are conferred by a prospecting licence. According to regulation 4, sub-paragraph (5) such a licence entitles a person to prospect and locate claims, subject to the Regulations. Sub-paragraph 6 of the said regulation gives the holder of a prospecting licence power to work the ground located until a claim licence has either been issued or refused, and subparagraph (4) of the said regulation empowers the Commissioner for good cause at any time to revoke any prospecting licence, subject to an appeal to the Governor. It is clear from the provisions of Regulation 14 that unless the holder of a prospecting licence applies for a claim licence within the prescribed time, his location becomes null and void and the provisions of Regulations 21 and 22 indicate that even after application there is no certainty of a claim licence being granted. It is, in my opinion, the claim licence which confers rights in and to the land (see Regulation 23). Until that is granted the holder of a prospecting licence has a mere hope, which may never be realised, of acquiring an interest in the land itself. I am fortified in this view by the fact that while Regulations 50 and 52 provide for the transfer and the sale at execution, respectively, of the holder's rights under a licence, *i.e.*, a claim licence, no corresponding provision exists in relation to holders of prospecting licences. Mr. Luckhoo contended that the holder of a prospecting licence has possessory interests over the land, but assuming that to be so, it does not necessarily follow that such interests are exigible for purposes of execution, and he has to concede that in this colony one cannot levy on the possessory interests of a person who had been in possession of land for a period less than that required to extinguish the rights of the true owner. I therefore uphold the first objection.

Even if my conclusion on that objection is incorrect, the hear-

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ing of the petition would have had to proceed because I found myself unable to accept Mr. Stafford's contention that the levy was merely upon the licences, *i.e.*, the documents themselves. To say that a man's interest in a claim licence is confined to his interest in the document itself seems to me an unduly restricted interpretation. If it were sound, then, in the absence of evidence of intention, a devise of a man's interest, say in a Government licence of occupancy, would render the devisee the proud possessor of the document called the licence, bereft nevertheless of all rights conferred by the licence. In *Mather's Sheriff and Execution Law* (2nd Edition) at pages 93 and 94, the expressions "seizure of a lease" and "a lease is taken in execution" are obviously used as synonyms of the interests conferred by the lease. Moreover, in the local case of *Brown v. Wieting, et al.* (L.J., 3rd June, 1901) Lucie Smith, acting C.J., uses the expressions "levy on an interest in a claim licence" in a context which clearly shows that he was alluding to the interests conferred by the licence. And lastly, I find that the late Sir Charles Major granted leave in the case of *Comacho v. Forbes*, (1915) L.R.B.G. 107, to levy execution on the right, title and interest to two licences to collect balata from trees on Crown lands. And surely in that case the execution creditors were not taking in execution merely the licences, *i.e.*, the documents.

The last point taken by Mr. Stafford raises an important, and so far as I am aware, a novel point relating to the mode of seizing interests held under a claim licence. I decline to decide the point by way of demurrer as there was an allegation in the petition that the right, title and interest of the debtor in and to certain claim licences had been seized on the 5th September, 1933. It was agreed, with the consent of counsel, first to take evidence as to the mode of the alleged seizure and thereafter to decide whether there had in fact been a seizure on that day, before proceeding to take evidence as to the existence of the debt.

The Marshal's evidence was to the following effect, that after receiving the writ of execution (Exhibit "B") he awaited instructions from the solicitor of the plaintiff in that action, that upon receipt of such instructions he obtained a certificate from the Department of Lands and Mines showing that the claim licences referred to in the said instructions were in the name of the execution debtor, that he then filled up a printed form, (Exhibit "C,") which he dispatched on the 5th September, 1933, in an envelope addressed to the Commissioner of Lands and Mines, that he afterwards on the said day prepared an Act of Levy (Exhibit "D"), that thereafter the Order of Court (Exhibit "A") and Exhibits "B," "C" and "D" were placed before the Senior Marshal who prepared the advertisements of the intended sale for publication in the *Gazette*. The said advertisement

numbered 726 appeared in the *Gazette* of September 9, 1933, at page 624 (Exhibit "E"). The Marshal admits that from the time he received the instructions to levy up to the time of the appearance of the advertisement in the *Gazette* he gave no intimation of the alleged seizure, oral or written, to the debtor or to anyone on his behalf. Mr. Lionel Van Sertima, a Government officer of 17 years' experience in the Department of Lands and Mines, says that it is usual in that Department to keep a file on which are entered such documents as Exhibit "C," that after that is done, the file is usually passed on to the particular branch of the Department which deals with claim licences, with instructions to the clerk in charge of that branch to make a note of the levy in the register of claim licences and to endorse same on the counterfoil of the claim licence in question, and he has known of this practice for about 17 years. He admits, as the fact, that there is no Ordinance or regulation requiring the recording of the receipt of such a notice as Exhibit "C" and that such recording is made merely for departmental purposes, and that no intimation is ever sent to the claim holder or to the Warden of the Mining District where the claim is situate. In this connection it is to be observed that Regulation 3 provides for an applicant for a prospecting licence giving to the Department a registered address at which all notices and other process necessary for the purposes of the regulations may be served.

There was at one time some doubt in my mind as to whether Exhibit "C" reached the Department of Lands and Mines on the 5th September. But I am now satisfied that that document arrived there on the 5th September and was taken out of the envelope containing it on the 6th September which date stamp it bears.

The question that falls for determination is whether the sending of Exhibit "C" by the Marshal to the Commissioner of Lands and Mines on the 5th September, 1933, coupled with his return embodied in the document called the Act of Levy, constituted a seizure on that day of the debtor's interests under the claim licences so that it can be predicated of the debtor that he allowed his property after being levied by seizure to remain in execution for seven days without taking steps to have the execution set aside and the property released.

Now it is clear that had the debtor been the owner in fee simple of the land the subject matter of the claim licence, the Marshal would have had to repair to the *locus in quo* and perform a physical act of seizure. In other words, entry upon the premises would have been essential. The interests, however, of the debtor being an incorporeal hereditament, and, therefore, intangible, such physical entry thereupon was *ex necessitate* impossible, and in England the mode of getting at the debtor's

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interest would have been the appointment of a receiver, a procedure sometimes called "Equitable Execution."

In this colony, however, it would appear from the case of *Brown v. Wieting et al (ut supra)* it has not been thought desirable to adopt such procedure due largely, I daresay, to considerations of expense and inconvenience and to the impracticability of a receiver dealing with such interests in land which is usually situate many miles from Georgetown.

In that case Lucie Smith, acting C.J., after pointing out that no procedure had been laid down for levying on an incorporeal right such as this proceeds as follows: "I do not think it is necessary for the Marshal to go on the placer in order to effect a levy on an interest in a claim licence. The place, that is to say, the land, is not attached and taken in execution, it is only the right given by the licence to dig for gold that is levied on. *It appears to be quite sufficient if due advertisement is made of the intended sale, and perhaps notice given to the Mining Department.*"

Here, then, as far back as 1901 is to be found a mode of seizing such interests laid down by the Court. Mr. Luckhoo, however, argues, that I am not bound by that decision, that the language is ambiguous and that I should not follow it. I can find no ambiguity in the language. The Judge in my opinion was seeking a substitute equivalent to an entry upon the land itself and it seems to me that he selected publication in the *Gazette* because in the circumstances of the case, it being impossible to perform an act of entry calculated to intimate to the public (including the debtor that the interests in the land had been seized, he considered such publication the closest symbolical equiparant, invested, like actual entry, with the element of publicity. I am unable to accept Mr. Luckhoo's contention that at common law an act of seizure need not be such an act as from its nature ought to give or be deemed to give, notice to the judgment debtor of the seizure. This is in direct conflict with the following passage supported by authorities, in Halsbury's *Laws of England*, Vol. 14, p. 54, paragraph 108: "An entry upon the premises on which the goods are situate, together with an intimation of an intention to seize the goods, will amount to a valid seizure even where the premises are extensive and the property seized widely scattered, *but some act must be done sufficient to intimate to the judgment debtor or his servants that a seizure has been made.*" I agree that there need not be proof that the debtor had actual notice of the seizure. For if that were so an absent debtor could never commit an act of bankruptcy of this nature. But it seems to me essential that the act constituting the seizure should be of such a nature that the debtor must be taken to have had either actual or constructive notice thereof.

This brings me to an analysis of the acts of the Marshal which

it is said constituted seizure on the 5th September. On that day the Marshal sent a notice (Exhibit "C") to the Commissioner of Lands and Mines to the effect that he had on that day attached in execution the interests of the debtor in certain licences and claims. The language used certainly implies that the Marshal had previously performed an act of seizure, of which he was afterwards apprising the Commissioner of Lands and Mines. Mr. Luckhoo being pressed to explain what that previous act was, contended that the Marshal by the very act of informing the Commissioner of Lands and Mines that he had attached the said interests thereby attached or seized same. I am unable to agree. If Mr. Luckhoo's contention is correct, then the seizure was not symbolical but merely notional and therefore devoid of that element of publicity which seems to be of the essence of a seizure whether on tangible or intangible interests (see *Re Williams; ex parte Jones*, (1880) 42 L.T., 157).

Upon what juristic basis can the proposition be founded that notice to the Commissioner constitutes seizure of a claim-holder's interests under a licence? It must be, it seems, that the Commissioner is *ad hoc* an agent or servant of every licence-holder. But I am unable in the absence of statutory enactment in that behalf—and there is none—to accept this contention. The Commissioner is not even the grantor of the interests conferred by the licence. He is a servant of the Crown the true grantor which acts through the Governor in Council. It is not his interests but those of the claim-holder that a seizure affects.

It seems to me that notice to the Commissioner such as was given in this case finds its true and appropriate setting, if first the essential act constituting the levy laid down by Lucie Smith, acting C.J., be performed. That is to say, the publication constituting in this case the seizure, corresponding as it does symbolically to the publicity inherent in an actual entry must first be made, then afterwards to use the words of the learned Judge, "perhaps" notice to the Commissioner. Mr. Luckhoo further contended that I should construe the language of Lucie Smith, acting C.J., to mean that publication in the *Gazette* and notice to the Commissioner were alternative methods of seizure. I am unable to accept this contention. The learned Judge uses the word "and" not "or." Further, it is clear from the whole context that what he regarded as essential to seizure was the publication. The use of the word "perhaps" rather indicates that he did not deem notice to the Commissioner to be at all essential. And, to me, the reason is obvious. Such notice would not itself constitute seizure but would be an intimation of a seizure already accomplished that would be useful to a Department whereat transfers of such interests are frequently taking place.

Mr. Luckhoo further contended that the claim-holder could not deal with his interests under the licence after notice was given to

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the Commissioner in the manner done by Exhibit "C." This seems to me to be begging the question. Whether the claim-holder could legally deal with the licence after such notice to the Commissioner depends upon whether the notice constitutes a seizure which is precisely the question to be determined.

Mr. Luckhoo also argued that because under the Rules of Court (see Order 36, rule 33) advertisement follows seizure, therefore Lucie Smith, acting C.J., when he used the words "it appears to me quite sufficient if due advertisement is made of the intended sale," implied that a seizure by notice to the Commissioner had already taken place. Such a construction would render the learned Judge's language self-contradictory, if not meaningless. For he was endeavouring to prescribe procedure not provided by any rules, and if Mr. Luckhoo's contention is correct, then he failed to lay down any mode of seizure whatever and left the matter *in nubibus*. Alternatively, in order to uphold his contention I should have to construe the sentence as if it read thus: "It would be quite sufficient if notice be given to the Mining Department and perhaps due advertisement of the intended sale"—a complete reversal of the order of thought in which the learned Judge expressed himself. It seems to me that the fallacy underlying this contention based on the rules of Court is the failure to appreciate the fact that the Judge was formulating procedure outside of,—because not provided for at all by, the rules. Hence analogies drawn from rules themselves are hardly of any assistance, if at all applicable.

My attention was also drawn to the provisions of section 28 of the Sale of Goods Ordinance, Chapter 65. Having regard to the definition of "good" in the said Ordinance, I have come to the conclusion that the section does not apply to immovable property. And that the interests of the debtor under the claim-licences are immovable property has been settled by the cases of *In re Comacho (ut supra)* and *E. M. Duke v. L. McKay*, 1920 (unreported). Even if the section did apply, the proviso thereto indicates that the issue of the writ is not equivalent to seizure, whereas the language of section 3 (1) (e) of the Insolvency Ordinance, Chapter 180, makes it clear that the period of seven days runs from the date of seizure, the words being "allows *that* property to remain in execution for seven days without taking steps to have the execution set aside and the property released." The expression "that property" must be construed with reference to the former part of the sentence where the words used are "execution issued against him has been levied *by seizure of any of his property*." Moreover, it is in keeping with the policy of the old English Bankruptcy enactments that time should run from the date of seizure (see *Gibson v. King* (1842) Carrington and Marsham, 458, and *Belcher et al v. Gummow*, (1847) 9 Q.B., 873).

I intimated to Counsel at the hearing that if either of them desired to furnish the Court with any further authority he might do so in the usual manner, and Mr. Luckhoo for the petitioners has, since decision was reserved, sent a memorandum in the following terms:—

1. It is not competent for the execution-debtor in these proceedings to question the regularity of the seizure which was made on the 5th day of September, 1933, inasmuch as no steps were taken by him to set aside the return on the writ of execution in the matter of *Pires & Silva Bros. v. J. D. Shorey* as being bad on the face of it:—

Hals, Vol. 14, page 22, paragraph 48, Rules of Court, 1900, Order 36, rules 39 and 41.

2. Steps to set aside the return made by the Marshal on the writ of execution must be made within a reasonable time. In the absence of such proceedings the return made by the Marshal stands and the execution-debtor cannot in the present Bankruptcy proceedings question the return—R. S. C., Order 70, rule 2. Rules of Court, 1900, Order 51, r. 2.

3. No notice to judgment debtor necessary—*Saibo v. Saibo et al.* 25 N.L.R. (Ceylon), p. 56.

I shall deal with the last point first. I have already held that proof of actual notice to the judgment debtor of the seizure is not necessary. But it may be noted that the decision in the Ceylon case of *Saibo v. Saibo et al (ut supra)* turned upon the special provisions of a section which in contradistinction to other sections did not provide for any notice to the original judgment-debtor where what was levied upon was a decree already obtained against that judgment-debtor by a successful judgment-creditor, himself the judgment-debtor of the person causing the levy. The *ratio decidendi* is to be found in the following passage of the judgment: “For the party who is affected by the seizure is the decree holder and the seizure does not directly concern the judgment-debtor who must, in any event, pay, whether to the decree holder or to the seizing creditor.”

With regard to the first point contained in the memorandum, I do not hold that the return on the writ of execution in question was bad on the face of it. It was only after investigation of the facts leading to the said return that it was possible to say whether the seizure was good or bad. I have read paragraph 48 of Halsbury’s *Laws of England*, Vol. 14, and observe, although my attention has not been called specifically to it, that it is there stated that the return is *prima facie* evidence of the facts stated in it as between the parties, meaning, I presume, the parties to the action out of which the execution has arisen.

This, however, is a Bankruptcy petition brought by persons not parties to the action out of which the execution arose, and in any event the return being only *prima facie* evidence of the facts stated therein, I am unable to agree that the Court is precluded

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from investigating the legal validity of an alleged seizure merely because the Marshal states in his return that he seized the debtor's interests in a claim licence on a certain day. There being an issue as to whether the facts did constitute a seizure the Court must be at liberty to examine those facts and to pronounce thereon. There is nothing sacrosanct about a Marshal's return, nor is it invested with the power of legal *legerdemain*.

As to the second point raised in the memorandum, I am of the opinion that the Rules of Court, Order 51, rule 2, corresponding to the English Order 70, rule 2, can have no application. Order 51, rule 2, deals only with irregularities. I have already held that the alleged seizure on the 5th September was a nullity. A proceeding which is a nullity cannot be cured under the provisions of the English Order 70, r. 1, to which the local Order 51, r. 1 corresponds. No necessity on the part of the debtor to set aside the return could therefore ever have arisen.

Before concluding, it might be well to observe that the Commissioner's keeping of a record for departmental purposes of notices such as Exhibit "C" and the endorsement upon the counterfoil of the claim licence of the alleged seizure could not in the absence of statutory enactment to that effect operate *per se* as a seizure. In England legislation had to be passed to render registration of a "writ of elegit" upon land a charge thereon: see the case of *Ashburton (Lord) v. Nocton*, (1915) 1 Ch. 274, where the effect of such registration is discussed.

I have therefore come to the conclusion following the decision of Lucie Smith, acting C.J., in *Brown v. Wieting et al (ut supra)* that the proper method of seizing a debtor's interests under a claim-licence is publication in the *Gazette* of the intended sale—this being the closest equivalent, from the point of view of the necessity for publicity, to actual entry upon the land, that intimation to the Commissioner of Lands and Mines is not itself the act of seizure, but *ex hypothesi* presupposes a seizure already accomplished by the method prescribed by the learned Judge, notice of which seizure is out of caution given to the Department wherein such interests are frequently dealt with.

It follows that in this case when the petition was filed on the 13th of September the property of the debtor had not been allowed, after it had been levied by seizure, to remain in execution for seven days, as the publication in the *Gazette* took place only on the 9th of September, 1933.

The petition was therefore, in my opinion, premature and must be dismissed with costs.

Leave to appeal, if the law so requires, is granted.

Solicitors: *Francis Dias, O.B.E.; R. G. Sharples.*

Petition dismissed.

JOHN PEREIRA v. S. S. M. INSANALLY.

JOHN PEREIRA *et al*, Plaintiffs,

v.

SHEKH SHER MOHAMED INSANALLY, Defendant.

[1930. No. 11.—BERBICE.]

BEFORE SAVARY, J. 1931. FEBRUARY 28.

Limitation of actions—Partition—Decision of Partition officer—Writ questioning—Not filed within two months—District Lands Partition and Re-Allotment Ordinance, 1916 (No. 16), s. 17 (now cap. 169, s. 16)—Fraud of officer—Effect of—Bar to statute—Pleading—General allegations of fraud—Insufficiency of—Knowledge of fraud—Date to be pleaded.

The plaintiffs brought an action for an injunction against the defendant as partition officer of Plantation Alness to prevent him from passing certain transports in connection with the partition of the said plantation.

The defendant pleaded that the plaintiffs' claim was barred by section 17 of Ordinance 16 of 1926 (now section 16 of chapter 169) which provides that an application to the Court under that section shall be made within two months of the decision of the Local Government Board. There was no averment of fraud in the pleadings of the plaintiff.

Held, (1) that when once fraud, whether concealed or not, is established, the rights of the defrauded party are not affected by any statutory period of limitation (save where the statute specially provides for cases of fraud) so long as that party remains in ignorance of the fraud without any laches on his part or any fault of his own;

(2) that the provisions of section 17 of Ordinance 16 of 1926 (now section 16 of chapter 169) fixing a period for filing actions to set aside decisions of a partition officer do not constitute a bar to plaintiffs' action if and when plaintiffs allege and prove facts necessary to constitute a fraud imputable to the defendant;

(3) that an averment as to when the facts constituting the fraud came to the knowledge of the plaintiffs is material as it is necessary that they should satisfy the Court that they are not guilty of *laches*.

Leave was granted to plaintiffs to amend their statement of claim to include an allegation of fraud imputable to the defendant, showing when the facts constituting the fraud came to their knowledge.

J. Eleazar, solicitor, for plaintiffs

S. I. Cyrus, for defendant.

Cur. adv. vult.

SAVARY, J.: In this action the plaintiffs seek to obtain an injunction against the defendant as partition officer of Plantation Alness to prevent him from passing certain transports in connection with the partition of the said plantation, and also pray for a declaration of title in their favour.

In view of one of the contentions raised in the defence, namely, that the claim of the plaintiffs was barred by virtue of the provisions of section 17 of the District Lands Partition and Re-allotment Ordinance, No. 16 of 1916 (hereinafter referred to as the Ordinance), the matter was set down for hearing argument on the preliminary point of law raised by the defendant. At this hearing counsel for defendant argued that the plaintiffs' claim is

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barred by the provisions of section 17 of the Ordinance, as the action was not filed within two months of the decision of the Local Government Board, because (a) the pleadings do not set out facts and circumstances material to establish a case of fraud, (b) even if there is an averment of fraud, the parties, who appear to be affected by the fraud as pleaded, are not parties to the action, in other words, there does not appear to be any necessary connection between the fraud alleged and the plaintiffs.

It is provided by the Ordinance that a claimant to or mortgagee of any share or holding who is dissatisfied with the decision of the partition officer may appeal to the Local Government Board within one month of the publication of the list of awards, and that the decision of the Local Government Board shall be final unless proceedings are taken in the Magistrate's Court or Supreme Court within two months of the determination of the appeal by the Board. It is admitted that this action was not brought within two months of the determination of the appeal by the Board, and this fact appears from the pleadings, but the plaintiffs have raised or attempted to raise a case of fraud on the part of the partition officer. It is conceded by defendant's counsel that fraud will prevent the limitation period from operating during the time the plaintiff's remained in ignorance of the fraud or the facts constituting it. but he contends that there is no averment in the plaintiffs' pleadings of the time when the fraud, if any, became known to the plaintiffs, and that therefore they cannot claim the benefit of this principle to prevent section 17 being a bar to the action. It is not disputed that there is no such averment in the pleadings, and therefore I have to consider whether the submission of defendant's counsel is sound.

It seems to me that I can, by analogy, adopt certain principles laid down in reference to the Statutes of Limitation. Without reviewing in detail the authorities dealing with this point I can state, what in my opinion, are the principles established by them.

It was decided in *Hovenden v. Annesley* (1806) 2 Sch. & Lef., 631, 632, that where a bar exists by statute, Courts of equity will, in analogous cases, consider the equitable rights as bound by the same limitations: see also *Rolfe v. Gregory*, (1865) 4 DeG., J. & S. 576. Applying that rule, a Court of Equity, would therefore, in this case, adopt the period of two months fixed by the Ordinance as a bar to granting equitable relief. Since *Gibbs v. Guild* (1882) 9 Q.B.D., 59, an action to recover by way of damages money lost by the fraudulent representations of the defendant, in which there was a plea of the Statute of Limitation, the Court of Appeal settled the rule that a Court of Equity will not be prevented by a plea of the Statutes of Limitation from applying its own equity with regard to a fraudulent concealment by the defendant of the accruing of the cause of action.

In the case of *Bulli Coal Mining Co. v. Osborne & anor.* (1899)

A.C., 351 the Privy Council considered *Gibbs v. Guild*, and extended the principle there laid down to a case where there had been no fraudulent concealment on the part of the wrong doer but where the facts established fraudulent conduct. The rule of equity that no length of time is a bar to relief in the case of fraud in the absence of laches on the part of the person defrauded was re-affirmed by the Privy Council. The rule applies, therefore, so long as the party defrauded remains in ignorance without any fault of his own: see page 363 of the report. The principles laid down by the Privy Council appear to apply to cases both of concealed fraud and fraudulent conduct without concealment, and this view has been accepted in several cases since: see *Molloy v. Mutual Reserve Life Insurance Co.* (1906) 94 L.T. 756, *Oelkers v. Ellis* (1914) 2 K.B., 139, and *Lynn v. Bamber* (1930) 2 K.B., 72. This last case contains an instructive review by McCardie, J., of all the authorities on the subject, and the decision of the Privy Council in the *Bulli* case was followed. McCardie, J., also came to the conclusion that the principle applied to pure common law causes of action as well as to claims in equity since all the Courts now administer principles of law and equity concurrently.

By virtue of the provisions of section 3 of the Civil Law of British Guiana Ordinance, 1916, the Supreme Court of British Guiana administers the doctrines of equity in the same manner as the Courts in England, so that I hold I am bound to apply the principles referred to in this judgment to the facts of this case.

After consideration of all the relevant authorities I think the proposition can be laid down as follows: When once fraud, whether concealed or not, is established, the rights of the defrauded party are not affected by any statutory period of limitation (save where the Statute specially provides for cases of fraud), so long as that party remains in ignorance of the fraud without any laches on his part or any fault of his own. Therefore it seems to me that the contention of counsel for the defendant is correct, and I hold that the provisions of section 17 of the Ordinance fixing a period of limitation for filing actions of this nature do not constitute a bar to plaintiffs' action if and when plaintiffs allege and prove facts necessary to constitute a fraud imputable to the defendant. I also agree that an averment as to when the facts constituting the fraud came to plaintiffs' knowledge is material as it is necessary that they should satisfy the Court that they are not guilty of laches. In my opinion reasons (a) and (b) in support of argument by defendant's counsel are generally sound, but, in view of the application for leave to amend the pleadings made on behalf of the plaintiffs it is unnecessary to discuss them further. On account of the form which the pleadings took originally, perhaps it is well that I should mention the case of *Lawrence v. Norreys* (1890) 15 A.C. 210, where the House of Lords laid down certain

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principles applicable to cases in which it is intended to plead fraud. General allegations, however strong may be the words in which they are stated are insufficient to amount to an averment of fraud of which any Court ought to take notice.

Towards the end of the hearing the solicitor who appeared for the plaintiffs was practically forced into admitting that his pleadings did not allege the facts necessary to establish fraud in a case of this nature, so as to meet the plea of the Ordinance, and asked for leave to amend his pleadings. Defendant's counsel, for reasons stated at the hearing, did not oppose the application but submitted that it should be granted only on terms.

I may mention that, at the first hearing of this matter in Berbice on the 27th October last year a similar application was made by the same solicitor, on behalf of the plaintiffs, by reason of his having made only a general allegation of fraud without setting out any facts or circumstances constituting it. Leave was then granted to amend the pleadings, and this second application arises from the amended pleadings being also defective. Until this action is determined a large number of transports in connection with the partition of Plantation Alness is delayed, and it is, therefore, necessary to provide for an early trial.

There is no question, to my mind, that this is a substantial amendment, and, in view of the circumstances, I propose to allow it only on the terms of plaintiffs paying all costs incurred up to date.

Leave will be granted to the plaintiffs to amend their statement of claim on or before the 21st March, 1931, and I order that no amended statement of claim be accepted for filing in the Registry unless and until the plaintiffs have previously paid in to the Registrar all the costs to date, fixed at \$100.

If an amended statement of claim is delivered and filed the defendant may, if necessary, deliver and file an amended defence on or before the 28th March, 1931, and plaintiffs may deliver and file an amended reply on or before the 8th April, 1931. The action will be set down for hearing on Tuesday the 21st April, in Georgetown. In default of the plaintiffs paying the costs as above within the period limited by this order and or filing their statement of claim within the time fixed, there will be judgment for the defendant with costs.

Judgment for defendant.

Solicitors: *J. Eleazar; J. F. Henderson.*

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[1933. No. 376. DEMERARA.]

BEFORE SAVARY, J. 1934. JANUARY 5, 8.

Indictment—Conviction on—Question of law—Reservation of—Request after trial—Criminal Session—Close of—Jurisdiction of judge after—Criminal Law (Procedure) Ordinance, Chapter 18, Section 174.

On the 8th December, B. was convicted of murder at the Berbice Criminal Session and sentenced to death, and on the same day the Session was declared closed. At the trial of B. no point of law was reserved and the judge was not asked to do so. On the 22nd December a notice of motion was filed praying for an order of arrest of sentence and asking the judge “to reserve for the consideration of the West Indian Court of Appeal such questions of law which have arisen on the trial.”

Held, that a judge is *functus officio* at the close of the Criminal Session, that, at that time, he could only state a case on a point of law raised at the trial and which he had consented to state, and that the motion must therefore be refused.

G. J. de Freitas, K.C., (J. A. Luckhoo, K.C., with him) for the applicant Boodhoo.

S. J. Van Sertima, K.C., for the Crown.

SAVARY, J.: On the 8th December, 1933, the applicant, Boodhoo, was sentenced by me at the Berbice Criminal Sessions to death, and on the same day the Sessions were declared closed.

On the 15th of December, Mr. Luckhoo, counsel for Boodhoo at the trial, made application to me at my Chambers in Georgetown to state a case for the consideration of the Court of Appeal. After expressing doubts of my ability to do so at that stage on request, I listened to his application and refused it.

On the 22nd of December a notice of motion was filed praying for an order of arrest of sentence and asking me “to reserve for the consideration of the West Indian Court of Appeal such questions of law which have arisen on the trial of the abovenamed case.” An affidavit in support was filed on the same day. The motion was heard on the 5th of January, 1934.

On the hearing of the motion I referred to the previous application in Chambers and was told by Mr. deFreitas, who moved the Court, that he was informed it was an informal application. I confess myself unable to appreciate this distinction, and I am inclined to the view that the subject matter of the motion is *res judicata*. Nevertheless, in view of the importance of the matter, I proposed to deal with the motion. Mr. Van Sertima, counsel for the Crown, took a preliminary objection that I had no jurisdiction at this stage to reserve a question of law because no point of law had been reserved at the trial; and secondly, I was not asked to do so.

The point is of considerable importance because of its far-

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reaching consequences. If it is competent to ask a Judge to reserve a point of law after the Criminal Sessions have come to a close, and when no such question was raised at the trial, then I can see no limit of time within which such application can be made, and a Judge will be asked to remember details of his summing up, perhaps months afterwards, without there being available any shorthand notes since none are taken.

In this colony there is no general right of appeal in criminal cases, tried on indictment, such as exists in England under the Criminal Appeal Act, 1907. Section 174 of the Criminal Law (Procedure) Ordinance, Chapter 18, taken from the Crown Cases Act, 1848, gives the trial Judge power to reserve a question of law which has arisen on the trial for the consideration of the Court of Appeal. It seems implied in the language of the section that (1) the point of law should have arisen on the trial. (2) that the Judge should have reserved or agreed to reserve the point.

In *R. v. Martin* (1849) 3 Cox C.C. 447, certain questions of law were raised by counsel for the prisoner after the conviction, and the Judge, after sentencing the prisoner, immediately reserved a case. At the hearing before the Court of Crown Cases Reserved, counsel for the Crown took a preliminary objection to the power of the Judge to reserve a case at that stage. Baron Rolfe dealt with the point as follows: "Mr. Ffooks suggested some doubt whether this Court had jurisdiction in this case, because the question arose subsequent to the trial and after conviction; but I think there is no ground for that doubt. The word "trial" ought to be taken in a liberal sense; and in my opinion, includes all the proceedings in the Court below."

The other case referred to by Mr. Van Sertima, *R. v. Mean*, (1904) 69 J.P. 27; 21 T.L.R. 172, quoted at p. 363 of the second edition of Bowen-Rowland's well-known book on *Proceedings on Indictment*, seems at first sight to support the view that an application can be made after the trial is concluded and the Sessions closed, but an examination of the reasons given by the Court supports the view which I take. At the trial before the Recorder of Cambridge in January, 1904, counsel for the prisoner objected to the admissibility of certain evidence and asked the Recorder to reserve the point, which he in effect agreed to do, but in fact did nothing further in the matter. The Sessions were closed and not adjourned. At the next quarter sessions held in April, 1904, the same Recorder stated a case but expressed his doubts as to whether he had jurisdiction to do so. When the matter came before the Court of Crown Cases Reserved, counsel for the Crown took a preliminary objection to the jurisdiction of the Recorder to state a case after the close of the Sessions.

Lord Alverstone, C.J., stated he did not intend in allowing the case to be argued to lay down a rule or to express the opinion

that there is power to state a case on a point which has not been taken at the trial, or which the Judge has not consented to state at the trial. He based his opinion on the view that the Recorder did, in substance, consent at the trial to state a case. The Lord Chief Justice also stated that he thought it would be dangerous to allow applications for cases to be made after the trial upon points that might have been indirectly raised, but not pressed, and upon which the Judge had not expressed an opinion as to whether he would reserve a case or not.

Kennedy, J., said: "I do not wish to add anything except to emphasise the view that at the trial there was an agreement to state a case. It is only upon that ground in this particular case that I think the Recorder had jurisdiction." The other three members of the Court concurred.

It is agreed that no point of law was raised at the trial before me and I was not asked to reserve any point.

R. v. Brown (1890) 24 Q.B.D. 357, which was relied on by the applicant, was cited in *Mean's* case by counsel for the defence. In *Brown's* case no counsel appeared in support of or against the conviction, and it is referred to in the judgment of Wright, J. in *B. v. Plummer* (1902) 2 K.B., 339, as an authority for the proposition that a question arising on a plea of guilty is a question arising at the trial. But there is language used in the judgment which suggests that a Judge on his own initiative can state a case after trial. If it is intended to be a decision to this effect I can only say that *Mean's* case, where the point of jurisdiction was argued and adjudicated on, does not follow it.

Lastly, I refer to *R. v. Meertins* (1926) B.G.L.R. 129, before the West Indian Court of Appeal who considered and dealt with a case stated by the trial Judge under circumstances somewhat similar to the application before me. But I do not consider this a binding decision as the point of jurisdiction was not raised before Douglass, J., or the West Indian Court of Appeal, and there was no adjudication on it.

On the language of section 174 and a review of the authorities I have come to the conclusion that I have no jurisdiction to state a case at this stage. In my opinion I am *functus officio* at the close of the Sessions, and could only state a case now on a point raised at the trial and which I had consented to state.

The plea of possible hardship in some cases, if this view were adopted, is matter for consideration when questions of policy are being considered, but not when the law is being administered.

This disposes of the motion, but as the merits of the application were argued, I will state my views shortly.

The affidavit in support does not, in my opinion, state the point to be reserved, but Mr. de Freitas has made it clear to me It can be put in this way, that where a witness has made contradictory statements, the reason of his having done so must be given by

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the witness himself, and it follows that, where the witness denies making such former statement, as the only eye-witness did in this case, the jury can have no explanation to consider, and the evidence of the witness is valueless and cannot be taken into consideration at all. The case where a witness states he cannot remember making a former contradictory statement seems to me logically to carry the same consequences.

For instance, if a witness on account of a state of mind caused by fear or otherwise could not remember making a previous statement when this question was put to him in the witness-box. and consequently could give no reason for the contradiction, then a jury would have to disregard the evidence given before them on oath even if apparently trustworthy, his state of mind having in the meantime become normal and there being other evidence available in the case to satisfactorily account for the previous contradictory statement.

If this contention is correct the jury would have to exclude from their minds, in the absence of a direct explanation by the witness, any other evidence of the witness himself or of other witnesses which might in the opinion of the jury satisfactorily account for the discrepancy. The question of contradictory statements made by a witness is one that goes to his credit on which the jury are to decide as Lord Ellenborough, C.J., stated in the *Teal* case subsequently referred to and where he further said: "But though a person may be proved on his own showing, or by other evidence, to have forsworn himself as to a particular fact, it does not follow that he can never afterwards feel the obligation of an oath: though it may be good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether."

The law as to the proper direction to the jury in such cases is, in my view, correctly stated at page 495 of the 28th edition of Archbold. It is not disputed that I gave that direction to the jury, but it is now urged that the statement in Archbold should be qualified as referring only to a reason directly given by the witness. The statement in Archbold is based on *R. v. Teal* (1809) 11 East 309; 103 E. R. 1022 and *R. v. Harris* (1927), 20 C. A. R. 144, where the passage referred to above in Archbold is cited with approval by the Court of Criminal Appeal. I have examined these and other authorities, and I can find nothing in any of them to indicate such a qualification.

It is admitted by Mr. de Freitas that no case has so suggested and the passive tense used in the passage in Archbold apparently negatives any such qualification. The words are "unless the reason of his having done so is satisfactorily accounted for."

The point raised seems in my view not based on sound reason and to be opposed to fundamental methods of proof in our

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Courts. For example, every day a person's state of mind at a particular time or when doing some act is proved by evidence given by others or from the circumstances of the case itself.

It follows from what I have said that I would not have exercised my discretion and stated a case for the Court of Appeal. The motion is dismissed.

Motion dismissed.

Solicitors: *J. Eleazar; Crown Solicitor.*

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ROBERT W. MUNN v. MARIE MUNN.

[No. 21 OF 1934—DEMERARA.]

BEFORE DE FREITAS, J. (ACTING)

1934. MARCH 12, 14, 21.

Divorce—Jurisdiction of Court—Domicil of origin—Change—Evidence of—Domicil of choice—Animus manendi.

Jurisdiction in divorce depends on domicil, and any one seeking to override his domicil of origin takes upon himself a heavy burden of proof. There must be an *animus manendi* accompanied by acts showing that it was more than a passing intention.

K. S. Stoby, for petitioner. The respondent did not appear.

DE FREITAS, J. (Acting): This is a petition by the husband for an order of dissolution of his marriage on the ground of his wife's adultery. The case is undefended. At the conclusion of the petitioner's case, being doubtful as to this Court's jurisdiction, I invited counsel for the petitioner to address me on the question of the petitioner's domicil, and in order to give him an opportunity of consulting the authorities on the subject I adjourned the case for two days.

At the resumed hearing Mr. Stoby for the petitioner asked and was granted permission to call another witness—Edwin James Pallister—who was examined for the purpose of proving that the petitioner was domiciled in this colony. The petitioner was re-called by me and gave additional evidence.

Counsel submitted that on the whole of the evidence I ought to be satisfied that the domicil was proved to be within the Court's jurisdiction at the time the suit was instituted, and cited in support of his submission *Wilson v. Wilson* (1872) L. R. 2 P. and D., 435; *Forbes v. Forbes* (1854) Kay 341; *Bell v. Kennedy* (1868) L. R., 1 H. L. Sc. App. 307 and 319; *In re Steer* (1858) 3 H. and N. 594; *Sharpe v. Crispin* (1869) L.R., 1 P. and D., 611 and 619, and *Drevon v. Drevon* (1864) 34 L.J. Ch. 129.

From the evidence it appears that the petitioner at the age of 26 years married the respondent who was then 17 years old, in

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this colony on the 4th August, 1931. He was then an overseer on a sugar estate. He was born in Scotland and his domicile of origin is admittedly Scotch. He came to the colony about four years before his marriage. Three months after his marriage he resigned his position as overseer and left for Scotland alone. He states that he explained to his wife his reasons for going to Scotland and that he left \$60 with a reverend gentleman in the colony to allow ten dollars per month to the respondent for her maintenance. He made her no further allowance during his absence in Scotland from the time he left the colony until his return on 19th November, 1933. He says he went to Scotland to look for work but did not succeed.

On the first day of the hearing he swore that when he left the colony in 1931, he intended to return in any case, whether he found employment or not in Scotland, but at the resumed hearing when he was re-called he said he had intended making his home in Scotland when he left Demerara and that he had asked his wife to join him in Scotland; that he had helped in his father's business in Scotland, but had decided to return to the colony as the business was not paying as well as it should. He states that he intends to reside in this colony and proposes opening a motoring business. Although he has been in the colony since November last he has taken no steps to establish this business beyond making informal enquiries. He has not yet found, and, for aught I know, has not even looked for a site for his business.

In a letter written on the 20th February, 1934, by his solicitor to the Registrar requesting an early fixture of this case it is stated that the petitioner desires to sail for Scotland at an early date on urgent personal affairs. The petitioner made no reference to this in his evidence, nor did he vouchsafe to explain the nature of his affairs.

I regret to have to say that I was not at all favourably impressed by the petitioner's testimony; it appeared to me to be lacking in candour. The impression that was left in my mind at the close of his evidence was that he had not told the Court the whole truth.

The only evidence that I have before me as to his change of domicile in his statement that he intends to reside in this colony, and at the resumed hearing when asked whether his home was in Scotland he added that he intended to make his home here. Not once did he say anything to suggest that he had no intention of taking up residence again in Scotland, or that he had a fixed and settled intention to make his permanent home here in this colony. Can I justly say that I am satisfied as to the Court's jurisdiction? I think not.

As was said by Lord Hanworth, M.R., in *Boldrini v. Boldrini and Martini* (1932), P. 9 at p. 12 (C.A.):—"Jurisdiction in divorce in England depends on domicile and there is no doubt

that any one seeking to override his domicile of origin takes upon himself a heavy burden of proof. There must be an *animus manendi* accompanied by acts showing that it was more than a passing intention. That has been held over and over again." The Master of the Rolls then continues by quoting the following passage from *Stanley v. Barnes* (1830) 3 Hagg. Ecc. 373, in which Sir John Nicholl stated the principle thus at p. 437:—

"For certain purposes a man takes his character, *prima facie*, from the place where he is domiciled and *prima facie*, he is domiciled where he is resident, and the force of residence, as evidence of domicil, is increased by the length of time during which it has continued. All these principles are clear; but time alone is not conclusive; for where is the line to be drawn? Will the residence of a month, or a year, or five years, or fifty years be conclusive? As a criterion, therefore, to ascertain domicil, another principle is laid down by the authorities quoted as well as by practice—it depends upon the intention, upon the *quo animo*—that is the true basis and foundation of domicil; it must be a residence *sine animo revertendi*, in order to change the *domicilium originis*, a temporary residence for the purpose of health or travel, or business has not the effect, it must be a fixed and permanent residence, abandoning finally and forever the domicil of origin; yet liable still to a subsequent change of intention."

The very same principles are applicable to divorce in this colony Mr. Stoby however contends that the petitioner's declaration of intention should be accepted in the absence of any circumstances to negative that intention. As I have already said all that the petitioner states is that he intends to reside here and later that he intends to make his home in this colony. Assuming even that he meant by this that he intended making this colony his permanent residence, I do not believe that it is more than a passing intention.

In *Wilson v. Wilson* (supra) the Judge Ordinary interpreted a passage in Lord Westbury's judgment in *Bell v. Kennedy* (supra) to mean that "if a man leave the country in which he is domiciled with the settled view and intention of taking up his permanent abode in another country, and arrives in that country and commences to take up that abode, that constitutes a change of domicile." Acting upon that principle he accepted the statement on oath by the petitioner as to his intention. The circumstances however in that case are totally different from what has been proved in the present case.

Wilson v. Wilson as stated in the head-note is an authority for the proposition that the oath of the person whose domicile is in question as to his intention to change his domicile is not conclusive, but the question for the Court is whether upon a

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review of all the circumstances it gives credit to his evidence. (See also *Manning v. Manning* (1871) L.R. 2 P. and D. 223.

Sir J. P. Wilde in *Sharpe v. Crispin* (supra at p. 621) says: "The evidence that a man desires to resign his domicile of origin ought to be cogent in proportion to the improbability of such a desire. And the converse is true—that if the probability is great far less evidence may suffice." In my view the probability of the petitioner's desire to abandon his Scotch domicile is very remote.

The witness Pallister added nothing of any value to the petitioner's evidence. He claimed that the petitioner and he were very good friends yet he never knew of the petitioner's marriage until the petitioner's return to the colony. He states that the petitioner told him he intended to remain in the colony and start a motor business, but when asked if the petitioner had said anything about returning to Scotland, he replied that he had not done so directly, and that probably the petitioner will not go back for years. I attach no weight to his evidence.

After giving this matter the most careful consideration I have come to the conclusion that the petitioner has failed to prove that he has abandoned his domicile of origin and that he is domiciled in this colony.

If I am wrong in this conclusion, and I have jurisdiction; then I find that an act of adultery by the wife was proved to have been committed by her on the 24th January, 1934. I am unable therefore to grant the relief sought, being, as I am, of the opinion that this Court has no jurisdiction. The petition is dismissed.

Petition dismissed.

Solicitor for petitioner: *M. S. Fitzpatrick.*

E. V. MUNROE v. A. L. MUNROE.

ELLA VICTORIA MUNROE PERSONALLY AND IN HER CAPACITY AS
ADMINISTRATRIX OF THE ESTATE OF CHARLES THOMAS WEBB, DE-
CEASED,

v.

ADOLPHUS LLEWELLYN MUNROE.

[No. 8 OF 1933—DEMERARA.]

BEFORE DE FREITAS, J. (ACTING).

1934. MARCH 20. 27.

Trusts—Express—Constructive—Evidence—Limitation Ordinance, Chapter 184.

The defendant received certain moneys from the plaintiff's testator more than three years before the filing of the writ in the action.

There was no evidence that the money was given to the defendant for safe keeping, or for any particular purpose, or that the defendant was under any duty to keep it separate from his own.

The defendant pleaded the Limitation Ordinance, Chapter 184.

Held, that the plea was a good one, and the action was barred.

S. L. van B. Stafford, for the plaintiff.

E. G. Woolford, K.C., for the defendant.

DE FREITAS, J. (Acting): This is an action by the plaintiff in her own right and as administratrix of the estate of Charles Thomas Webb, deceased, for an order declaring the defendant to be the trustee for the estate of Webb, deceased of the sum of \$536.41 alleged to be the balance of moneys received by the defendant for and on behalf of the said Charles Thomas Webb. during his lifetime, and for an account of the defendant's dealings with the said moneys and payment of any sum found to be due.

The defendant is the eldest brother of the plaintiff who is the administratrix of the estate of their uncle, Charles Thomas Webb, deceased (hereinafter referred to as the testator).

From the 15th day of April, 1929, down to the 5th day of October, 1929, the date of the testator's death, the defendant was the testator's attorney in this colony, and to the extent of \$208.96 of the plaintiffs claim, Mr. Woolford, K.C., counsel for the defendant, admits liability to the plaintiff as trustee of the testator.

As to the sum of \$331.57, the balance—according to defendant's figures—of the plaintiff's claim, the defendant admits receiving it before his appointment as attorney, from the testator's then attorney, Charles Denbow, but alleges in his defence that the same was handed to him as a gift "by way of pecuniary assistance as from the testator and was not intended by the testator to be repaid." He also pleads the Limitation Ordinance, Chapter 184, in respect of this sum.

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It is contended by Mr. Stafford, counsel for the plaintiff, that this sum of \$331.57 paid by Denbow to the defendant must be regarded as money in the hands of the defendant as trustee for the representative of the testator, and that therefore the Limitation Ordinance is not applicable to the case. He relies on *in re Tidd* (1893) 3 Ch. 154; and *North American Land and Timber Company Limited, v. Watkins* (1904) 1 Ch. 242, affirmed by the Court of Appeal (1904) 2 Ch. 233.

At the hearing Mr. Woolford, K.C., abandoned the allegation that this money was a gift and rested his case on the plea of prescription; he expressed a willingness to submit to judgment in the plaintiff's favour for the sum of \$208.31, contending that the defendant could in no way be said to be a trustee of the \$331.57.

Two questions therefore arise for my decision. Firstly, is the defendant a trustee of the sum of \$331.57, and secondly, is the action barred by the Limitation Ordinance, Chapter 184?

I very much regret that this case was not fully and properly argued before me as the points of law involved are by no means free from difficulty, and I am sorry to have to say that I am not in the least indebted to counsel for their assistance, except perhaps to Mr. Stafford for his reference to *in re Tidd*, a case which I have found difficult to reconcile with some of the many authorities I have consulted, except by distinguishing it as I have done, in my endeavour to determine the rights of the parties to this action in respect of the sum of \$331.57.

The admission by the defendant that he received this money, coupled with the allegation (now abandoned) that it was a gift, seems to me to amount to an acknowledgment that he still has the money, or has spent it for his own purposes; but there is not any promise on his part to pay; on the contrary he pleads that the plaintiff's cause of action (as to this sum) is statute barred.

As to the plaintiff's contention that this sum of \$331.57 must be regarded as money in the hands of the defendant as trustee for the plaintiff. I fail to see, after giving the matter my best consideration, how the defendant can be said to be a trustee. He is certainly not an express trustee, and, in my view, on the evidence before me, I cannot even say that he is a constructive trustee, for there is a complete absence of evidence (putting aside for the moment the letter by the testator to Denbow of 15th January, 1928, Exhibit 1, with which I shall deal later) as to the purpose or object for which the money was given to the defendant.

It is interesting to note that in a very recent case reported in the *Times Law Reports* of the 23rd February, 1934, *Aschkenasy v Midland Bank, Limited*, 50 T.L.R. 208, a somewhat similar claim to the present, a claim was made for a declaration that the

defendants held the sum claimed by the plaintiff as trustees for him and were liable to pay it to him on demand. At the hearing of that action counsel for the plaintiff said he did not rely on any equitable claim to follow up the money but would stand or fall on the contract which he contended the defendants had made with the plaintiff. The sum claimed was £18,044. This sum had been on the instructions of the plaintiff to his bankers at Basle transferred to the defendant Bank in England in 1918 to be held by them to the credit of a bank in Petrograd. The defendant Bank received the money and credited it to the Petrograd Bank in their books on account of the plaintiff but the latter Bank never received the defendant Bank's communications which were returned. Counsel for the plaintiff contended before Roche, J., that the defendants still held it for the use of the plaintiff and as I have said abandoned the equitable claim. The defendant's counsel submitted that there could be no trust in that case and urged that the money was received by the defendants in an ordinary agency transaction and the Statute of Limitations ran from the date of receipt.

Roche, J., entered judgment for the defendants on the ground that there was no contract between the plaintiff and the defendants and that was sufficient to dispose of the case. He did not deal with the defence of the Statute of Limitations, which he said it would be open to the defendants to rely on, should there be an appeal.

I can hardly believe that plaintiffs counsel in that case. Mr. van den Berg, K.C., would have abandoned the equitable claim if it could have been sustained at all.

In the present case, a letter by the testator to his then attorney dated 15th January, 1928, was tendered on behalf of the plaintiff but on objection taken by Mr. Woolford, K.C., I reserved the question of the admissibility for further consideration, although I did not see how the letter helped the plaintiff's case unless it was put in to prove that the defendant received that money for the purpose and object mentioned in the letter. In my view the letter is not admissible for that purpose. I cannot assume that Denbow informed the defendant of the contents of the letter or that he gave any instructions to the defendant. Had the defendant denied the receipt of the money I could not possibly accept that letter as evidence that the money had been paid by Denbow to the defendant. The statement of the account (Exhibit 3) by Denbow to the testator is for the same reason inadmissible as against the defendant. I have not heard from plaintiffs counsel, nor do I know on what principle these two documents are to be admitted as evidence against the defendant, and I must therefore reject them.

The defendant did not give evidence, so that all I have about the origin of the transaction, or the purpose or object for which

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the money was handed to him, is an admission that Denbow on behalf of the testator gave the defendant the money in question.

Mr. Stafford, however, relied on the case in *re Tidd, Tidd v. Overell* (1893) 3 Ch. 154 where North. J., said that the defendants' testator in that case stood in a fiduciary position to the plaintiff.

In that case there was evidence that the plaintiff had handed £300 to his brother whose estate the defendant represented, for safe keeping, upon the understanding that the brother might use it until the plaintiff asked for it. What the case really decided was that the evidence having' shown that the money was given to the defendant's testator to hold until the plaintiff asked for it, the transaction was analogous to a deposit account at a bank, and that therefore the Statute of Limitations was no bar to the plaintiff's claim as time did not begin to run till demand. It is true that the learned Judge also held that the deceased brother stood in a fiduciary position to the plaintiff, but that was not the real ground for his decision.

In the present case I have no evidence to justify me in finding that the money was given to the defendant for safe keeping or for any particular purpose, or that he was under any duty to keep it separate from his own, which appears to be the test whether an agent holds money as a trustee in many of the cases I have examined.

North American Land and Timber Company v. Watkins, Limited, (supra), cited for the plaintiff, is a case in which the defendant—the general manager of the company—was found to be a trustee of the money for the company, he having been entrusted with large sums of money for the particular purpose of purchasing land in America for and on behalf of the company, and having charged the company with more money for the land than he paid for it and keeping the profit for himself. The case therefore does not assist me.

Assuming, however, but without so deciding, that the defendant is a constructive trustee, I am of opinion that he is not thereby precluded from availing himself of the shelter or benefit of the Limitation Ordinance.

As I understand the English Law, the Statute of Limitations is no defence in the case of express trusts, but subject to certain excepted cases of constructive trusts to which the doctrine that time (apart from laches) is no bar in the case of express trusts has been extended, a person charged with liability merely as a trustee by implication is entitled to the protection afforded him by the Statutes of Limitation. The present case does not fall within any of the exceptions: see *Soar v. Ashwell* (1893) 2 Q.B. 390 and *in re Blake* (1932) 1 Ch. 54, 62.

In *Friend v. Young* (1897) 2 Ch. at p. 431, Stirling, J., after quoting the following passage from Lord Westbury's speech in the House of Lords in *Knox v. Guy* L.R. 5 H.L. 667

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“For where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the Statute, and imposes on the remedy it affords the same limitation”—proceeds as follows: (at p. 432).

“In this case there is no question that the Courts of law and those of equity have concurrent jurisdiction with reference to such a claim as this; indeed as has already been stated, an action at law has been brought and judgment recovered for the very sum in question against the surviving partner in the firm of F. Friend & Company. A court of equity, therefore, ought to give effect to any bar created by statute which could be available at law.”

And later in his judgment he says: “. . . . the existence of a fiduciary relation does not prevent the defence of the statute being set up in the present case.”

Whether these principles of English Courts of Equity are wholly applicable to this colony as regards the limitation of actions is a question about which much may be said, but it is unnecessary for my judgment to deal with it.

Suffice it to say that the plaintiff’s cause of action in respect of the \$331.57 is in reality one for money had and received; indeed, Mr. Stafford suggested that if the Court were of opinion that the defendant was not a trustee, the claim might be amended to make that position quite clear.

Now section 6 of the Limitation Ordinance limits the period within which actions for any moveable property, or upon any contract or agreement relating to moveable property to three years next after the cause of action has arisen.

The receipt by the defendant of the \$331.57 was more than three years before the writ in this action was filed; the action is therefore barred and the amount cannot be recovered from the defendant.

Mr. Woolford, K.C., having admitted that \$208.96 of the plaintiff’s claim is trust money held by the defendant as trustee for the estate of Charles Thomas Webb, deceased, I give judgment for the plaintiff for the sum of \$208.96 with costs and I make the order as claimed in paragraph 14 (a) of the Statement of Claim in respect of that amount.

I certify for costs of counsel.

Judgment for plaintiff.

Solicitors: *R. G. Sharples; V. D. P. Woolford.*

E. A. CLARKE v. H. O. CLARKE.

EDWARD ALEXANDER CLARKE

v.

HILDA OUSTEYNE CLARKE.

[No. 356 OF 1933—DEMERARA.]

BEFORE FULL COURT: SAVARY, C.J. (ACTING) AND DE FREITAS,
J., (ACTING).

1934. FEB. 2; APRIL 10.

Summary conviction offence—Complaint—Defect—Substance or form—Amendment—Variance—Offence proved—Adjournment—Married woman—Maintenance—Complaint for—Grounds of—Wilful neglect to maintain—Desertion—Alternative grounds—Validity.

When a person has once been brought before a magistrate the case against him is not to be got rid of on account of any defect in substance or in form in the complaint. If the complaint discloses a variance between the charge and the actual offence proved, the magistrate has power to adjourn the case in order that the defendant may be prepared to meet the offence disclosed by the evidence.

Rodgers v. Richards (1892) 1 Q.B. 566 applied.

A wife applied for an order of maintenance against her husband. The ground of her complaint was that the husband had wilfully neglected to provide reasonable maintenance for her and her infant children, and by such neglect had caused her to leave him and live separately and apart from him.

Before the magistrate the husband contended that the matrimonial offence was not proved, that the evidence proved that he had deserted his wife, that the complaint was not for desertion and that the magistrate should dismiss the complaint. The magistrate found that the husband had deserted his wife, and made an order against her husband for the maintenance of herself and her infant children.

The husband appealed.

Held, that the complaint should be amended by adding an alternative claim for desertion, that in the present case there was no necessity for an adjournment as the very defence set up was that it was a case of desertion and that the appeal should be dismissed.

Appeal from the decision of Mr. C. E. Browne, acting Stipendiary Magistrate, ordering the defendant Edward Alexander Clarke to pay to the complainant Hilda Ousteyne Clarke the sum of \$6.25 per week for the maintenance of herself and her two children.

S. L. van B. Stafford, for appellant.

S. J. Van Sertima K.C., for respondent.

The judgment of the Court which was read by Mr. Justice deFreitas was as follows:—

The respondent in this case, the wife, issued a summons in the magistrate's court for the Georgetown Judicial District applying under section 41 of chapter 9 (formerly the Summary Jurisdiction (Married Women) Ordinance, 1905), *inter alia*, for an order for maintenance against her husband, the appellant.

The ground of her complaint was that her husband had willfully

neglected to provide reasonable maintenance for her and her infant children and by such neglect had caused her to leave him and live separately and apart from him on the 2nd of June, 1933.

The magistrate, after hearing the complainant (respondent), and her witnesses and the defendant (appellant), ordered the appellant to pay \$6.25 per week for the maintenance of the respondent and her children.

From this order the appellant now appeals.

The grounds of appeal as set out in the notice are as follows:

- (a) That the decision is erroneous in point of law, or alternatively.
- (b) That the judgment was based on a wrong principle because the matrimonial offence was not sustained by the evidence; for the evidence in the case established that the spouses were already living separately and apart from each other continuously since the 14th of April, 1933, and had at no time since then and prior to the 2nd of June, 1933, or even to the 23rd of August, 1933, the date of the order, resumed cohabitation, and that it was therefore impossible for the complainant to leave the defendant on the 2nd of June, 1933, as alleged in the complaint.

From the notes of evidence it appears that as the result of a quarrel on the 14th of April, 1933, the appellant left his house for two days. He returned for a change of clothes and left saying he would send for the rest of his belongings later. He did so a week later and down to the 2nd of June, 1933, when the wife herself left the house he had not returned. When asked by his servant whether he was leaving his wife and children without making any provision for them he replied that Mrs. Clarke (meaning the respondent) knew what to do; she could take him to Court. The appellant having told his landlady's husband that he would be responsible for the rent until the end of May and no longer, the respondent was informed of this and told by the landlady's agent that she would have to leave the house as her husband would not pay the rent. The appellant made no allowance to the respondent from the time he left the house on the 14th of April. He is a Customs Officer and is in receipt of a salary of \$93.10 per month; the respondent has no income of her own.

The parties were married on the 27th of August, 1921, and have two children of the marriage.

During the twelve years of their unhappy married life there have been, as the result of quarrels, frequent partings for varying periods of time followed by a reconciliation on each occasion. In 1931 the appellant left the house and remained away for three months; he became ill and they made it up. In 1932 the respondent consulted a solicitor about a separation, but at the appellant's request they again adjusted their differences, but only temporarily. Things seem to have gone from bad to worse until finally on the

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2nd of June, 1933, the respondent says that as a result of her husband's "failure to provide her with food and money" she had to leave the house and subsequently lodged an application that is the subject of this appeal.

The magistrate was of opinion that the matrimonial home at the material times was the house at lot 89, Cowan Street, where the spouses lived; and that by not paying the rent and depriving her of food, the defendant caused the applicant to leave that house and live separately and apart from him. He also found that there was desertion on the part of the husband.

Counsel for the appellant contends that as the respondent had already ceased to cohabit with the appellant since the 14th of April, the magistrate could not come to the conclusion that the appellant left the respondent. In other words he urges that there must be an existing state of cohabitation between the spouses at the time when the wife alleges that the husband's wilful neglect to provide reasonable maintenance caused her to leave and live separately from him, and that as the evidence established that the cohabitation had ceased since the 14th of April, the only ground of complaint that the respondent could have would be desertion by the husband.

This appeal appears to us to be entirely devoid of any merit, for assuming the appellant's contention as to non-existence of cohabitation at the time when respondent left the house, to be correct, about which we express no opinion, the respondent was undoubtedly entitled to an order for maintenance on the ground of desertion.

The Summary Jurisdiction (Married Women) Ordinance, 1905, now appearing in the Statute Book under the heading of "Protection and Maintenance of Married Women" in Chapter 9, section 41, was passed in order to provide a cheap and simple procedure whereby married women, within its terms, might obtain maintenance and other remedies and we do not consider that these wholesome provisions should be defeated by what Lord Merrivale in *Fletcher v. Fletcher* (*infra*) terms "argumentative subtleties" such as the appellant's arguments appear to be.

The respondent might have issued a summons for maintenance on the ground of wilful neglect to provide reasonable maintenance, alternatively, on the ground of desertion. See *Tyrell v. Tyrell* (1928) 138 L.T. 624; *Fletcher v. Fletcher* (1928) 92 J.P. 94; and Rayden and Mortimer on *Divorce*. 3rd edition, p. 106.

The magistrate has found that there was desertion, and the appellant states on oath that he left the house in April with the intention of leaving altogether and not going back, and that he had not given anything for the support of his wife and children since he left and had no intention of doing so.

He was examined and cross-examined fully on his and his wife's conduct during the whole period of his married life and

we can find no justification for his leaving his wife and children unprovided for. His conduct in this respect is most reprehensible, especially in view of his own admission that his wife has no income of her own.

He was invited as far back as April, 1932, by Mr. Crane, then solicitor for the respondent, in a very friendly letter, to make some provision for his wife, but nothing seemed to have come of Mr. Crane's efforts and the respondent had no alternative but to seek redress in the magistrate's Court.

Section 25 of the Summary Jurisdiction (Appeals) Ordinance, chapter 16, provides that no objection shall be taken or allowed to any proceeding in a magistrate's court . . . for any variance between any complaint or summons and the evidence adduced in support thereof in that court.

The evidence in this case shows that the appellant has deserted his wife. The respondent applied for a maintenance order on the ground of the husband's wilful neglect to provide reasonable maintenance; she was entitled to the same order on the ground of desertion and the magistrate could under section 94 of chapter 14 have amended the complaint by adding the words "of desertion, alternatively" after the word "guilty" in the said complaint. Indeed, the magistrate seems to have founded his order on the ground of desertion, for, at the end of his reasons for decision, having already stated that he was of opinion that the offence of desertion and neglect to maintain were both proved on the evidence he says: "I found that desertion was proved and fixed the amount at \$6.25 per week for maintenance of the applicant and her children." In *Hill v. Ward* (1894) 17 Cox C.C. 736, the appellant was summoned under section 6 of the Sale of Food and Drugs Act, 1875, and the evidence disclosed an offence under section 3 of the Amendment Act, 1879, under which he was convicted. Mathew, J., in affirming the conviction, said "The only question here is that which arises with regard to the form of the summons, for there is a good old-fashioned variance between the offence charged in the summons and that which is proved by the evidence: but the Summary Jurisdiction Act was framed to get rid of this very difficulty." Again in *Rodgers v. Richards* 1892 1 Q.B., 555 Wills, J., says: "The scheme of the Summary Jurisdiction Act, 1848, is plain. When a person has once been brought before the Justices, the case against him is not to be got rid of on account of any defect in substance or in form in the information. If the evidence discloses a variance between the charge and the actual offence proved, the Justices have power to adjourn the case in order that the defendant may be prepared to meet the offence disclosed by the evidence."

In the present case there was no necessity for an adjournment, for as we have said the very defence set up was that it was a case of desertion.

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We think that justice should be done by amending the complaint as above indicated and confirming the magistrate's order upon the appellant to pay \$6.25 per week for the maintenance of herself and her two children on the ground of the appellant's desertion.

Mr. Stafford for the appellant contended that his client would be prejudiced by any such amendment but we fail to see in what way the appellant has been misled or could be prejudiced in view of the appellant's own evidence. Any witnesses he might call could only support his own testimony which in our opinion does not justify or excuse the desertion proved.

The appeal is dismissed with costs.

The magistrate's order is varied by giving the custody of the two children, Edward Arthur and Holly Irene to the mother until the age of sixteen.

Appeal dismissed.

A. A. THORNE v. C. R. JACOB.

ALFRED ATHIEL THORNE v. CHARLES RAMKISSOON
JACOB.

[PETITION NO. 2 OF 1934—DEMERARA.]

BEFORE SAVARY, C.J., (ACTING)

1934. April 16, 17.

Election petition—Close of cases for petitioner and for respondent—Counsel for respondent addressing Court—Witness for petitioner—Respondent's application to recall—Special circumstances.

The case for both the petitioner and for the respondent had been closed. While counsel for respondent was addressing the Court, he made an application to have Joseph Alexander Carroll, a witness for the petitioner, recalled in order to question him concerning an incident which took place while he was a member of the police force.

S. J. Van Sertima, K.C., for the respondent,

E. G. Woolford, K.C., for the petitioner.

SAVARY C.J., (Acting): An application was made to me yesterday morning for leave to recall the witness, Carroll, in order to cross-examine him about an incident in his career as a policeman.

It is admitted that at this stage of the trial a witness is not allowed to be recalled except under special circumstances, and it seems to me that these must include the fact that the evidence brought before the Court is of such a nature as to make it almost inevitable that the judge would change a view held by him.

The incident referred to is of remote date and happened twenty-one years ago. His subsequent career and retirement on pension as a Sergeant-Major show that a serious view was not taken of the matter. Short of an inquiry held by me in this Court, it would be impossible to assess the value of the incident as affecting the witness's character, and that inquiry is not permissible. In addition, the witness would be bound to answer, only if compelled by the Judge, and if he did, his answer could not be contradicted.

Judges as a rule, deprecate questions which may reflect on a person's moral character unless they are relevant to the issues before the Court or have a real evidential value.

In my view there are no special circumstances in respect of the application and it is more than likely that I would not have compelled the witness to answer the question.

The application is refused.

Solicitors: *A. McL. Ogle*, for petitioner; *W. D. Dinally*, for respondent.

ALFRED ATHIEL THORNE v. CHARLES RAMKISSOON
JACOB.

[PETITION NO. 2 OF 1934—DEMERARA.]

BEFORE SAVARY; C.J., (ACTING.)

1934. MARCH 5, 6, 7, 8, 9, 12, 13, 14, 15, 28; APRIL 4, 5, 6, 10, 11,
12, 13, 16, 17, 18; MAY 1.

Election petition—British Guiana Constitution Order in Council, 1928, Chapter 2—Article 44—Bribery—Single act—Effect—Election void—Giving money to voter before voting—Evidence of bribery—Election agent—Agency—Evidence of—Cumulative circumstances—Liability of candidates for acts of agent—Treating—Corrupt intention—Evidence of—Excessive refreshments—Numerous occasions—Income—Article 21—Voluntary payments—Whether part of income.

A single act of bribery is sufficient to invalidate an election.

In the absence of proof to the contrary, giving money to a voter before voting is evidence of bribery.

The basic principle of all elections is that a voter should exercise an independent judgment when casting his vote.

A judge should not hold a charge of bribery proved upon evidence which, in his opinion, would not be sufficient to warrant a jury in so finding.

An agent must be a person who acts in the promotion of an election, and he must have authority or there must be circumstances from which it can be inferred. It is not necessary to prove that he was actually appointed by the candidate and he need not be a paid agent. Agency is usually proved by inference from a variety of facts, each of which, taken singly, may not furnish any conclusive or even material evidence against the party accused, but the aggregate of which combine to establish, to the satisfaction of the Court, the connection between the candidate and the alleged agent.

A candidate is liable for the election agent's acts, and a candidate, although not liable personally, becomes responsible to the extent that he cannot retain a seat that has been partly obtained by bribery:

Treating invalidates an election if the circumstances show that it was done with a corrupt intention.

If the refreshments provided were excessive, or if the occasions were numerous, or if there were other circumstances calculated to excite suspicion a corrupt intention might be inferred.

It is not necessarily corrupt treating if the persons attending a meeting are provided with some sort of refreshment so long as they are not gathered merely to gratify their appetites and so to influence their votes.

Semble, the word "income" in Article 21 of the British Guiana Constitution Order in Council, chapter 2, does not include a mere voluntary payment, even if there is a succession of such voluntary payments.

E. G. Woolford, K.C., (C. Vibart Wight and K. S. Stoby with him,) for the petitioner.

J. A. Luckhoo, K.C., and S. J. Van Sertima, K.C., (A. E. Seeram, with them,) for the respondent.

SAVARY, C.J., (Acting): At the election of a member for the Legislative Council to represent Electoral District No. 10, held on the 15th of December, 1933, Charles Ramkissoon Jacob the respondent on this election petition, was opposed by Alfred Athiel Thorne, the petitioner, whom he defeated by a majority of 142; 350 votes being recorded for the respondent and 208 for the petitioner.

The election petition was filed on the 15th of January, 1934, and impeaches the election on the following grounds: (1) corrupt practices by the respondent, namely, bribery and treating; (2) corrupt practices by agents, namely, bribery and treating; (3) illegal practices by an agent, namely making a payment or a contract for payment on account of the conveyance of voters to and from the poll.

The petitioner also prayed the seat. In the recriminatory case of the respondent three charges of bribery and one of treating are alleged against the petitioner.

The trial occupied twenty days, and fifty-three witnesses gave evidence; fourteen were called in support of the petition, thirty by the respondent, and nine in answer to the recriminatory case.

It is regrettable that the failure to appreciate their duty to the Court of a large number of witnesses, more particularly those called on behalf of the respondent, has not facilitated my task of arriving at the truth. And it is a sad reflection that a substantial proportion of them are registered voters. The notion of some was to engage in a battle of wits with opposing Counsel and the Court, little realising the odds, and failing to appreciate that in such a contest they would generally come off second best. Others were prepared to conceal as much of the truth as possible so as to try and deceive the Court, meanwhile forgetting that the matter had been removed from the atmosphere of a political platform to a Court of law, where in the course of the inquiry statements and assertions are tested by cross-examination.

I was informed that this is the first election petition brought in this Colony based on charges of bribery and corruption, not by way of predicating an absence of those practices in the past, but rather as an explanation of the attitude of mind of the witnesses towards these practices.

Representation in the Legislative Council is regulated by the British Guiana (Constitution) Order in Council, 1928, chapter 2, and elections are governed by provisions of the said Order-in-Council, the Elections (Legislative Council) Regulations, 1930, and the Elections (Legislative Council) Expenses Regulations, 1930.

The petitioner alleged against the respondent six cases of bribery, four of treating, and one of illegal practice. One charge of treating was abandoned at the outset, and, in respect of another, no evidence in support was tendered. No useful purpose will be served by a detailed analysis of the evidence, and I intend to state my findings as briefly as circumstances permit. Five of the bribery charges are alleged against the respondent personally, and the remaining one against him by his agent.

Article 44 of the Order-in-Council contains eight definitions of bribery, although, as ordinarily understood, bribery is the giving of money. In relation to election law, the commonest form is simply the giving of money to induce a voter to vote; and, if done

after voting, this act must be shown to have been done corruptly. Every man should know that it is an unlawful and wrong thing to give it; and every man who receives it should know that he is doing a dishonest act in being bribed.

Furthermore, it might be useful to point out that bribery in the various forms defined in this article is a criminal offence. This article 44 incorporates the provisions of sections 2 and 3 of the Corrupt Practices Prevention Act, 1854, (17 and 18 Vict. c. 102), which were adopted to the Corrupt and Illegal Practices Act 1883, 46 and 47 Vict. c. 51), and the provisions of section 49 of the Representation of People Act, 1867, (30 and 31 Vict. c. 102).

Now there are two well established rules of the law of bribery in relation to election petitions, which it would be helpful to enunciate before dealing with the particular cases.

The first is that a single act of bribery is sufficient to invalidate an election (see *Blackburn* (1869) 1 O'M & H. 202; *Norwich* (1871), 2 O'M & H. 41), and the second, that giving money to a voter before voting is evidence of bribery in the absence of proof to the contrary. (See *Bradford* (1869) 1 O'M. & H. 36; *Limerick* (1869) 1 O'M & H. 184).

I find so far as the case of the petitioner against the respondent is concerned, the following charges of bribery proved,—two against the respondent personally, and one against his agent Abdool Rohoman Khan. The first charge is set out in paragraph 3 (a) of the petition, and alleges that the respondent gave to one Joseph Alexander Carroll, at La Grange, on the 6th of December, 1933, two shillings, to influence his vote. Carroll, a retired Sergeant-Major of Police on pension, did not know either candidate before the election, and it is admitted that the respondent went to his home on two occasions. On the first occasion, early in November, respondent was accompanied by one Ezekiel Beresford Ward, a retired Sergeant of Police on pension, described by respondent as his clerk for the election, and who knew Carroll well. Carroll signed the requisition and promised respondent his vote. The second visit was on the 6th December, by respondent Ward and one Norman Harley Clement. There is a conflict of evidence between respondent and his witnesses as to the real object of this visit, but the petition alleges that it was towards the end of it that the respondent gave two shillings to Carroll, more or less secretly, to influence his vote. His wife supports him to the extent of stating he showed her the two-shilling-piece, but in Court she was unable to identify respondent. Although Carroll is suffering from the effects of some form of paralysis and his eyesight is defective to some extent, I am satisfied he made no mistake in identifying the respondent as the person who went to his house on the 6th of December. The incidents deposed to by Carroll are the same as those admitted by respondent and his witnesses save the giving of the money.

The police started enquiries to ascertain whether corrupt practices had taken place during the election and in the course of these enquiries P.C.'s Wills and Cort went to Carroll on the 21st of December. A statement was taken from Carroll who at the same time handed P.C. Wills a two-shilling-piece. This two-shilling-piece was put in an envelope and sealed and both statement and two-shilling-piece were subsequently given to Sergeant Bernard, the non-commissioned officer at Vreed-en-Hoop station.

The respondent denies the charge, and Ward and Clement say they did not see any money given, but, if it was given more or less secretly as alleged by Carroll, it would not be surprising if they saw nothing, even if I were disposed to accept their evidence on this point which I am not.

My view is strengthened by the fact that since this charge came to the knowledge of Ward and Clement, and Ward heard of it before these proceedings commenced, neither has spoken to Carroll about it. Clement paid his last visit on the 18th of December and Ward has not been to his house since the 6th of December. Neither has Ward nor Clement made any enquiries from the constables concerned in this matter. I have come to the conclusion that I must accept the evidence of Carroll and the other witnesses in support of this charge.

The second charge of bribery against the respondent is based on an allegation in paragraph 3 (c) of the petition, that on the 12th of December, 1933, he promised John Benjamin Mercurius employment as a carpenter and to procure him a situation with the Town Council if he would vote for him. Such a promise to a voter constitutes bribery, and is included in the definition of bribery set out in article 44 of the Order in Council.

Mercurius alleges that this promise was made to him by respondent after a meeting at Sisters, and Mercurius impressed me as being a truthful witness, and I accept his evidence which, in my opinion, establishes the second charge of bribery against the respondent.

The basic principle of all elections is that a voter exercises an independent judgment when casting his vote, and, therefore, the Order in Council includes in the definition of bribery a large number of acts and things done by a candidate or his agents which may have the effect of improperly influencing a person's vote.

In coming to these conclusions I have borne in mind the rule as to the nature of the evidence necessary to establish a charge of bribery, namely, that a charge of bribery, whether by a candidate or his agent, is one which should be established by clear and satisfactory evidence, as the consequences resulting from such a charge being established are very serious. A judge should not hold the charge proved upon evidence which, in his opinion, would not be sufficient to warrant a jury, in so finding (see *London-derry*, (1869, 1 O'M. & H, 277, 279). I have also not overlooked the denials of

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respondent on these charges, but it seems to me that the value of the denials is materially whittled down by two documents which, in my view, are indicative of his conception of an election, and demonstrate the ill-advised way in which he approached this contested election. I refer, first of all, to respondent's election manifesto, exhibit S.A.3, prepared by one Ashby for the respondent. Respondent says Ashby brought it to him and he approved of it. The passage I refer to is as follows, "It seems to me that a handful of Impecunious Pedagogues want to dictate to you in the choosing of your representative."

When asked in cross-examination to explain why the word "Impecunious" had been introduced in the manifesto. Ashby stated that he meant thereby to tell the electorate that there was no money or drinks to be expected from Thorne through the teachers. Counsel for the respondent, no doubt seeing the inevitable effect of this evidence, tried in re-examination to rehabilitate the witness but without success, as Ashby repeated: "I meant that the teachers had no money to give the electorate, no money to bribe them." Now Ashby was an active supporter of respondent throughout the election campaign, and in my opinion, one of his agents. Respondent has not attempted to offer any explanation on this point.

The other document is equally instructive. It is a letter written by the respondent on the 7th of December, 1933, to three persons two of whom were the polling agents, exhibit C.R.J.I. It is as follows:—

"Messrs. J. M. Deane, C. W. A. Glasgow, Samuel N. Grant,

"Gentlemen.—In reply to your letter of to-day's date, when Mr. Ward comes up to see you again, *he will do the needful*.

Mr. Deane has promised to send a list. Please let me have this soon.

"Mr. Glasgow had promised to see some of the gentlemen who were not nearby. I am hoping he is trying his best *as my success will mean something for him in many ways*. I hope you are all O.K. We reached home quite safely.—Yours very truly.

(Sgd.) C. R. JACOB."

Now when it is remembered that Ward was his clerk and agent, it seems unnecessary to comment on the letter as it speaks for itself.

The third charge of bribery is against his agent, Abdool Rohoman Khan, and is set out in paragraph 3 (b) of the petition. He is alleged to have given to one Abeed Khan, a voter, at Bagotstown, on the 15th of December, polling day, the sum of \$1 to influence his vote. The incident is deposed to by Mrs. Azore, whose evidence appeared truthful, and, in material particulars, is corroborated by that of Mrs. Douglas, a witness for the respondent.

The only question for real consideration on this charge is whether Abdool Rohoman Khan was an agent of the respondent.

Now it is clear that an agent must be a person who acts in the promotion of an election, and he must have authority, or there must be circumstances from which it can be inferred. It is not necessary to prove that he was actually appointed by the candidate and he need not be a paid agent. It is usually proved by inference from a variety of facts, each of which, taken singly, may not furnish any conclusive or even material evidence against the party accused but the aggregate of which combine to establish, to the satisfaction of the Court, the connection between the candidate and the alleged agent. (see *Bewdley* (1869) 1 O'M. & H. 17 and *Stroud*, (1874) 3 O'M. & H. 11).

Now what are the circumstances from which I am asked to infer agency? They are (1) that Khan was seen going about with a book and pencil about election time, and at Cheong's shop at Peter's Hall he tried to canvas his vote, abusing him on being informed that he (Cheong) was voting for Thorne; (2) that he told Abeed Khan he would get a car for him to go and record his vote; (3) that he was seen going from house to house for 6 or 7 weeks before the election; (4) that on election day he was seen at Providence with voters, taking them to the polls and driving them away; (5) that he asked one Samuel Newton Harper, a schoolmaster, for his vote in favour of respondent a few d before the election; (6) that on the day before the election he was seen speaking to voters with a list in his hand; (7) that he was on the platform at one meeting and spoke; (8) that he borrowed the school bell from Harper for meetings in support of respondent.

Furthermore, I do not think that Khan is the sort of person who would pay out of his own pocket the sum of \$1 in order to show his support of a candidate.

I feel my view on this conclusion strengthened when I bear in mind that although the respondent denied the agency of several persons alleged to be agents, and in respect of whom there was evidence of their activities to lead to that inference, there was no mention, even by his own witnesses, of the activities of any of those who were stated by him to be his agents. Respondent stated that his polling agents were also his election agents, and that they canvassed votes and arranged meetings, and generally reported on the campaign, yet not a single witness mentioned the names of any of them in reference to any such activities.

It was strongly urged on me by Mr. Van Sertima on behalf of the respondent that Khan was a political enthusiast who was doing this merely to assist his own cause but it is interesting to note that in the *Tewkesbury* case (1880) 3 O'M. & H. 98, the person found by the court to be an agent was described by Hawkins, J., as an active politician. Both respondent and Khan denied the agency, but the collective body of evidence on this point satisfies me that Khan was an agent of the respondent.

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The law is clear that the candidate is liable for the election agent's acts; therefore, it follows that the respondent, although not liable personally, becomes responsible to the extent that he cannot retain a seat that has been partly so obtained. (See *Stroud* (1874), 3 O'M. & H. 11; *Tewkesbury* (1880) 3 O'M. & H. 98; *Great Yarmouth* (1906) 5 O'M. & H. 176; *Londonderry*, (1869) 1 O'M. & H. 278).

Although I have come to the conclusion that the remaining six charges that were proceeded with were not proved to my satisfaction, either on account of the unsatisfactory nature of the evidence or because the facts as proved did not bring respondent within the ambit of the law pertaining to elections, I propose to deal shortly with three of them.

Of the two charges of treating that I have had to consider, one refers to what took place at the house of a man called Benjamin Augustus Nestor on the 8th of December, set out in paragraph 4 (c) of the petition, and the other, to an incident that took place after a meeting held at Bagotville on the 13th of December, when Mercurius was treated to two drinks by the respondent, as alleged in paragraph 4 (b) of the petition.

Now, treating also invalidates an election if the circumstances show it was done with a corrupt intention. Baron Pollock in the *St. George's Division* case, (1895) 5 O'M. & H. 99, 100, lays it down that if the refreshments provided were excessive, if the occasions were numerous, and if there were other circumstances calculated to excite suspicion, a corrupt intention might be inferred. And Vaughan Williams, J., in the *Borough of Rochester* case, (1892) 4 O'M. & H. 157, says that it is not necessarily corrupt treating if the persons attending a meeting are provided with some sort of refreshment so long as they are not gathered merely to gratify their appetites and so to influence their votes.

Although I am satisfied that on these two occasions drinks were provided by the respondent or his agents, I feel that, giving full weight to the statements of the law in these and other cases, the circumstances are on the border line, and, therefore, I must hold the charges not proved.

But it is well to point out that candidates who resort to treating the electorate must realise that it is a dangerous practice which exposes them to an election petition which may result in the election being declared void.

The charge of illegal practice in paragraph 6 of the petition, alleges that one Collins, an agent of the respondent, paid or contracted to pay to Cyril Sierra on the 15th of December, \$1 to carry voters to the polls.

In my opinion the proof of agency is weak, and bearing in mind what Blackburn, J., said in the *Hastings* cases (1869) 1 O'M. & H. 219, as to much more evidence being required to satisfy a

Court of agency in the case of an isolated act, I hold this charge also not proved.

To sum up, I find that there has been established against the respondent, personally, two charges of bribery. From this it follows that I must declare the election of the respondent, Charles Ramkissoon Jacob, void, and in view of the fact that the petitioner claims the seat it becomes necessary to examine the recriminatory case of the respondent against the petitioner.

As I mentioned at the commencement of my decision, the respondent prefers four charges against the petitioner, three of bribery and one of treating. The charge of bribery in paragraph 2 (*b*) of the respondents case was abandoned, and the allegation of treating in paragraph 2 (*d*) was not pressed. That leaves to be considered two charges of bribery set out in paragraph 2 (*a*) and 2 (*b*) respectively of the respondent's case—one against the petitioner personally, the other against Henry Aaron Britton, an agent of the petitioner.

The petitioner is alleged to have given to Mercurius, the same person previously referred to on polling day, at La Grange the sum of \$1 to induce him to vote in his favour or for having done so. Now two circumstances about this incident strike me as curious. According to the evidence there was no attempt at secrecy by the petitioner when giving this money, and Mercurius immediately took it to four supporters of Jacob, namely, Crawford Edwin, Felix and Edwards, none of whom was a friend of Mercurius and showed them the \$1 note. In addition, this is alleged to have taken place between 3 and 4 p.m. on polling day on the road in front of the polling station with voters about, including supporters of both sides. Two of the witnesses called to support this charge proved to be unreliable, namely, Crawford and Edwards, and I cannot say that the others, Edwin and Felix, have impressed me sufficiently to enable me to be satisfied on this charge which is denied by petitioner and Mercurius. In the circumstances I do not find this charge proved.

Britton is alleged to have given one Simeon Adolphus Clarke, a voter, on polling day at Ruimveldt, the sum of \$1 to induce him to vote for the petitioner. Three witnesses, John Frederick Joseph, Peter Ow King and Ashby, the author of the manifesto, were called in support of this charge. This bribery is also alleged to have been done very openly on the public road in front of the polling station, between 4 and 4.30 p.m. and about fifty to sixty feet from the witnesses. Now, if these witnesses were trustworthy. I would have had to give credence to their story in spite of the open character of the bribery, but I find myself unable to place much reliance on them. Ashby was a shifty witness, full of guile. His taking part in a visit to one of the witnesses called by the petitioner, Mrs. Azore, in company with the respondent and one Wray, after she had given evidence, and during a period when the

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hearing of the petition had been adjourned, has left an unfortunate impression on my mind and satisfied me that it would be unsafe to rely on his story. I am afraid that I would also hesitate to put much credence on the evidence of the two remaining witnesses who seemed to be closely connected with Ashby on polling day.

The charge has been denied by both Britton and Clarke, the latter of whom is employed at the Transport and Harbours Department.

I was invited by Mr. Woolford to discard Britton's evidence in considering this charge and to treat him as a discredited witness. Any difficulties that have been created, and any suspicion in my mind on this part of the petition were entirely the result of the unsatisfactory nature of Britton's evidence some portions of which, to say the least, can only be described as ridiculous. As I have stated before, a charge of this nature must be established by clear and satisfactory evidence, but I would be acting contrary to the established rule of the Court if I permitted the unreliable evidence of the witnesses called in support of this charge by the respondent to be bolstered up by the unsatisfactory evidence of Britton.

Suspicion there is but I cannot act on evidence of mere suspicion.

There remains to be dealt with the respondent's challenge of the petitioner's qualification for election as a member of the Legislative Council. Article 21 of the Order in Council makes it necessary that a candidate for election should possess certain qualifications one of them being "a clear annual income of not less than two thousand four hundred dollars." The petitioner produced a book containing certain figures making his income for the year 1933 the sum of \$2,482. This book contains the months of the year but not the dates when the entries were made or the payments were alleged to have been received, and in addition, contains, with one exception, round figures, which could not be reconciled with the figures given by Mr. Percy Wight from his books. I have serious doubts as to this being a book of original entry.

The figures taken from books subsequently produced by Mr. Delph, Manager of the "Daily Chronicle," and Mr. Wight, which were not challenged, throw so much doubt on petitioner's that I do not feel justified in concluding that petitioner was properly qualified at the time he presented himself for election.

This disposes of the matter, but as Mr. Van Sertima contended that the word "income" should be construed as bearing a meaning analogous to that word in reference to income tax law. I shall express my opinion on it. This argument had reference to certain payments by Mr. Wight to the petitioner which, on the evidence before me, did not seem to be based on any contract, or obligation between the parties. Assistance is derived on this point from the

case of *Stedeford v. Beloe* (1932) A.C. 368, a decision on the Income Tax Act, 1918, where it was held by the House of Lords that a mere voluntary payment is not, in the true sense of the word, income, even if there is a succession of such voluntary payments, none of which need necessarily be continued. I am therefore inclined to think that this contention is sound.

For the foregoing reasons it is my deep duty to declare that the election of the respondent, Charles Ramkissoon Jacob, is void, and that the petitioner who claims the seat was not duly qualified at the time he presented himself for election, and, therefore, I refuse to make the declaration that he was duly elected.

As to the costs, I intend to adapt what appears to me the more modern rule of the Court of fixing the proportion of costs to be recovered by each party. (See *Berwick-upon-Tweed* (1923) 7 O'M. & H. 47; *Oxford Borough*, *ibid.* 97). In doing so I bear in mind what Denman, J., said in the *Ipswich Case* (1886) 4 O'M. & H. 75 "We may be doing mischief by attempting to sever too much the question of the case of the petition as a whole from the question of each particular case brought forward." I therefore order that the petitioner be allowed three-fourths of the costs of the petition and the respondent one-quarter of his costs. The costs awarded to the petitioner and respondent respectively will be set off one against the other, and execution will be issued for the balance in favour of the party entitled thereto.

I would like to add that I cordially associate myself with the remarks of Mr. Woolford as to the admirable spirit in which the case was conducted, and to express appreciation of the assistance given by counsel on both sides.

In conclusion it is pertinent to point out that it is the duty of the Court to preserve and maintain the purity of electoral contests, and I trust that the judgment I have pronounced will materially assist in the accomplishment of that purpose. Let those persons, whose sense of honest citizenship seems to have been blunted by their connection with corrupt and illegal practices, henceforth bear in mind that these practices are not an essential concomitant of elections.

Election declared void.

Solicitors: *Albert McLean Ogle; W.D.Dinally.*

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Re EDMUND FITZGERALD FREDERICKS, DECEASED;
Ex parte P. M. BURCH-SMITH.

[1934—No. 114. DEMERARA.]

BEFORE DE FREITAS, J., (ACTING).

1934. MAY 14, 28.

Will—Not signed by testator—Enclosed in an envelope—Signature thereon—Omnia praesumuntur rite esse acta—Whether that maxim applies—Validity of will—Pronounced against—Originating summons—Whether right procedure.

A document purporting to be a will was not signed by the deceased who was a barrister-at-law. Both of the subscribing witnesses were dead, and one of them had been a practising solicitor. The said document was found, after the death of the testator, in his safe. It was enclosed in a closed envelope on which the words "Will of E.F. Fredericks 4/3/30" appeared in the handwriting of the deceased. The name as written on the envelope was the usual signature of the deceased.

Held, that the name or signature appearing on the envelope which was in no way attached or connected with the will except that at some time after the attestation by the witnesses the will was inserted in the envelope was not a signature to the will, and that the document was not validly executed as a will.

Carlos Gomes, solicitor, for the applicant.

DE FREITAS, J., (Acting): Edmund Fitzgerald Fredericks, Barrister-at-law, died in this Colony on the 6th April, 1934.

Two days after his death a typewritten document dated the fourth day of March, 1930, purporting to be his Last Will and Testament was found in his safe at his chambers. This document which was enclosed in a closed envelope, consists of half of a double sheet of what is commonly known as pott-paper, foolscap size, one page of which contains the wishes of the deceased as to the disposition of his property and the usual attestation clause. The first three lines at the top of the page are as follows:—

"This is the Last Will and Testament of me Edmund Fitzgerald Fredericks. Barrister-at-law, and revokes all former wills and codicils." and the last line is:—

"Made this fourth day of March, 1930, at Georgetown, Demerara." Then follows on the left half of the page and half inch below the last line the usual attestation clause—"Signed by the Testator, &c." There is no signature of the deceased on the document; the space at the foot thereof for the signature being left blank.

At the end of the attestation clause there are the signatures of the two attesting witnesses—

"B. C. Belmonte" and "Henri Campbell" both of whom have since died.

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The envelope in which the document was enclosed has the following words written thereon in the handwriting of the deceased:—

“Will of
E. F. Fredericks 4/3/30”

The name as written on the envelope is the usual signature of the deceased.

The carbon copy of the document with the same two witnesses' signatures was found at the house of the deceased enclosed in an envelope similar to the one containing the original document and with the identical words written on it in the deceased's handwriting as appear on the envelope in which the original was enclosed.

A question having arisen as to whether the document could be admitted to probate Pearson MacKattick Burch-Smith, the person named by the deceased as his executor, is now applying by way of Originating Summons for an order that the endorsement on the envelope bearing the signature of the deceased and dated the 4th day of March, 1930, and the document enclosed therein constitute one testamentary disposition, namely, the last will of the deceased, and that it was executed within the terms of the Wills Ordinance, chapter 148.

Albertha Pieters and Cyril Thompson, two of the legatees mentioned in the will, who also claim to be the next-of-kin of the deceased, but have not attempted to establish their claim, have appeared in person and expressed their consent to the order applied for.

The question that arises is one that has given me some anxious thought for if the document purporting to be the will of the deceased is not admitted to probate, it is clear that effect cannot be given to his wishes unless the legatees who have appeared can eventually prove their claim to be the sole next-of-kin and desire that those wishes be carried out despite the intestacy.

I have carefully examined all the authorities cited at the hearing of this application and many others, but I regret that much as I should wish to be convinced of the error of my first impression I have not been able to find any authority which could justify me in pronouncing in favour of the validity of the will.

It is extraordinary that this difficulty should have arisen in respect of a will purporting to have been made by a barrister and witnessed by one who was once a practising solicitor and who would be expected to be conversant with the requirements of the law as to the proper execution of wills.

The sole question to be decided is whether the signature of the deceased on the envelope in which the original writing was enclosed can be said to be his signature to the will in compliance with the provisions of the Wills Ordinance, chapter 148.

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The only evidence I have as to the execution of the will is that set out in paragraphs 4 and 5 of the applicants affidavit which are as follows:—

“4. On the 4th day of March, 1930, the deceased told me at his office that he desired to make his will and requested me to send his typist Valarie Valentine Horton, then Nelson to him to take down the terms thereof.

5. I thereupon sent the said typist to him, but was not present in the room when the said will was dictated to her. Later the said day, I saw Benjamin Colaco Belmonte since deceased, and a person known to me by the name of Paul Mattis also since deceased in the office of the said Edmund Fitzgerald Fredericks. Later the same day the deceased told me in their presence that he had made a will in which he had appointed me one of his executors. He then had in his hand an envelope bearing the words—“Will of” and dated “4/3/30” in the handwriting of the deceased together with his signature thereon. He then told me in the presence of the said Benjamin Colaco Belmonte and the person known to me as Paul Mattis that the envelope contained his last will which he was putting in the safe where I could find it after his death, and that he was taking to his residence at E.E. Bent and Hardina Streets a duplicate thereof. He then in my presence and in the presence of the said Benjamin Colaco Belmonte and of the person known to me as Paul Mattis put the said will in his iron safe at his office.”

It appears that Paul Mattis and the witness Henri Campbell are one and the same person.

Now, can it be said in these circumstances that the signature of the deceased appearing between the words “Will of” and the figures “4/3/30” endorsed on the envelope was intended by Mr. Fredericks to be the signature to his will? I think not. It seems to me more probable that the whole endorsement was intended by him merely as a description of the document enclosed in the envelope, especially when one sees the very same indorsement on each of the two envelopes, the one containing the original and the other the carbon copy; furthermore from the folding of the document it appears that the only part of it exposed to the view of the witnesses was what was written in the first two lines, and the words—“names as witnesses” in the last line of the attestation clause, the space for the testator’s signature being covered by the last fold of the paper. It is not at all unlikely therefore that through an oversight Mr. Fredericks forgetting that he had not signed the will took up the folded document and inserted it in the envelope and then wrote the indorsement.

But even assuming that the deceased did intend the signature on the envelope to be the signature to his will, there is no

evidence that it was written before the witnesses attested and subscribed their names and the probability is that it was not. There is evidence that he acknowledged in the presence of the witnesses that the document enclosed in the envelope was his last will but this was done after the witnesses had already attested; and there is nothing to show that the witnesses saw or had the opportunity of seeing the signature.

It is now established by the authorities that both witnesses must attest and subscribe *after* the testator's signature shall have been made or acknowledged to them when both are actually present at the same time, although they need not attest in the presence of each other (*Williams on Executors*, 12th ed., p. 50) and to constitute a sufficient acknowledgment the witnesses must at the time of acknowledgment see or have the opportunity of seeing the signature of the testator

It is urged however that I should invoke the aid of the maxim "Omnia praesumuntur rite esse acta," seeing that the testator was a barrister and therefore presumably well acquainted with the proper mode of executing wills and that I should presume in favour of due execution.

There is no doubt that had the signature of the deceased appeared at the foot of the will. I should unhesitatingly apply the maxim in the absence of evidence to the contrary, the two witnesses being now dead, (see *In the Goods of Peverett* (1902) P. 205).

In *Harris v. Knight* (1890) 62 L.T. 507; 15 Prob. Div. 170, 179 Lindley, L.J., said in the Court of Appeal "The maxim *Omnia praesumuntur rite esse acta*, is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established, when the evidence is consistent with that intention having been carried into effect in a proper way, but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other, but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid rather than that it was done in some other manner which would defeat the intention proved to exist and would render what is proved to have been done of no effect."

The difficulty I find in applying this maxim to the present case is that the document before me is unsigned by the deceased, and the only signature is that which appears on the envelope.

In the recent case of *Neal v. Denston* (1932) 147 L.T. 460 Langton, J., at p. 463, after quoting the above extract from Lindley, L.J., said "I am in this case really met with no evidence upon which I can really rely at all as to the manner in which this act of

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execution was performed, and I have a document before me which on the face of it was properly and duly executed. The signature of the testator appears above the signature of the two witnesses, the signatures of the two attesting witnesses appear where they ought to appear and where one would expect them to appear opposite the attestation clause and exactly where they would be expected to appear if the execution of the will had been due and proper. Applying the maxim in these circumstances in the manner in which Lindley, L.J., explained it I think I am entitled to say, and I feel I can say as a matter of probability that the probabilities are that this execution was due and proper.

In the present case as I have already said, the signature does not appear on the will, but appears where no one could possibly expect it to appear if it was intended as a signature to a will.

Section 4 of the Wills Ordinance requires that a will, to be valid, shall be signed by the testator at the foot or end thereof, and section 5 (1) provides that so far only as regards the position of the signature of the testator, the will shall be deemed to be valid if the signature is so placed at or after, or following, or under, or beside, or opposite to, the end of the will, that it is apparent on the face of the will that the testator intended to give effect by that signature to the writing signed as his will. Subsection two of section five gives an enumeration of circumstances which shall not affect the validity of the will, none of which are applicable to the present case. There is however a proviso to the section that nothing written below the signature shall be given effect to.

How then can it be said that a name or signature appearing on an envelope which is in no way attached or connected with the will except that at some time after the attestation by the witnesses the will was inserted into the envelope, is a signature to the will, within the meaning of the Ordinance? In my view, to so hold, would be to completely disregard the statutory provisions.

I am aware of the decisions in which a signature on a sheet of paper upon which no dispositive part of the will was written has been held to be the signature to the will, but in all those cases, so far as I have been able to ascertain, the paper bearing the signature was at the time of execution in some way or other attached to the paper or papers on which the will was written: (See *Rees v. Rees* (1873) 3 P. & D. 84, *In the Goods of Horsford* (1874) 3 P. & D. 211; *Lewis v. Lewis* (1908) P. 1. The facts in these cases are not at all similar to the case we are now considering.

The cases which at first blush appear to have any similarity to the present one are *In re Nicholls. Hunter v. Nicholls* (1921) 2 Ch. 11, and *In the Goods of Almosnino* (1859) 29 L. J. P. 46, cited by the solicitor for the applicant; but there again although there were both cases in which it was held that the endorsement on the envelope and the document therein contained consti-

tuted one testamentary disposition, the facts and the evidence as to the execution of the will and the endorsement on the envelope are very different from those in the present case. *In re Nicholls, Hunter v. Nicholls* was a case of a closed or secret will made by an Englishman in Chile according to the provisions of the Chilean Civil Code before a Notary Public and five witnesses.

The will itself was signed by the testator at the foot thereof in secret without witnesses and placed in a sealed envelope which was endorsed with a statement on the cover by the Notary that the testator had appeared before him and stated before five witnesses that within the sealed envelope his testamentary dispositions were contained. This endorsement was also signed by the testator, the witnesses and the Notary.

By the Chilean Civil Code a closed will was deemed to include the cover which contained it.

The will was registered or proved in Chile and administration with the will and cover annexed was granted to the plaintiff in England.

A question having arisen whether the document enclosed in the envelope with the cover together constituted the will of the testator according to English law the trustees issued an Originating Summons for the Court's direction.

It will be readily seen from the above statement of facts that Chilean law must necessarily be an important though not the sole deciding factor in the determination of the question. Eve, J., before whom the matter was argued says at p. 15 after citing Art. 1021 of the Chilean Civil Code:—

“The article has an important bearing on the question I have to determine”

and at p. 16 he continues thus:—

“I think the indorsement is a statement by the testator made in the presence of the adequate number of witnesses that the document which is therein contained is his will, and that his property is to be disposed of in accordance with the terms of that document. Having regard to the law under which the will was made and the whole transaction took place, it is impossible in my opinion to treat the envelope as divorced from the document which it contains.”

The case followed the reasoning in *In re Almosnino* (1859) 29 L. J. P. 46.

Reference to the judgment and the facts in that case will at once make clear the difference between it and the present one, although it was a case of a will made in England.

In my opinion it is impossible to say that either of those cases is any authority for my arriving at the same conclusion as regards Mr. Fredericks' will.

Re E. F. FREDERICKS, DECD.

I must therefore with much regret pronounce against the validity of the will. The application is dismissed.

I allow the applicant his costs out of the Estate which I fix at \$45 (forty-five dollars).

I desire to add word on a point of practice. The procedure by Originating Summons adopted in this case is, in my opinion, as at present advised, incorrect but as the point has not been fully argued, I need only say that it must not be taken as a precedent.

Application dismissed.

L. REIS v. J. GONSALVES.

LEONARDA REIS v. JOHN GONSALVES.

[1934.—No. 141. DEMERARA.]

BEFORE DEFREITAS, J., ACTING).

1934. JUNE 19, 20, 22.

Promissory note—On demand—Payment—Demand for—Interest—Claim for—Facts to be stated.

Where interest is claimed on a promissory note made payable on demand it is sufficient if the date of the demand is stated in the claim.

Francis Dias, solicitor, for plaintiff.

E. G. Woolford, K.C., for defendant.

DEFREITAS, J., (Acting): This is a claim on a specially indorsed writ for \$100.58 being principal and interest due on a promissory note made by the defendant in favour of the plaintiff, payment whereof was demanded on the 2nd May, 1934.

The note was for \$100 and is dated 8th November, 1930. The sum of 58 cents is claimed as interest from the date of the demand.

It is contended on behalf of the defendant that although interest may be recovered from the date of demand on a promissory note made payable on demand, the plaintiff is not entitled to recover it in the present case on a specially indorsed writ because there is no statement on the indorsement of the claim that the interest is claimed either on a contract or under a statute. Counsel for defendant admits that the Bills of Exchange Ordinance allows such interest to be recovered as liquidated damages but the plaintiff having failed to state in the indorsement that the interest is claimed under that Ordinance he is precluded from claiming it in this action by way of a specially indorsed writ, and that the Court has therefore no jurisdiction to give judgment on the plaintiff's claim.

Until I am told by a Court of Appeal that I am wrong. I shall hold, as I indicated at the hearing, that the writ is properly indorsed as a specially indorsed writ. It follows the forms given

in the Rules of Court, and all the precedents I have ever seen for claims of this nature on specially indorsed writs, and it is in accordance with the practice that has prevailed both here and in England for years.(see *Bullen and Leake*, 8th Ed., p. 116, and the Forms in the local Rules of Court and in the Annual and Yearly Practice).

Counsel for the defendant has placed great reliance on a passage appearing at page 26 of the Yearly Practice for 1934, in which it is said that the indorsement itself must “state” whether interest is claimed under a contract to pay it or under a statute fixing the amount.

It would have been more accurate to say that the indorsement must “show” rather than “state” how the interest is claimed (see *Gold Ores Reduction Co. v. Parr*, (1892) 2 Q.B. 14).

In my view the indorsement shows quite plainly that the interest is claimed from the date of demand, from which date it is admitted that interest is recoverable as liquidated damages under the Bills of Exchange Ordinance. In none of the precedents given does a statement ever appear that interest claimed on a bill of exchange is claimed under the Bills of Exchange Act.

The *ratio decidendi* in all the cases cited by Mr. Woolford, K.C. for the defendant was that the interest claimed was not a liquidated amount, it being interest that could only be given and assessed by a jury, and if a jury thought fit, and therefore unliquidated (see *London and Universal Bank v. Earl of Clancarthy*, (1892), 1 Q.B. 689; and *Lawrence & Sons v. Willcocks*, (1892) 1 Q.B. 696).

The defendant admits making the promissory note sued on, but alleges that the plaintiff is indebted to him in the sum of \$9.56 for goods sold and delivered, which he claims to be allowed to set off against the plaintiff’s claim. The plaintiff does not admit the defendant’s claim.

In the circumstances the defendant is entitled to leave to defend as to \$9.56 and I give him unconditional leave to defend as to that extent.

I give judgment for the plaintiff for the sum of \$91.02 and reserve the question of costs until the determination of the defendant’s set off.

I give the following directions as to the further conduct of the action.

- (1) No further pleadings shall be necessary.
- (2) The defendant to furnish the plaintiff with particulars of the set off claimed before mid-day on Monday the 25th June.
- (3) The case is fixed to be heard on Wednesday the 27th June, at 12.45 p.m.
- (4) Should the defendant succeed on his set-off, no costs to be awarded to the plaintiff; should he fail to establish a set off to the extent of reducing the plaintiff’s claim to \$100 the defendant to pay the plaintiff the costs of the action.

A. R. C. EWING v R. V. E. WONG.

ALFRED RAILTON CRUM EWING v. ROBERT VICTOR
EVAN WONG.

[PETITION NO. 54 OF 1934.—DEMERARA.]

BEFORE CREAN, C.J.

1934. SEPTEMBER 7, 10.

Election petition—Purity of elections—Ballot papers—Right of Court to inspect—Elections (Legislative Council) Regulations. 1930, Rule 26—Evidence Ordinance, chapter 25, section 10.

A judge hearing an election petition has an absolute discretion to inspect any document in the parcel produced by the Clerk of the Legislative Council in pursuance of an order of Court made under regulation 26 of Elections (Legislative Council) Regulations, 1930, if in his opinion such an inspection will be helpful to him in determining any one of the issues raised in the petition.

H. C. Humphrys, (A. C. Brazao with him) for the petitioner.

E. G. Woolford, K.C., and *S. J. Van Sertima, K.C.*, (A .J. Parkes with them) for the respondent.

Cur. adv. vult.

CREAN, C.J.: The point has been raised by Mr. Woolford that the Court should not inspect the 5 Ballot papers which have been tendered in evidence. The reason given for the objection to their production for inspection is that no grounds have been shown why they should be inspected. When this objection was taken I was of the opinion that there was no substance in it. But, as Counsel asked for an opportunity to argue the point, such an opportunity was given, and, after hearing the argument and the authorities quoted in support of it, I am still of the opinion that point is not even an arguable one. The law as to elections in this colony is set out in the British Guiana Constitution Order in Council, 1928.

By virtue of the authority of this order in Council, rules were made for the regulation of the election of members of the Legislative Council. Rule 26 of these regulations directs the Returning Officer to make up and seal into one parcel the different parcels of voting papers, counterfoils, marked copies of Registers, etc., and send the same to the Clerk of the Legislative Council who is directed to keep them in safe custody. It is set out in this rule that when an election petition has been presented questioning the validity of any election the said Clerk shall, on the order of a Judge of the Supreme Court, deliver to such Judge the parcel relating to the election that is in dispute.

In accordance with that rule an order was made that the Clerk deliver the parcel containing these voting papers, and consequently, they are all before the Court. But it has been argued

that though they are handed into Court, the Court should not inspect them unless some reason is shown for such inspection. The only ground for such an argument would be that secrecy is the all important object of election law, but it must strike anyone that it is equally important to secure purity of election. And if it were not within the power of the Court to inspect all the contents of the parcel which the Clerk produces, it might be impossible to determine on the latter issue.

There is a definite provision in the regulations of this Colony which contemplates all election papers being produced in Court by the Clerk of Council, on an order of the Judge hearing an election petition. That order is made by the Judge on the assumption that their production will assist in the more effectual trial of the petition. But if the objection to their being looked at by the Court is upheld, then it must be taken that this specific provision of law was made without any definite object, and is meaningless. For, if papers are to be handed into Court according to law, it must be assumed that they are not produced for the ornamentation of the Court, but are to be read by the Court, and inspected by the Court, if it is thought necessary for the better determination of the issue for trial.

To my mind, it is quite clear that the law of this Colony gives the Judge hearing an election petition absolute discretion to inspect any document in the parcel produced by the Clerk of Council if in his opinion such an inspection will be helpful to him in determining any one of the issues raised in the petition.

Further, and apart from the above regulations, there is a general power given to a Judge by section 88 of the Evidence Ordinance of this Colony by virtue of which he may call for and compel the production of any document or other evidence he considers material.

NISMOO v. KUDRATH.

NISMOO, Plaintiff,

v.

KUDRATH, Defendant,

[1930. No. 68.]

BEFORE GILCHRIST, J.

1931. FEBRUARY 10, 11, 14, 16; MARCH 2.

Judgment summons—Judgment debt—Wilful default in payment—Debtor's means since judgment—To be proved—Magistrate's Court—Order of commitment—Enforceable within four years—Ord. 11 of 1893, ss. 2, 36, 39, 41, 53 (1); Ord 10 of 1893, ss. 50, 54, 55, 56, 66, and Magistrate's Court Rules 1911 and 1927—Insolvency Rules 1901, rule 351—Not applicable to Magistrate's Court.

Rule 351 of the Insolvency Rules, 1901, (which provides that an order of commitment on a judgment summons made by a judge of the Supreme Court if unexecuted for a year and not renewed is inoperative) does not apply to proceedings in a magistrate's court by way of judgment summons.

An order of commitment on a judgment summons made by a magistrate may be executed within four years from the date of the order.

It would be an abuse, a most irregular and improper proceeding and would constitute a great neglect of duty if a judge (or magistrate) in order to save himself the trouble of enquiring whether there was a default and whether the debtor *had* possessed the means of making payment were to issue a warrant of commitment with a stipulation for suspension if some smaller sum was paid without having really arrived at the conclusion that there *had* been default. An adjudication of committal ought only to take place where there has been a *wilful* default in payment because this power of committal is not an imprisonment for debt, it is an imprisonment for past dishonesty.

If the whole conduct of the parties before the judge (or magistrate) was such as to recognise that the debtor *had* means, the judge (or magistrate) might well adjudicate without any specific proof of it.

Action for malicious arrest. The facts and arguments appear from the judgment.

E. F. Fredericks, for plaintiff

J. A. Luckhoo, K.C., for defendant.

Cur. adv. vult.

GILCHRIST, J.: In this action the plaintiff claims damages from the defendant for malicious arrest on the 5th January, 1928, and 25th October, 1929, alternatively, for false imprisonment.

2. The following facts are not in dispute:—

(a) On the 21st October, 1927, the Magistrate of the East Demerara Judicial District, at the Sparendam Magistrate's Court, on judgment summons proceedings instituted by the defendant against the plaintiff in respect of a judgment for \$29.06 obtained by the defendant against the plaintiff, made the following order:—

“Defendant (plaintiff in this action) by consent committed to prison for 21 days. Order suspended on payment of \$2 a month, first payment on 15th November, 1927.”

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(b) The costs of the judgment summons proceedings were \$1.68.

(c) On the 11th December, 1927, the plaintiff paid the defendant \$2.

(d) On the 5th January, 1928, the defendant swore to an affidavit in the said matter as follows:—

“1. That on the 21st October, 1927, at said Sparendam Court, I obtained an order against the said defendant Nismoo on a judgment summons in my favour committing the defendant to prison for 21 days for failing to pay me a sum of \$29.06 and costs, \$1.68, but the commitment to prison was suspended on payment by him to me of the sum of \$2 per month commencing on the 15th day of November, 1927, for the first payment.

“2. That the defendant has since the date of the said order paid to me the sum of \$2 on account of said amount of said order.

“3. That the defendant has neglected to pay the balance amount due to me on said order amounting to the sum of \$28.92 although he has and has had the means to do so and I desire that a warrant be issued for his commitment to prison.”

(e) On the 6th January, 1928, the Magistrate of the said District issued an order of commitment of the judgment debtor, the plaintiff in this action,—see Exhibit N3.

(f) The total amount payable by the plaintiff to the defendant on the judgment summons proceedings totalled \$31.52.

(g) On the 9th January, 1928, the plaintiff paid to H. B. Gajraj, agent of the defendant, the sum of \$2.

(h) Subsequent to the 9th January, 1928, the plaintiff paid to defendant further sums from time to time, the last payment being \$3 on the 26th February, 1929. These payments together with the \$2 paid on the 11th December, 1927, and \$2 paid on the 9th January, 1928, amount to \$29.

3. The order of commitment of the judgment debtor (plaintiff) of the 6th January, 1928, is endorsed as having been executed on the 25th October, 1929.

4. The case for the plaintiff is that at this time, that is. on the 25th October, 1929, there was nothing due by him to the defendant in respect of the judgment summons proceedings, there having been a mutual agreement between himself and the defendant when the \$3 was paid on the 26th February, 1929, to set off certain costs due by the defendant to him, which said costs satisfied his liability to the defendant in respect of the said proceedings.

The case for the defendant is a denial of any agreement between himself and the plaintiff to set off certain costs, that no costs were payable by him to the plaintiff, that on the 25th October, 1929, when the order of commitment was executed, the sum of \$2.52 remained unpaid.

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Considering and weighing the evidence in this respect I come to the conclusion that on the 25th October, 1929, the sum of \$2.52 still remained unpaid in respect of the said proceedings.

6. The submission of counsel for the plaintiff is that the order of the 21st October, 1927, is an order that the judgment debt be paid by instalments and not as contended by counsel for the defendant at the trial (a complete change of front to paragraph 8 of the defence) a committal order for the non-payment of the judgment with a direction that it shall not issue if the plaintiff pays the debt by instalments.

7. Now what is the meaning of the order of the 21st October, 1927, (I should prefer to say the “note of the Magistrate of his order”) on the hearing of the judgment summons proceedings? (Exhibit N1). It is substantially similar to that made by the County Court Judge in *Reeves v. Fowle*, which, under the name of *Stonor v. Fowle*, was dealt with in the House of Lords, (1888) 13 A.C. 20, where it was held to be an order of commitment with a direction that it shall not issue if the debtor pays the debt by certain instalments.

When the order for commitment was subsequently issued in this matter, that is the order of commitment of the 6th January, 1928, this is made perfectly clear by its terms. Those terms are: “Whereas Kudrath the plaintiff obtained a judgment against the defendant Nismoo for the payment of \$29.06 and the defendant Nismoo has made default in payment of the said sum and the defendant Nismoo having been duly summoned to show cause why he should not be committed to prison for such default. And it being now proved that the defendant Nismoo now has or has had since the date of the judgment (but has paid \$2) the means to pay the sum then due and payable in pursuance of the judgment, and has neglected to pay the same, and has shown no cause why he should not be committed to prison: It is hereby ordered that the defendant Nismoo be committed to prison for 21 days unless he sooner paid the said sum and costs stated below as that on the payment of which he is to be discharged” “And you the said Police and keep him for 21 days from the arrest under this order, or until he is sooner discharged by due course of law.”

8. I would here point out that the plaintiff in his reply pleads that “the Magistrate had jurisdiction to make the orders of the 21st October, 1927, and 6th January, 1928 (the pleading states 5th January, clearly a clerical error) and there was proof of means on which the Magistrate could and did act.”

9. In *Stonor v. Fowle* (1888) 13 A.C. 20 Lord Halsbury, L.C., says at page 24:— “The Debtors’ Act has prescribed that there shall be in substance an abolition of imprisonment for debt, but has also provided that a debtor having had the means or having the means at the time when the matter comes up for

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adjudication. . . . wilfully refuses to pay or has improperly spent the money which he had after the date of the judgment, and has not applied it as he should have done in honesty for the purpose of satisfying the creditor's claim, there shall then be a jurisdiction . . . of sending him to prison, and that that sending of him to prison shall be a punishment to him for the offence which upon that hypothesis he has already committed, inasmuch as the Act especially provides that that imprisonment shall not be in satisfaction of the debt: it is an imprisonment for the offence which he has already committed." At page 25 he says: "What happened afterwards, whether the man had means or had not, whether he did comply with the conditions into which he had entered or not, could in logic or good sense have no relation to the offence which on (in this case, the 21st October, 1927) was already consummate. But the extreme rigour of the law might be relaxed in his case if instead of continuing his refusal or neglect to pay he complied with what the plaintiff in this case was satisfied with, namely, the gradual wiping off of the debt by the payment of . . . per month. And I do not think any one observation . . . seems to throw any doubt upon such a course being legal." The other Law Lords agreed with his opinion.

10. In *Mitchell v. Simpson*, 23 Q.B.D. 373, Charles. J., in dealing with the Debtors Act, says at pages 378-9:—"The order of commitment requires the high bailiff to deliver the defendant to the custody of the Governor of the prison and requires the Governor to safely keep him in the prison for . . . days from the arrest under this order or until he be sooner discharged by due course of law. I quite agree that ordinarily a person cannot purge himself of contempt without some action of the Court itself. But Parliament can point out a way in which this may be done and in this case it has prescribed what shall be due course of law, viz., either remaining in prison until the determination of the sentence or else paying the money with the costs. In either of those methods the debtor can escape the further consequences of his misconduct It certainly seems to me that an order of commitment under the Debtors Act is punitive in its character although it can be got rid of by a money payment."

In the Court of Appeal, in the matter of *Mitchell v. Simpson*, 59 L.J.Q.B. 355, Lord Esher, M.R., says at page 358:—"The order committed the . . . to prison, not because he was in debt, but for an offence—that is to say, for not paying his debts when ordered by the Court when he had the means to do so; and it is therefore, a contumacious refusal to obey an order of the Court after he has had every sort of warning and opportunity given him to do so."

In *Marris v. Ingram* (1879) 13 Ch.D., 338, Sir George Jessel, M.R., says at page 343:—" . . . the Act abolishes imprisonment

for debt in the case of an honest debtor, but it is at the same time intended for the punishment of a fraudulent or dishonest debtor. It is in that sense vindictive, and intended to be so.”

11. So in the present case, having regard to sections 3 and 4 of the Debtors Ordinance, No. 9 of 1884, which are substantially the same as sections 4 and 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), I hold that the order of the Magistrate of the 21st October, 1927, as drawn up by the order of commitment of the 6th January, 1928, was an order committing the plaintiff (the judgment debtor) to prison for not paying his debt to the defendant when he had the means to do so, that is, for the offence which was on the 21st October, 1927, already consummate, but from what evidently passed between the plaintiff and the defendant at the hearing of the judgment summons proceedings, the Magistrate, to use the words of Lord Herschell in *Stonor v. Fowle*, in mercy to the plaintiff declared liable to suffer imprisonment, allowed him an opportunity of escaping from that liability provided he made certain payments.

12. From what I have said above it follows that the allegation in paragraph 4 of the Statement of Claim that the affidavit of the defendant sworn to on the 5th January, 1928, was false in certain respects, is unfounded. The said allegation appears to me to be founded on the opinion of counsel for the plaintiff that the order of the Magistrate of the 21st October, 1927, was an instalment order for the liquidation of the judgment debt and not an order of commitment for his (the plaintiff's) contumacious conduct in not satisfying the said judgment debt when he had the means to do so.

13. It is not necessary to deal with the question of the alleged arrest of the plaintiff in January, 1928, in view of my finding as to the meaning of the order of 21st October, 1927, as subsequently drawn up by the order of commitment dated the 6th January, 1928, and in view of the admission of counsel for the plaintiff at the hearing that if the order of the 21st October, 1927, was a committal order and not an order for the payment of the judgment debt by instalments the failure of plaintiff to pay on due dates, that is on the dates specified by the said order as the condition on which the order of commitment should remain inoperative, the subsequent payment of \$2 on the 9th January, 1928, to Gajraj for the defendant would not have purged the plaintiff of his contempt. I may, however, state that the evidence of the plaintiff of his arrest in January, 1928, is supported by Alfred Adams, then a sergeant in the Police Force, and in charge of Alberttown Police Station. Having regard, however, to the records of the Alberttown Police Station and Sparendaam Police Station, which were produced at the hearing, and to the endorsement of the order of commitment as to its execution, and in a measure to the evidence of Jahooran, the

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wife of the plaintiff, I hold, if such is necessary, that the alleged arrest of the plaintiff in January, 1928, is not established.

Jahooran in her evidence states that long before the money was paid at Brickdam Police station (on the 25th October, 1929) a policeman came to her place and left a message for her husband. It is possible that in consequence of such message the plaintiff happened to be at the Alberttown Police Station in January, 1928.

14. It is now necessary to consider the submission of counsel for the plaintiff that the order of commitment having remained unexecuted for over a year and not having been endorsed as renewed it was inoperative and afforded no justification for plaintiff's arrest on the 25th October, 1929.

15. In support of his submission counsel referred to rule 351 of the Insolvency Rules, 1901, made under section 170 of the Insolvency Ordinance, 1900, with respect to the Debtors Ordinance, 1884.

16. Having regard to sections 36, 39, 41 and 53 (1) of Ordinance 11 of 1893. to the meaning of "judgment" in section 2 of the said Ordinance, to sections 50, 54 to 56 and 66 of Ordinance 10 of 1893, and to the Magistrates' Courts Rules, 1911, as amended in 1927 in respect of judgment summons proceedings to which counsel for the plaintiff drew the attention of the Court, I am of opinion that Rule 351 of the Insolvency Rules, 1901, does not apply to judgment summons proceedings in a Magistrate's Court, and that the order of commitment of the 6th January, 1928, was executable within four years from the 21st October, 1927, and was therefore of full force on the 25th October, 1929, when it was executed by arrest of the plaintiff.

17. In the circumstances, therefore, there will be judgment for the defendant. Having regard to the whole circumstances of this case, as disclosed by the evidence, oral and documentary, and to paragraph 8 of the defence which counsel for the defendant threw overboard at the trial and to his having adopted a complete change of front as to the meaning, force and effect of the orders of the 21st October, 1927, and 6th January, 1928, I make no order as to costs.

In view of a remark from the Bar at the hearing of this matter, it may not be out of place to draw the attention of Magistrates to the case of *Stonor v. Fowle* and in particular to the opinions of Lords Bramwell and Herschell.

Lord Bramwell says at page 28:—"I think a county court judge would do wrong if merely because both parties were willing to give time . . . he should adjudicate that the man had had means and had made default. At the same time, if the whole conduct of the parties before him was such as to recognise that the man had had means the county court judge might well adjudicate without any specific proof of it. I think it is impor-

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tant to bear in mind that an adjudication of committal ought only to take place where there has been a wilful default in payment; because in truth this power of committal is not an imprisonment for debt, it is an imprisonment for past dishonesty, together with the prospect of the plaintiff getting his money.”

Lord Herschell says at page 30:— “. . . . I think a judge would very much neglect his duty if in order to save himself the trouble of enquiring whether there was a default, and whether the man had possessed the means of making payment he were to issue a warrant of commitment with a stipulation for suspension if some smaller sums were paid, without having really arrived at the conclusion that there had been default. I think that that would be a most irregular and improper proceeding and one which might very well be called in question. I think that it would be an abuse.”

Judgment for defendant.

Solicitors: *Carlos Gomes; L. Ramotar.*

A. R. C. EWING v. R. V. E. WONG.

ALFRED RAILTON CRUM EWING v. ROBERT VICTOR
EVAN WONG.

[PETITION. NO. 54, OF 1934.—DEMERARA.]

BEFORE CREAN, C.J.,

1934. SEPTEMBER 14, 17.

Election petition—Amendments—When allowable—Supreme Court of Judicature Ordinance, cap. 10. s. 32.

Everything possible should be done by the Court to ensure a fair and effectual trial of an election petition. If it appears to the Court that suggested amendments, which do not include fresh charges, are conducive to a more effectual trial, and do not take the other side too much by surprise, then those amendments should be allowed, even if the application for them is made rather late.

H. C. Humphrys (A. C. Brazao with him) for the petitioner.

E. G. Woolford, K.C., and *S. J. Van Sertima, K.C.*, (A. J. Parkes with them) for the respondent.

Cur. adv. vult.

CREAN, C.J.: This petition was filed on the 18th June, 1934. Particulars of it were applied for by the Respondent's Solicitor on the 26th June, and on the 30th July, 1934, particulars were delivered in pursuance of that application.

The hearing of the petition before this Court was fixed for the 4th September, 1934, and on that day leave to amend certain amendments to the petition and particulars was applied for by Counsel for the Petitioner. That application is opposed by the Respondent. The Jurisdiction of this Court to hear election petitions is derived from the British Guiana (Constitution) Order in Council, 1928. This Order directs that every election petition shall be tried before the Supreme Court in the same manner as a suit commenced by a writ of summons. And at the trial the Court shall have the same powers, jurisdiction, and authority, and witnesses shall be subpoenaed and sworn in the same manner as nearly as circumstances will admit as in a trial of a Civil Action in the Supreme Court and shall be subject to the same penalties for perjury.

In the list of six amendments asked for by the Petitioner there is one which, if granted, would introduce into the petition a substantially new charge against one Ellen Elizabeth Whyte, one of the Respondent's Agents. The other five amendments sought do not involve a new charge against anyone.

Two of these five amendments are not objected to by Respondent but as to the remaining three, it is submitted by Counsel for the respondent that as they were not applied for within the time limited for such an application, an affidavit must be filed to

ground such application. And the authority given is that it appears that from the text-books such a practice prevails in England in an application such as this.

It appears from section 32 of the Supreme Court of Judicature Ordinance, Chapter 10, that, subject to the provisions of any statute, this Court may in any cause or matter make any order as to the procedure to be followed or otherwise which the Court considers necessary for doing justice in the cause or matter, whether that order has been expressly asked for by the party entitled to the benefit thereof or not. It is set out in this Ordinance that a "cause" includes any action or other original proceedings between a plaintiff and defendant and any criminal proceeding at the suit of the Crown. It is also set out that a "matter" includes every proceeding in the court not in a cause.

It seems to me that everything possible should be done by the Court to ensure a fair and effectual trial. If it appears to the Court that suggested amendments, which do not include fresh charges, are conducive to a more effectual trial, and do not take the other side too much by surprise, then, in my opinion, those amendments should be allowed, even if the application for them is made rather late in the day.

The three amendments which I have referred to do not so far as I can see include any fresh charge against the respondent or his agents. They do not take the respondent by surprise or prejudice his defence, and as I think their allowance will tend to a more effectual trial, I am of opinion that they should be allowed even at this stage.

The amendment asked for in regard to the acts of Ellen Elizabeth Whyte is on quite a different footing. In the petition there is a general allegation against the Respondent and his agents one of whom is Whyte. Specific charges are made against them and the specific charge against Ellen Elizabeth is that she threatened to damage Paul Adal in his business if he continued to canvas for the Petitioner and did not support the Respondent. This act of hers would amount to undue influence, and undue influence is a corrupt practice, which if committed, has the effect of making an election invalid.

In the amendment asked for it is sought to allege that a promise was given by her to one Ramsamooj that the respondent would give a feast and assist him in financing any religious feast he desired if he voted and procured votes for the Respondent. This allegation, if proved, would amount to bribery which is also a corrupt practice but quite a different offence from undue influence.

The law on this point is set out in Halsbury's Laws of England Vol. 12 at page 390. There it is said that the Court has not jurisdiction to allow an amendment of a petition after the time prescribed by statute by the introduction of a fresh substantive

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charge. It is submitted, there is not jurisdiction to allow such an amendment, whether the charge sought to be added be one of a fresh nature, or whether it be one only of a fresh instance but not covered by the allegations in the petition as standing.

In this amendment the facts set out indicate the offence of bribery on the part of Ellen Elizabeth Whyte. Counsel for the petitioner submits that as one paragraph of the petition alleges generally that corrupt practices were committed by the agents of the Respondents of whom Whyte is one, then, even if the petition originally alleges only one form of a corrupt practice by Whyte, an amendment may be added whereby another form is charged because the expression "corrupt practice" includes in its meaning the offences of treating, undue influence, bribery and personation. Therefore I suppose it is suggested that the greater includes the less. I do not think this submission can be taken seriously for there is no doubt that an election petition must be treated very largely as an index to specific charges of which particulars are to be given. Here corrupt practices were charged generally, later in the petition undue influence was specifically charged against Whyte; now it is asked that a charge of bribery be included against her. If this amendment were allowed at this stage, I apprehend it would have the effect of enabling a petitioner to bring fresh charges against a respondent at anytime, and consequently there will be no finality to the pleadings.

The argument that a charge of corrupt practices would include all offences comprised thereunder is very well answered by the *Lancaster Division Case* (1896) 5 O'M. and H. where it is said that such a general charge is very much the same as if a charge was made in an indictment of "other felonies and misdemeanours." It is stated in the above case that if such a thing were to be allowed Petitioners would be able to allege in general terms corrupt and illegal practices on the part of the Respondent and say no more. And then, from time to time, by delivering particulars, amended particulars and further amended particulars, keep on adding new charges without any regard to the limitation of time.

For the reasons I have given the application for leave to amend as to the fresh charge against Ellen Elizabeth Whyte must be refused.

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NELSON CANNON v. PERCY CLAUDE WIGHT.

[No. 212 OF 1933.—DEMERARA.]

BEFORE SAVARY, J.

1934. FEBRUARY 27, 28; MARCH 1, 2; MAY 1, 2, 3, 4, 7, 8,
9, 14, 15; SEPTEMBER 25.*Contract—Repudiation—Rescission.*

The law as to repudiation and rescission of contracts discussed.

Action for damages for breach of contract. The facts and arguments appear from the judgment.

S. L. van B. Stafford, for the plaintiff.*E. G. Woolford, K.C.*, for the defendant.*Cur. adv. vult.*

SAVARY, J.: At the close of the plaintiff's case a submission was made on behalf of the defendant that a case had not been made out, and it is with that question that this decision deals.

In the prayer of the statement of claim the plaintiff claims from the defendant \$35,962.96 damages for breach of a contract made on the 24th of February, 1932, and on the 22nd of September, 1932.

I now proceed to set out the circumstances leading up to the transaction which is the subject matter of this action. Prior to the 23rd of February, 1932, the plaintiff was the owner of a part of Plantation Bel Air known as Bel Air Park, which was mortgaged to one Maria de Abreu. The said Maria de Abreu foreclosed the mortgage on the 6th of January, 1932, and on the 23rd of February, she purchased the property at a sale at execution under those proceedings. On the same day the defendant entered into an agreement with the said Maria de Abreu to purchase the property from her for the sum of \$47,000.

On the day following the plaintiff and the defendant entered into the agreement which is the subject matter of this action. This agreement, which resulted from requests made by the plaintiff to the defendant to assist him, would have enabled the plaintiff, if the terms of it had been or could have been successfully carried through, to obtain some material advantage from Bel Air Park although it had passed out of his hands. The agreement took the shape of a letter from the plaintiff to the defendant to the terms of which defendant expressed his approval and, as is so often the case in transactions of this nature, litigation ensues largely because the document imperfectly defines the position of the parties. Under the agreement

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the defendant undertook to purchase Bel Air Park from Mrs. de Abreu for \$47,000 and the plaintiff agreed to endeavour to sell the property in lots to the extent of \$47,000 within six months of the 23rd of February, 1932, and on payment of that amount within the same period together with interest, it was agreed that the remaining unsold lots be divided equally between the plaintiff and the defendant. What I assume was intended to be a right given to the plaintiff could have been couched in plainer language, and the agreement is silent as to the period of time within which the defendant should purchase the property from Mrs de Abreu. There are other terms and conditions contained in the agreement but those previously referred to are the material ones that come into question in this suit.

In consequence of the agreement entered into, advertisements approved by both parties were inserted in the three daily newspapers, the *Daily Argosy*, the *Daily Chronicle*, and the *New Daily Chronicle* offering the property for sale in lots, with a statement that transport was guaranteed, see Exhibit A.M.B.2. The period of six months, previously referred to, expired on the 23rd of August, 1932, and during that time the defendant never completed his purchase of Bel Air Park from Mrs. de Abreu and never had transport of the property passed to him. On the other hand it appears equally clear from the evidence that the plaintiff had not sold during that material period lots to the extent of \$47,000, and was not in a position to satisfy the conditions that would have entitled him to claim the benefit coming to him under the agreement. Whether the word "sold" is to be given its strict meaning or the looser meaning of having persons willing and able to buy though not bound by contract, is not necessary for me to decide in view of the evidence which will be discussed later.

In this state of affairs, on the 22nd of September, 1932, the plaintiff and the defendant entered into a verbal agreement, the terms of which were not given in evidence by the plaintiff as pleaded in his statement of claim, but I am asked to infer their nature from the wording of a new advertisement in the three papers the draft of which had been initialled by both parties. These advertisements appeared in the *New Daily Chronicle* on the 23rd of September, 1932, and in the *Daily Argosy* and the *Daily Chronicle* on the 23rd of October, 1932. It is alleged on behalf of the plaintiff that in effect this was an extension to the 16th of November, 1932, of the original agreement so as to enable the defendant to obtain transport of Bel Air Park on or before that date with a corresponding right in the plaintiff to obtain intending purchasers up to that date.

Leaving aside for a moment the question of the Statute of Frauds which was pleaded and raised, I am inclined to think that that is a reasonable view to take of this transaction as evidenced by the advertisements, By the 11th of October, 1932, the defendant had

not obtained transport from Mrs. de Abreu, and on that day she filed against the defendant an action for specific performance of her agreement with him. The defendant contested the action and it was not until the 25th of April, 1933, that judgment was obtained against him, and on the 15th of May, 1933, transport was passed to him of Bel Air Park.

It is clear from this narrative of the facts that at the material times in 1932, the defendant was not in a position to pass transport to any intending purchasers of the lots, and it is on this fact that the plaintiff bases his claim. Put shortly, his case is the defendant's default in not obtaining transport of the property at the material time or times in 1932, constituted a breach of contract and prevented him from obtaining purchasers of the lots to the extent of \$47,000, thereby depriving him of the opportunity of obtaining a material benefit under the agreement with the defendant.

The first question I have to consider is whether the verbal extension made on the 22nd September, 1932, is evidenced by any writing sufficient to take it out of the provisions of section 3 (D) (d) of the Civil Law Ordinance, Ch. 7, which corresponds to part of section 4 of the Statute of Frauds. Although it was at one time contended by Mr. Stafford, counsel for the plaintiff, that there could be a parol extension of time for performance of a contract required to be in writing, it was subsequently admitted by him that he could not support the contention, so that I have to consider whether Exhibit N.C. 5, a copy of the draft advertisement which plaintiff says was initialled by the defendant and sent by him to the *Daily Argosy*, the original of which was now stated to be lost, can be said to satisfy the statute. As I indicated before, the form of the advertisement seems to strongly support the view that the time within which plaintiff was to obtain purchasers of lots to the extent of \$47,000 and the defendant to obtain transport was extended to 6th of November, 1932. In my opinion the document can be said to evidence an agreement between the parties to so extend the time, and I proceed to discuss the case on this footing.

In support of his case plaintiff's counsel advanced two contentions:

(1) That the defendant not having obtained transport on or before the 6th of November, 1932, the plaintiff was prevented from performing his part of the contract of obtaining purchasers to the extent or \$47,000 with the result that he lost the profit he could have made under terms of the agreement and is entitled to recover the same by way of damages for breach of contract:

(2) In the alternative, that the defendant repudiated the contract and so relieved him. the plaintiff, from further performance and that, in those circumstances, the plaintiff would be entitled to succeed in his claim for damages if he proved that he had expended reasonable efforts towards procuring purchasers and

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had reasonable expectations of getting purchasers at the time of the repudiation.

In considering the first contention it must be borne in mind that under clause (b) of the agreement the plaintiff was to endeavour to sell the property in lots to the extent of \$47,000 within six months of the 23rd of February, 1932, and if he did so, then under the provisions of clause (d) the remaining unsold lots were to be divided between the plaintiff and the defendant. That appears to me to be the substance of the agreement, and in view of the clause (c) it must be taken that the plaintiff was limited to this period of six months and no more, since after that period, other considerations applied to a sale of the property, and in view of the course of events a discussion of this latter question is unnecessary. As I have previously stated, this period of six months was extended to the 6th November, 1932, by the agreement of September, 1932.

It was not alleged or proved on behalf of the plaintiff that he was at any time in a position to produce purchasers of lots to the extent of \$47,000 that is, either persons bound by contract or persons ready and able to buy lots during the material periods, or, for that matter, at any time thereafter, and I now proceed to consider whether there is evidence to support the first contention, that it was the defendant's default in not obtaining transport at the material times that prevented the plaintiff from obtaining purchasers to the necessary extent. Now it is important to bear in mind that, although this is the case put before the Court on behalf of the plaintiff, the evidence discloses that;

(1) During the period covered by the original or the extended contract the plaintiff is not positive, in other words, cannot remember that he told the defendant who were the persons willing to purchase lots although he does say he told the defendant that he had sold lots to some people;

(2) During the same period and in fact up to June, 1933 as subsequently appears, the plaintiff never at any time informed the defendant it was impossible for him, the plaintiff, to perform the contract on account of the defendant not having obtained transport;

(3) The plaintiff during the material periods and up to May, 1933, after the extended period had expired was endeavouring to sell lots, (see letters dated 26th April, 1933, 28th April, 1933, and 16th May, 1933, exhibits A7, A9 and A15 respectively);

At the meeting of the 22nd of September, 1932 at which were present the plaintiff, the defendant, Dr. Gomes, his son Clement Bettencourt-Gomes, and Mr. Vivian Dias, solicitor, when the plaintiff says the general position was discussed and which resulted in the extension to the 6th of November, 1932, no mention of the defendant's default was made by the plaintiff or any one else nor was it suggested that his failure to obtain tran-

sport had prevented the plaintiff obtaining potential purchasers or rendered performance of the contract impossible, nor did the plaintiff mention the fact that he had or had had persons ready and able to purchase;

(5)The first intimation by the plaintiff to the defendant of the actual sale of specific lots was on the 26th of April, 1933, (Exhibit A7) five months after the period of extension had expired. There is even then no mention of the names of the intended purchasers in this letter;

(6)The first occasion when this contention of impossibility of performance was raised was in a letter from the plaintiff's solicitor to the defendant dated 26th June, 1933—Exhibit A17.

These facts and various contemporaneous incidents, if I may so call them, seem to point strongly to the view that at that material time, 1932 and even part of 1933, the plaintiff did not entertain the notion that the contract had been rendered impossible of performance by him through the defendant not having obtained transport, and it may well be that previous unsuccessful attempts to sell Bel Air in lots or otherwise from the year 1925, and the fact that persons, during the time the plaintiff was owner of the property, were not deterred from entering into contracts of purchase to be completed in five years (see Exhibits 31 and N.C. 22) precluded the plaintiff from entertaining any such opinion. But on the contrary the evidence forces me to the view that at the material times the plaintiff did not in fact have any persons ready and able to complete the purchase of lots. This is really the main contention put forward by the defendant and, in my opinion, the facts and circumstances of the case point to that conclusion.

At the meeting in September no mention was made of the contract having been rendered impossible of performance by the defendant's default, and it seems to me that if the plaintiff had conceived that to be the position in 1932, he certainly would have mentioned it at the meeting, and would have no doubt stressed his difficulties on that score. It is true that the plaintiff stated in evidence that if transports had been passed to people able to buy, whoever they might be, his and defendant's task would have been easier, and added that no person had informed him that he would not accept transport. Surely if the plaintiff were in a position at the material times to request the defendant to pass transport to purchasers he would have done so, but on the contrary we find that it is on the 26th of April, 1933—exhibit A7—for the first time, five months after the expiration of the extension of time, that there is an intimation by the plaintiff to the defendant that eight lots have been sold and even then it is not stated to whom. I agree with the suggestion made by Mr. Woolford, counsel for the defendant, that the wording of this letter—Exhibit A7—indicates that it was then for the first time that notice was given to

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the defendant of any sale of lots and this view is strengthened by the fact that it is only on the 16th of May, 1933—Exhibit A15—that the plaintiff mentions the names of two purchasers in favour of whom transport is to be advertised, Conrad F. Barrow and Hansa Persaud, four lots each, and adds at the end of the letter that he will let the defendant know later about the others. This presumably refers to the purchasers of the other four lots set out in A7.

In my opinion the conclusion is almost irresistible that it was then for the first time that the plaintiff had at hand two persons ready to complete the purchase of four lots each, and this conclusion is further supported by a paragraph in a letter of the 28th of April, 1933—Exhibit A9—where the plaintiff says: “With regard to the sale by me of the lots which I have notified Mr. Wight on the 26th instant I have acted and will continue to do so under my agreement with him dated February, 24th, 1932.”

Furthermore, perusal of Exhibit N.C. 19, a book which the plaintiff alleges he kept to record the transactions arising out of the agreement in question in this case, shows, that Barrow the person mentioned in Exhibit A15 paid \$100 on account of the purchase of three lots on the 6th of January, 1933, a date subsequent to the material times, and it is perhaps significant and worthy of notice that this same book, Exhibit N.C. 19, shows that various sums of money had been received by the plaintiff from six persons on account of the intended purchase of eight lots of land. Clinkett and Barrow, two of these persons, made first payments on account of their respective purchases after the 6th November, 1932, and the remaining four persons paid from time to time during the material period sums amounting to \$600 according to the entries in this book (Ex. N.C. 19). Some of them paid in full the contract price and the total amount received by the plaintiff up to February, 1934, was \$900. It seems to me that this book goes a long way to putting the plaintiff out of Court.

But does the evidence of the plaintiff and his witnesses offset the effect of the facts and circumstances just discussed by me? I think not. Of the 15 witnesses called by the plaintiff only four appear to give evidence that has some bearing on this point; they are Persaud, Ashrafally, Hansa Persaud and E. N. Bacchus, the latter two being among the six persons whose names appear in the book Exhibit N.C. 19 The plaintiff gave a list of persons who were, according to him, potential purchasers, but admitted that none of them had signed contracts. The four witnesses previously mentioned by me are the only ones called to bear out this statement of the plaintiff's, and I now proceed to deal shortly with their evidence. Hansa Persaud stated that he paid to the plaintiff on the 3rd of March, 1932, \$300 on account of the sum of \$600, the price of lots bought by him, and this is

confirmed by an entry in the book N.C. 19. He was given receipt N.C. 21. Bacchus paid \$50 on account of \$400 on the 3rd of October, 1932, and was given receipt exhibit E. N. B. 1.

These two documents, N.C. 21 and E.N.B. 1, do not contain any terms of purchase and fix no times for completion and E.N.B. 1 does not even state when the balance is payable. Bacchus stated in evidence that he told the plaintiff he would try to buy a lot, and it appears clear from his subsequent conduct that he was in no haste to effect or complete the purchase. The evidence of Persaud and Ashrafally was to the effect that they had been willing to buy lots for themselves and others but did not do so because the plaintiff could not give them and the others transport. But neither chose any specific lots nor could they say what lots the others wanted and it appears strange that, if they and the persons whom they mentioned were ready and able to effect and complete sales within the material period the plaintiff would not have communicated this fact to the defendant. For instance, the plaintiff does not mention them either verbally or in any of his letters as persons who were or had been ready and able to complete purchase of lots. The names of Persaud and Ashrafally do not appear in exhibit N.C. 19, no doubt because they had not got beyond the talking stage, and it would rather appear that they had not at the material time convinced the plaintiff that they ought to be seriously considered as potential purchasers. So far as Hansa Persaud and Bacchus are concerned I have come to the conclusion that at no time during the material period were they ready and able to complete their purchases in spite of their evidence to the contrary, and I am largely aided in this view by the fact that it was only in his letters of the 26th of April, 1933, and the 16th of May, 1933—exhibits A7 and A15—that the plaintiff mentioned Hansa Persaud as being then ready to purchase, and it is worthy of comment that even at that stage there is no mention of Bacchus.

In view of the observations I have made I find myself unable to rely on the evidence of the two other witnesses. Persaud and Ashrafally, and I am not satisfied that they could at any time be regarded as potential purchasers, and the vague statements about other persons who were not called as witnesses appear to me valueless.

The evidence of the remaining witnesses called on this point is of so vague a character and so unsatisfactory that no Court could act on it. Some refer to incidents clearly arising before the agreement in question was made, and others make it clear that any difficulties of transport did not deter them from trying to purchase lots.

Finally, I refer to a general statement made by the plaintiff in the course of his evidence to the effect that in March or April 1932 when he heard of the transport difficulties, there were at

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that time persons willing to pay their money for lots and to take transport of them. He mentions the names of Hansa Persaud, Morgan and Barrow as such persons who had made deposits on account of purchase money.

I have already dealt with Hansa Persaud who was called as a witness, but although Morgan and Barrow did not give evidence, a perusal of the book N.C. 19 and an analysis of the entries therein throw an interesting light on their position in thus matter, and appears to entirely refute the statement made about them by the plaintiff. The book N.C. 19 shows that R. L. Morgan made a deposit of \$150 on the 14th of March, 1932, in respect of lot 5 section A, the price of which was \$600. Thereafter, in the months of June, July, August, September and October, 1932, he paid \$10 each month. In 1933, he paid the same amount, \$10 in the months of February, April, June, July, August and September, and in the year 1934, he paid \$15 in the month of February. This makes a total of \$275 paid by R. L. Morgan on account of \$600 and the entries show that by the end of 1932 the material year, he had paid \$200 on account, and at the time the action was brought in July, 1933, the sum of \$240. It is also significant that in this letter of the 26th of April, 1933—A7—the plaintiff mentions lot 5 section A, Morgan's lot, as one of those sold by him, yet in the subsequent letter of the 16th of May, 1933—A15—he does not put forward Morgan's name as one of those in favour of whom transport was to be advertised. The inference is irresistible that if Morgan was at any material time willing to buy, he was not able to complete the purchase.

The position of Barrow is even less convincing as it appears from the book N.C. 19 that he made a deposit of \$100 on account of lots 1 and 2, section A, and lot 1, section B, on the 6th of January, 1933, two months after the extension of time had expired, \$1,650 was the purchase price of these lots and \$100 was deposited on account of it.

It seems apparent, therefore, that any difficulties of obtaining transport of the lots, if such difficulties were known to them, did not prevent Morgan and Barrow from trying to buy lots.

Accordingly I have come to the conclusion that the general statement made by the plaintiff on this very material point of his case and referred to above, is not justified by the actual facts and can carry no weight for the purpose of this decision.

For the reasons given by me I have come to the conclusion that the plaintiff has not established that it was the defendant's default, as he alleges, in not obtaining transport that prevented him from performing his part of the agreement.

Although it may be said that this view disposes of the first contention on behalf of the plaintiff, I propose to deal shortly with two cases cited by Mr. Stafford on this point, and to point out how, in my opinion, these cases can be easily distinguished from the

plaintiff's. *Mackay v. Dick* (1881) 6 A.C. 251, was a case of contract being rendered impossible through the default of the defendant. The plaintiffs, the respondents, had contracted to sell and deliver to the defendant, the appellant, a digging machine capable of doing certain work in a fixed time and which had to satisfy a certain test by the defendant. The defendant did not apply the contract test, and refused to pay the price. The plaintiff was held entitled to recover the price. A passage in the judgment of Lord Blackburn at p. 263 was strongly relied on by counsel. It is as follows: "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances." The other case was *Trollope & Sons v. Martyn Brothers* (1934) 150 L.T. 376, which has since been taken to the Appeal Court, where the judgment of Horridge J., was affirmed by a majority. The decision of the Court of Appeal will be found in (1934) 2 K.B. 436. The plaintiffs sued for commission, or, in the alternative, for damages for breach of contract under the following circumstances. The plaintiffs who were sole agents for the sale of the defendant's real property introduced a potential purchaser, who arranged with the vendors to buy the property "subject to contract." Subsequently the vendors refused to proceed with the sale, and an action was brought in which it was decided by the trial judge and the majority in the Court of Appeal that the plaintiff's were entitled to recover the equivalent of their commission as damages.

It was sought by counsel for the plaintiff to make these cases support the proposition that under the circumstances the only obligation of the plaintiff was to exert himself and show that he had a reasonable expectation of procuring purchasers, irrespective of the amount mentioned in the agreement, and if he were prevented from accepting any offers on account of the default of the defendant in not obtaining transport of the property, he, the plaintiff, would be entitled to succeed.

These cases, in my opinion, do not appear to support such a proposition, and I may mention an important distinguishing element, that in both of them the plaintiff's had done all that they had contracted or were entitled to do, there was nothing more to be done by them. It seems to me that to bear some analogy to these cases plaintiff would have had to prove that he had potential purchasers to the extent of \$47,000 ready and able to complete their purchases at the times material to this case, and that his efforts resulted in nothing through the default of the defendant in not having had the property transported to him.

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I may here set out the concluding words of the judgment of Greer, L.J., in *Trollope & Sons v. Martyn Brothers* at p. 452 of the report in (1934) 2 K.B. They are as follows: "I am of opinion. on considering the terms of the contract in the present case in a reasonable and businesslike manner that an implication necessarily arises that the parties must have intended that there should be a stipulation in favour of the agent that when the agent had done all that he had contracted to do the principal would not by withdrawing, without reasonable cause, so far as the agent was concerned, from the transaction deprive the agent of the commission which would become due if the sale to his customer had been completed."

No other authorities cited to the Court afford any assistance on this point, and I therefore come to the conclusion that the plaintiff's first contention fails as in my view there appear to be no facts to lay the necessary foundation for that contention.

The second contention on plaintiff's behalf which is, in reality, an alternative view of the case, is based on an alleged repudiation by the defendant of the agreement. In considering this point it is necessary to refer to paragraphs 17 and 19 of the statement of claim wherein it is alleged that the defendant repudiated the agreement on the 11th of October, 1932, and prior and subsequent thereto.

This is the date of the writ in the action brought by Mrs. de Abreu against the defendant in the proceedings to enforce performance of the contract for the purchase of Bel Air Park by the defendant. There is no evidence of any actual repudiation by the defendant communicated to the plaintiff, but I am asked to say that the conduct of the plaintiff leading up to the filing of the action for specific performance and the nature of the defence therein was in effect a repudiation of the agreement. The statement of defence in that action dated 28th October, 1932, is somewhat vague and might have set out more precisely the real issue or issues, but it was contended on behalf of the defendant that paragraph 7 of the defence was the real ground of defence in order to have a dispute as to title settled, and that there was nothing to show the defendant intended to repudiate his obligations under the agreement. Surely in considering this question of repudiation one is entitled to examine the conduct of the other party.

The plaintiff never informed the defendant at any time either verbally or in writing that he regarded his conduct as amounting to repudiation of this agreement, and it seems to me that the evidence establishes that he never so regarded it. Mention may be made of a paragraph in the plaintiff's letter to the defendant's counsel, Mr. Woolford, of the 28th of April, 1933—Exhibit A9—where he says "with regard to the sale by me of the lots which I have notified Mr. Wight on the 26th instant, I have acted and

will continue to do so under my agreement with him dated February 24th, 1932.”

It seems to me that if the plaintiff had viewed the defendant’s conduct in the light in which I am now asked to do, it would have been natural for him to have said so in some letter. But assuming that there was a repudiation in October, about which I have doubts, then in my opinion, the position that it would give rise to under the circumstances of this case would not assist the plaintiff, since he did not accept or act on the repudiation.

In paragraph 19 of the statement of claim there is an obvious confusion between “repudiation and rescission,” because it is alleged that the defendant repudiated and rescinded the agreement. As I understand the principle of law applicable to this matter, repudiation by one party to a contract gives the other party the right to elect to rescind it, and if the repudiation is not accepted by the other party, then the contract is kept on foot and remains in force for all purposes. See Salmond and Winfield’s *Law of Contracts*, pp. 273, 274, 283 and 284.

Mr. Stafford, when opening his case, put his contention in this way, that, as defendant had repudiated the agreement on the 11th of October, 1932 (which as previously stated is the date of the writ in the *de Abreu* action) the plaintiff was absolved from carrying out his obligations, and quoted in support the case of *Brathwaite v. Foreign Hardwood Co.* (1905) 2 K. B. 543, a decision of the Appeal Court. When the submission was made at the close of the plaintiff’s case with which I am dealing in this judgment, Mr. Stafford varied his contention on this point by urging that all that the plaintiff had to show in order to succeed was that he had expended reasonable efforts towards procuring purchasers and had a reasonable expectation of getting purchasers at the time of the repudiation. He further cited *In re Bayley Worthington & Cohen’s Contract* (1909) 1 Ch. 648, *British and Beningtons, Ltd., v. N. W. Cachar Tea Co. and others* (1923) A.C. 48 at p. 66, and *Guy-Pell v. Foster* (1930) 2 Ch. 169. In my opinion the cases cited do not support such a proposition of law. At the outset I would like to point out that in the two latter cases repudiation by one party had been accepted and acted upon by the other, a state of affairs which does not exist in this case, and I fail to see how the law as laid down with reference to those facts can find a place in this case. But as a matter of fact, these two cases appear to me to be illustrations of the application of the rule of law enunciated in the well known cases *Hochster v De La Tour* (1853) 2 E & B. 678; *Frost v. Knight* (1872) L.R. 7 Ex., 111 and *Johnstone v. Milling* (1886) 16 Q.B.D. 460.

The law is thus stated by Cockburn, C.J., in *Frost v. Knight*, at p. 112: “The law with reference to a contract to be performed at a future time, where the party bound to performance announces

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prior to the time his intention not to perform it as established by the cases of *Hochster v. De La Tour*, (1853) 2 E. & B. 678, and *The Danube and Black Sea Co. v. Xenos* (1863) 13 C.B. (N.S.) 825, on the one hand, and *Avery v. Bowden* (1855) 5 E. & B. 714, *Reid v. Hoskins* (1856) 6 E. & B. 953, and *Barrick v. Buba* (1857) 2 C.B. (N.S.) 563 on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

“On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.”

This passage is quoted with approval by the Court of Appeal, in *Johnstone v. Milling*, *supra*, and it may be pointed out that the principles of Law laid down in these three cases formed the basis of the decision of the Court of Appeal in *Guy-Pell v. Foster*, *supra*. But there remain the cases of *Brathwaite v. Foreign Hardwood Co.* and *re Bayley-Worthington and Cohen's Contract* to be dealt with. It is on these cases that Mr. Stafford so strongly relied, but, there are passages in the judgment in *Brathwaite's case* which appear to be in conflict with the rules of law laid down in the well known cases referred to in this part of my judgment, and, as the authority of the case has been questioned in the House of Lords, I do not think I should act on it. In *British and Benningtons, Ltd. v. N.W. Cachar Tea Co. and others*, (1923) A.C. 48, a case of anticipatory repudiation by the buyers of a crop of tea from India, which repudiation was accepted by the sellers and acted upon, Lord Sumner at p. 70 of the report made the following observations about *Brathwaite's case*; “Their answer, as I understand it, is that the sellers cannot claim damages for this anticipatory repudiation, unless they were in such a position, when they accepted it, as to be able to prove that they were then for their part able and willing to perform their obligations under the contracts in accordance with their terms, and that in such proof they must fail, because, as regards the tea lying at Scotch ports, they manifestly could not

satisfy an agreed condition precedent—namely, to ship all the tea direct to London and there deliver it *ex bonded* warehouse. The sellers successfully contested this below on the authority of *Brathwaite v. Foreign Hardwood Co.*, a decision which bound the Court of Appeal. My Lords, as reported, that decision is not quite easy to understand. It was presented to Your Lordships by the respondents, fortified by the opinion of Scrutton, L.J., as a decision that, when there has been a repudiation by one party on a given ground, and an acceptance of that repudiation by the other party, the former can no longer rely on any other ground for refusing to perform his obligations, and particularly cannot require the latter to prove his readiness and willingness to perform any of his obligations under the contract thus repudiated. I have no recollection of that case to carry me beyond the language of the report, as I do not doubt Scrutton, L.J. had, but, in my opinion, the case as reported either does not lay down this proposition or, if it does so, is wrong.” At page 71 he adds: “I do not think that the case, as reported, lays it down that a buyer, who has repudiated a contract for a given reason which fails him, has, therefore, no other opportunity of defence either as to the whole or as to part, but must fail utterly,” and finally at page 72 he says: “*Brathwaite’s case* says nothing which affects the regular consequences, when it appears that at the time of breach the plaintiff is already completely disabled from doing his part at all.” Both Lords Buckmaster and Wrenbury concurred in this judgment, although Lord Atkinson who delivered the first speech quoted passages from *Braithwaite’s case* without comment.

In *Braithwaite’s case* the plaintiff claimed damages for non-acceptance of two consignments of rosewood sold by him to the defendants, and the evidence established that the plaintiff, the seller, had actually tendered to the buyers the bills of lading relating to the consignments after the buyers had repudiated the contract. The defence raised the point that they were entitled to repudiate the contract on the ground that the rosewood was not of good, sound and merchantable quality. It was this condition precedent as to quality which Kennedy, J. and the Court of Appeal held to have been waived by the wrongful repudiation. But, in considering that case in relation to this one, it must be borne in mind that the plaintiff in *Braithwaite’s case* had substantially done what he had contracted to do, that is, he had delivered the rosewood although it was alleged that the quality of some of it did not answer the description in the contract. Therefore, it seems to me that, apart from the comments of Lord Sumner, the case does not support the wide proposition put forward by Mr. Stafford when one bears in mind the facts, which formed the subject matter of the decision in the case, which are so different to those in this case.

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I now proceed to deal with other *re Bayley-Worthington & Cohen's Contract* and refer to the passage at page 664 of the report on which Mr. Stafford relied: "In my opinion the repudiation of the contract by the purchaser relieved the vendors during such time as the purchaser insisted on repudiation from proceeding with their part of the bargain." Parker J. then referred to *Jones v. Barkley* (1781) 2 Doug. 684; *Ellis v. Rogers* (1885) 29 C.D. 661 and *Percy v. Smith* (1842) Car. & M. 554. This passage is cited by Lord Atkinson in *British and Benningtons, Ltd., v. N W. Cachar Tea Co.*, immediately after discussing *Braithwaite's case* (see 1923 A.C. 66) but Lord Sumner makes no reference to it, and in view of the latter's comments on *Braithwaite's case* it seems to me that the passage set out above cannot be taken to lay down a rule of law of general application but must be read purely with reference to the subject matter of that case, a dispute between vendor and purchaser arising out of a contract of sale of land which as Parker, J. says at page 656 of the report gives rise to duties different to those applicable to other contracts.

I may also mention that *Bayley-Worthington's case* is not referred to in Salmond & Winfield's *Law of Contracts* or in Vol. 7 of the 2nd edition of *Halsbury's Laws of England* which contains the chapter on Contracts, and although it is cited in *Leake on Contracts and Chitty on Contracts*, it is not referred to in the chapter on renunciation, and in the latter work it is cited in the chapter dealing with actions by a vendor of land against a purchaser. As is to be expected, it is referred to both in *Williams on Vendors and Purchasers* and *Dart on Vendors and Purchasers* which deal with sales of land. The contract between the plaintiff and the defendant is not one of sale between vendor and purchaser, but is, in my opinion, more akin to one between principal and agent.

I have therefore come to the conclusion that, even if it could be said that the defendant's conduct amounted in effect to a repudiation of his obligations about which I have previously expressed my doubts, the plaintiff could not claim any advantage from that fact as he neither accepted it nor acted upon it as a repudiation. In my view the proposition on this point urged on behalf of the plaintiff is not sound, and is not justified by the authorities cited, and I prefer to be guided by the rule of law laid down in *Frost v. Knight* and other cases referred to by me.

In my opinion the plaintiff has not established the facts necessary to enable me to apply what I conceive to be the correct principles of law in a case of this nature, and his action fails as he has made out no case against the defendant.

A number of other contentions were put forward which it is unnecessary to deal with in view of the conclusions to which I have arrived, and the question of want of consideration as affect-

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ing the agreement in dispute was not argued when the submission was made at the close of the plaintiff's case although the point was taken in the pleadings, and I give no decision on it. There will be judgment for the defendant with costs.

Judgment for the defendant.

Solicitors: *Carlos Gomes; A. G. King.*

JAMES JONAS v. JAMES LONDON.

[No. 202 OF 1934.—DEMERARA.]

APPELLATE JURISDICTION.

BEFORE FULL COURT.

SAVARY, J., AND STEWARD, J., (Acting).

1934. SEPTEMBER 21; NOVEMBER 9.

Rogue and vagabond—Armed with a dangerous weapon with intent to commit an unlawful act—Vagrancy offence—Act committed in heat of moment—Summary Jurisdiction (Offences) Ordinance, cap. 13, section 147 (vi)

Section 147 (vi) of the Summary Jurisdiction (Offences) Ordinance, cap. 13, provides that every person who is armed with a dangerous weapon with intent to commit an unlawful act shall be deemed to be a rogue and vagabond, and shall, on conviction thereof, be liable to a penalty of fifty dollars or to imprisonment for three months.

The police were executing a search warrant on the premises of the appellant who, resenting the search, left the bedroom which was being searched, went into the gallery and picked up a cutlass from under the table. The appellant then returned to the bedroom brandishing the cutlass and threatening to use it on the police, and in fact advanced on the respondent, who was one of the party, with his cutlass uplifted. So threatening was his attitude that the police left the premises.

Held, that the appellant had not committed an offence under the aforesaid subsection.

De Cambra v. Jacobs, A.J. 21.8.08. *Gomes v. Daniel*, (1914) L.R.B.G. 38, and *Edwards v. Menezes* (1918) L.R.B.G. 117, followed.

Appeal from an order of Mr. R. D. R. Hill, Magistrate of the Berbice Judicial District, convicting the appellant for having committed an offence under section 147 (vi) of the Summary Jurisdiction (Offences) Ordinance, Chapter 13.

Joseph Eleazar, solicitor, for the appellant.

Iris deFreitas, for respondent.

The following judgment of the Court was delivered by Mr. Justice Savary:—

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We have already intimated that we allow the appeal and now proceed to give our reasons

The appellant was on the 2nd of July, 1934, convicted by the Magistrate of Berbice of being armed with a dangerous weapon, a cutlass, with intent to commit an unlawful act, to wit, to assault P.C. London.

The facts found by the Magistrate are that on the occasion in question the police were executing a search warrant on the premises of the appellant who, resenting the search, left the bedroom which was being searched, went into the gallery and picked up a cutlass from under the table. The appellant then returned to the bedroom brandishing the cutlass and threatening to use it on the police, and in fact advanced on the respondent, who was one of the party, with his cutlass uplifted. So threatening was his attitude that the police left the premises.

The point for the decision of the Full Court is whether under these circumstances he can be convicted of the offence with which he was charged. The offence is created by section 147 (vi) of the Summary Jurisdiction (Offences) Ordinance, Ch. 13, and a person convicted under section 147 shall be deemed a rogue and vagabond and shall, in addition, suffer other penalties. Section 147 substantially reproduces section 4 of the Vagrancy Act, 1824, 5 Geo. IV., c. 83, and subsection (vi) creates offences similar to those found in the English Act.

It seems clear to us that the source of the local legislation indicates the interpretation that should be placed on the provisions of section 147, that is, that they are vagrancy offences. This view is confirmed when we turn to section 149 which deals with the proof of unlawful intent. This section, in part, reproduces section 15 of the Prevention of Crimes Act, 1871, 34 and 35 Vict. c. 112, which section was enacted to remove doubts as to the nature of evidence required to prove intent which was a material ingredient of various offences under the Vagrancy Act. Section 149 permits evidence to be given to the Court, before verdict, of the "known character" of the accused. Phipson on *Evidence*, 7th Edition, at page 184, discussing section 15 of the Prevention of Crimes Act, previously referred to, states the position as follows: "thus, evidence may, irrespective of rebuttal, be given before verdict, that he (the prisoner) has been previously convicted of theft, or is an associate of thieves."

In addition, two local decisions of the Appeal Court afford assistance in the matter. In *Gomes v. Daniel* (1914) B.G.L.R. 38, a case where the prisoner was charged with the same offence as the appellant, the facts were somewhat similar. A bailiff and the execution creditor had gone to execute a levy on the prisoner's property, who, being displeased, took up a cutlass and attempted to use it on the execution creditor. Rayner, C.J., in the course of his judgment said: "The appellant was convicted

“under Part V. of the Summary Convictions Offences Ordinance, 1893 (17 of 1893) which deals with offences against morality, religion and public convenience, and from a review of the various acts which are made offences, it shows the persons aimed at are persons who make a practice of doing acts detrimental to the public, acts of a persistent or deliberate nature. A sudden or unpremeditated act is not one of those contemplated by this part of the Ordinance.” Later on, after setting out the facts, he states: “That is clearly not an act within the vagrancy sections of the Ordinance, and the appellant cannot be said to have been found armed with or to have upon him the cutlass. He picked it up in the heat of the moment; he did not have it when the bailiff and the execution creditor entered the shop. That is not an act for which a man is liable to be branded as a rogue and vagabond.” The other case is *Edwards v. Menezes*, (1918) B.G.L.R. 117. where Hill, Ag. C.J. sums up the position as follows: “To hold that the appellant, interfering on behalf of the woman in the first instance, eventually obtaining a revolver, and threatening a disorderly lot of men, should be liable under a section which brands him as a rogue and vagabond, and places him in the category with potential burglars, highwaymen, and murderers would be wrong. To sustain a conviction under that section there must be, in my opinion, circumstances pointing to premeditation, and not mere impulse, circumstances of time, or of place or suspicious behaviour.”

We may mention that the case of *De Cambra v. Jacobs* (A.J. 21.8.08), cited by Mr. Eleazar, who appeared for the appellant, is referred to in the judgment of Hill, Ag. C.J.

Although it may not be easy to state in positive language the limit of facts and circumstances within which offences under section 147 (vi) lie, the above decisions give some helpful indications of the ambit of the section, and applying those principles it seems to us that the facts of this case do not bring the prisoner within the purview of the section and the conviction cannot stand.

The appeal is therefore allowed and the conviction must be quashed.

Appeal allowed.

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ALFRED RAILTON CRUM EWING v. ROBERT VICTOR
EVAN WONG.

[PETITION NO. 54 OF 1934.—DEMERARA.]
BEFORE CREAN, C.J.

1934. SEPTEMBER 4, 5, 6, 7, 10, 11, 12, 14, 17, 18, 19, 20, 25, 26, 27, 28;
OCTOBER 1, 2, 3, 4, 5, 9, 10, 15, 16, 17, 18, 25; NOVEMBER 9.

Election petition—Agents—Liability of candidate for corrupt practices of—Costs.

Any person authorised to canvass in an election is an agent.

Under election law a candidate is responsible for the acts of his agent even though he has directly forbidden the corrupt and illegal practices to be done.

The general rule that costs follow the event prevails in election cases unless special circumstances, for example, a flagrant abuse of the process of the Court in charging recklessly or in a frivolous or vexatious manner, are proved in which cases the Court may make such order as seems fit.

Election petition by Alfred Railton Crum Ewing praying that the election and return of Mr. Robert Victor Evan Wong to be a member of Legislative Council for Electoral District No. 12, Essequibo River, be declared void on the grounds of corrupt and illegal practices by the respondent, his agents and canvassers.

H. C. Humphrys, (A. C. Brazao with him), for the petitioner.

E. G. Woolford, K.C., *S. J. Van Sertima, K.C.*, (A. J. Parkes with them), for the respondent.

Cur. adv. vult.

CREAN, C.J.: This is the petition of Mr. Alfred Railton Crum Ewing who prays that the election and return of Mr. Robert Victor Evan Wong to be a member of Legislative Council for Electoral District No. 12, Essequibo River District be declared void on the grounds of corrupt and illegal practices by the said Mr. Wong, his agents and canvassers.

The petition is tiled under the authority of the British Guiana (Constitution) Order-in-Council, 1928, and the Rules and Regulations made thereunder in 1930. In this Order it is enacted that no election shall be valid if any corrupt practice is committed in connection therewith by the candidate. A corrupt practice shall be deemed to be committed by a candidate if it is committed with his knowledge and consent or by a person who is acting under the general or special authority of such candidate with reference to the election.

Corrupt practice is defined to mean any of the following offences: treating, undue influence, bribery, and personation.

The petition herein alleges all of these offences against the respondent Mr. Wong, but as there was no evidence given as to

undue influence that allegation was withdrawn, but one of illegal practices is included which refers to the carrying of voters in a hired motor-car by the agent of the respondent free of charge.

The election was held on the 28th of May last when Mr. Wong the respondent had a majority of 37 voters, and this petition was filed on the 18th June.

The first charge in the petition is that of treating which is alleged to have taken place in the shop of Walter Chee-a-Tow at Louisiana. It is set out in paragraph 3a of the petition that Walter Chee-a-Tow treated John Archer and Joseph Stanton, both registered voters, and other voters, to spirituous and other drinks for the purpose of corruptly inducing and influencing them to cast their votes for the respondent. An amendment to the petition was granted by which Frederick Sue-a-Quan, Chee-a-Tow's manager, was joined as having taken part in this treating on the morning of the election.

Another allegation of treating is made against Chee-a-Tow at the shop of one of his relations at Enterprise. The petition sets out that this act of bribery took place at Louisiana. This, it is submitted, is a clerical error and leave is therefore asked to amend it so as to make it read as having taken place at Enterprise. This amendment is objected to, but as the evidence from the beginning of the case shewed that the act took place at Enterprise, and as the decided cases indicate that such an amendment as this is granted as a matter of course, I cannot see any reason for refusing it.

The shop where this alleged treating of Archer and Stanton took place is at Louisiana. The shop is run by Frederick Sue-a-Quan. He shares the profits equally with Walter Chee-a-Tow, and after much fencing by Chee-a-Tow, and after he had said he was a clerk in his employment, he admitted that Sue-a-Quan was his partner.

John Archer who is a registered voter tells the Court that on the morning of the election he was invited into this shop to "drink Wong and to vote Wong" and that this invitation was given in the presence of Sue-a-Quan. He entered the shop and was given by Sue-a-Quan 2 bottles of beer, two half bottles of wine and half a bottle of stout. He did not pay for these drinks and says there was no mention of payment by Sue-a-Quan.

Joseph Stanton is also a registered voter and says that on the morning when he entered the shop of Sue-a-Quan there were many people there. Amongst others, he says he saw one Fortune who was washing his face in beer. This witness asked for half bottle of wine which he got; later he asked for two half-bottles of beer and a bottle of stout which he also got from Sue-a-Quan. For all these drinks he did not pay and further he says he has never been asked for payment.

In addition to what these two witnesses say there has been a

volume of evidence given as to this treating, some of it unsatisfactory and some of it unconvincing, but, from the mass of it, there emerges the clear fact there was a crowd in this shop of Chee-a-Tow on this morning of the election, and that a vast amount of drinking was going on, the drink being handed out by Sue-a-Quan whilst Chee-a-Tow appears to have been at the door of the shop in a car to drive voters to the polling stations.

Walter Chee-a-Tow and Frederick Sue-a-Quan endeavour to explain how these drinks were supplied on the morning of the election. Chee-a-Tow produces the books of the shop to prove that the drinks were charged against the accounts of the consumers and then by some arrangement with their employers payment was to be made by the employers, out of the consumers' wages. An examination of the books, however, and the evidence of Chee-a-Tow as to how they were kept clearly shew that no reliance whatever could be put upon them. He says in his evidence that he did not get a case of beer and one of stout between the 20th and 26th May, last. But when his order book for this shop is produced he has to admit that he did get these two cases. He also admitted on the production of this book that a case of beer, one of stout and one of wine were got for the shop on the 14th May. But since the 28th May, the day of the election, there is nothing to show from his order book that any beer, stout or wine was got for this shop.

This Walter Chee-a-Tow is the most astounding witness I have ever heard. He says he was glad to assist Mr. Wong in his candidature, he says he was working for him and that he felt he should support him in every way possible as there was a close bond of friendship between him and Mr. Wong. Yet he has the temerity to go into the witness-box and swear that he never spoke to Mr. Wong about this election either before it or after it. This statement of his must be taken as deliberate; for he was asked at least three times and asked slowly the same question and each time reiterated it. Mr. Wong himself quite frankly admits this statement of Chee-a-Tow's is untrue. Whether such a statement is to be attributed to an attempt at cleverness on the part of the witness or to be put down to stupidity it is difficult to say, but the result of it is that it makes one doubt anything he says. He has said there is a close bond of friendship between him and Mr. Wong, but even if there is, and even if he has unbounded admiration for him, that is no reason why he should come into Court and swear what is probably untrue and what he must know is untrue.

From the evidence given as to this consumption of drink in the shop of Walter Chee-a-Tow and Frederick Sue-a-Quan on the morning of the election, I have come to the conclusion that it was not supplied to these voters in the ordinary course of business or trading, but was supplied to them free for the purpose of corruptly influencing them to vote in a particular way, and that appears to me to be the only inference which could be drawn from the facts.

It is set out in section 45 of the Order-in-Council that any person who corruptly, by himself or by any other person, either before, during or after an election directly or indirectly, gives or provides or pays wholly or in part the expense of giving or providing any food, drink, entertainment to or for any person for the purpose of corruptly influencing that person or any other person to vote or to refrain from voting at such election, or on account of their having voted or refrained from voting at such election shall be deemed guilty of treating. From this definition it can be seen that even the treating of non-voters in order that they might influence voters is an offence under this section 45 of the Order-in-Council.

Under this heading another allegation is made against Chee-a-Tow. It is alleged that he gave Balgobin, Sookdeo, and Gopal Lal a half bottle of rum on the morning of the election with the intention of corruptly influencing them and other voters to vote in a particular way. The evidence as to this particular act of treating is given by one Rusulan and her son Abdool Samad who is a youth of about 18. They swear that they saw Chee-a-Tow give the rum to Balgobin, and that they saw these three men drink it. The youth says he picked up the empty rum bottle and exchanged it at a local shop for fish-hooks. There is evidence given against the character of these two witnesses on behalf of the respondent. The particular, and what was supposed to be the most telling, accusation against the boy was that he was a wild person and did nothing but catch fish in the river and gather coconuts when he was asked. I have heard many reasons why a witness should not be believed, but I must confess that I have never heard a more singular one, or a less cogent one, than this. This specific charge is also met by evidence that Rasulan was at a wedding nearby and so could not have seen what she alleges. This *alibi* I consider unfinished and incomplete and no reason for disbelieving Rasulan. Evidence is also given by Walter Chee-a-Tow in rebuttal; but, after what I have said as to the possibilities of this witness in swearing what he thinks is expedient, it would be absurd to pay any attention to his denial.

I can see no reason for disbelieving the woman Rasulan and her son Abdool Samad, and I therefore find that Walter Chee-a-Tow did give the rum on the morning of the election to the three persons named, and the only inference I can draw from that gift of drink is, that it was given with the intention of corruptly influencing voters.

I have found that drink was supplied free by Frederick Sue-a-Quan and Walter Chee-a-Tow to voters and non-voters, and the question has been raised by Mr. Woolford as to the agency of these two for the respondent. If the evidence does not show that they were agents for the respondent for the purposes of this

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election then their acts have no effect on it and the respondent is not answerable for their conduct.

The question of agency in an election is a difficult one as there does not appear to be any express provision in any enactment with reference to it. But it may be taken that the principles, practice and rules on which Election Committees have heretofore acted in dealing with election petitions, are to be observed as far as may be by Judges on the hearing of these petitions though their harshness and the stringency of their operation have been admitted.

A most important ruling on this point was given by Baron Martin, Mr. Justice Blackburn and Mr. Justice Willes in the *Norwich Case*, 1869, when they unanimously came to the conclusion that any person authorised to canvas was an agent, and they said it did not signify whether he was forbidden to bribe or not. If the candidate honestly told the agent not to bribe and the agent did bribe, then such bribery would affect him.

On this question of agency each case must be considered upon the whole facts taken together.

In the case of Chee-a-Tow we have evidence that he was canvassing: votes for Mr. Wong, evidence that he was driving a car for him on the day of election and, generally, that he was very busy in promoting the election of the respondent.

The respondent says he did not appoint any election agent or agents of any kind, but it must be inferred from the evidence that he knew that Chee-a-Tow was working for him.

Taking the whole facts of the case into consideration I have no doubt that he was an agent of respondent for the purposes of the election.

As to Sue-a-Quan, on his own admission he was canvassing votes for the respondent.

He was a partner in the shop in which the treating took place and on those facts and the other facts in the case I have no doubt that he must also be considered as an agent of respondent and so responsibility for his acts as well as those of Chee-a-Tow must fall on the shoulders of respondent.

The next issue is that of illegal practices by the respondent or his agents in the hiring of cars for the conveyance of voters to the poll. There is a mass of evidence on this point, most of it very contradictory, which I do not propose going into in detail. But after considering it and the law in regard to this particular offence I am not prepared to hold that the charge of illegal practices has been proved.

Personation is the next allegation made by the petitioner against the respondent. Definition of this offence is given in section 47 of the Order-in-Council as: "Every person who at an election applies for a ballot paper in the name of another person, whether that be the name of a person living or dead, or of a

fictitious person or who, having voted once at any election, applies in the same election for a ballot paper in his own name shall be guilty of personation within the meaning of this Order.”

There are three acts of personation alleged: One against Kudrath Shaw, one against Abdool Rahiman and one against Phillip Nathaniel Teischmaker.

Kudrath Shaw frankly admits that he voted twice at this election and says he had a right to vote twice. There is a statement in his evidence that he was asked by the respondent Mr. Wong to vote twice but in view of the contradictory nature of his evidence I am not prepared to accept that. Therefore, the position is that Kudrath Shaw voted twice, but there is no evidence that it was with the knowledge and consent of respondent, and so it is submitted by counsel for respondent, in the absence of such evidence, there is no such corrupt practice as would void this election. In support of that contention he refers me the *West Belfast Case* (1886), reported in 4 O'M. and H. I think the *obiter dictum* in this case amounts to this—if it is proved that there was wholesale personation the Court might declare the election void. But if there are a few cases only of personation in a big constituency and no evidence that they are connected with the candidate, then the Court would not hold such personation was a ground for voiding the election. This I apprehend is the reasonable view to take of such a situation, and, following the principle of it, I cannot see how Kudrath Shaw's voting twice on his own initiative can affect this election.

The allegation of personation by Abdool Rahiman is of quite a different nature. It is alleged in the petition and particulars, that Isri Persaud, Eric Leung Walker, and Dan Rahat procured Abdool Rahiman, who is not registered as a voter in the electoral district, to personate one Abdool Rahoman, a registered voter No. 466 on the register. It is alleged this was done for the purpose of corruptly increasing the number of votes given for the respondent.

There is evidence on this issue that Abdool Rahoman No. 466 on the register did not vote at this election. There is evidence that he applied to be put on the register as a voter and was so put as No. 466 and that he was the person entitled to vote on this number. And there is evidence that Abdool Rahiman knew a week before the election that he was not the person whose name was opposite to No. 466 on the register. Evidence is also given by the brother of Rahoman, Abdool Razac, that Abdool Rahiman was warned that he was not a voter, and that R. Rose Chung and Isri Persaud approached him after the voting and asked him to get the receipt which was issued to his brother as voter No. 466 to save them from getting into trouble and to hush up the matter.

There is corroboration of this warning given to Abdool Rahiman

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before he went in to vote, that he was not a voter. This evidence is given by James Haripaul and Eric Crum Ewing, and Ewing says that Isri Persaud and Walker who were working for respondent were also warned when they were bringing him to vote that he was not entitled to vote.

I am asked to say that Abdool Rahiman genuinely thought he was the person named on the register and therefore if he did vote he did so *bona fide*. A scrutiny of his evidence is helpful in coming to a conclusion whether or not he acted bona fide in voting and is to be believed when he says so.

On the day of the election he admits that he got two dollars from one Harold Lloyd to vote for Ewing. He had been already canvassed by Robert Rose Chung for Wong at Good Success Polling Station and promised to vote for Wong because, as he said, he was the better man. But his evidence shows that he went in the car of Isri Persaud to Zeelandia and voted there though he was warned he was not a voter. When asked why he told Rose Chung he was voting for Wong and then took two dollars to vote for Ewing, he replied that it had been the custom for a long time to take money for vote.

There is evidence that this person applied to be a voter, when according to his birth certificate he was under age. But notwithstanding that, the evidence points to the fact that he knew he was not the Abdool Rahoman on the register when he voted on this day and also that he knew he was not entitled to vote as such, and I find accordingly. And I also find that he did so with the knowledge and consent of Isri Persaud one of the agents of respondent. This man Abdool Rahiman was most unimpressive in the witness-box and I consider his explanation of how he came to vote on this day as most unsatisfactory. He was in no way ashamed of what he had done, due possibly to his memory of the fact that he was a person of such importance on the day of the poll; but it is doubtful if he will ever be so important again.

The next case of personation is that of Philip Nathaniel Tieschmaker who voted at Enterprise on this day and then went in a car driven by Walter Chee-a-Tow to Richmond Hill and applied for a ballot paper to vote again. This is admitted by him.

From the evidence of the presiding Officer at Richmond Hill, Tieschmaker came into the Polling Station, gave his name, address and number and asked for a ballot paper. He was asked if he had already voted in the division. He acted as if he did not hear and said "I am waiting for the ballot paper." However, on the Presiding Officer raising his voice and again putting the same question to him, he hesitated for a second or two, scratched his head and said "Yes, sir; I voted at Enterprise this morning."

The defence of Tieschmaker to this allegation of his attempting to vote twice is that he genuinely thought there was nothing

against his voting twice at an election. He says he was driven to the polling station by Chee-a-Tow with other voters but there was not a word spoken about the election by any one of them in the car. There is evidence that Chee-a-Tow said on arrival "I have brought some more voters. Mr. Wong." but that is all that Chee-a-Tow or the others said about the election.

This man Tieschmaker would have the Court believe that he is an innocent, without guile or education. But when he is tested in cross-examination by Mr. Humphrys it is seen that he can read difficult matter with ease, and is not an uneducated person by any means. The truth of his assertion that he thought he could vote twice is rather tested by his friend Chee-a-Tow who drove him to Enterprise to vote. He says he asked Tieschmaker if he had voted already and the reply was that he had not voted already. One naturally asks then, if he thought he could vote twice, why does he deny that he has already voted.

The reply of Theophilus Clarke to a question by the Court is illuminating on this subject. He says he would not believe that anyone thought he could vote twice in a British Colony. I agree with his view and find that when Philip Nathaniel Tieschmaker applied for this ballot paper he knew he had no right to vote twice at the same election.

The remaining allegations in the petition are bribery. It is alleged that Lilia, Isri Persaud, and Eric Leung Walker who were working for the respondent promised a dinner to voters thirty days after the election.

The first promise was given by Lilia, on the 21st May to Buddha and G. A. Jawahir, a schoolmaster at the Canadian Mission School at Ridge, Wakenaam. The next was given by Isri Persaud on the 27th May to Ramkisson Subaran and others while they were being driven by him to a meeting of Mr. Wong's. Several witnesses swear to the fact that Isri Persaud said to them that they should all vote for Wong as he had promised to give them a dinner 30 days after the election. The dinner to the Mohammedans and Hindus was to be separate. On the evidence of these witnesses I come to the conclusion that this promise of a dinner was made to these witnesses on the day before the election. And as to the allegation by Jawahir, who is a school teacher and a leading man in his district, I can see no reason for disbelieving him and Buddha who corroborates him and so I take that allegation also as proved.

The remaining allegation in the petition as to the promise to give a dinner is made against E. L. Walker. It is admitted by Walker that there was a conversation between him and the witnesses about a dinner, but he denies the definite promise of one. The evidence is so strong against him, however, that it forces me to the conclusion that he did make such a promise and I so find.

It has been submitted by Mr. Woolford that even if this dinner

were promised by these agents, it is so insignificant that it could not amount to bribery. But as I interpret the definition of bribery in the Order-in-Council such a promise comes with it. It says that any person who promises, or promises to procure, any money or valuable consideration to a voter to induce him or any voter to vote at any election shall be deemed guilty of bribery. To hold therefore that such a promise as above is not included in the definition of bribery one must be prepared to say that a dinner is not a valuable consideration. I am not prepared to say so, therefore I must rule against this submission.

Ali Hussein Khan is a farmer. He spent a whole day in the witness-box and during that time he never faltered though subjected to the most searching cross-examination by counsel for the respondent.

The substance of his evidence is that after one of Mr. Wong's meetings Isri Persaud approached and promised him that Mr. Wong would give him one dollar for every vote he got. He says he got fifteen or sixteen votes for Mr. Wong and then demanded his dollars from Isri Persaud but was given an evasive reply by him.

I consider this evidence is true and therefore find that the allegation in the petition as to this promise is proved. But the evidence following Ali Hussein Khan's leads me to think that there was a misapprehension between the parties when Ali Hussein said that he was promised that Mr. Wong would make him all right if he got votes for him.

There are one or two other acts of bribery alleged such as the promise of Rose Chung to ask Mr. Wong to become Chairman of the Farmers' Association and to give a subscription to it, but these are so remote and hazy that I do not propose to deal with them.

The final point for consideration is the allegation against Mr. Wong personally of different offences against the election law. He has gone into the witness box to answer those, and in his evidence says that almost immediately prior to this election the judgment of Mr. Justice Savary in *Thorne versus Jacob* was delivered. He appears to have been quite familiar with the law as to elections laid down by the learned Judge in that case, and, as a consequence, he says he made it a condition before he stood that he would be no party to bribery, treating or other offence in his campaign. He does say that there is a bitter personal enmity between him and Mr. Ewing, but luckily it does not appear to be a hopelessly permanent one, for he tells us that Mr. Ewing shook hands with him and congratulated him at the declaration of the poll.

I take it that Mr. Wong had read the decision of Mr. Justice Savary in *Thorne versus Jacob* and as a result of that reading was pretty conversant with the law as to elections in this colony. He has given evidence at great length, and, after hearing him, I

have come to the conclusion that his denials are convincing and that he is much too intelligent, apart from anything else, to have committed the acts alleged against him.

His election address of the 17th May, also bears that out, for in it he states that he will do nothing which the law governing elections will not permit. And when he says in his evidence that "I was not privy to, nor did I authorise or consent to anything improperly done by my agents or canvassers or supporters in this election" I take that to be correct.

Though the respondent did not authorise or consent to any of the offences proved against his agents and canvassers yet, he is responsible for them as if they were his own acts according to election law. This law has been described by the English Judges as "A stringent law, a hard law, a harsh law, it makes a man responsible who has directly forbidden a thing to be done, when that thing is done by a subordinate agent." But the ultimate effect of this very harsh law in England—after the hearing of countless election petitions—has been to make the conduct of elections pure and that is shown by the extreme rarity of an election petition to-day.

Here it has been proved that certain agents of the respondent have been guilty of corrupt practices which are grounds for invalidating the election. For those acts the respondent is responsible and on account of these acts this election must be declared void.

The petitioner has not claimed the seat, therefore what he said and did during his election campaign is not in issue, and is outside the province of this hearing.

Costs will follow the event; that is, the Petitioner is entitled to the costs as to the different allegations in the petition which have been proved.

Election declared void.

The question of costs was subsequently argued and the following ruling was given on the 9th November, 1934, by the Chief Justice:—

When the judgment declaring this election void was read, I intimated to the parties that the costs would follow the event, that is, the petitioner was to have the general costs of the petition and the costs in regard to the allegations of personation, bribery, and treating which he had proved.

Counsel for the respondent asked for an opportunity to argue the question of costs which was granted and this argument has been heard.

It was submitted that the respondent was entitled to have his costs of charges in support of which no evidence had been given and in support of this submission several English cases have been quoted to me.

At page 251 of the 20th Edition of "Rogers on Elections" it is stated "the petitioner was given the costs of a successful petition except that the respondent was to have his costs of charges in support of which no evidence had been given."

The *Ipswich Case* and the *East Dorset Case* are two of the three cases which are mentioned as deciding this question. From a perusal of the *Ipswich Case* it will be seen that it was with a certain amount of diffidence that Mr. Justice Denman conceded to the view of Cave J., that the respondent was to have costs of cases of which no evidence was given, and prefaces his ruling by remarking that he thought they were creating a dangerous precedent by severing the question of costs of different cases in a petition.

The *East Dorset Case* referred to in support of the contention is a precedent for allowing a respondent costs of cases in which the petitioner has failed to call evidence.

But in the same volume of Reports the *Hartlepoons Case* is reported, and it is a precedent for the petitioner having his costs except on those issues on which he has failed.

The *Borough of Pontefract Case* is referred to also by the respondent's counsel as an authority for allowing respondent costs but on reading the ruling of Mr. Justice Hawkins it will be seen that it is not at all analogous to this case.

In the *Pontefract Case* it was held that the charges were multiplied in a scandalous and reckless way and that the petitioner must have known it was impossible to support them consequently he was only allowed the costs of charges he proved, and respondent was allowed the costs as to charges about which no evidence was called. This order was made to mark the disapproval of the Court of the reckless way of heaping charges and putting persons to the inconvenience and embarrassment of meeting them and also to mark their disapproval of what the Court thought was a cruel and vindictive proceeding.

On this petition the petitioner alleged bribery, treating, personation, illegal practices and undue influence. He succeeded in proving bribery, treating and personation. He failed in proving illegal practices, but the evidence given on this allegation clearly showed that it was an issue for the hearing of evidence and a decision thereon and was far from being reckless or scandalous. And as to undue influence, the petitioner intimated to the Court one month before the conclusion of the hearing that he did not intend to call evidence on this head. That appears to be such notice as to prevent the respondent being put to the inconvenience and embarrassment of meeting this charge.

On the hearing of this petition there was nothing disclosed which showed that these proceedings were instituted recklessly or that the allegations were vexatious or frivolous. There was no special circumstance shown which would ground an order to deprive the

petitioner of his costs or to penalise him by ordering that he should pay any part of the respondent's costs, consequently, my opinion is that he is entitled to general costs of the petition and of the allegations which were found to be proved by him. There does not appear to me to be any reason for an apportionment of costs. The petitioner is really in the position of a plaintiff who has succeeded in his claim. As such he is entitled to his costs unless the Court is of opinion that he has abused the process of the Court by making frivolous and vexatious allegations, which I have held he has not done.

As the question of costs is one of great importance in election petitions I have consulted my brother judges with a view to laying down some rules for future guidance. We have come to the conclusion that the general rule that costs follow the event is to prevail as in this case unless special circumstances are shown to the Court to displace this rule. There are many grounds for departure from the general rule and if the Court in its discretion is satisfied that a good ground is shown, such as a flagrant abuse of the process of the Court in charging recklessly or in a frivolous or vexatious manner then the Court may make such an order as seems fit.

In the case of a petitioner claiming the seat, then the position is the same as if a counterclaim were filed by the defendant and the costs would follow each event in the ordinary way.

Solicitors: *Carlos Gomes; Albert McLean Ogle.*

MAY DEANE v. CECIL FRANKLIN.

[No. 239 OF 1934.—DEMERARA.]

APPELLATE JURISDICTION.

BEFORE FULL COURT.

SAVARY, J., AND STEWARD, J., (ACTING).

1934. NOVEMBER 9.

Punishment—Principles of—Modern tendency—First offenders—Good character—Not to be imprisoned—Recognisance—Appeal—Variation of sentence.

Circumstances under which a first offender of good character should not be sent to prison.

Appeal from an order of Mr. J. A. Veerasawmy, Magistrate of the West Demerara Judicial District, convicting the appellant of assault occasioning actual bodily harm, and sentencing her to undergo six weeks' imprisonment with hard labour.

S. J. Van Sertima, K.C., for the appellant.

The Acting Attorney-General, *S. E. Gomes (Iris de Freitas)* with him) for the respondent.

The following judgment was delivered by Mr. Justice Savary:— This is an appeal against a sentence imposed by the Magistrate of West Demerara in a case where the appellant was convicted of an assault occasioning actual bodily harm and sentenced to six weeks' imprisonment with hard labour. An appeal has been made to the Court to treat the appellant as a first offender on the ground that she has hitherto borne a good character, and having regard to the circumstances of the crime. The appellant bit off a portion of another woman's lip in the course of a fight. The appellant, a nurse, was at the time of the offence employed as a League district nurse, and has tendered to the Court evidence of good character by Drs. Craigen and Singh. The offence is a serious one, but, in view of the tendency of the modern practice of the Courts to avoid sending first offenders of good character to prison if the circumstances warrant it, we have come to the conclusion that in the special circumstances of this case the Magistrate's order should be varied. The appellant has paid \$100 compensation to the injured woman. We order the appellant to be discharged conditionally on her entering into a recognisance with a surety in the sum of \$100 to be of good behaviour and to appear for conviction and sentence when called on at any time within two years. The appellant must pay the costs of the appeal fixed at \$20.

Sentence varied.

EDITOR'S NOTE:—In *Iris Mafford v. Jonathan Sarrabo*, 29. 3.1935, a case of assault causing actual bodily harm, the Full Court substituted for the penalty of six weeks' imprisonment imposed by the Magistrate, a fine of \$25, and \$10 compensation.

A. E. GLASGOW v. E. CADOGAN.

A. E. GLASGOW v. E. CADOGAN.

[No. 225 OF 1934—DEMERARA.]

APPELLATE JURISDICTION.

BEFORE FULL COURT.

CREAN, C.J., AND SAVARY, J.

1934. NOVEMBER 23, 27.

Registering Officer—Appointment by the Governor—Delegation of powers—Invalidity of—Employers and Servants Ordinance, cap. 261, sections 21, 22 (1) (b), 22 (2).

Section 22 (1) (b) of the Employers and Servants Ordinance, Cap. 261, provides, *inter alia*, that no contract of service shall be enforced under section 21 unless the labourer who is to serve under it has been registered by a person appointed by the Governor in that behalf.

J.W. was so appointed by the Governor. He delegated his powers to A.W.

Held, that the person appointed by the Governor had no power to delegate his powers.

Appeal by the defendant from an order of Mr. P. F. Steward, Magistrate of the Georgetown Judicial District. The facts appear from the judgment.

C. R. Browne, for the appellant.

R. S. Miller, for the respondent.

Cur. adv. vult.

The judgment of the Court which was read by the Chief Justice, was as follows:—

The appellant was convicted in the Magistrate's Court for failing to pay wages alleged to be due to one Edward Cadogan. The complaint was brought under section 22 (2) of the Employers and Servants Ordinance, Cap. 261, which provides a penalty of fifty dollars being imposed on an employer for failing to pay wages to a labourer within 14 days after they become due. This penalty of course can only apply to contracts of service made under this Ordinance.

It has been submitted to us that there was no contract in this case, such as is prescribed by the Ordinance, and that, in the absence of such a contract, the prosecution in this case did not lie. The ground for this submission is that Alexander Winter who entered into this contract was not a person appointed by the Governor in that behalf, and, therefore, as he was not a competent party, there can be no contract, such as is contemplated by the Ordinance, and such as would found criminal proceedings such as these.

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The evidence shows that James Winter was appointed by the Governor under this Ordinance, and that he, James Winter, took it upon himself to delegate these powers to his nephew, Alexander Winter. This delegation of powers by James Winter to his nephew was completely outside his powers, even though he says the Commissioner of Mines agreed to Alexander Winter his nephew acting for him. From the Ordinance it is quite clear that no one has power to register unless he is directly appointed by the Governor in that behalf. In view of the unambiguous wording of the section counsel for the respondent does not support the conviction on that section, and for the reasons already given the conviction must be quashed, and the fine, if paid, returned to the appellant. The Employers and Servants Ordinance is peculiar in that it makes no provision for the Court before which appellant is being heard ordering a defendant to pay the amount of wages due. It strikes us that if such a power were given to the Court it would save a labourer the expense of instituting a fresh action for his wages.

Appeal allowed and costs 20 dollars to appellant.

Appeal allowed.

Re NELSON CANNON, *ex parte* THE REGISTRAR

[No. 306 OF 1934—DEMERARA.]

BEFORE FULL COURT.

CREAN, C.J., AND STEWARD, J., (ACTING).

1934. DECEMBER 7.

Contempt of Court—Levy on business premises—Premises closed by marshal—Opened by judgment debtor—Articles levied upon used—Act calculated to obstruct and interfere with the course of justice and to prevent due administration of law—Protection by Court of officers or property in possession of officers.

The Court of its own motion issued an order on a person to appear and show cause why he should not be attached for contempt of Court in that he broke into, entered and occupied a building and interfered with and operated the machinery therein which had been levied upon and was *in custodia legis*.

The object of the discipline enforced by the Court is not to vindicate the dignity of the Court; but to prevent undue interference with the administration of justice. Where it is necessary for the protection of its officers or of property in the possession of one of its officers the Court must show it has a long arm and must act.

Order made by the Chief Justice on Nelson Cannon to appear and show cause why he should not be attached for contempt of

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Court, in that on the 23rd day of November, 1934, he did wrongfully and unlawfully break into and enter into and occupy the building and erection situate at 29 Main Street, Georgetown, and interfere with and operate the machinery therein which had been duly and properly levied upon and which was *in custodia legis*.

S. L. van Batenburg Stafford, for Nelson Cannon, showed cause.

The following judgment of the Court was delivered by the Chief Justice:—

The affidavits shew that the marshal of this Court in pursuance of a writ of execution issued by the Court, took possession of the premises and machinery of the New Daily Chronicle Printing Office the property of the Respondent herein. They also shew that at about 4.30 p.m. on the day of this execution the Respondent ordered his men to break open one of the doors of the premises and enter. This order appears to have been carried out and the men seem to have entered and begun work, as did the Respondent. The affidavits on which this application is grounded are by officers of this Court, and they shew that the conduct of the Respondent was calculated to obstruct and interfere with the course of justice and to prevent the due administration of the law. But in fairness to the Respondent it must be mentioned that he went out of the premises after a short occupation when spoken to by Mr. Jackson, the Registrar, and informed by him of the seriousness of the act.

As the marshal or Sheriff was in possession by virtue of a writ of execution properly issued by this Court, the goods and premises were *in custodia legis*, or in the keeping of the law when the act of the Respondent interfering with this possession took place. No one had any right to interfere with them in any way except by virtue of an Order of Court.

This Court is bound to protect its officers, and it is a contempt if any one by strong hand takes goods seized by virtue of a writ out of his custody. And were the person not made answerable for the contempt the consequences would be disastrous.

If we were to allow the process of the Court to be dealt with in the way the Respondent has done in this case the consequences would be most serious. So serious, that, if it were tolerated, strange and undesirable results would be most likely to follow, and, ultimately, there would be no law or order in the colony.

We should like it to be known that the object of the discipline enforced by the Court is not to vindicate the dignity of the Court; but, to prevent undue interference with the administration of justice. It must also be known that the hands of the Court are not so tied that it cannot protect its officers. Where it is necessary for the protection of its officers, or of property in

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the possession of one of its officers, the Court must shew it has a long arm and must act.

The Court has acted, and acted of its own motion, in issuing these proceedings against the Respondent. We have heard the submission of Mr. Stafford that there is some irregularity in the proceedings, but we are of opinion that a close examination of the law of the colony will shew that they are perfectly regular.

There is no denial of the act of interference by the Respondent, but in his replying affidavit he ends up by saying that he deeply regrets the act complained of herein and humbly apologises to this Court to whose merciful consideration he submits himself.

This course adopted by the Respondent we consider is creditable to him, and on account of its fullness and unreservedness we give him the consideration he asks for, and make no order except that he pays the costs of these proceedings \$24.44.

E. P. NIVEN, Commissary of Taxation (Appellant).

v.

EDWARD FUNG (Respondent).

[No. 250 OF 1934.—DEMERARA.]

APPELLATE JURISDICTION.

BEFORE FULL COURT. CREAN, C J., AND SAVARY, J.

1934. NOVEMBER 23. 1935. JANUARY 14.

Fiat of Attorney—General—Production and proof—Interpretation Ordinance, chapter 5, section 36.

The respondent was charged in a magistrate's court with an offence in respect whereof it is provided that no prosecution or proceeding shall be commenced without the authority in writing of the Attorney-General. At the close of the case the respondent contended that no fiat of the Attorney-General had been adduced in evidence, and that therefore the case should be dismissed. The magistrate thereupon dismissed the case.

The fiat of the Attorney-General was, however, in proper order and was actually attached to the file of proceedings before the Court, and consequently available for immediate production in evidence at the commencement of the case. Neither the complainant's solicitor, nor the defendant's counsel, nor the magistrate knew that there was a fiat or that it was attached to the file of proceedings.

Held, on appeal, that the production and proof of the Attorney-General's fiat was an indispensable condition to the magistrate's proceeding to hear the case, and as that condition was not fulfilled, the hearing was a nullity.

Appeal by the complainant from an order of Mr. P. F. Steward, magistrate of the Georgetown Judicial District, dismissing a complaint.

S. E. Gomes, Assistant Attorney-General, for the appellant.

S. J. Van Sertima, K.C., for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by the Chief Justice as follows:—

The accused was charged in the Magistrate's Court at Georgetown with selling rum contrary to section 41 (1) of the Intoxicating Liquor Licensing Ordinance.

On a charge such as this the prosecution or proceeding cannot be commenced without the authority in writing of the Attorney-General.

At the close of the case for the prosecution before the learned magistrate the point was raised by counsel for the respondent herein—who was the accused—that as there was no fiat of the Attorney-General proved, the prosecution must fail. On this submission the learned magistrate dismissed the case

It now transpires that the fiat of the Attorney-General was in proper order, and was actually attached to the file of proceedings before the Court, and consequently available for immediate production in evidence at the commencement of the case. But it was not produced and put in as evidence in the ordinary way, and, naturally, then Counsel for the accused submitted that as it was not proved there was no authority in the Court to proceed.

This Court is now asked by Mr. Gomes, Assistant Attorney-General, to reverse the order of dismissal and to convict the accused on the evidence already given before the Magisterial Court. He argues that the only condition precedent necessary in a case such as this is the existence of the fiat of the Attorney-General and that its existence on the file of proceedings before the case was commenced in Court was all the proof necessary to comply with the Ordinance.

There is no dispute as to the existence of the fiat, and there is no dispute as to its being attached to the file of proceedings; but, unfortunately no one in the case appears to have been aware of its existence.

It seems to us that the argument of Mr. Gomes that the existence of a document is sufficient proof of that document cannot bear a very close scrutiny. If his contention were a correct one, then the document might be even outside the precincts of the Court, but the fact that it exists at all should be taken by the Court as proof of it. With that view we cannot agree.

We are of opinion that the dictum of Mr. Justice Channell in the case of *Edward Turner*, (1909) 3 Crim. App. Rep., pages 103, 115, 117, 155 indicates clearly what is the reasonable view to be taken as to how a document is to be proved. The indication given therein, is that the document is to be produced in

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Court and proved. The fact that it is attached to, papers on the file without anyone being aware of its existence cannot, we think, be taken as such a production and proof as is contemplated in the above case.

It has been submitted to us by the Assistant Attorney-General that section 36 of the Interpretation Ordinance of this Colony might enable this Court to find that the existence of a fiat is proof of it. By this section, any document purporting to bear the fiat of the Attorney-General shall be received as *prima facie* evidence of any proceeding without proof being given that the signature to the fiat is that of the Attorney-General.

In our view the section is very clear and for us to put such a meaning to it as suggested by the Assistant Attorney General would be in effect to legislate and not to interpret which is the usual duty of the Court. The law is clear, and it is not for this Court to extend the ordinary meaning of the words used in the section, or to import into it a meaning which is obviously not present. This section clearly means that once the fiat of the Attorney-General is produced in a case such as this, it shall be received by the Court as evidence that the signature to the fiat is that of the Attorney-General if it purports to be.

As to the application to reverse the order of dismissal and to convict the accused on the evidence already given for the prosecution before the Magisterial Court, we have to say that there are insuperable difficulties in granting it. We have not seen the witnesses, nor have we heard them, and in addition and most important of all, it is usual to hear the defence before a man is convicted; therefore, we think the application must be refused.

In the absence of the fiat of the Attorney-General being produced in evidence in the ordinary way, we are opinion that the learned magistrate was without jurisdiction when he heard the evidence he did. We take the view that the production and proof of this fiat was an indispensable condition to his proceeding to hear the case and as that condition was not fulfilled the hearing of the case was a nullity and the accused was never in real peril.

The arguments disclose that the position which has arisen in this case is a very peculiar one. But though Mr. Gomes has argued it with great skill and in the most ingenious way we do not see that this Court can rectify the original omission. Consequently the appeal must be refused.

No order as to costs.

Appeal dismissed.

Re N. CANNON, *ex parte* PERCY C. WIGHT.

Re NELSON CANNON,

Ex parte PERCY CLAUDE WIGHT, Creditor.

[INSOLVENCY NO. 2 OF 1935.]

BEFORE SAVARY, J.

1935. FEBRUARY 11, 13, 15.

Insolvency petition—Notice of intention to dispute—Ulterior motive of petitioner—Whether material to issue.

After the service of an insolvency petition on a debtor, he filed a notice of intention to oppose the petition in which he stated that the petition was not presented *bona fide* with a view of obtaining an adjudication but for the purpose of oppressing him and making him a bankrupt, and of stifling or defeating his appeal against the petitioner in action No. 212 of 1933 by the debtor against the petitioning creditor. In that action judgment was given for the defendant (the petitioning creditor) against the plaintiff (the debtor) with costs, and an appeal was pending to the West Indian Court of Appeal. Subsequent to the judgment in the action No. 212 of 1933 and while three executions had been levied on the property of the debtor, the petitioning creditor with knowledge thereof, purchased the debt \$3,035.96 on which the petition was founded for \$1,926.72. That debt was the only one which the debtor owed to the petitioning creditor.

Held, that there was no evidence that the petitioning creditor bought the debt in question in order to found insolvency proceedings so as to defeat the debtor's appeal. *Further*, that even if there was, mere motive is not sufficient to constitute an abuse of process or a fraud upon the Court.

Petition by Percy Claude Wight for a receiving order against Nelson Cannon. The petition was opposed on the grounds stated in the judgment.

H. C. Humphrys, for the petitioning creditor.

S. L. Van B. Stafford, for the debtor.

Cur. adv. vult.

SAVARY, J.: The question which I have to consider on the hearing of this bankruptcy petition is whether sufficient cause has been shown why no receiving order should be made. I am satisfied, and it is not seriously disputed that the conditions on which a petitioning creditor may found a bankruptcy petition exist in this case, namely, a debt owing by the debtor to the petitioning creditor and an available act of bankruptcy, but the debtor contends that the Court ought, in the exercise of its discretion, to dismiss the petition on the grounds alleged in his notice to show cause. The ground is that the petition is not presented *bona fide* but for the collateral purpose of oppressing the debtor and stifling or defeating the debtor's pending appeal in the case of *Cannon v. Wight*. No oral evidence was given before me but counsel on behalf of the respective parties made a series of admissions which is the only material I can consider for determining this matter.

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Mr. Stafford, counsel for the debtor, bases his contention on the following facts:—

- (1) that the petitioning creditor took an assignment of the judgment debt on which the petition is founded on the 16th January, 1935;
- (2) that the debt is the only one owed to the petitioning creditor;
- (3) that the petitioning creditor paid \$1,926.72 for this judgment debt of \$3,035.96 with interest and costs;
- (4) that when he took the assignment he knew of three judgments against the debtor on which execution had been levied which facts pointed to the debtor being in embarrassed circumstances;
- (5) that there is an appeal pending in the case of *Cannon v. Wight*.

Counsel then invites me to the conclusion that the only reasonable inference to be drawn from these facts is that the petitioning creditor had the ulterior motive of defeating this pending appeal, that his conduct is oppressive and the petition an abuse of the process of the court, and that no order should be made on it. In reality the matter resolves itself into one of motive, and, apart from any legal consideration as to the effect of motive on proceedings of this nature. I have to consider whether the facts enumerated above lead me to the conclusion contended for by the debtor. Now the burden is clearly on the debtor to satisfy me as to this, and I can only say that although the facts are possibly open to the inference, contended for by the debtor, I can also visualise several other reasons for the petitioning creditor buying this judgment debt. In these circumstances I find that there is no evidence to lead me to the conclusion that the petitioning creditor bought this judgment debt in order to found bankruptcy proceedings so as to defeat the debtor's appeal. As I mentioned before, neither the petitioning creditor nor the debtor went into the witness box and it would be pure conjecture on my part to come to that conclusion. This disposes of the matter, but as an important question of principle affecting the presentation of bankruptcy petitions was fully discussed, I think it right that I should express my view on it. The conclusion I have arrived at, which will indicate the point under discussion, is that mere motive is not sufficient to constitute an abuse of process or a fraud upon the court. This view is based on a decision of the Privy Council, the case of *King v. Henderson* (1898) A C. 720, where most of the relevant authorities are discussed. At page 731, Lord Watson who delivered the judgment states:

“Their Lordships do not dispute the soundness of the proposition that a plaintiff or petitioner who institutes and insists in a process before the Bankruptcy or any other Court, in circumstances which make it an abuse of the

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remedy sought or a fraud upon the Court, cannot be said to have acted in that proceeding either with reasonable or probable cause.

But, in using that language, it becomes necessary to consider what will, in the proper legal sense of the words, be sufficient to constitute what is generally known as an abuse of process or a fraud upon the Court. In the opinion of their Lordships, mere motive, however reprehensible, will not be sufficient for that purpose; it must be shown that, in the circumstances in which the interposition of the Court is sought, the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others, whether legal or equitable."

On the following page this is the language used:

"Motive cannot in itself constitute fraud, although it may incite the person who entertains it to adopt proceedings which, if successful, would necessarily lead to a fraudulent result; and it is not the motive, but the course of procedure which leads to that result, which the law regards as constituting fraud."

And finally at page 734 he says:

"A desire and intention on the part of the petitioning creditor to terminate a partnership connection between the debtor and a firm which owed money to him and to Mr. Wood, whom he represented as agent, is simply a by motive which would not taint his procedure unless there were proof of positive fraud, which is absent in this case."

The history of the evolution of the law on this point is interesting, and I think I am justified in making the statement that the modern trend is to confine within narrow limits the grounds which are now deemed sufficient against the making of a receiving order. Without attempting an exhaustive list I may mention fraud, extortion or where a receiving order would enable the petitioning creditor to defeat the rights of others, whether legal or equitable, and these are examples of cases where the process of the Court was held to be abused. It is interesting to point out that in 1899, the Supreme Court of Victoria, Australia, held that a bankruptcy petition brought for the purpose of depriving a municipal councillor of his seat was not an abuse of the process of the Court, *Re Morissey, ex parte Perkins*, (1899) 24 V.L.R. 776, E. & E. Digest, Vol. 4, p. 155, note (d).

Finally, I would like to set out some words of Lord Justice Cozens-Hardy in the case of *Fitzroy v. Cave*, (1905) 2 K.B. 364, at p. 374, which though not a case in Bankruptcy bears some analogy to the matter under consideration.

They are as follows:

"It is further urged that his only object is to obtain a judgment which may serve as the foundation of bankruptcy

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proceedings, the ultimate result of which will be the removal of the defendant from his position as director of a company in which the plaintiff is largely interested. But I fail to see that we have anything to do with the motives which actuate the plaintiff, who is simply asserting a legal right consequential upon the possession of property which has been validly assigned to him. If the defendant pays, no bankruptcy proceedings will follow. If he does not pay, bankruptcy is a possible result.”

For the foregoing reasons I am of opinion that the petitioning creditor is entitled to the relief prayed for in his petition and I accordingly make a receiving order based on the act of bankruptcy set out in paragraph 4 (*b*) of the petition. There will be the usual order as to costs. I certify for Counsel.

Receiving order made.

Solicitors: for the petitioning creditor. *G. R. Reid;*
for the debtor. *Carlos Gomes.*

L. HERBERT, *et al.* v. A. BLENMAN, *et al.*

[No. 111 OF 1934—DEMERARA.]

BEFORE SAVARY, J.

1934. NOVEMBER 14, 15, 16; 1935. MARCH 26.

Prospecting licence—Locations—Subject of—Land reserved for the use of the Crown—Meaning of—Notice in Gazette—Construction—Mining Regulations, 1924, reg. 6. (1).

Regulation 6 (1) of the Mining Regulations, 1924, provides that a person who obtains a prospecting licence can prospect for and locate claims on any of the Crown lands in the colony not previously lawfully occupied or previously located or *reserved by notice published in the Gazette for the use of the Crown*, or the Colony, or as an Indian Reservation.

A notice was published in the *Gazette* on the 21st June, 1930, that until further notice no Concessions, Leases or Licences applied for under the provisions of the Mining (Consolidation) Ordinance, 1920, will be granted on or over certain specified Crown Lands.

A. located a claim within that area on the 23rd March, 1931. The aforesaid notice was cancelled on the 18th April, 1931. B. located the said claim on the 18th April, 1931.

Held, (1) that the regulation contemplated reservations of a more or less permanent character and that the notice of the 21st June, 1930, did not fall within its ambit.

(2) that the notice did not prohibit persons from prospecting in the specified areas.

(3) that the location by A. was lawful, and the subsequent location by B. invalid.

H. C. Humphrys, for the appellant.

J. A. Luckhoo, K.C., for the respondent.

Cur. adv. vult.

SAVARY, J.: This is an appeal from a decision of Mr. Vincent Roth, Warden, who dismissed with costs a complaint of the appellants.

The appellants claimed a declaration that they were entitled to occupy a particular piece of Crown land delineated on a plan "K" located by them on the 19th of October, 1931, under a prospecting licence and in respect of which Claim Licence No. 13536 was issued. This claim was referred to as "Sunshine Creek" during the hearing, and the appellants allege that the respondents trespassed on it. The respondents' answer is that they had previously, on the 18th of April, 1931, located a claim called "In Time," which they allege comprise a piece of land wrongly included by the appellants in their claim "Sunshine." It is this piece of land which is really in dispute.

The respondents also claimed a declaration that they were entitled to occupy and work the lands within claim licence No. 13305. A considerable amount of evidence of a very conflicting nature was given on the issue of fact and the Warden came to the conclusion that the complainants had not satisfied him that "Sunshine Creek" included the piece of land in dispute as he was left in a state of doubt.

On the appeal Mr. Humphrys, counsel for the appellants, argued that the conclusion of the Warden on the facts was unreasonable and ought to be reversed. After careful consideration of the various points raised on both sides including a letter from Farrier to Pindar of the 7th of March, 1933, Exhibit E, I have arrived at the conclusion that I cannot disturb the Warden's decision on the facts.

Now I come to the second ground of appeal that was argued, a question of law. In their case before the Warden the respondents asked for a declaration that they were entitled to occupy and work the claim located by them. "In Time:" and in respect of which claim licence No. 13305 was issued, and the Warden went into the question of the validity of this location. The Warden dealt with the matter in his decision and came to the conclusion that the respondents' location was valid, although he, in fact, omitted to make the consequential declaration. In my opinion the appellants are entitled to raise this question of the validity of the respondents' location on this appeal, as a decision adverse to the respondents would leave these kinds open for prospection by the appellants or others. The point urged on behalf of the appellants is that the location of the respondents on the 18th of April, 1931, is invalid because one Lewis George had

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previously, on the 23rd of March, 1931, located the same claim and that the Warden was wrong in his view on this point.

It seems beyond dispute that one Lewis George did locate on the 23rd March, 1931, and the Warden impliedly so found, and the respondents located the same claim on the 18th of April, 1931, so that as three months had not elapsed since George's location, it would appear at first sight that the location of the respondents would be invalid. This would follow from the provision of regulation 7 (1) of the Mining Regulations, 1924, (hereinafter referred to as "the Regulations") which provides, in effect, that a person who has located a claim shall not more than three months thereafter file a notice thereof at the office of the Warden or at the Department of Lands and Mines in Georgetown together with an application for a licence called a "Claim Licence." The same regulation provides that if such notice and application are not filed as required the location becomes null and void and thereafter any person may locate a claim in respect of the same land. But the respondents' answer is that the location of George was invalid for the reason put forward by them and hereinafter set out, and therefore it could not affect their subsequent location which must be decreed good and valid. The respondents contend that as a result of a notice dated the 21st of June, 1930, under the hand of the Acting Commissioner of Lands and Mines published in the *Official Gazette* of the same day, the location of claims in the area in dispute was prohibited until further notice which further notice dated the 18th of April, 1931, appeared in the *Official Gazette* of that date. This further notice cancelled the prohibition imposed by the notice of the 21st of June, 1930. Based on these notices the submission made by the respondents is that between the 21st of June, 1930, and the 18th of April, 1931, prospecting within the prohibited area, which included the land in dispute, was not permitted, therefore Lewis George's location on the 23rd of March, 1931, is invalid and theirs on the 18th of April, 1931, is good and valid. At first sight it does appear strange that the location by the respondents was on the same day as the date of the further notice cancelling the previous prohibition, but perhaps this is a mere coincidence.

In order to form an opinion on this submission, it is necessary to consider the effect of the notice of the 21st of June, 1930, and to decide whether its language can be said to have reference to the locating of claims under a prospecting licence.

By regulation 4 (1) of the Mining Regulations it is provided that a prospecting licence is issued subject to the provisions of sub-section (1) of regulation 6.

Regulation 6 (1), omitting the parts not material to this point, enacts that a person who obtains a prospecting licence can prospect for and locate claims on any of the Crown Lands in the colony not previously lawfully occupied or previously located or

reserved by notice published in the *Gazette* (a) for the use of the Crown, (b) or the colony, (c) or as an Indian Reservation.

The notice of the 21st of June, 1930, is as follows: "Notice is hereby given for general information that, until further notice, no Concessions, Leases or Licences applied for under the provisions of the Mining (Consolidation) Ordinance, 1920, will be granted on or over the Crown lands situate within the area bounded as follows." . . . then follows a description of the area.

The respondents submit that this notice is one published under regulation 6 (1) and has the effect of reserving the area in question for the use of the Crown or the colony with the result that no locations in that area under prospecting licences would be valid. In my opinion this is not a notice under regulation 6 (1) as it does not conform to the language of the regulation and in addition is obviously notice of a temporary state of affairs, whilst the words of the regulation seem to imply a reservation of a more or less permanent character. Furthermore, concessions, leases and claim licences are granted in respect of a limited and defined area of Crown lands, whilst prospecting licences apply generally to all the Crown lands in the colony subject to the exceptions mentioned in regulation 6 (1) so that it seems to me that language different to that in the notice would be necessary in order to exclude the area set out in the notice from the operation of prospecting licences. My view is that although the word "Licence" may in certain contexts include a prospecting licence, in the notice of the 21st of June, 1930, it refers to claim licences only; such a construction appears to me reasonable and enables full effect to be given to the notice. Whatever may have been the intention I have to construe the language used. If it can be said that such a notice was one issued by virtue of regulation 6 (1) then the addition of a few words would have been necessary to make it apply to locations under prospecting licences if such had been the intention. If it is necessary to express an opinion I take the view that this notice ought to be regarded as an administrative notice dealing with Crown lands and not a notice under the Regulations.

For these reasons I am of opinion that the decision of the Warden on this point was erroneous and that the respondents are not entitled to the declaration asked for by them as their location of the claim "In Time" was null and void.

As the appellants fail so far as their claim is concerned. I dismiss the appeal, but as they have succeeded on the question of the respondent's claim I allow no costs to either party of the appeal.

Appeal dismissed.

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J. H. NEWPORT v. E. HOHENKERK, *et al.*

[No. 87 OF 1934—DEMERARA.]

BEFORE SAVARY, J.

1934. NOVEMBER, 13, 27, 28. 1935. MARCH 26.

Mining claim—Location—Notice and application for licence to be filed within three months—Day of location excluded from said period—Location null and void if documents not filed in time—Person whose location is annulled not to re-locate without permission of Commissioner—Location under different prospecting licence—Effect of—Mining Regulations, 1931, Reg. 14 (1).

Regulation 14 (1) of the Mining Regulations, 1931, provides that “every person who locates a claim shall within a reasonable time after such location, and in any case not more than three months thereafter, file or cause to be filed a notice together with an application in writing, and if such application and notice be not filed as required the location shall be null and void and thereafter any person may locate a claim in respect of the same land.”

A. located a claim on the 29th June, 1933, but did not file a notice or an application. On the 29th September, 1933, B. located the claim, and on the 30th September, 1933, C located it

Held, that the period of three months allowed to A. to file his papers did not expire until midnight on the 29th September, 1933, that the land was therefore not open to location on the 29th September 1933, that B.’s location was null and void, and that C.’s location was regular and in order.

Semble, that the proviso to regulation 14 (1) which enacts that the person whose location is annulled by that regulation shall not re-locate the claim without the permission in writing of the Commissioner or Warden previously obtained refers to subsequent locations under the same prospecting licence and not to subsequent locations under a different prospecting licence.

Appeal from a decision of M. P. Hastings, Warden of No. 3 Mining District. The facts and arguments sufficiently appear from the judgment.

H. C. Humphrys, for the appellant.

J. A. Luckhoo, K.C., for the respondent.

Cur. adv. vult.

SAVARY, J.: This appeal by John Henry Newport from a decision of Mr. Hastings, Warden of No. 3 Mining District, arises out of a dispute about the location of a Mining Claim known as “Ace of Diamonds No. 4.” The appellant’s case before the Warden was that, by his authorised agent, John Walter Newport, he located this claim on the 29th of September, 1933, under licence B20915, which had been issued to him on the 24th of November, 1932, and duly placed his location boards thereon. On the following day the respondents purported to locate the same claim, and also put up location boards. This brought about the dispute. Although the Warden accepted the facts as deposed to by the appellant and his witnesses he held as a matter of law that this location on the 29th of September, 1933, was a re-location within the Mining Regulations, 1931, and was invalid because it had

been done without the previous permission in writing of the Commissioner of Lands and Mines or the Warden.

The main reason for the Warden coming to the conclusion that this was a re-location is that the John Walter Newport who located this claim for the appellant on the 29th of September, 1933, is the same person who had previously, on the 29th of June, 1933, located the same claim under another prospecting licence B21476 on behalf of himself and one Robert Drayton. In my opinion this view of the Warden is erroneous. Regulation 14 (1) of the Mining Regulations, 1931, contains a proviso at the end dealing with re-locations, and my conclusion is that this refers to subsequent locations under the same licence and not under a different licence.

It would follow from this that the appellant's location on the 29th of September was not a re-location, but Mr. Luckhoo, counsel for the respondents, takes the point that the period of three months referred to in Regulation 14 (1) within which an application for a claim licence must be made expired on the 29th of September, 1933, and not on the 28th of September, as contended by the appellant, so that the claim located on the 29th of June was not open for prospection under another prospecting licence until the 30th of September. I now proceed to discuss this submission which is one involving the rule as to computation of time.

Regulation 14 (1) omitting the parts not material to this point reads as follows: "Every person who locates a claim shall within a reasonable time after such location and in any case not more than three months thereafter . . . file or cause to be filed . . . and if such application and notice be not filed as required the location shall be null and void." The question may be tersely stated in this way, in computing the period of three months aforesaid, is the day of location of the claim included or excluded? The question is not free from difficulty and a large number of cases were cited to me by counsel on both sides. After considering the various cases and after some fluctuation of opinion, I have come to the conclusion that in computing this period of three months the day of location is excluded.

I gather from the various cases that there is no universal rule for the computation of time and that regard must be paid to the words used, the circumstances of the case and the purpose for which the computation is made. See per Esher, M. R. at p. 269 and A. L. Smith, L.J., at p. 272 in *Re North, ex parte Hasluck*, (1895) 2 Q.B. 264. But, although it appears that there is no universal rule of computation of time, the cases justify the view that the usual course in recent times has been to construe the day exclusively, whenever anything has to be done in a certain time after a given event or date. Sir William Grant, M.R., in 1808, in the case of *Lester v. Garland* (1808) 33 E.R. 748, indicated this

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opinion and broke away from the line of cases supporting the opposite view. What I have mentioned as the usual rule will be seen illustrated in a number of cases. See *Hardy v. Ryle*, (1829) 109 E.R. 224; *Young v. Higgon*, (1840) 151 E.R. 317; *Migotti v. Colvill* (1879) 4.C.P.D. 233; *Re Railway Sleepers Supply Co.*, (1885) 29 Ch.D. 204; *Radcliffe v. Bartholomew* (1892) 1 Q.B. 161; *Re North, ex parte Hasluck, supra*; *Goldsmiths' Co., v. West Metropolitan Railway*, (1904) 1 K.B. 1; and Beal's book on Legal Interpretation at pp. 87, 88, 271. Mr. Humphrys who contended that the first day, that is the day of location, should be included relies on an expression of opinion in *Lester v. Garland* that this rule applies where the person against whom time was to be computed was privy to the act or event. A difficulty which confronts me is that I can find no subsequent case where this question of being privy to the act or event was considered a determining factor, but on the contrary in several of the cases referred to, notably *Re Railway Sleepers Supply Co.*, a case wherein the words to be interpreted bear a close resemblance to the words in Regulation 14 (1), the question of privity was not even mentioned although the fact of privity was apparent. See also *South Staffordshire Tramways Co., v. Sickness and Accident Assurance Association*, (1891) 1 Q.B. 402, and the criticism of Baron Parke on this point in *Young v. Higgon*. I am, therefore, not prepared to apply the rule as to privity urged by Mr. Humphrys. Two other cases in which the method of computation was similar to that urged by the appellant can, in my opinion, be distinguished. In *Russell v. Ledsam* (1845) 153 E.R. 604, original letters patent were dated the 26th February, 1825, for a term of fourteen years and the question for decision was whether the renewed letters patent dated the 26th of February, 1839, were granted within the period of fourteen years. Baron Parke, who delivered the judgment of the Court, recognised what I have described as the usual rule, but came to the conclusion that the question for decision was when the term given by the patent commenced, that is, from what day it was protected. He applied the analogy of a term granted by a lease. And Warrington, J., applied a similar rule in *English v. Cliff* (1914) 2 Ch. 376, a case concerning a trust arising on a deeds of settlement. In neither of these cases were there words either similar to or of the same import as those in Regulation 14 (1), and in my opinion they have no application. It seems to me that I must give the word "thereafter" its proper meaning, that is, "after the location" or "from the location" and if one applies a test that was suggested in several of the cases, e.g., *Young v. Higgon* and the *South Staffordshire Tramways case* of reducing the time to one day, it would be apparent that hardship and inconvenience would ensue if the first day or the day of location were not excluded. Counsel for the respondent further contended

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that if the Court was against him on this question of the computation of time, then the location of the 29th of June, 1933, by John Walter Newport on behalf of himself and Drayton should be deemed to have been abandoned when that of the 29th September, 1933, was made by John Walter Newport on behalf of the appellant. This case was not made on the pleadings nor was it raised before the Warden, and I have great doubts whether it is competent to argue it before me. But anyway, my opinion is that there is no evidence to support such a contention.

The result of my view is that (1) the period of three months in Regulation 14 (1) so far as regards the location of the 29th of June, 1933, by John Walter Newport on behalf of himself and Drayton expired at midnight on the 29th September, 1933.

(2) The location by John Walter Newport on the 29th September, 1933, on behalf of the appellant, is null and void.

(3) The location by the respondents on the 30th September, 1933, is lawful and effective.

For these reasons the appeal is dismissed with costs.

Appeal dismissed.

Solicitor for appellant: Albert Ogle.

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JOHN BOLLERS v. THE COMMISSIONERS OF INCOME TAX.

[No. 373 OF 1933.—DEMERARA.]

BEFORE SAVARY, J.

1935. MARCH 28; APRIL 2, 3; MAY 21.

Company—Capital assets—Sale—Reserve Fund—Distributed as profits—Dividend—Income Tax—Liability to—Income Tax Ordinance, Chapter 38, ss. 5 (c) 23 (1) 24, 25.

A dividend distributed by a company from a Reserve Fund made up of profits realised from the sale of its capital assets is not assessable to income tax when received by the shareholders.

Appeal from an assessment under the Income Tax Ordinance, chapter 38. The facts and arguments sufficiently appear from the judgment.

G. J. de Freitas, K.C., for the appellant, John Bollers.

S. E. Gomes, Assistant Attorney-General, for the respondent, The Commissioners of Income Tax.

Cur. adv. vult.

SAVARY, J.: The point for decision on this appeal can be stated in a few words, but the solution of it is a matter of some difficulty. It can be put thus, is a dividend distributed from a Reserve Fund made up of profits realised from the sale of capital assets of a company assessable to income tax when received by the shareholders. The Commissioners held that it was, and proceeded to make an assessment on the appellant in respect of it, and the appellant now appeals from this assessment. A short statement of the material facts is now necessary.

In 1919 Brodie and Rainer, Limited (hereinafter called the Company) realised from a sale of immovable property a profit which was carried to a reserve fund. In 1932 the Company decided to distribute a part of this profit then standing at the figure of \$23,608.75, and such distribution absorbed \$11,215 of this amount.

The resolution of the directors states that it was decided that a dividend of 12½% be distributed to the shareholders, and the appellant's proportionate share of this distribution is \$575, the subject matter of the assessment in dispute.

Appellant's counsel, Mr. G. J. deFreitas, contends that if the fund out of which the dividend is distributed is not taxable in the hands of the Company, then the dividend is not taxable in the hands of the recipient.

He urges that the scheme of the local Ordinance, so far as companies are concerned, is similar to that of the English Income

Tax Acts, in respect of which, it has been held since 1914, that the company is the Taxpayer and pays tax on its profits as a company that is empowered though not bound to deduct the proportionate amount of income tax from the dividend to be paid to each shareholder. The result is that as a rule in practice the company pays income tax direct to the Crown and hands over what may be called the net amount of dividend to the shareholder, on which he pays no further income tax.

Though the word "dividend" is specifically mentioned in section 5 (c) of the Income Tax Ordinance, Ch. 38, which is the charging section, he urges that the scheme remains the same. He further maintains that as the Crown, at any rate, since the decision in *Board of Assessment v. Brodie & Rainer, Ltd.*, B.G.L.R. (1918) 135, admits that this fund in the hands of the company was not liable to assessment to income tax, it follows that any distribution by way of dividend from that fund is not liable to tax in the hands of the shareholder.

In my opinion the contentions put forward by Mr. de Freitas are sound and seem to be borne out by the provisions of sections 23 (1), 24 and 25 of the Ordinance and the cases of *Purdie v. R.* (1914) 3 K.B. 112, *Gimson v. Inland Revenue Commissioners* (1930) 2 K.B. 246, and *Neumann v. The Commissioners of Inland Revenue* (1934) A.C. 215.

In *Gimson's case* it appears from the case stated by the Special Commissioners for the opinion of the High Court that the Crown conceded the point that so much of the dividend as was paid out of profits on realization of investments should be treated as of a capital nature and not assessable to income tax.

Neuman's case, which is very instructive seems to me to clarify the position. At page 222 Lord Tomlin says:—"The relative positions of a company and the shareholders of the company in relation to income tax, under the Income Tax Acts have always been recognised as special in character. It was never, I think, doubted that under the Act of 1842 the profits of a business carried on by a company were taxable against the company under Sch. D, and were not taxable again after distribution in the hands of the shareholders under Sch. D or any other schedule. At the same time it was permissible to the company under s. 54 of the Act of 1842 to deduct from the dividend the proportionate part of the tax paid to the tax collector, and the shareholders entitled to exemption from or abatement of income tax could upon the footing of the deduction obtain the necessary return of tax." At page 228 the same Law Lord proceeds: "It is not disputed that if a dividend is paid out of the profits produced by a sale of a capital asset it is not made out of profits or gains charged on the Company, and therefore no deduction from the dividend is authorised and the dividend itself is not liable to be taken into account in fixing the liability

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“to surtax of a shareholder.” And Lord Wright puts it thus at page 235: “The scheme of these provisions as I understand them is to impose the tax “on all the profits of the company at the source: if and so far as these profits have been so taxed, they are not liable to any further tax (other than “surtax) in the hands of the shareholder receiving the dividend. The shareholder and the company are no doubt separate entities: the company is not “an agent for the shareholder to pay tax on the dividend, nor is the company the collector for the Revenue to deduct the tax from the dividend. “The company is the taxpayer. The shareholder has no right to any share in “the profits till a dividend is declared: the company may use the profits in “any way it pleases vis-a-vis any shareholder.” At page 236 he uses these words “On a careful review of these provisions, I reach the conclusion that “a shareholder is not separately taxable (I disregard surtax) on a dividend, “as a profit individual to himself, under Sch. D. Case VI, as the Court of “Appeal held, or at all” and at page 240 occurs this passage: “On that view “of the position, the dividend here in question was a dividend from which “the deduction of tax was authorised so that whether tax were deducted or “not, the dividend must be brought into account by the appellant in the return of his total income and accordingly becomes liable to surtax.”

I now proceed to deal with the argument of Mr. Gomes for the Crown. He urges that the word “dividend” in section 5 (c) should not be given a limited meaning but should be held to include a distribution from a fund made up from the proceeds of sale of capital assets. The effect would be that even if income tax is not deductible by the company, the dividend is taxable in the hands of the recipient. He contends that this is the position because the scheme of the local enactment is not similar to that of the English Acts. In my opinion this argument is not sound as it fails to take into account the provisions of section 23 (1), 24 and 25 of the Ordinance which lay down the position of companies in relation to income tax and appear to me to place local companies on a footing analogous to that of companies under the English Acts.

Mr. Gomes further contends on the authority of two cases. *In re Bates*, (1928) Ch. 682 and *Hill and Ors. v. Permanent Trustee Co. of New South Wales, Ltd.*, (1930) A.C. 720, that this dividend, although representing profits realised on the sale of a capital asset, should be treated as income, and is therefore taxable. The first observation I have to make is that these were cases brought to determine the question whether cash bonuses or dividends, distributed out of capital assets, were to be treated as income or corpus of the respective trust estates, in other words, they were cases between tenants for life and remaindermen, and not revenue cases. The words of Pollock, M.R. at page 462 in

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Inland Revenue Commissioners v. Fisher's Executors, (1925) 1 K.B. 451 are instructive on this point. He says: "But we have to look at it not from "the point of view of Company law; and I agree with Mr. Hill that we have "not to look at it from the point of view of what ought to be the position as "between a tenant for life and a remainderman under a will or settlement "such as had been done in a number of cases to which he was prepared to "refer; but we have to look at it from the point of view of super tax law, "and to see whether or not this portion of the debenture stock received by "the late Bishop Fisher is part of his total income estimated in the same "manner as it would be estimated for income tax purposes." This judgment was affirmed in the House of Lords, (1926) A.C. 395.

In addition I would like to refer to the fact that Lord Tomlin who was a member of the Board of the Privy Council, in *Hill's case*, delivered the principal speech in the House of Lords in *Neumann's case* without making any reference to *Hill's case* nor did counsel cite it. I make this remark because it seems to me that if *Hill's case* laid down a principle that was considered applicable to income tax law, mention would of necessity have been made to it in *Neumann's case*.

In the result, my view is that the Income Tax Ordinance is similar in scheme to the English Acts so far as companies are concerned, and that I should apply what appear to me to be the principles laid down in the English Courts on this point, that is, where income tax is not deductible from a dividend by the company distributing it, it is not assessable to income tax in the hands of the shareholders or recipient. That being my view, it is unnecessary to refer to any other authorities cited to me nor do I feel called upon to define the ambit of the word "dividend" in section 5 (c) of the Ordinance.

For these reasons the appeal succeeds and I set aside the assessment of the Commissioners.

The appeal is allowed. No order as to costs.

Appeal allowed.

Solicitors: Francis Dias; Crown Solicitor.

G. K. JOHNSON v. M. P. CAMACHO.

G. K. JOHNSON v. M. P. CAMACHO.

[No. 75 OF 1934.—DEMERARA.]

BEFORE SAVARY, J.

1934. NOVEMBER 20, 21, 22, 29, 30; DECEMBER 18, 19, 21.

1935. JANUARY 9, 10, 22, 23, 25, 31; FEBRUARY 1, 5, 6, 12; APRIL 26.

Admiralty jurisdiction—Ships—Collision—Negligence—Inevitable accident—Ship at anchor—Moving ship—Ship adrift.

When a ship at anchor is run into by a moving one, for example, a ship that has broken away from its moorings and is adrift, the burden is on the latter to prove that it is not responsible for the accident.

Action for damages in respect of a collision between ships. The plaintiff pleaded negligence. The defendant did not plead inevitable accident, but he set it up at the trial, and as both parties dealt with it and called evidence on that issue, the trial judge dealt with it.

H. C. Humphrys, for the plaintiff.

E. G. Woolford, K.C., for the defendant.

Cur. adv. vult.

SAVARY, J.: This claim for damages arises out of a collision between the schooners "Holetown" and "Golden West," owned by the plaintiff and the defendant, respectively, at about 7 p.m. on the night of the 7th of January, 1934, whereby the "Holetown" was seriously damaged. At the time of the collision the "Holetown" of 33 tons, was moored at the end of the ice factory wharf of Messrs. Wieting and Richter, Ltd., and the schooner "Vivian P. Smith," also belonging to the plaintiff, was moored alongside the "Holetown" that is, was the outside vessel. The "Holetown" and the "Vivian P. Smith" were properly moored to the wharves. The "Golden West" a larger schooner, was moored at the end of the Guiana Steam Saw Mill's new wharf with her stern tipped up, as repairs were to be carried out the next day. The bow of the "Golden West" was about forty to fifty feet from the stern of the "Holetown."

The plaintiff alleges various acts of negligence but the only ones I am called on to consider are: (1) that the "Golden West" was improperly secured to the wharf, (2) that the mooring ropes were not proper or sound, (3) that the schooner was much longer than the width of the wharf, (4) that her stern was tipped up thus offering a larger surface to the wind. (3) and (4) are not really acts of negligence but set out conditions in existence that night which become material to the consideration of the question whether the "Golden West" was properly moored.

In the preliminary act of the defendant he denies by inference that there was any collision, and alleges that the damage to the "Holetown" was caused by the "Vivian P. Smith," a heavier vessel, tearing away the "Holetown's" after-cleats and sending her adrift on to the mudflat. At the trial leave was given the defendant to file an amended preliminary act which makes it clear that the defence is that there was no collision, but it does not in fact set up the alternative defence of inevitable accident, which was the real defence ultimately argued before me. However, as both parties dealt with that aspect of the matter and called evidence on this issue, I propose to deal with it.

In my opinion the defence of "no collision," over which a considerable amount of time was wasted, was never justified and should not have been put forward. I accept the version of the plaintiffs witnesses as to how the collision occurred and may state generally that in any conflict of evidence I prefer to rely on the plaintiff's witnesses.

I am satisfied that the collision was the result of the defendant's vessel's mooring ropes parting, thus sending her adrift when she came into collision with the "Holetown's" stern, causing considerable damage. What was the cause of the mooring ropes parting? The plaintiff says that she was improperly secured to the wharves, and that the ropes were bad or not suitable: the defendant says it was due to the weather. I now proceed to consider the defence of inevitable accident and the evidence adduced to support it. It is common ground that around 7 o'clock that night a squall of rather unusual severity for this harbour broke, the wind then blowing North-North-west, and that immediately it struck the defendant's vessel several of the mooring ropes parted. Commodore Douglas states that at about eight twenty o'clock that night when he got to the wharf he found the stern wire hawser of the "Arapaima" broken, but all the 4-inch ropes intact, and the next morning he saw the schooner "Stella Maris" sunk in the channel outside the Georgetown Sterling.

There is no evidence to show how the "Stella Maris" was moored or when she broke from her moorings. Then there is Captain Jones of the "Blue Jacket" who states that his vessel was moored alongside Booker Bros. No. 4 wharf with ten lines out, all new ropes, and yet in the morning he found the vessel aground at Sprostons' wharf about three ship's lengths from her mooring. He had 134 tons of sugar aboard. He further states that he visited his ship at about 7 p.m., found nothing unusual in the weather and went away. He also states that in his opinion there was no storm that night. I have no evidence as to what caused the "Blue Jacket" to part from her moorings and it is impossible to reconcile his story with the expert evidence of Messrs. Walcott and Stoll, the pilots, to which I shall refer later.

In fact I cannot accept his evidence. Captain Lewis of the "Rima," a schooner of 73 tons, which was moored alongside Booker Bros, cooperage wharf, tells the Court that another schooner, the "Leading Light," was moored outside his vessel, and that all her mooring lines save one were made fast to the "Rima." When the squall struck his vessel she broke away from the wharf, but it has to be remembered that his vessel was carrying a double strain, its own and that of the "Leading Light." Captain Clyne of the punt "Britannia" found after the squall that two of his ropes had parted but the punt did not leave her moorings.

That is all the evidence on this point and there is an entire absence of testimony, usual where such a defence is raised, of the number of ships in the harbour that night, similar to those in the case or otherwise, and of the extent of damage to the shipping generally.

During the trial I suggested that such evidence might be helpful, but none was forthcoming. It is not for me to speculate, and the onus is on the defendant to establish his defence of inevitable accident. I find that he has failed to do so. See *The Annot Lyle*, (1886) 11 P.D. 114, and *The Merchant Prince*, (1892) P. 179, and *The Schwan* in the same report at p. 419. The defence of tempestuous weather must not be too readily accepted unless supported by convincing evidence. See *The Uhla*, (1867) 19 L.T. 89. But in this case I am of opinion that the plaintiff has established positive acts of negligence against the defendant and I rely principally on the following evidence in support of this conclusion: (1) a discarded mainsheet was used as one of the spring lines of the "Golden West," and according to Walcott, the pilot, who was one of the defendant's witnesses, a mainsheet is not suitable for mooring; (2) the two back spring lines of the "Golden West" broke immediately the squall struck her and then the stern lines parted, which fact Commodore Douglas said could not be explained as he would expect the stern lines to break first, the inference being that the spring lines were unsuitable or not in good order;

(3) the statement of Captain Leverock of the "Golden West" made to the plaintiff and Captain Hassell of the "Vivian P. Smith" that the ropes were not good, which is supported by the fact that in his statement given to the plaintiff's solicitors, exhibit B.L.1., he repeats the same thing coupled with his admission in Court that the plaintiff asked him for the ends of the broken ropes;

(4) defendant's vessel was ill-equipped with rope that night because when the ropes parted there was no extra rope on board as the defendant was requested to send some rope to his vessel immediately;

(5) the mooring ropes were partly grass and partly manilla the

former of which is admittedly not so strong and is not in general used by vessels;

(6) the opinion of Walcott and Stoll, the pilots, that if the "Golden West" had nine good mooring lines as alleged by the defendant they would not expect her mooring ropes to break in that weather;

(7) at least half an hour before the squall broke there was a warning of possible bad weather and no extra precautions were taken on the "Golden West," although the place where she was moored and the tilting up of her stern were such as to require every precaution, whilst Captain Hassell of the "Vivian P. Smith" put out an extra stern line as he said the weather was squally.

Various other points in the evidence could be made the subject of comment by me, but I think I have set out enough to justify my view that the owner of the "Golden West" is guilty of negligence in that the "Golden West" was not properly moored that night, and that she broke away owing to her mooring ropes not being in good order.

Viewed from another angle the defendant's position seems equally hopeless. It is settled law that when a ship at anchor is run into by a moving one the burden is on the latter to prove that it is not responsible for the accident: *The Annot Lyle, supra, The Merchant Prince, supra*, and it would appear from *The Bothnia*, (1860) 167 E.R. 28, that a ship that has broken away from its moorings and is adrift is deemed a moving ship for this purpose.

It also appears to be settled law that where the ship that came into collision with another is accused of being improperly moored the burden is on the accused ship to satisfy the Court that she was properly moored: *The John Hartley*:(1865) 13 L.T. 413, and see also *The Pladda* (1876) 2 P.D. 34, *The Kepler* (1875) 2 P.D. 40.

Applying these principles to the facts of this case the defendant has failed to satisfy me that his vessel is not wholly to blame for the collision.

For these reasons I am of opinion that the plaintiff succeeds in his action and I now proceed to assess the damage. Defendant's counsel has suggested \$6 a day for demurrage and I accept that figure.

The damages will be:

Bill of Sproston, Ltd., for repairs ...	...	...\$810 23
Repairs to sails	... ..	... 28 35
Demurrage	... ..	... <u>120 00</u>
		<u>\$958 58</u>

There will be judgment for the plaintiff for \$958.58 and costs.

Solicitors: *G. R. Reid; Albert Ogle.*

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LAMBERT E. HENERY v. S. DAVSON & CO, LTD.

[No. 12 OF 1932.]

BEFORE CREAN, C.J.

1934. Nov. 27, 28, 29; DEC. 3, 4, 5, 6, 10, 11, 12, 13, 18, 19, 20.

1935. JAN. 2, 4, 8, 9, 10, 11; FEB. 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20,
21, 22, 25, 26, 27, 28; MARCH 1, 4, 6, 11, 12; MAY 2.

Trustees—Conflict between interest and duty—Secret agreement—Subject matter of trust—Destruction—Classes of trustee—Express—Constructive—Statute of Limitations—Analogy to—Equitable defences—Laches—When time begins to run—Secondary evidence—Costs.

Plantation Providence was the property of E. T. Henery and P. J. T. Henery. In 1895 the defendants obtained a sentence of the Supreme Court of British Guiana against them. On the 6th of July, 1895, plantation Providence was levied upon and the estate was then placed under sequestration. Enough money was lodged in Court on June, 27, 1899, to pay off the debt for which the estate was under sequestration, but, as there were other creditors of the estate who were in a position to apply for sequestration it was agreed that the estate should be conveyed to trustees subject to certain conditions and trusts. A trust deed was entered into on September, 1, 1899, and was to remain in force for three years from the 6th July, 1899. This deed after making provisions for certain payments mentioned in it, directed the profits thereafter to be distributed amongst the creditors. The trustees were to stand possessed of the trust estate upon trust to pay expenses of maintaining and cultivating the plantation, to pay the salary of the trustees, and the annuities, and the balance, if any, to the creditors by way of dividend. The British Guiana Bank were given the right to call for a legal mortgage. The trustees were given power to sell and were authorised to call a general meeting of the creditors to decide on such a question. On the 15th April, 1901, an agreement was entered into, extending the period of the trust deed of September 1, 1899, to three years from 6th July, 1902. This agreement was carried out by the execution of the trust deed of 5th July, 1902. In this deed it was provided that the British Guiana Bank was to have a first charge on the estate and to have the right to call for a legal mortgage, and the amount of the mortgage debt was to be payable one month from the date of the mortgage.

The trustees under this deed were E. C. Hamley, the manager of the British Guiana Bank, J. Downer, the attorney in this colony of the defendants, and N. R. McKinnon.

On the 1st September, 1902, an agreement was entered into between the British Guiana Bank by E. C. Hamley, the managing director and the defendants by J. Downer their attorney whereby the British Guiana Bank sold to the defendants its claim up to the 30th June, 1902, for which it was about to obtain a mortgage from the said trustees. It was provided that the Bank should, immediately on the mortgage by the trustees becoming due, proceed in execution and do all in its power to obtain an order for the immediate sale of the plantation, and that the Bank should buy the said plantation, provided it does not realise more than the sum due to the Bank by the trustees at the time of the sale under the mortgage and trust deeds. It was also agreed that if the Bank become the purchaser it would immediately transport the same to the defendants who under the terms of the agreement would become purchasers as from July 1, 1902. This agreement was signed by J. Downer on the express instructions of the defendants.

The trustee N. R. McKinnon was not a party to the agreement of the 1st September, 1902. The other trustees E. C. Hamley and J. Downer did not tell him that the agreement had been made. The creditors were not consulted with reference to it.

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Negotiations leading up to the agreement of September, 1, 1902, took place either before or immediately after the execution of the trust deed of 5th July, 1902, and these negotiations were conducted by the two trustees E. C. Hamley and J. Downer.

A mortgage to the British Guiana Bank under the powers contemplated in the trust deed of the 5th July, 1902, was executed on the 10th September, 1902, to secure payment of \$29,882.83. In this mortgage one month was given within which to pay the mortgage debt to the Bank. On the 8th November, 1902, the Bank instituted a suit against the mortgagors and obtained judgment on the 22nd November, 1902, by default, none of the trustees entering appearance. A writ of execution under the judgment was issued on the 31st December, 1902, and in pursuance of it the plantation was levied upon on the 2nd January, 1903. On the 3rd January, 1903, the Supreme Court appointed E. C. Hamley and W. W. Craib as sequestrators over the plantation. On the 16th January, 1903, the sequestrators reported to the Court that they were not in a position to report definitely in favour of an immediate sale, or of a continuation of the sequestration for 12 months. On the 27th January, 1903, E. C. Hamley and J. Downer, two of the trustees under the trust deed of 5th July, 1902, reported to the Court recommending an immediate sale of the plantation. On the 31st January, 1903, N. R. McKinnon, the other trustee, reported to the contrary. On the 18th February, 1903, the sequestrators definitely reported that an immediate sale of the plantation would be most advantageous to the interest of the creditors. The Court was not informed of the existence nor of the terms of the agreement of the 1st September, 1902. On the 19th February, 1903, an order of Court was made directing an immediate sale of the plantation.

By letter dated 3rd April, 1903, J. Downer as attorney of the defendants authorised the Bank to bid up to \$52,000 for the plantation. On the said day the plantation was sold to the Bank for \$40,300 and Letters of Decree granted on the same day.

No endeavour was made to get financial aid from anyone but the British Guiana Bank. There was no advertisement calling for tenders, and no advertisement of a sale by private treaty. The British Guiana Bank transported plantation Providence to the defendants who mortgaged it to the Bank. The defendants were given three years within which to pay off the mortgage.

Held, (1) that there was a confidential or fiduciary relationship between E.C. Hamley and J. Downer on the one hand and the *cestuis que trust*, that is to say, the creditors of the estate, the proprietors and the annuitants on the other hand.

(2) that there was a duty on them to bring to the notice of the Court the fact of the existence of the agreement of the 1st September, 1902, and so give an opportunity to the Court to peruse it and consider its effect upon the trust estate.

(3) that the object and effect of that agreement was to put an end to the trusts under the trust deed of 5th July, 1902, and to transfer the subject matter thereof to the defendants.

(4) that the making of the agreement of the 1st September, 1902, and the several acts done thereunder constituted a breach of trust by the trustees E. C. Hamley and J. Downer.

(5) that the defendants were liable for the breach of trust committed by their agent J. Downer, which breach they expressly authorised.

(6) that by acquiring possession of this plantation as a result of that breach of trust the defendants constituted themselves trustees of it for the proprietors, creditors and other *cestuis que trust*, and so became liable to account for it as such.

(7) that the defendants were not named in the instrument of trust as trustees, they did not take upon themselves the carrying out of the original trusts, they made no attempt to carry out the trusts created by the trust deed of the 5th July, 1902; but on the contrary they acquired possession of the trust property and by so acquiring it, they made it impossible for the trustees to work the trust property for the benefit of the creditors generally and the other *cestuis que trust*. They were, therefore, not express trustees, but constructive trustees.

Express trustees consist of (a) trustees named as such in the instrument of trust, and (b) persons who, though not named in the instrument of trust, have

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assumed the position of trustee for others, or take possession or control on behalf of others.

An express trustee cannot rely as a defence to an action by his beneficiary either upon the Statutes of Limitation, or upon the rules which were enforced by Courts of Equity by analogy or in obedience to those Statutes.

When claims are made in equity, which are not as regards equitable proceedings the subject of any express statutory bar, but the equitable proceedings correspond to a remedy at law, in respect of the same matter which is subject to statutory bar, a Court of Equity, in the absence of fraud or other special circumstances, adopts by way of analogy the same limitation for the equitable claim.

A constructive trustee, who has acquired the trust property without any breach on his part, can rely as a defence to an action by his beneficiary upon the rules which were enforced by Courts of Equity by analogy to the statutes of Limitation. In such an event, time runs in favour of the constructive trustee from the moment he takes possession.

The defence of lapse of time based upon the rules which were enforced by Courts of Equity by analogy to the Statute of Limitations is not available (1) where a stranger to the trust has assumed to act and has acted as a trustee; (2) where a stranger has concurred with the trustee in committing a breach of trust and has taken possession of the trust property, and has not duly discharged himself of it by handing it over to the proper trustees or to the persons absolutely entitled to it; or (3) where persons make themselves trustees *de son tort*, or actually participate in a fraudulent breach of trust to the injury of the *cestuis que trust*.

Held, as the defendants not only participated in the breach of trust whereby they acquired the trust property, but expressly instructed their agent, the trustee J. Downer, to carry out what in equity amounted to constructive fraud, they could not rely upon the defence of lapse of time, and that the only defences available to them were the purely equitable ones of laches and acquiescence.

With respect to the equitable defences of laches and acquiescence, time begins to run from the time the claimant knew the facts, and not from the time when he ascertained the proper construction to be placed upon them nor from the time at which he was advised he had a right of action.

The plaintiff in January, 1903, had suspicions that there was some underhand dealing between the defendants and their agent (who was a trustee) as to the transferring of the plantation the subject matter of the trust, and he told the said trustee about it. During the hearing of an action in 1904 the plaintiff heard the Chief Justice say that a breach of trust had been committed by the trustee and he understood that the breach of trust was in regard to the said plantation. The plaintiff's counsel pleaded this breach of trust in defence in the action in 1904, wherein the plaintiff was a defendant. The plaintiff was present in Court when the trustee was examined and cross-examined in that action, and was present when he was ordered to produce an agreement dated September 1, 1902, upon which the breach of trust was founded. On the evening of the day on which the hearing of the action in 1904 was finished, the plaintiff discussed the matter fully with his legal adviser, and he saw him occasionally between 1904 and 1906 when the plaintiff left the colony. He returned in 1929. In 1931 he was advised that he had a good cause of action, and he instituted proceedings in 1932 claiming relief founded on the breach of trust.

Held, that time began to run from the time the plaintiff knew the facts and not from the time when he ascertained the proper construction to be placed upon them; that, although the plaintiff did not appreciate until 1931 the proper construction to be placed upon the facts, he knew of them since 1904, and, the defendants not being express trustees, the plaintiff was barred by laches from obtaining relief.

An agreement which was admitted in evidence in an action in the Supreme Court was subsequently lost. In his judgment the Chief Justice stated the effect of the agreement.

Held, that the statement of the Chief Justice was admissible as secondary evidence of the agreement.

Though the Court may be of opinion, that in consequence of the lapse of time, or the acquiescence of the plaintiff or the person under whom he claims, the claim for relief consequent on a breach of trust must be dismissed, yet,

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if it is not satisfied by proof of the propriety or fairness of the transaction at the time, it will not give the defendants the cost of the suit.

Marquis of Clanricarde v. Henning (1861) 30 Beav. 175 followed.

Action claiming relief consequent upon a breach of trust.

The facts and arguments appear from the judgment.

S. J. Van Sertima, K.C., (*A. G. Brazao* with him), for the plaintiff.

G. J. de Freitas, K.C., and *J. A. Luckhoo, K.C.*, for the defendants.

Cur. adv. vult.

CREAN, C.J.: This case has long been pending in Court. It was filed as far back as January, 1932, and after a hearing which counsel say is the longest within their memories it was concluded on the 12th March last.

From the pleadings filed it was apparent that the case was one of great monetary value and of very new circumstances. It was so plain from them, that it was also a case of such great variety in the proofs and so full of argument on both sides, that I deliberately did not interrupt counsel but allowed them to put forward their arguments in their own way and as free as possible from any interruption by me. And in the delivery of my opinion I shall endeavour to make it appear that all that has been said on each side has been sufficiently considered by me.

At the outset I think I should say that Counsel on both sides have prepared their arguments and presented them and the facts, in a way which has appeared to admirable. During the long hearing there has been such a total absence of any impoliteness to each other, or to the witnesses that I have no hesitation in saying that the manner in which this case has been conducted might with profit be taken by the younger members of the Bar as a model upon which to work.

The plaintiff is a man of 71 years of age who was born in Cumberland and came to this colony for the first time in the year 1886 or 1887. He is the son of Dr. Edmund T. Henery who was the owner of Providence estate in partnership with Percival J. T. Henery in 1895, when the sequestration of this estate took place, the first step of consequence in the transactions which have led up to the filing of this action.

By the will of Dr. Edmund T. Henery of the 31st March, 1891, the plaintiff was appointed one of the executors, and half of this Plantation Providence was devised by that will to the plaintiff, and his two brothers Thos. Art Edmund Henery and John Philip Edmund Henery in equal shares. The residue of the estate was devised and bequeathed to the plaintiff, his sister Rose Ellen, and his two above-named brothers in equal shares.

The claim of the plaintiff is made in his capacity of executor.

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Alternatively, he claims one-third of the amount found to be due in his individual right as a devisee or legatee.

The history of this matter so far as it affects the present claim begins in the year 1895. In that year the defendants obtained a sentence of the Supreme Court of British Guiana against the then proprietors of this Plantation Providence, Edmund T. Henery and Percival J. T. Henery.

On the 6th July, 1895, the estate was levied upon, under the said sentence and the sequestration was continued from time to time up to the 6th July, 1899. Enough money was lodged in Court on 27th June, 1899, to pay off the debt for which the estate was under sequestration. But as there were other creditors of the estate who were in a position to apply for sequestration it was agreed that the estate should be conveyed to trustees subject to certain conditions and trusts.

A trust deed was entered into on the 1st September, 1899, and was to remain in force for three years from the 6th July, 1899. This deed, after making provisions for certain payments mentioned in it, directs the profits thereafter to be distributed amongst the creditors. That is, the trustees were to stand possessed of the trust estate upon trust to pay expenses of maintaining and cultivating the plantation, to pay the salary of the trustees, and the annuities, and balance, if any, to the creditors by way of dividend. The Bank were given the right to call for a legal mortgage. The trustees were given power to sell and were authorised to call a general meeting of the creditors to decide on such a question.

This trust deed was due to expire on the 6th July, 1902, but on the 15th April, 1901, an agreement was entered into between the several parties to it. On this agreement it is set out that in the interest of the British Guiana Bank, it is necessary that the trusts should continue for a further period of 3 years from the 6th July, 1902. It was agreed that the trusts in the new deed should be the same as in the first deed.

This agreement was carried out by the execution of the trust deed of 5th July, 1902. But there is a difference in the second deed in regard to the provisions for a mortgage to the B.G. Bank. In the first deed provision for a mortgage to the Bank is present in an indefinite way; but in the second deed there is nothing indefinite about it. The Bank are to have a first charge on the estate, to have the right to call for a legal mortgage, and the amount of the mortgage debt is to be payable one month from the date of the mortgage.

As I have stated above the second trust deed was executed on the 5th July, 1902, and it is important to note that E. C. Hamley, John Downer, and Neil Ross McKinnon are the trustees appointed therein. On the 6th August, 1902, the father of the present plaintiff died, and the evidence shows plaintiff is his executor.

It is alleged by the plaintiff that an agreement was entered into by the B.G. Bank, and S. Davson and Co., Ltd., which is signed by E. C. Hamley as Managing Director of the Bank, and by J. Downer as Attorney of S. Davson and Co., Ltd. In a Judgment of this court delivered on the 19th April, 1904, in an which has been constantly referred to in the hearing of this case as the Lonsdale action and which was instituted by the B.G. Bank, against R. E. Henery and L. E. Henery the present plaintiff. G.J. 19.4.1904. it is set out that "an agreement (undated, but which must have been passed prior to the mortgage as one of the recitals therein is to the effect that the Bank is about to receive a first mortgage on the plantation and the stamp is cancelled with the date on 1.9.1902) was entered into by the plaintiff and S. Davson and Co., Ltd, and signed by E. C. Hamley as Managing Director of the Bank, and J. Downer as Attorney of S. Davson and Co., Ltd. By this agreement the Bank sells its claim up to the 30th June, 1902, for which it was about to obtain a mortgage, to S. Davson and Co., Ltd., and it is provided that the Bank shall immediately on the mortgage becoming due, proceed in execution and do all in its power to obtain an order for the immediate sale of the plantation, and that the Bank shall buy the said plantation, provided it does not realise more than the sum due to the Bank at the time of the sale under the mortgage and trust deeds, and shall, if it becomes the purchaser, immediately transport the same to S. Davson & Co., Ltd., who, under the terms of the agreement, would become purchasers as from the 1st July, 1902. Subsequently, by a letter dated 3rd April, 1903, J. Downer as attorney of S. Davson & Co., Ltd., authorised the Bank to bid up to \$52,000 for the plantation."

This extract from the judgment of this Court in 1904 was admitted preparatory to, and to assist in, finding as a fact whether or not such an agreement was entered into between the British Guiana Bank and defendants and signed by E. C. Hamley and John Downer for them.

A mortgage to the Bank under the powers contemplated in the trust deed of the 5th July, 1902, was executed on the 10th September, 1902. In this mortgage one month was given within which to pay the mortgage debt to the Bank. This payment was evidently not made, for on the 8th November, 1902, the Bank instituted a suit against the mortgagors and obtained judgment on the 22nd November, 1902. Certain other steps followed this which I must refer to in detail later.

It is alleged by the plaintiff in his statement of claim that the agreement above referred to of the 1st September, 1902, and the several acts done thereunder constituted a design on the part of the Bank, and S. Davson & Co., Ltd., the defendants—acting through their agents Edward C. Hamley and John Downer—to deprive the proprietors of their entire interest in the plantation,

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and to vest the same in the defendants without any regard to, and in breach of the trusts imposed upon Hamley and Downer who were Trustees by the Trust Deeds already mentioned.

In the statement of claim it is further alleged that E.C. Hamley and John Downer were well aware that the fundamental object of the trust deeds was to pay off the several creditors of the proprietors including the two annuitants; and, thereafter, to reconvey the estate to the proprietors. Further, that the trustees were under a duty to endeavour to obtain advances from other sources if the British Guiana Bank declined to make further advances for the carrying out of the trusts. That the said agreement of 1st September, 1902, created a conflict of duty and interest so far as the trustees were concerned by reason whereof the trustees did not carry out their duty. It is further set out that neither the Bank nor any of the trustees including E. C. Hamley and John Downer disclosed to the Court in the proceedings for the sale of the plantation that there was such an agreement in existence between the Bank and the defendants. It is claimed by virtue of the said agreement and the several acts and things done thereunder, the Bank and the defendants became trustees *de son tort* through their said agents of the said plantation, and concurred with the trustees in committing a breach of trust and took possession and control of the trust property and have not discharged themselves of the trusts imposed upon the said property. The statement of claim further says that by reason of the foregoing the defendants became for all purposes express trustees of the said plantation for and on behalf of the proprietors, and are liable to all the legal obligations flowing therefrom; alternatively, the liabilities of the defendants consequent upon their active participation in or deliberate perpetration through their agents of the said breach of trust are in equity coterminous with those of the said agent, the trustee John Downer. Other averments in the claim are that the defendants worked and managed the plantation since 1903, made considerable profits thereby, particularly between the years 1914 and 1921, and that the defendants have since transferred the plantation to the Berbice Development Co., Ltd. And finally, upon payment to, or reservation of the sum found to be due the said creditors, the whole of the balance remaining to be paid to plaintiff in his capacity of executor of his father Edmund Thornton Henry, or in the alternative, one-third thereof to be paid to him in his individual right.

The above claim is an amended one: the relief sought in the original statement of claim was substantially the same as the amendment except that as an alternative the plaintiff claimed the sum of £166,000. He asked for a conveyance of the estate to him, but omitted to ask for any order for payment to the creditors mentioned in the trust deed of 5th July, 1902.

On these averments in the statement of claim the plaintiff

claims a declaration of this Court that the defendants were from the 9th May, 1903, to the 6th November, 1918, trustees of Plantation Providence. This plantation was purchased from the defendants on the 6th November, 1918, by the Creeklands Rubber and Produce Co., Ltd., and so the plaintiff also asks that the defendants be declared trustees of the purchase price thereof whether in shares or cash or otherwise coming to them from their disposition of the said plantation.

The plaintiff asks further that the defendants do render accounts of the intakings and outgoings of the said plantation between the above dates including the purchase price, but with all just alliances. He also asks that the defendants do pay into the Registry of this Court the sum found to be due on the taking of the said accounts, such sum to stand charged in the first place with the debts due to all the creditors under a trust deed of the 5th July 1902, save the British Guiana Bank, but without prejudice to the rights, if any, of the said Bank, and for ascertaining the amount due to the said creditors, all necessary notices to be given and inquiries to be made.

The agreement of the 1st September, 1902, which has been referred to, was before the Court on the hearing of the action by the British Guiana Bank against Rose Ellen Henery, of the City of Bath in England and Lambert Edmund Henery, the plaintiff herein, in his capacity as one of the executors of his father Edmund Thornton Henery, deceased. This was an action by the Bank to oppose the transport by the defendant Rose Ellen Henery of the coffee plantation Lonsdale *cum annexis* and against Lambert Edmund Henery for payment of \$80,994. This action has been consistently referred to during the hearing of this case as the "Lonsdale Action" and it may be more convenient to continue to refer to it by that name. In the defence of Lambert Edmund Henery—the present plaintiff—to that action it is stated at paragraph 26 thereof that the plaintiffs ought not to be admitted to say that the sum of \$80,994 or any sum is due or owing to them because the plaintiffs who were the B.G. Bank together with S. Davson & Co., Ltd., wrongfully conspired with Edward Charles Hamley and John Downer, two of the trustees appointed by the trust deeds of the 1st September, 1899, and the 5th July, 1902, for the purchase by the said S. Davson and Co., Ltd., of Plantation Providence, the subject of the trust under the said trust deeds or either of them, for a less sum than could have been obtained in breach of the said trust, knowing that the said Edward Charles Hamley and John Downer were trustees, and that the said plantation was the subject of the said trust.

This defence is dated the 30th January 1904, and is signed by Neil Ross McKinnon as counsel for Lambert E. Henery the second defendant therein and plaintiff in this case, and it should be observed that he is the same Neil Ross McKinnon who is

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appointed in the above trust deeds as a co-trustee of E. C. Hamley and John Downer.

An order for discovery was made in this action, and in compliance with that order an affidavit by E. C. Hamley was sworn on the 17th February, 1904. In that affidavit at paragraph 9 he says that "no documents having relation to arrangements for the sale of Plantation Providence between myself and John Downer mentioned in paragraph 6 of the Court's Order have ever existed. The plaintiff's have in their possession and power certain documents numbered 1—3 inclusive which are attached to each other and marked 1, 2 and 3 respectively and initialled by me. These documents relate exclusively to a conditional purchase by S. Davson & Co., Ltd., of the claim representing the amount of cash lent and advanced by the plaintiffs to the trustees." It has been agreed on by both sides that the foundation of the plaintiff's case rests upon the existence of the agreement of the 1st September, 1902, an extract from which was embodied in the judgment of the Chief Justice at the time, Sir Henry Bovell, in the Lonsdale action. This is the important document in the case; for as has been alleged by plaintiff in his pleadings, that which was done in pursuance of that agreement was the breach of trust on which he is now bringing this action.

In the defence the existence of this agreement is not admitted, and when counsel tendered the above extract from the judgment as secondary evidence of its one-time existence and its terms, such production was objected to. A ruling was given by me on the objection, the substance of which was that the extract from the judgment was admissible preparatory to, and to assist in, finding as a fact, whether or not such an agreement ever existed. The copy of the relevant part of the judgment in the Lonsdale action containing the effect of the agreement of the 1st September, 1902, was admitted as secondary evidence for the purpose of coming to a conclusion as to whether or not such an agreement ever existed.

Although the admission of this part of the judgment in the Lonsdale action was objected to most tenaciously by counsel for the defendants, it must have appeared to him after consideration that the Chief Justice of the colony was not likely to embody in his judgment the effect and exact words of an agreement which never existed and which he had never seen, and so it was ultimately admitted by him that there was an arrangement either verbal or in writing whereby defendants would buy the claim of the Bank on this plantation.

Apart from that, however, the evidence of John Downer, the attorney of the defendants at the relevant time and the one-time trustee of the deed, is now before the Court. This judgment in the Lonsdale action is brought to his mind, and it is pointed out to him that it is stated therein that he did sign this agreement. To this he replies that if the Court says so, he must have. He

does not remember signing it, but says if there is evidence that he did, he must have done so.

The evidence of Mr. Conyers is not very definite, his memory appears to be hazy as to what took place in September, 1902, and thereabouts. But he does admit there were negotiations between the Bank and defendants the effect of which would have been the same as is mentioned in the extract from agreement of 1st September, 1902, and that the person with whom the Bank started these negotiations for sale was Mr. Downer. He does not admit that the subject matter of what these negotiations were about would be committed to writing but says the terms would be contained in a letter.

On the whole I think the evidence of Mr. Conyers corroborates that of Mr. Downer, and on this evidence and the exhibits referred to in the argument as to the admissibility, plus the evidence as to the loss of the document, I have no hesitation in finding as a fact that there did exist the agreement to which the Chief Justice refers in his judgment in the Lonsdale action. And, in my opinion, the extract from that judgment ought to be admitted as secondary evidence of the contents of that agreement so far as is contained therein.

The making of this agreement is really the first issue on the pleadings and on that issue the plaintiff succeeds.

Having ruled that there was such an agreement entered into, the possible effects of it have now to be considered. It is alleged that the outstanding effect of the agreement was to create a conflict of duty and interest for the two trustees. It is said that it constituted a fraudulent preference in favour of the Bank, and the defendants, S. Davson & Co., Ltd., over and above the other creditors and the proprietors whose interests the trustees were equally charged with protecting. It is alleged further that from the moment the trustees entered into this agreement on behalf of their principals their interest in carrying out this agreement was diametrically opposed to their duties as trustees.

On the one hand there was a duty imposed upon them by the trust deed of the 5th July, 1902, as trustees to endeavour to manage and preserve the estate for the benefit of all those mentioned in the deed. On the other hand, the agreement they signed involved an undertaking that the Bank would do everything in its power to cause an immediate sale at execution of the plantation for the purpose of enabling the defendants to purchase the said plantation.

In support of the allegation of a breach of trust, it has been mentioned by counsel for the plaintiff that the evidence in support of that contention is almost all documentary, and admits of no contradiction. It is further said by him that these documents show that every step was taken at running speed and at a pace so unlike the usual one of a Court proceeding as to compel one

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to say that they indicate a suspicious haste on the part of the Bank, S. Davson and Company, Ltd., E. C. Hamley, and Downer to have the plantation sold by the Court and thereafter transferred to the defendants.

As these different proceedings before the Court in 1902, 1903, and 1904, form a large part of the evidence on which the plaintiff grounds his allegations of breach of trust and fraud in equity, I think I am bound to set them out in detail. The first document on which he grounds his case is the trust deed of the 5th July, 1902, which was executed for the purpose of continuing the trusts created by the prior deed of 1899. Those trusts were in effect to work and cultivate the plantation for the benefit of all the parties to the deed. But in addition, the Bank is to have a first charge on the estate, a right to call for a legal mortgage, and the amount of the mortgage debt is to be payable one month from the date of the mortgage. The first step in this is that a certificate is produced that Dr. Edmund Thornton Henery, the father of the plaintiff, died on 6th August, 1902, or one month and one day after the date of the trust deed. The extract of the agreement which has already been referred to, the stamp on which was cancelled on the 1st of September, 1902, being now held as admissible in evidence is also produced. And taking the date of the cancellation of the stamp on it as a guide it was executed twenty-six days after the death of the plaintiff's father. The mortgage to the Bank, provided for in the trust deed, executed by the trustees and dated the 10th of September, 1902, that is ten days after the agreement, to secure to them the payment of \$29,882.83 is also produced.

A copy of the file of proceedings in an action instituted by the Bank against the trustees for payment of this sum of \$29,882.83 is also produced, and it shews that the action was filed on the 10th November, 1902, that is two months after the mortgage was executed. The record shews that none of the trustees entered an appearance to the said action and that judgment by default was given on the 22nd November, 1902.

A writ of execution under the said judgment was issued on the 31st December, 1902, and in pursuance of it the said plantation was levied upon on the 2nd January, 1903.

On the 3rd January, 1903, the Supreme Court appointed sequestrators in and over the plantation. Those sequestrators appointed were E. C. Hamley and William Watson Craib.

On the 16th January, 1903, the sequestrators Hamley and Craib reported to the Court that they were not in a position to report definitely in favour of an immediate sale or of a continuation of the sequestration for 12 months.

On the 27th January, 1903, a counter report was made by E. C. Hamley and John Downer, two of the trustees in the trust deed

of 5th July, 1902, in which they recommend an immediate sale of the plantation.

On the 31st January, 1903, Neil Ross McKinnon the other trustee reported to the contrary.

On the 18th February, 1903, the sequestrators Hamley and Craib definitely reported that an immediate sale of the plantation would be the most advantageous to the interest of the creditors.

On the 19th February, 1903, an order of the Court was made directing an immediate sale of the plantation.

On the 3rd April, 1903, the plantation was sold to the Bank for \$40,300, and Letters of Decree granted on the same day. Counsel for the plaintiff has asked the Court to consider the rapidity of these proceedings to get this plantation transferred to the defendants. And on consideration of the very short intervals of time which occurred between the different steps taken to put an end to the trusts, I think that even the least critical must admit that the movement was most expeditious, and its rapidity ought to be taken into account when coming to a decision as to the alleged breach of trust.

In addition to the documentary evidence as to the breach of trust by the defendants, it appears to me the evidence of John Downer is also important and that it is necessary to set it out at some length.

He was one of the trustees under the deed of the 5th of July, 1902, and so one of the principal people acting in these transactions which it is submitted constituted a breach of trust. He is an old gentleman of 85. It appears he was looked upon as one of the shrewdest business men in the colony, and even to-day one could not say he was a person of slow comprehension. Certainly, his evidence cannot be considered as the inconsequent wanderings of a very old person. He was the attorney of the defendants in this colony from the year 1886, until about the 7th March, 1904, when he ceased to be, and since that day he says he has never crossed their doors. However, since 1932 the relations between him and the defendants appear to be friendly, and this desirable state of affairs was brought about by Mr. Farrar, the attorney of the defendants, calling upon him when this action was threatened by the plaintiff and asking him if he could give any information about the circumstances surrounding the purchase of Providence Estate by the defendants.

In the course of the interview with Mr. Farrar he told him that he was in a very bad financial position, and that any information he could give which would be of use to the defendants in this action should be compensated for in some way. Since the date of that interview he had received a sum of £50, a sum of £25, and two sums of £10 each. The witness goes on to say that when he ceased to be attorney for the defendants in 1904, he received one year's salary under the terms of his contract. But

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between the years 1904 and 1932 he received nothing from the defendants.

During the year 1932 Mr. Downer received £200 from the defendants which he save was in the form of a gift. In 1933 he received £200 from them again and this sum he considers he received as part fulfilment of a promise made to him when he left the firm of S. Davson & Co., Ltd. in 1904 which promise was fulfilled only in 1932 after this action was instituted. The witness says he is now drawing \$80 a month from the defendants in accordance with an arrangement made with him by Mr. Farrar, and he gives a receipt that these sums are given by way of pension from the defendants. In fairness to counsel for the plaintiff it must be mentioned that he told the Court that he attributed no motive whatever to these payments, and remarked that even if the plaintiff fails Downer has succeeded, and so it is an ill wind that blows nobody good. Mr. Downer remembers he was a trustee under the deed of the 5th July, 1902, and that he told Hamley to bid up to a certain amount for the estate and that he did this for his principals, S. Davson & Co., Ltd., on the strength of the general authority he had from them.

This was told to Hamley on the morning of the sale, but the witness says there was an arrangement that the defendants should take over the estate if ever it became the property of the Bank. He says he was asked by a messenger from Hamley if he would take over the Bank's claim against the estate. His recollection is that the arrangement was made before the mortgage to the Bank was put through. He says he must have passed on Hamley's offer to London to his principals and ultimately authorised Hamley to bid up to \$10,000 beyond the claim of the Bank against the estate. He is not sure if he was really taking over the Bank's claim as his principals came out of the Colony later on and had many interviews with Mr. Hamley. There was an arrangement about a year or so before the day of the sale between the Bank and his principals that they would buy the claim of the Bank. He admits that for all practical purposes he was Messrs. Davson in Berbice, and that it was rather an important bit of business for his principals to buy this estate as the property had a good name, but as to whether or not that arrangement was made by him or his principals he is not quite clear.

From the evidence of this witness it appears that the defendants were prepared to take over the estate for the amount of the present debt due to the Bank by the estate, and, in addition, they were prepared to bid up to \$10,000 beyond the amount of that debt.

Never at any time was an endeavour made to get financial help from any one but the British Guiana Bank. He says there was never any advertisement of sale, never an advertisement calling for tenders, and never an advertisement of sale by private treaty.

He remembers the case in the Supreme Court by the British Guiana Bank against the plaintiff and his sister. He saw the judgment, and was astounded that he should have been referred to by the judges in the terms they used about fraud and collusion. It is admitted by the witness that he must have signed the agreement which is referred to in that judgment.

In cross-examination it is said by this witness that the estate was valueless on account of the burden of having to pay the annuities set out in the trust deeds. It would have been useless to try and get finances from any one outside the British Guiana Bank to carry on this estate, and hopeless to try and pay off the creditors whose debts then amounted to \$175,000. The British Guiana Bank refused further advances and foreclosed.

In the opinion of the witness nothing could have been done in 1902 to keep the estate afloat to pay off the creditors and save it for Dr. Henery and his heirs. As a trustee he considers nothing could have been done to save the estate in 1902, unless the *market of the world had improved*. No one but the Bank would finance the estate on account of the charge the annuitants had on it.

The Bank bought the estate at auction, and afterwards transported it to defendants with a mortgage in their favour. The Bank gave the defendants three years to pay off the mortgage.

The witness is not certain if he made the arrangement personally with Mr. Hamley whereby the estate was to be auctioned and bought by the Bank and then conveyed to the defendants, but he says, if he did make that arrangement, it was on the express instructions of his principals, the defendants. It is further said by witness that his principal was in the colony at the time, and must have had a good many conferences with Mr. Hamley.

He was astounded at the judgment because of the allegations made and of the remarks by the Judge about Mr. Hamley and him.

The evidence of Mr. Frank Albuoy Conyers has also some bearing on this issue. He says he is 73, and was for a long time in the service of the British Guiana Bank. He was appointed manager in 1897 or 1898, and continued as manager until it was taken over by the Royal Bank of Canada in 1914. He retired in 1917. He knew Mr. Hamley who was sent out from London in 1896 after there had been a run on the Bank and the Government had to intervene to restore confidence. He remembers the Bank advanced money to Plantation Providence, and its becoming heavily indebted to the Bank. He also remembers this estate going into sequestration about the year 1895, and the circumstances which brought about the sequestration. These were that the Bank refused to give any further advances, and

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that, by arrangement with the other creditors, the defendants sued. At the end of this sequestration in 1899 the recollection of the witness is that the estate had creditors to the extent of \$135,000. He describes how the trust deed of 1899 came to be executed, and how it was agreed in April, 1901, that new machinery should be purchased for the estate. In June, 1902, before the execution of the second trust deed of 5th July, 1902, the Bank notified the trustees that they would be calling on them for a mortgage. Immediately after the trust deed of 5th July, 1902, was signed the Bank called for a mortgage which was done for the purpose of giving the Bank a prior claim to the annuitants. At that time the estate account was overdrawn to the extent of \$36,000, and this was in addition to the old debt of \$80,000. This witness says the Bank approached the defendants to see if they would be willing, if the estate were sold at execution, to pay the Bank the amount of their claim, and they would then transport the estate to the defendants. He says this arrangement was made by the Bank as an ordinary business transaction. It was made because they had lost \$80,000 already, to avoid further loss and to get out of financing estates. The witness agrees that Mr. Downer would be the person with whom this arrangement was made, that such an arrangement would be of some importance to the Bank and though not probably reduced into writing it would be contained in a letter.

The memory of this witness does not appear to be at all good as to the incidents which occurred in 1902-03 and 1904. However, he does say that the negotiations were started immediately after the second trust Deed of the 5th July, 1902, was signed.

Some of the evidence of the plaintiff must also be referred to in deciding upon this issue, particularly where he says he was in Court during the hearing of the Lonsdale action when Mr. Hamley was ordered to produce an agreement between him and the defendants. On this document being produced he says there were some scathing remarks made by the Chief Justice to Mr. Hamley about his having committed a breach of trust in reference to the Providence estate. When Mr. Hamley was told by the Chief Justice that he had committed a breach, the plaintiff says she looked at Mr. Hamley whereupon he began to perspire and tremble. He does not say why, but I take it that he wants the Court to infer that this state of Mr. Hamley was not due entirely to the ordinary heat of the day.

Another fact which is relied upon by the plaintiff in support of his allegation of fraud is that the trustees did not disclose to the Court when they were applying for an order for the sale of the Providence plantation, the existence of the agreement of the first of September, 1902, to sell to S. Davson & Co., Ltd.

In addition to this concealment of the agreement, it is submit-

ted that the third trustee, Neil Ross McKinnon, was not consulted nor any of the creditors of the estate.

A further fact for consideration is that the agreement shews that the defendants were to become owners of the estate from a date prior to the signing of the trust deed of the 5th of July, and that the defendants were prepared to pay \$11,000 more than they ultimately did for the estate.

Mr. Downer for all practical purposes was Davson & Co., Ltd. He was also a trustee under the deed. He says that it was rather an important bit of business for his principals to buy this property as it had a good name.

Hamley the other person who signed the agreement for the Bank was also a trustee.

After the date of the signing of the agreement the rapidity with which the various steps were carried out indicate strongly that there was considerable anxiety to have the estate transferred to the defendants as soon as possible.

The reports prior to the order for sale shew that Hamley and Downer wanted this estate sold. And as they had already signed an agreement for the transfer of it to the defendants in the event of a sale, it is only natural to suppose that they wanted to make it possible to carry out and effectuate their agreement at the earliest possible moment.

Neil Ross McKinnon was their co-trustee and reported against a sale, in support of which he produced the evidence of Sandford that the estate was a good one. Though he was their co-trustee and appearing to be keenly interested in the fortunes of the estate they never told him of the existence of this agreement.

On this evidence it is submitted on behalf of the plaintiff that when Messrs. Downer and Hamley signed that agreement of the 1st September, 1902, they put themselves in a position inconsistent with the interests of the trusts, and in carrying out such agreement a breach of the trust was committed by them. This submission is founded on the principle laid down by Lord Brougham in *Hamilton v. Wright* (1842) 9 C1. and Fin. 111, 123 that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which can have a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule. A trustee is not permitted to do anything which has a tendency to injure the trust or a tendency to interfere with his duty. And in the case of *Bray v. Ford* (1896) A. C. 44, 51, the same rule is referred to by Lord Herschell and the reasons for it, when he says: "It is an inflexible rule of a Court of equity that a person in a fiduciary position is not, unless otherwise expressly provided, entitled to make a profit, he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this

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rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has therefore been deemed expedient to lay down this positive rule.”

Mr. de Freitas has argued that the evidence has not disclosed anything to show that there was a dishonest intention on the part of the trustees, and, therefore, there is no ground for seeking relief in equity. It is suggested that there must be dishonesty proved before the Court will treat anyone who is a stranger to the trust as an express trustee supporting the contentions of plaintiff that defendants were to be held express trustees. I think the answer to this is, that it is not entirely a question whether or not there has been real dishonesty by the defendants but whether a long standing rule of equity has been infringed.

However, it has not been contended with any vigour that the acts of the trustees in this transaction constituted actual positive fraud. Actual positive fraud is not the only type of fraud which is considered in a Court of equity as affording ground for relief. There is another type which is treated as legal or constructive fraud. By constructive fraud is meant an act of contract, although not originating in any actual design to perpetrate a fraud, is yet by its tendency to deceive or mislead other persons deemed equally reprehensible with positive fraud, and, therefore, prohibited by law in the same way as acts and contracts done *malo animo*.

Some of the cases under this head of constructive fraud grow out of some confidential or fiduciary relation between all the parties or between some of them, which relationship is watched with a special jealousy and solicitude, because it affords the power and the means of taking undue advantage, or of exercising undue influence over others. In this case there was a confidential or fiduciary relationship between E. C. Hamley and John Downer and the *cestuis que trust* that is, the creditors of the estate, the proprietors and the annuitants. And if it is shewn that these two trustees have done anything which places them in a position inconsistent with the interests of the trust, or had a tendency to interfere with their duty in discharging it, then their acts or contracts must be considered as constructive fraud.

I am unable to agree with the above contention that there must be actual dishonesty proved before relief in equity is granted.

It has been said on behalf of the defendants that the father of the plaintiff was not a *cestui que trust* and therefore the son of the plaintiff herein is not entitled to any relief. To give an opinion on this, it is necessary to refer to the trust deed under which the trusts were created. On reference to it at clause 25 it is seen that on full payment of the claims of the creditors with interest

the trustees are directed to transport the estate to Edmund Thornton Henry; consequently, I think that Edmund Thornton Henry must be considered as a *cestui que trust* for by this clause in the deed it seems clear that in the event of the creditors being paid in full the estate would result back to him.

It is admitted that the principles of equity largely apply to this colony, but it is suggested in certain cases they should not be applied and that the present case is one of those. As to this, the important reference is the Civil Law of British Guiana Ordinance. Chapter 7, section 3, the effect of which is that the common law of the colony shall be the common law of England as on the 1st day of January, 1917, including therewith the doctrines of equity as then administered or at any time thereafter administered by the Courts of justice in England, and the Supreme Court shall administer the doctrines of equity in the same manner as the Supreme Court of Judicature in England administers them at the date aforesaid or at any time thereafter. This section clearly shews that the doctrines of equity as administered by the Supreme Court of Judicature in England apply to the colony, and I cannot see that it can be seriously contended that the present claim is not one which calls for equitable relief. I cannot think of any claim on the common law side of the Court which provides for the specific relief now sought by the plaintiff,

It had been submitted that there was no conflict of duty and interest when Downer agreed with Hamley in the agreement of the 1st of September. The reason given for this submission is that there can be no conflict of duty and interest except where the trustee gains a personal interest in the transaction. And as Downer got no personal gain from this transaction the principles of *Hamilton v. Wright* do not apply.

I think the unanswerable reply to this argument is in *Kerr on Fraud* where it is said that it is immaterial whether he got any personal benefit or not. It may be that the terms on which he attempts to deal with the trust estate are as good as could have been obtained from any other quarter. They may even be better, but so inflexible is the rule, that no inquiry can be made as to the fairness or unfairness of the transaction. It is enough that the act has a tendency to interfere with the duty of protecting the trust estate which the trustee has taken upon himself to perform. The policy of the rule is to shut the door against temptation. The disability arises from the obligation under which a trustee lies to do his utmost for the *cestuis que trust*. And it might be assumed that he was indirectly acting for his own personal benefit, for instance, it may be that he wished to recommend himself to his principals by what he thought was astuteness or zeal in their service.

It has been argued that there was no express term in the trust deed which cast a duty on the trustees to look elsewhere for

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advances to carry on the estate, once the British Guiana Bank had refused to advance further moneys. And it is stated that the evidence shews that it would have been impossible at that time to get finances from any other source. It may be that there was no express duty on them so to do, but the deed contemplates such an action, and express authority is given to the trustees to look elsewhere for funds, and it is admitted that no effort was made by the trustees in this respect. If they made no effort to raise funds for the carrying on of the estate, they made no effort to preserve the subject matter of the trust which must appear to anyone as one of the most important duties of the trustees. But as two of the trustees executed an agreement for their principals for the destruction of the trusts by selling the subject matter of it to the defendants it would be absurd to expect them to make any such effort. By that agreement these two trustees put themselves in the position of being useful to the British Guiana Bank and Messrs. Davson, Ltd., in the sale and purchase of the trust estate, but that position was not only useless but detrimental to the general body of creditors, the proprietors and annuitants. In fact it was fatal to them; for, once this sale to the defendants was concluded their chances of ever getting anything out of the estate were hopelessly and irremediably lost. And if Mr. Downer in his evidence says he was astounded at the scathing remarks of the Chief Justice about him and Mr. Hamley, that is no reason for saying that those remarks were ill-founded. It is stated by Mr. de Freitas that the references by the Chief Justice to the conduct of the trustees were irrelevant. To him it appears a mystery why the Court referred to these trusts and he submits that the Court was quite wrong in saying there was a duty on the trustees to look elsewhere for financing the estate. This part of the judgment in the Lonsdale action is not evidence but it is submitted by Counsel for the defendants that he is entitled to look at it and criticise it from the legal point of view as it is contained in the law reports of the colony. Further it is submitted that the Lonsdale judgment is a contradiction to the judgment of the Chief Justice in 1903 when he ordered an immediate sale of the estate.

It seems to me that the remarks of the Chief Justice, Sir Henry Bovell, must be agreed with, in view of the fact that the agreement of 1st September, 1902, was before him, and that any effort to get further finance would be in direct opposition and a hindrance to the carrying out of that agreement. It must have appeared to the Chief Justice that the trustees by that agreement precluded themselves from making any effort in that behalf.

The point has been pressed during the hearing that the agreement was to buy only the Bank's claim on the estate. But it seems to me the intended effect and the resulting effect was the full transfer of the estate to the defendants. Whether the trans-

action is called a sale of the Bank's claim or not, the ultimate result of it was that the defendants got the estate.

It has been argued that even if the Chief Justice had known of the existence of the Agreement of September, 1902, it would not have made any difference in the order for sale he made in February, 1903. I have read that judgment, and it appears to me that it was with a great deal of hesitation that such an order was made owing to the conflicting opinions given by the experts as to the possibilities of the estate being able to get over its financial difficulties. It seems to me clear that the existence of this document would have had some effect on the judgment, in the sense that it would have presented something for the Court to weigh and take into consideration before making its order, and, therefore, I think there was a duty on the trustees to bring the fact of its existence before the Court and so give an opportunity to the Court to peruse it and consider its effect on the trust estate.

It is also contended on behalf of the defendants that the sale to the Bank or the sale by the Bank to the defendants cannot be impeached because the estate was no longer subject to the trusts and was not a sale by the trustees; that it was sold under an order of the Court after the whole question as to whether or not there should be a sale was fully argued and that the order cannot be set aside without proof of actual fraud; and, further, that the title of Letters of Decree granted by the Court to the Bank annulled all claims of whatever kind attaching to the property.

It cannot be disputed that the Bank had a right to have the estate brought to execution sale, and the plaintiff is not seeking to set aside that sale. As to the argument that the estate was no longer subject to the trusts and was not a sale by the trustees, it is quite true that the sale of the estate was not by the trustees; but it is clear from the September agreement that the object and effect of that agreement was to put an end to the trusts and to transfer the subject matter thereof to the defendants, and done by Downer on their express instructions. It, therefore, seems to me that the defendants cannot be permitted to take refuge in a position which has been created by their own acts. It has been argued for the plaintiff that the acts creating this position constituted a breach of trust by the defendants amounting to constructive fraud. As that agreement has been admitted in evidence the argument by counsel for the plaintiff seems to me to be quite sound when he says that a man cannot benefit by a position created by his own acts which are in reality contrary to the principle in equity forbidding the purchase of a trust property by a trustee or his agent.

I think it is unnecessary to deal with the submission on behalf of the defendants that the sale to the defendants by the Bank cannot be impeached. It is argued that because it was by Order of the Court, made after the hearing of arguments, that the Order

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cannot be set aside without proof of actual fraud. I think that it is unnecessary because no one is asking to have the sale set aside. What is being asked is that the defendants be declared express trustees. But if it had been asked. I am not prepared to say that the concealment of the agreement of September, 1902, would not have been a ground for setting the sale aside if application had been made in time. If this contention were sound, it would mean a serious curtailment of the powers of a Court of Equity in its administration of law as to trusts.

As has already been said John Downer was the principal agent of the defendants in this colony, but it has been argued that if what he did, in entering into that September agreement was wrong it was wrong only because he was a trustee, and therefore any liability for that act cannot be fixed on his principal. On this point the case of *Lloyd v. Grace Smith & Co.*, (1912) A.C. 716 must be referred to because of the authorities in it referred to by Lord Macnaghten. And from those authorities it seems clear "that an innocent principal is liable for the fraud of his authorised agent acting within his authority to the same extent as if it was his own fraud." And it is said that it would be a mistake to qualify that rule by saying that it only applies when the principal has profited by the fraud.

It does seem beyond doubt that Mr. Downer was acting as the agent of the defendants when he signed this agreement, and that he did so on the express instructions of the defendants cannot be denied. Nor can it be denied that the fact of his being a trustee made it much easier for him to carry out that agreement.

Mr. Van Sertima has argued that principals cannot be any less liable than their agent, if they cause him, on their behalf to commit a breach of trust. This appears to me to be quite sound, and therefore if it is sought to place the principals in the position of trustees of this estate for the *cestuis que trust* instead of Downer, that does not appear to me to be unreasonable. The position certainly is peculiar, but I do not think it can be considered in such a way as to deprive the plaintiff of being able to seek a remedy in a Court of Equity.

An aspect of the case of great interest is that put forward by Mr. de Freitas when he says that there did not appear to be any possibility of any dividend coming to the ordinary creditors or of anything resulting to any one from this trust estate in 1902 as it was saddled with debts amounting to \$120,000 excluding mortgage. His submissions are borne out by the evidence given as to the very depressed state of the sugar industry at that time and on that evidence one is bound to conclude that it was at a very low ebb.

Evidence is given by Mr. Wight as to the prices being obtained for sugar estates about the year 1900, and from those prices it would appear that the sugar industry was indeed in a dying condition. His evidence is helpful as to the price of sugar in 1918-1919

because he speaks from his own knowledge, and says that definite genuine bargains took place at £80 a ton, and that on the day on which he gave his evidence it was about £6 15s. a ton. Part of Mr. Downer's evidence is also relevant to this view of the case when he says that nothing could have been done in 1902 to keep this estate afloat, to pay off the creditors and save it for Dr. Henery and his heirs unless the market of the world had improved. The market of the world evidently did improve as sugar did actually fetch £80 a ton in 1918.

This view of the position in 1902 certainly is of interest, but though of interest I cannot see that it can be argued that it justified the trustees in putting themselves in a position which might deflect them from their duties as trustees.

If the British Guiana Bank and Messrs. Davson had arranged for the sale of the estate directly between themselves and excluded any acts by E. C. Hamley and John Downer, the trustees, then it is admitted this transaction could not have been impugned. This could easily have been done by the trustees retiring from the trusts before negotiations began for the transfer of the estate. If they had done so, they would have left themselves untrammelled and free to act in whatever way they thought best for their respective principals. Unfortunately, they did not, and so we have this complicated position to-day.

I take it as proved that the trustees E. C. Hamley and Downer, executed the agreement of September, 1902, and that its object was to transfer this estate to the defendants and so put an end to the trusts. It is clear that this object was carried out by these two trustees, and that the defendants' became the owners of the estate at \$11,000 less than they were willing to bid up to. It is also clear that the agreement was entered into to bring about the acquisition of the estate by the defendants S. Davson & Co., Ltd., parties to the trust deed of 5th July, 1902, creating the trusts. The evidence shows clearly that there was a certain amount of secrecy surrounding this agreement, as McKinnon the other trustee was never consulted about it, and when the application for sale was made its existence was never brought to the notice of the Court. It is clear from the agreement that the defendants are to be owners from the 1st day of July, 1902, which is five days prior to the trust deed creating the trusts for the benefit of the creditors and other *cestuis que trust*. And it is also clear from the evidence that negotiations leading up to this agreement took place either before or immediately after the execution of the trust deed and that these negotiations were conducted by these two trustees. The evidence also discloses to my mind that the purpose of the agreement was to bring about the acquisition by one *cestui que trust*—S. Davson & Co., Ltd.—of the whole trust property which was entrusted for the purpose of being worked for the benefit of all the *cestuis que trust*.

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In my opinion the making of the agreement of September, 1902, and the several acts done thereunder constituted a breach of trust by the trustees Hamley and Downer. The evidence shews they acted in a dual capacity, and in so doing they offended against the inflexible rule in equity that a trustee cannot put himself in the position where his duty conflicts with his interest.

And as Downer was the employee and paid agent of the defendants at the time of the breach, and as the breach was committed by him on their express instructions, I do not see how they can be less liable than their own agent John Downer for the breach. And it is my view that by acquiring possession of this plantation as a result of that breach of trust the defendants constituted themselves trustees of it for the proprietors, creditors and other *cestuis que trust* and so became liable to account for it as such.

I have held that the defendants by their acts constituted themselves trustees of this estate. It is now of the utmost importance to decide whether they were express trustees or constructive trustees. This is important because the defendants have pleaded the Statute of Limitations as a defence; they have pleaded also laches and acquiescence by the plaintiff.

The Statute would I think be applicable if the action were one which could have been brought on the common law side of the Court. The other defences of laches and acquiescence are purely equitable ones.

The law seems to be clear that an express trustee cannot rely as a defence to an action by his beneficiary either upon the Statutes of Limitation or upon the rules which were enforced by Courts of Equity by analogy or in obedience to those statutes. The possession of an express trustee was treated by the Courts as the possession of his *cestuis que trust*, and accordingly time did not run in favour against them. This is the view set out by Viscount Cave in the case of *Taylor v. Davies* (1920 A.C. 636, 650). It is also said therein at p. 651: "This disability applied, not only to a trustee named as such in the instrument of trust, but to a person, who, though not so named, had assumed the position of a trustee for others or had taken possession or control of property on their behalf, such, for instance, as the persons enumerated in the judgment in *Soar v. Ashwell* (1893) 2 Q.B. 390." Other kinds of trustees are referred to, but they are all persons who, though not originally trustees, had taken upon themselves the custody and administration on behalf of others, and, though sometimes referred to as constructive trustees, they were in fact actual trustees though not so named.

It followed that their possession also was treated as the possession of the person for whom they acted and they, like express trustees, were disabled from taking advantage of the time bar.

The authorities appear to me to show clearly that the position of a constructive trustee is widely different, and that time runs in his

favour, if there has been no breach of trust or improper conduct, from the moment he takes possession. But there is another class of constructive trustee in whose favour time does not run from the moment he takes possession, and that class is defined clearly by Lord Selborne in the case of *Barnes v. Addy* (1874) 9 Ch. App. 244, 251, when he says: "Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestuis que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

I have enumerated these different classes of trustees because I think it is important to do so in view of the fact that the defence of the Statute of Limitations by analogy is available to one class of trusteeship and not available to the others.

When claims are made in equity, which are not as regards equitable proceedings the subject of any express statutory bar, but the equitable proceedings correspond to a remedy at law, in respect of the same matter which is subject to statutory bar, a Court of equity in the absence of fraud or other special circumstances adopts by way of analogy the same limitation for the equitable claim.

If the defendants are constructive trustees of the type where the equitable obligation arises from the circumstances of the case, and there has been no intention to create a trust, and no improper conduct in reference to the trust property from which the Court will infer an express trust there is nothing to prevent the defendants from raising the defence of time and pleading the Statute of Limitations.

If the defendants are express trustees, that is, if they were specifically nominated and appointed by the instrument creating the trust then they cannot plead the Statute of Limitations.

If they are of the type of trustee mentioned in *Soar v. Ashwell* (1893) 2 Q. B. 390, that is, persons who, though not named in the instrument of trust, have assumed the position of trustee for others, or those who take possession or control on behalf of Others, they cannot plead the Statute of Limitations because they are looked upon as express trustees. I do not think the defendants herein can be looked on as of this type of trustee because the person in that case who was declared by the Court to be an

express trustee was evidently so declared because he took upon himself the carrying out of the original trusts.

The position of the defendants is quite different. They have not made any attempt to carry on the trusts created by the deed of 5th July, 1902. On the contrary, they acquired possession of the trust property, and by so acquiring it, they made it impossible for the trustee to work the trust property for the benefit of the creditors generally and the other *cestuis que trust*.

And if the class of trustee to which the defendants belong is of that type described by Lord Selborne in *Barnes v. Addy* (1874) 9 Ch. App. 244, that is, where persons make themselves trustees *de son tort*, or actually participate in a fraudulent breach of trust to the injury of the *cestuis que trust*, then the lapse of time cannot be set up as answer to the claim.

Commenting on this case, Kay, L.J., says in his decision in *Soar v. Ashwell* (1893) 2 Q.B. 405: "These words seem to me to define, as accurately as is perhaps possible, the difference between an express and a constructive trustee . . . The result seems to be, that there are certain cases of what are, strictly speaking, constructive trusts, in which the Statute of Limitations cannot be set up as a defence. Amongst these are the cases where a stranger to the trust has assumed to act and has acted as a trustee, and where a stranger has concurred with the trustee in committing a breach of trust, and has taken possession of the trust property, knowing that it was trust property, and has not duly discharged himself of it by handing it over to the proper trustees or to the persons absolutely entitled to it."

What I take to be the relevant statute as to the time within which an action for recovery of immovable property can be brought is subsection (2) of section 4 of the Civil Law of British Guiana Ordinance. Cap. 7, and it prescribes twelve years as the limit.

It has been submitted by Mr. Luckhoo that the action of the plaintiff is one which might as well have been filed on the common law side of the Court, and so the Statute of Limitations would automatically be available as a defence. With this submission I am unable to agree, for it appears to me clear that the case is one exclusively for a Court of equity.

It has been further argued that at most the evidence might disclose that a breach of trust was committed, and that the defendants acquired the property through that breach, and, by doing so, only constituted themselves constructive trustees and are therefore entitled to plead the Statute of Limitations as more than twelve years have elapsed since the transaction. With that argument I am also unable to agree, and for the reason that I think the only constructive trustee who can avail himself of the Statute by analogy is the one who has acquired the trust property without any breach on his part. I may mention here that it is

not suggested that the Statute itself applies; but, the case is one of those in which equity follows the law, and will not allow an action after a lapse of years to succeed.

On the evidence before the Court in this case it appears to me that the defendants must be considered as of the class of trustees defined by Lord Selborne in *Barnes v. Addy* because they not only participated in the breach of trust whereby they acquired the trust property, but expressly instructed their agent John Downer to carry out what in equity amounted to constructive fraud. And as I have held the defendants were trustees of this class, it appears to me that the only defences which are available to them are the purely equitable ones of laches and acquiescence.

It has been submitted by Mr. Van Sertima for the plaintiff that when the equitable remedy is in respect of fraud there are no laches so long as the party defrauded remains, without any fault of his own, in ignorance of the fraud. And following that submission, it is said by him though the breach of trust and constructive fraud took place in 1903 when the transfer to the defendants was completed, the facts constituting such breach and constituting his title to relief did not come to his knowledge until 1931 when he, Mr. Van Sertima, was consulted by the plaintiff as to his rights.

He also submitted, and I think quite rightly, that in an equitable defence of this sort, the onus is on the defendants to prove the laches on the part of the plaintiff. The defendants have accepted this position, and rely on the evidence given, particularly on that of the plaintiff himself, to support their defence of laches and acquiescence.

This part of the defence has been argued most exhaustively by both sides, and there has been such a volume of authorities cited that I fear if I were to refer to them all in detail the result would be interminable length and a possibility of the point in issue being completely obscured.

It has been decided already that the defendants are in possession of this trust property by what is considered in equity as constructive fraud. They have been in possession since 1903, and it is now argued by counsel for the defendants that the evidence shews that the plaintiff knew all the relevant facts constituting his title to relief and on which he now grounds this cause of action as early as 1904, and therefore he is now barred by his own laches and acquiescence from seeking relief from this Court.

The principle on which a Court of Equity proceeds, in these matters of lapse of time, is clearly ascertained upon principle and authority and is laid down by Lord Redesdale in the case of *Hovenden v. Lord Annesley* (1806) 2 Sch. and Lef. 607. The principle is that where a person is in possession by virtue of a fraud, he is not a trustee in the ordinary sense of the word and

he does not become so until he is declared by a decree of a Court of Equity. In these cases time begins to run from the period at which the fraud was discovered. Until the fraud is discovered the time does not operate, but the fraud is considered to be discovered at the time when such reasonable notice of what has happened has been given to the person injured as to make it his duty if he intend to seek redress, to make inquiry and to ascertain the circumstances of the case.

From this authority it appears the bar as to time is not imposed by any Statute, it is only by analogy to a Statute of Limitations that the rule has been laid down as to the period from which time begins to run. It runs from the time the person aggrieved knew of the fraud, and was able to institute a suit to set aside the transaction complained of.

On the same point the judgment of Sir W. Grant in *Beckford v. Wade* (1805), 17 Ves. 87, 97, is of great importance where he says: "It is certainly true that no time bars a direct trust as between *cestuis que trust* and trustee; but, if it is meant to be asserted, that a Court of Equity allows a man to make out a case of constructive trust at any distance of time, after the facts and circumstances happened, out of which it arises. I am not aware, that there is any ground for a doctrine, so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear, that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into Court of Equity to seek that relief."

Another authority on which the defendants put much reliance is the case of *Lindsay Petroleum Co. v. Hurd* (1874) L.R. 5 P.C. 221 which is an authority for saying in order that a remedy should be lost it is—if not universally, at all events ordinarily—necessary that there should be sufficient knowledge of the facts constituting the title to relief.

The case of *Molloy v. The Mutual Reserve Life Insurance Company* (1906) 94 L.T., 756, is quoted as an authority for the submission that the plaintiff must be taken to have known in 1904 all the facts as to the breach of trust which would have enabled him to bring this action, and that time was therefore a bar to this action, as the period at which time began to run was when the plaintiff knew the facts and not at the time at which he ascertained the proper constructions to be put on them.

The case *Willis v. Earl Howe* (1893) 2 Ch. 545, has also been referred to. The principle laid down by that case as I read it, is that a claimant will be barred by time if he could with reasonable diligence have discovered the fraud before twelve

years immediately preceding the institution of the suit. But I cannot say that this case is entirely applicable as it is a case of concealed fraud within section 26 of the Statute of Limitations in England.

The principle of *Bright v. Legerton* (No. 1) (1860) 29 Beav. 60, appears to be that, where there is an express trust, lapse of time is to apply where there has been gross laches on the part of the claimant.

Then there is a very important principle referred to by Lord Brougham in *Kennedy v. Green* (1834) 3 My. & K. 699, 719, where he is dealing with constructive notice. He refers to it under two heads and says "under one or other of these heads, perhaps under both, comes the other principle; which is quite undeniable, that whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led, although all was unknown for want of the investigation."

It is mentioned by Lord Justice Bruce in the case of *Stafford v. Stafford* (1857) 1 De G. & J., 193; that the principle on which the Court acts is that when the facts are known from which a right arises, generally the right is presumed to be known.

To ascertain these facts, and to give a finding on them, it is necessary to examine the evidence of the plaintiff at some length, as his is the evidence directly bearing on this point.

The plaintiff says that he was in the Georgetown Club in January, 1903, and saw E. C. Hamley there. Hamley told him then that the plantation was going to be sold, whereupon he asked Hamley for time, to enable him to go to London to raise the money to pay off the debt due to the Bank but was told by him that the Bank could not wait any longer. He had suspicions that something was being done which was wrong by Hamley and the defendants, and told Hamley that whatever it was he would find it out some day.

After this interview he did not go to Mr. McKinnon, his legal adviser and says he did not know that Mr. McKinnon was a co-trustee of Hamley and Downer.

It is admitted by him that he was angry about this transaction, that he knew that the plantation was going to be sold and that he and Mr. McKinnon never took any steps about opposing the sale. During the early part of 1903 it is admitted by the plaintiff that he was in Georgetown and knew of the sale of Plantation Providence but did not go to Mr. McKinnon to find out anything about it. The one absorbing interest of the plaintiff at this time appears to have been in gold and diamond mining. He was not annoyed when he read of the sale because he expected it.

The plaintiff admits that he knew that when a property was going to be transported opposition was called for and could be

entered. He made no effort to oppose because he thought he had no claim as the estate was in the hands of the Bank.

A writ was served on the plaintiff and his sister about Christmas 1903, opposing the sale of the Lonsdale estate. And on being informed by McKinnon that if he did not enter an appearance his sister would lose the estate he did so.

This case—which has been called the Lonsdale action through out this hearing—was heard. The hearing lasted three days, and, during the hearing. Mr. Hamley admitted in the witness-box that there was an agreement in writing between him and the defendants which agreement he was ordered to produce. On this document being produced there were some scathing remarks made by the Chief Justice to Hamley about his having committed a breach of trust. These remarks were made by the Chief Justice on the last day of the hearing, and after that, the plaintiff says he was informed by Neil Ross McKinnon, his counsel in the case and one of the trustees in the deed of the 5th of July, 1902, that he was bound to win his case and that he need not stay any longer. The plaintiff says he then left the Court before the decision was given as he had other things to do which to him were very important, and which he has described as the making of preparations to go into the interior of the Colony and the arranging of men to go with him.

On the same afternoon he heard that Hamley was to sail for England by a boat which was in port, and on hearing this, asked his counsel, Mr. McKinnon, if nothing could be done to stop him going as there appeared to be something wrong in view of what he had heard in Court. He asked if anything could be done about the estate and was told by Mr. McKinnon that it was hopeless, that nothing could be done because the estate was sold the previous year at execution. He (plaintiff) says he thoroughly believed him as he was his father's legal adviser for years. Shortly after this, he returned to the interior of the Colony either beyond the Kaieteur Falls or the top of the Mazaruni River where he had claim licences for diamonds and gold, and says he gave up all hope of anything from the estate. He remained there for four or five months. The next incident he describes is that he had a bad accident and broke his leg, and, as a consequence of that, he had to leave the colony in 1906 for treatment in England where he remained till 1929.

His interest in the Providence plantation was revived owing to consistent rumour coming from Berbice in 1929 and 1930 that there was some action in England as to the plantation. This persistent rumour was kept up until April, 1931, when he received a letter from Judge Hewick who was one of the Judges who heard the Lonsdale action in 1904. This letter caused him, he says, to make a search for any agreement or anything else relating to the Providence estate. He describes going to

Mr. George King, solicitor. He says that he got a copy of the Court's judgment in the 1904 case in April or May, 1931, and consulted his counsel, Mr. Van Sertima, as to it in the following month. Advice was given to him by his counsel at the end of June, or beginning of July, and, before getting that advice, it is stated by the plaintiff that he did not know of the facts and circumstances leading up to the acquisition by the defendants of Plantation Providence. He says that, before Mr. King gave him a copy of the judgment in the Lonsdale action, he had not read it and was not aware of its contents. But owing to the advice he received from his counsel he decided to bring this action. He had no money, but succeeded in raising it in January, 1932, and filed the present action.

In cross-examination this witness says that one sister, who is blind, and a brother are interested parties under the will of his father. He further says that he heard the Chief Justice say in Court, on the hearing of the Lonsdale action in 1904, that Hamley had committed a breach of trust, that he understood that the breach of trust had reference to the Providence estate, and agreed with the suggestion of counsel cross-examining him that his suspicions were aroused about some irregularity over that estate.

To very many questions as to why he did nothing about this transaction when he knew there was something wrong, the plaintiff replies that he did nothing because he had to go back to the "bush." To such an extent does he rely on a journey to the bush as a reason for doing nothing, that counsel for the defendants suggests that that journey is his refuge when he is asked troublesome questions about not having taken any action about this claim.

This evidence of the plaintiff shews that he saw Mr. Hamley in the Georgetown Club in January, 1903, and asked him why they were putting up the plantation for sale. It shews that the plaintiff told Hamley that there must be some underhand dealing between him and the defendants, and that he also told him that whatever that dealing was he would find it out some day. The evidence also shews that the plaintiff did find out what that underhand dealing was when Hamley was in the witness-box in the Lonsdale action, not from what Hamley himself said, but from what the Chief Justice said, and, from these remarks, he says his suspicions were confirmed at last. Notwithstanding that, he went to England in 1906 and did not return to the colony till 1929 and took no interest in the colony, he says, in so far as sugar estates were concerned. He thinks Mr. McKinnon told him that he had won the Lonsdale action, but did not ask him what the Chief Justice said about the breach of trust. Though the alleged breach of trust by Hamley and Downer is pleaded in the plaintiff's

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defence in the Lonsdale action, he says he never heard of it until to-day.

The important part of the plaintiff's evidence is where he describes what took place after the hearing of the Lonsdale action when the Chief Justice informed Mr. Hamley that he had been guilty of a breach of trust. He says that he went to the Georgetown Club that evening about 6 o'clock and there saw his legal adviser, Mr. McKinnon, whom he asked if nothing could be done to stop Mr. Hamley leaving the colony. He says he asked this because of the statement of the Chief Justice that Mr. Hamley had committed a breach of trust. He further says he understood the breach of trust had reference to the Plantation Providence and asked Mr. McKinnon what steps he should take. His suspicions were aroused, and he felt that he had been wronged in consequence of the sale of Providence and admits that he discussed the matter fully with Mr. McKinnon that night.

He says he felt aggrieved over the sale of this property, and discussed the matter with Mr. McKinnon, and asked him what steps could be taken to get back the property whereupon he was advised that nothing could be done. Notwithstanding this advice given by Mr. McKinnon the plaintiff says he still continued to feel that he had been wronged, and has felt this grievance for the last thirty years. He admits he never asked Mr. McKinnon to consider the point, nor did he ever think of asking any other lawyer in Georgetown or Berbice for advice as to his position.

Before going into the bush the plaintiff says he did not know when the judgment would be given in the Lonsdale action, but he admits that he asked Mr. McKinnon about it, and that he saw McKinnon occasionally between the conclusion of the Lonsdale action and 1906, the date of his departure from the colony.

In addition to the evidence of the plaintiff the defendants rely strongly on the defence tiled by the present plaintiff in the Lonsdale action. Therein it is pleaded on his behalf that S. Davson & Co., Ltd., wrongfully conspired with Edward C. Hamley and John Downer two of the trustees, for the purchase by S. Davson & Co., Ltd., of Plantation Providence the subject of this trust.

It is argued that if the knowledge of this conspiracy or breach of trust was in the hands of the plaintiff's counsel, it must have also been within the knowledge of the plaintiff. And that when plaintiff asked his counsel after the hearing of the Lonsdale action if nothing could be done in the matter, the whole position including the breach of trust must have been considered, and therefore known to the plaintiff.

In reply to this Mr. Van Sertima says that it was outside the duty of Mr. McKinnon to inform the plaintiff of his rights against the defendants who were not parties in the Lonsdale action, and that his duty ceased when the Lonsdale action ended. It is sub-

mitted that the test is whether or not the plaintiff could have sued his legal adviser for not disclosing the facts to him.

I think that the arguments of Mr. Van Sertima are entitled to the highest respect and consideration, but as to this contention I am unable to say that it is exactly on the point.

It appears to me that what this Court has to consider is not whether there was a duty on Mr. McKinnon to tell the plaintiff of his facts but whether he did in fact tell him of his rights, or whether the relation of legal adviser and client existing between them raises a presumption so strong in favour of the plaintiff having been told of his rights that the law holds the knowledge to exist because it is highly improbable it should not.

It has been admitted that if it is established by the evidence that the plaintiff was aware of all the facts relating to the acquisition of the plantation by the defendants before he consulted Mr. McKinnon, then he is guilty of laches. It is argued that in order to have knowledge of this acquisition plaintiff must have known of the terms of the agreement of 1st September, 1902, and that Messrs. Hamley and Downer executed that agreement.

This submission is made notwithstanding the evidence of plaintiff at page 13 of his evidence. In this evidence the plaintiff admits that he heard Hamley say in Court that there was an arrangement in writing with the defendants before the sale. His evidence then goes on to say: "Mr. McKinnon then asked to have it produced and the Chief Justice ordered Mr. Hamley to send to the Bank and get all the documents. The papers were brought from the Bank, and after the Judges went through them, the Chief Justice said "Edward Charles Hamley—you are the Managing Director of the Bank. You have not only committed a most serious breach of trust, but you have defrauded your own Bank."

Though all this occurred in open Court it is argued that there is no evidence that the plaintiff was aware of the contents of the agreement of September, 1902, and that it was signed by Hamley and Downer, and therefore he did not know of all the facts constituting his title to relief. And, following this, it is contended that if he were not aware of the contents of this agreement, such ignorance was not due to any culpable negligence on his part. As to this contention, the evidence relied on is the story of the plaintiff about his asking Mr. McKinnon if nothing could be done immediately after the hearing of the Lonsdale action, and being advised by him that the position was hopeless.

This latter contention amounts to alleging that he was wrongly advised by Mr. McKinnon, and, as a consequence of that, he did not know of his right to relief until 1931 when he was so advised by Mr. Van Sertima.

Substantially then the defence of the plaintiff to the charge of laches on his part is that he did not sleep on his rights since

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1904, because, in that year he saw Mr. McKinnon and took it from what he said that he had no claim. He was advised the position was hopeless, and I suppose it is possible for it to be taken that this advice amounted to advising plaintiff that he had no rights.

But it has to be remembered that Mr. McKinnon was in possession of all the facts as to this breach of trust. He had raised the question of this agreement of the 1st September, 1902, in plaintiff's defence to the Lonsdale action and referred to it therein as a conspiracy. That being so, it is difficult to imagine when he told the plaintiff that the position was hopeless as to getting back the plantation that he was thinking that an action for the recovery of it, on account of the conspiracy or breach of trust, was hopeless. It is my view it would be much more reasonable to conclude that he was endeavouring to tell the plaintiff that even if he were successful in an action against the defendants for breach of trust the position of the plaintiff would still be hopeless as there was no chance of the plaintiff being able to pay off the debts amounting to \$175,000 with which the plantation was encumbered.

It appears to me that the words of the rule or the principle in equity, that time begins to run from the date on which the claimant knew of all the facts constituting his title to relief or the date of his discovering the fraud, must be interpreted in their ordinary meaning. If the rule were interpreted that time would only begin to run from the date on which a claimant was advised of his right to bring an action for relief, then it would be possible for very anomalous positions to arise. For instance, if time only ran against a claimant from the day on which he was advised he could seek relief, then he might get advice from one legal adviser that he had no cause of action, and forty years later get advice from another that he had. To say that time would only begin to run from the date on which the latter advice was given would be a complete destruction of this principle as to when time begins to run.

I think the proper interpretation of the principle is that time begins to run from the time the claimant knew the facts, and not at the time he ascertained the proper construction to be put on them or the time at which he was advised he had a right of action. And this view I think is borne out by the decision in *Molloy v. Mutual Reserve Insurance Company* (1906) 94 L.T. 756.

Concisely, the facts on which the defendants ground their defence of laches are (1) that the plaintiff in January, 1903, had suspicions that there was some underhand dealing between Hamley and the defendants as to the transferring of the plantation and that he then told Hamley about it; (2) that during the hearing of the Lonsdale case he heard the Chief Justice say that a breach of trust had been committed by Hamley and that he understood that breach of trust was in regard to the plantation

Providence; (3) that his own counsel actually pleaded his breach of trust in defence in the Lonsdale action; (4) that he (plaintiff) was present in Court when Hamley was examined and cross-examined in that action and present when he was ordered to produce the agreement of 1st September, 1902; (5) that on the evening of the day on which the hearing of this action was finished he discussed the matter fully with his legal adviser Mr. McKinnon; (6) that the plaintiff saw his legal adviser occasionally between the date of the conclusion of this Lonsdale case and 1906 when plaintiff left the colony for 23 years.

In face of these facts it is argued that the plaintiff cannot say that he was unaware of the facts constituting his right to relief.

It has been suggested by Mr. Luckhoo for the defendants that the remarks of the Chief Justice during the hearing of the Lonsdale action were as good advice as the plaintiff could have got as to his right to bring an action against the defendants for breach of trust. And to my mind there is a great deal of substance in that suggestion.

In spite of all the above facts the contention put forward on behalf of the plaintiff is that he never really appreciated his true position in relation to the defendants until he was advised by Mr. Van Sertima in 1931. Further, that he cannot be considered to have cleared his mind as to what his cause of action was until 1931 when he got this advice.

But I think it cannot be disputed that from the time a person who claims to put in suit a cause of action knew, or with ordinary intelligence ought to have known, the facts which created the cause of action, time begins to run against him, and when once it begins to run, it continues to run.

From the evidence given by the plaintiff himself and the other evidence given in the case, and, after taking into consideration the whole of the circumstances of the case, I think the only reasonable inference to be drawn is, that the plaintiff knew all the facts upon which he has based this cause of action, and all the facts which he now relies on as his title to relief, since the year 1904. And as he has slept on his rights for over 27 years without taking any steps to obtain the relief of this Court, in my opinion he has been guilty of gross laches, and so his claim must be refused as barred by lapse of time.

There is not I think any necessity to refer to the Statute of Limitations except perhaps to say that in a claim such as this 12 years is the time prescribed within which it may be brought. Taking the statute as a guide, and by analogy to it a claim like the plaintiff's would have to be brought in a Court of Equity within 12 years from the time when the claimant first knew the facts constituting his title to relief.

The result of this case is no doubt unfortunate for the plaintiff But Courts of Equity in applying length of time as a bar to relief

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do not proceed on the ground of individual hardship or loss. The view of the Court is, that public policy requires that persons should not lie by and call for accounts at a distant period. If a Court of Equity allowed a person to make a claim at any distance of time such a doctrine would be fatal to security of property and quiet possession. And it might not be inappropriate to remark at this stage that if the taking over of the plantation had led to ruinous expenditure and had rendered it unproductive it is very probable there would have been no claim as to it.

As to the costs, I think the rule as to them in a case of this kind is clearly laid down in the case of *Marquis of Clanricarde v. Henning* (1861) 30 Beav. 175, which is:—"Though the Court may be of opinion, that in consequence of the lapse of time, or the acquiescence of the plaintiff, or the person under whom he claims, the claim must be dismissed, yet if it is not satisfied by proof of the propriety or fairness of the transaction at the time, it will not give the defendant the costs of the suit."

Following this rule, I do not think the defendants are entitled to costs; and consequently, in dismissing the plaintiff's claim I make no order as to costs.

Judgment for the defendants.

Solicitors: *C. A. Campbell; Francis Dias. O.B.E.*

MARY HUTSON v. HENRY HEYWOOD.

MARY HUTSON, Appellant (Defendant).

v.

HENRY HEYWOOD, Respondent (Complainant).

[1931—No. 13.]

BEFORE FULL COURT; DE FREITAS, C.J., GILCHRIST & SAVARY, JJ.

1931. MARCH 6.

Criminal law—Conviction—Sentence on—Previous conviction—Not proved by evidence or admission—Not to be taken into consideration.

Appeal—What occurred in Court below—Affidavit as to—Filed without leave—Cancelled from records.

In measuring punishment a magistrate should not take into consideration a previous conviction unless it is proved by lawful evidence or expressly admitted.

It is a misuse of procedure to file affidavits as to what occurred in the Court below unless there is an order of the Supreme Court. If the record appears to be defective, the Supreme Court will call upon the Court below for a statement, or counsel for appellant and respondent might agree upon certain facts.

Affidavit filed by appellant without leave cancelled from record.

Appeal by the defendant from an order made by Mr. Vincent Roth, Travelling Magistrate, convicting her of assault contrary to

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section 26 of Ordinance 17 of 1893 and sentencing her to undergo imprisonment for one month with hard labour.

S. J. Van Sertima (R. S. Miller with him) for appellant.

Respondent did not appear.

The judgment of the Court was delivered by the Chief Justice:

In measuring punishment Magistrates should not take into consideration a previous conviction unless it is proved by lawful evidence or expressly admitted. The conviction will stand but this Court substitutes for the Magistrate's sentence of peremptory imprisonment an order that the appellant pay a fine of twenty-five dollars and in default thereof that she be imprisoned and kept to hard labour for one month.

The Court makes no order as to costs of appeal.

Sentence varied.

Re BENJAMIN ELIAS JACOB COLACO BELMONTE.

[PETITION NO. 26.OF 1931.]

BEFORE FULL COURT:

DEFREITAS, C.J., GILCHRIST & SAVARY, JJ.

1931. MARCH 6, 12.

Solicitor—Struck off roll—Re-admission—Application for—Conditions precedent—Contrition—Reparation.

An order striking a practitioner off the roll of solicitors is not necessarily inexorable. Even after he has been struck off a second time, there is power to re-admit him, subject to certain conditions precedent, of which two essentials are contrition for his misconduct and reparation to the clients who have suffered wrongs that he has been ordered by the Court to redress,

In re Poole L.R. 4 C. P. 350, 358 applied.

Petition by Benjamin Elias Jacob Colaco Belmonte for re-admission as a solicitor. The facts appear in the judgment.

G. J. deFreitas, K.C., E. F. Fredericks, and S. J. Van Sertima, for petitioner.

The judgment of the Court was delivered by the Chief Justice.

By this petition Benjamin Elias Jacob Colaco Belmonte applies to be re-admitted and re-enrolled as a solicitor of this court. In September, 1896, he was admitted and enrolled as a solicitor. In

July, 1897, he was found guilty of misconduct and he was thereupon ordered to be struck off the roll of solicitors. In February, 1898, the Judicial Committee of the Privy Council rejected his application for leave to appeal against the order. At the hearing of the application Lord Macnaghten said: "If a solicitor did anything of the sort in this country he would very properly be struck off the roll, and I do not see why it should not be so there," in British Guiana. In April, 1898, April, 1899, April, 1901, and June, 1902, this court refused to accede to four successive petitions by him to be restored to the roll. In April, 1904, it was ordered, on his petition, that he be re-admitted and re-enrolled; and that was done.

On the 1st of February, 1912, he was ordered by a judgment of this court to restore a pawn-ticket to his client, one Simerkie, and to cancel a promissory note given to him by Simerkie and to return it to Simerkie. In respect to this matter of Simerkie he was found guilty of misconduct and it was thereupon ordered on the 16th of February, 1912, that he be struck off the roll, a second time. It is for release from this order that he now petitions.

In another judgment of this court, delivered on the 10th of February, 1912, it was stated that on the application of his client, one July, the Court on the 18th of May, 1911, ordered him to pay to July moneys of that client that he had received and held for her, amounting to \$754.55; and in that judgment it was further stated "that having regard to the pendency of other proceedings against the respondent for professional misconduct, the court abstains from the present consideration of his conduct in this matter." The other proceedings referred to were in relation to the matter of Simerkie. He endeavoured to make an application to the Judicial Committee for leave to appeal from the order striking him off a second time, but he abandoned the attempt. In May, 1914, November, 1917, and December, 1923, this court rejected petitions by him to be restored to the roll.

It appears from reported cases in England, South Africa and Ceylon that an order striking a practitioner off the roll of solicitors is not necessarily inexorable. Even after he has been struck off a second time, there is power to re-admit him, subject to certain conditions precedent, of which two essentials are contrition for his misconduct and reparation to the clients who have suffered wrongs that he has been ordered by the court to redress. In his present petition (as in his previous ones) there was no mention of his contrition. By the court's unusual indulgence, however, he was allowed to add to the petition now before us an expression of his contrition. But in this petition (as in his previous ones) there is no reference whatever to any effort having been made by him to carry out the court's orders against him by making amends to his victims. It was on the 18th of May, 1911, that the judgment was delivered ordering

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him to repay to his client, July, the sum of \$754.55. He continued to practise thereafter, until the 16th of February, 1912, when he was again struck off the roll.

It would be well for the petitioner, and for all who may be concerned, to ponder the observations of Willes, J., in *Re Poole*. (1869) L.B. 4 C.P. 350, at page 353 "Looking at the power vested in this court of admitting to the responsible position of attorneys and officers of the court persons who thus have the sanction of the court for saying that *prima facie* at least, they are worthy to stand in the ranks of an honourable profession, to whose members ignorant people are frequently obliged to resort for assistance in the conduct and management of their affairs, and in whom they are in the habit of reposing unbounded confidence; and looking to the fact that in restoring this person to the roll we should be sanctioning the conclusion that he is in our judgment a fit and proper person to be so trusted; I think we ought not to do so. except upon some solid and substantial grounds. And I further think it ought to be made a condition precedent to the restoration of the applicant to his former position that he should have made full restitution if of ability, or at least that he should have shewn that he has made the best efforts in his power to do so. To require less would be a perversion of our duty and would in effect be offering a premium to evildoers, to the discouragement of those who toil honourably and faithfully in their profession."

The petition is dismissed.

Solicitor for petitioner: *A. G. King.*

M. J. DE FREITAS v. COM. OF INCOME TAX.

MARIA JOSE DEFREITAS v. COMMISSIONERS OF
INCOME TAX.

[No. 141 OF 1933.—DEMERARA.]

BEFORE SAVARY, J.

1935. APRIL 3, 4; MAY 21.

Income Tax—Mutual fire insurance company—Profits—Distribution of—Liability to income tax when received by a member—Cap. 226, s. 8—Cap 224, s. 6—Discount—Income Tax Ordinance, cap. 38, ss. 10 (l), (h), 5 (c).

Where a mutual fire insurance company makes a periodical distribution of profits to members, such profits representing the unused and unrequired portions of premiums remaining after provision has been made for claims, losses, expenses of management and other proper charges, income tax is payable on the profits received by a member of the company.

Semble, that such profits are discounts on the premiums within the meaning of section 5 (c) of the Income Tax Ordinance, chapter 38.

Appeal by Mrs. Maria Jose deFreitas against an assessment of the Income Tax Commissioners. The necessary facts and arguments appear from the judgment.

G. J. deFreitas, K.C., for the appellant.

S. E. Gomes. Assistant Attorney-General, for the respondents.

Cur. adv. vult.

SAVARY, J.: The appellant is the holder of policies of insurance issued by the British Guiana and Trinidad Mutual Fire Insurance Co. and the Hand-in-Hand Fire Insurance Co., respectively and by virtue of sections 8 and 6 of the respective Ordinances, Chapters 226 and 224, regulating the business of these companies; she is a member of each.

It is admitted that both concerns are of a mutual character and have no shareholders, but the number of policy holders is unlimited.

The appellant during the years 1928 to 1931 paid fire insurance premiums to both companies which she claimed as deductions under the provisions of section 10 (1) (h) of the Income Tax Ordinance, Ch. 38, and which were duly allowed by the Commissioners. In the year 1931 the appellant received from both companies the sum of \$747.31 in cash which was her share of the division of net profits of the company commonly called cash profits, and the Commissioners have assessed the appellant in respect of this amount. It is this assessment which is the subject of appeal.

The Commissioners state that the respective Ordinances and the By-Laws made thereunder provide for a triennial distribution of profits to members, such profits representing the unused and

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unrequired portions of premiums remaining after provision has been made for claims, losses, expenses of management and other proper charges. These profits are usually paid in cash. The Commissioners justify the assessment on two grounds which may be stated shortly as follows: (1) that the sum received as cash profits is a discount on the premiums paid and is chargeable with tax under the provisions of section 5 (c) of the Ordinance, or alternately (2) that the cash profits received during any year go to diminish the amount paid for premiums during that year with the result that the sum of money to be deducted in respect of premiums paid for that year should be the difference between the actual gross premiums paid and the amount of the cash profits received.

For the appellant it is contended (1) that as this is a mutual company the amounts received by her as cash profits is really a refund of her own money and not a discount and therefore not chargeable to tax; (2) that the cash profits received in any one year bear no relation to the premiums paid for that year as they relate to premiums paid during the three preceding years and therefore cannot be said to be a discount of premiums for the year of assessment; (3) that as a mutual company cannot make profits what it returns to its members cannot be in the nature of a profit which is a discount. There is no authority bearing directly on that point but counsel on both sides referred to the same authorities—*Thomas v. Evans & Co., Ltd.*, *Jones v. South West Lancashire Coal Owners Association*, a double appeal reported in (1927) 1 K.B. 33 and (1927) A.C. 827.

In *Thomas's case* the point for decision was whether the amount of calls paid by Evans & Co., Ltd., a Colliery Company, the respondents in the first appeal, to the South West Lancashire Coal Owners Association, the respondents in the second appeal, in order to obtain indemnity against compensation in respect of fatal accidents to their workmen, was deductible in computing the amount of the colliery company's profits for income tax purposes. The Special Commissioners of Income Tax, Rowlatt, J., and the Court of Appeal held that the calls were in the nature of insurance premiums and were deductible.

In *Jones's case* which eventually reached the House of Lords, it was held that, as the respondents in the second appeal were a mutual Association, the surplus of calls received by the Association from its members over the amount of its expenditure for the year did constitute profits liable to income tax.

The principles laid down in these cases do not materially assist me in determining the point in dispute but there are *obiter dicta* in the judgments which are of assistance.

After hearing a full argument I have come to the conclusion that the assessment by the Commissioners is correct. This is a tax on income, and, in order to arrive at the net taxable income,

certain deductions are allowed by section 10. In the case of those who derive their income wholly or partly from rents, premiums for fire insurance on the property producing that income can be deducted. It is true that section 10 (1) (h) uses the words "premiums paid"; but it seems to me that a broad view of these words should be taken and when a person becomes a member of a mutual fire insurance concern that is allowed by law to divide its net profits among its members and which under its by-laws does so regularly, the member expects the premiums paid by him or her to be diminished or reduced by this periodical distribution. These two companies make a triennial distribution of profits so that it appears to me that when in any year the premiums actually paid are reduced by the amount of cash profits received, the premiums paid for that year of assessment is the difference between the two.

The elucidation of income tax law is notoriously difficult, and I am relieved to find that in course of his judgment in the first appeal the Master of the Rolls expressed an opinion, which, although an *obiter dictum*, supports the view I have taken. At p. 55 of the report in (1927) 1 K.B. 33 he says: "If the business men carrying on the Association thought it safe to say that the accumulated reserve was too large and that the Association might be able to distribute, or allow a set-off against the premiums, if that contingency were to arise then it would be possible for the Revenue to say: Well, you have not paid the whole of these 'premiums.' They could point, if and when a distribution was actually made, to the quota received, and say that the sums paid for premiums must be diminished, because in fact the members of the Association had not paid their full premiums."

This disposes of the appeal in favour of the Crown but as the question whether these cash profits are discounts on the premiums within section 5 (c) was fully discussed I will express my opinion. I think they are. Although there is a good deal to be said in favour of the arguments advanced by the appellant's counsel on this point, I have come to the conclusion, though not with any great confidence, that the interpretation I am asked to put on the word is too narrow.

The Oxford Dictionary defines "discount" as "an abatement or deduction from the amount or from the gross reckoning of anything," and then proceeds to give its narrower commercial meaning. The word "discount" is used *simpliciter* in the Ordinance without any limitation, and it seems to me that, giving it its broad meaning, the cash profits received by the appellant would come within it as being a discount on premiums. An expression of opinion by Rowlatt, J., although in the nature of an *obiter dictum* deserves consideration in an income tax matter. At p. 45 of the report he states: "If a person pays a premium for insurance

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with a right to a refund next year or in certain events it might perhaps be said that he is paying a premium under discount and the full amount cannot be claimed as a deduction, but that does not arise here”.

For these reasons the appeal fails and is dismissed. No order as to costs.

The assessment to stand subject to a deduction of \$103. It is confirmed at that figure.

Appeal dismissed.

Solicitors: *J. E. deFreitas; Crown Solicitor*

EXORS. OF P. N. BROWNE v. M. P. CAMACHO, JUNIOR.

[No. 364 OF 1933.—DEMERARA.]

BEFORE STEWARD, J. (Acting).

1935. JUNE 4, 5, 6; JULY 8.

Barrister—Not retained by solicitor—Right to sue for fees—Legal Practitioners Ordinance, Chapter 26, sections 23, 24 (1), 25.

A barrister not retained by a solicitor can sue for fees.

S. J. Van Sertima, K.C., (C. R. Browne with him) for the plaintiff.

S. L. van Batenburg Stafford, for the defendant.

Cur. adv. vult.

STEWARD, J. (Acting): This is an action brought by the executors of the estate of P. N. Browne, deceased for money due on a promissory note made in their favour by the defendant M. P. Camacho, Jnr., on the 18th of May, 1933.

The defendant by his defence admits making the promissory note but says there was no consideration as the money due was for professional services rendered by a barrister-at-law, and that by the Legal Practitioners Ordinance, Chapter 26, a barrister cannot sue for his fees.

The facts, which are admitted, are that in 1929 the defendant was arrested and charged with perjury; that the defendant's father arranged with Mr. Francis Dias, a solicitor, to conduct the defendant's case in the Magistrate's Court and, ultimately, the defendant was committed for trial. Mr. Dias was paid \$200 for his services.

The defendant and his father then approached the late Mr. P. N. Browne, a King's Counsel of this colony, with respect to the defendant's defence at the Berbice Sessions in November, 1929. Mr. P. N. Browne agreed to conduct the defence, and asked that

a Mr. Fredericks should be briefed as junior counsel, and that the services of Mr. Francis Dias should be secured as he had been in charge of the defence in the Magistrate's Court. It was admitted that Mr. Francis Dias never retained Mr. Browne or Mr. Fredericks as counsel. The defendant was acquitted, and both Mr. Fredericks and Mr. F. Dias were paid by the defendant's father.

The defendant's father in his evidence said he only agreed to pay Mr. Browne £100, but nothing turns on this as the defendant said in his evidence that when he made the note sued on he was perfectly willing to pay the balance of Mr. Browne's fees which remained outstanding after the payment of the £100 but that he was now legally advised to defend this action.

Many letters including an itemised bill of costs and an account were sent by Mr. P. N. Browne to both the defendant and his father, and, ultimately, after the death of Mr. P. N. Browne in 1933, the defendant signed the note sued on.

The only point in this case whether a barrister *qua* barrister can sue for his fees in this colony.

A barrister wishing to practise in this colony has to be admitted to practise in accordance with the Legal Practitioners Ordinance, Chapter 26.

It seems to me that the first part of section 19 (2) of that Ordinance which reads "A barrister who practices as a solicitor, shall, in so far as he so practises, be deemed to be a solicitor within the meaning of this section," contemplates the fusion of the two branches of the profession.

On looking at section 25 which reads "No special agreement otherwise valid in law between a barrister or solicitor and his client as to the amount or manner of payment for the whole or any part of any past or future services, fees, charges or disbursements in respect of business done or to be done by the barrister or solicitor, shall be good or valid in law unless it is in writing," it is seen that a barrister can enter into an agreement with his client, as to fees, etc., but that agreement is not valid unless in writing. This directly contemplates privity of contract between a barrister and his client.

Again section 23 (1) renders a barrister liable on demand to account to his client for money advanced for expenditure in or as security for costs, fees charges, etc., and in default amenable to an order of the Court that he shall do so.

Also the first subsection to section 24 directly enables a barrister to sue for payment of a bill of costs, if the bill has been taxed and copy delivered to the client; the proviso to this section actually contemplates a barrister being able to arrest a client indebted to him who is about to quit the colony.

I have no doubt in my mind that by reason of sections 23, 24

(1) and 25 of the Legal Practitioners Ordinance that a barrister can sue for his fees.

I have come to this conclusion by construing those sections and also following the case of *Sirikissoon v. Fernandes* (1923) B.G.L.R. 1. Of course if a barrister is retained by solicitor, this decision does not apply.

Mr. Stafford has urged that in construing the word "barrister" in sections 23, 24 (1) and 25 of the Ordinance, one must refer back to the words "barrister who practises as a solicitor" in section 19 (2). But that section only says that a barrister whilst so practising is deemed to be an officer of the Court within the meaning of the section.

I need not refer to all the authorities quoted to me by the defendant's counsel as I am deciding, whatever the English law says, that a barrister in this colony is governed by the Legal Practitioners Ordinance.

In passing, I should mention that it seems to me that a barrister can be sued for negligence as there is privity of contract between a barrister and his client, but I am not called upon to decide this point.

The result is that the defendant has not been able to satisfy the Court that there is no consideration for the promissory note sued on, and therefore there will be judgment for the plaintiffs in the sum of \$1,024.34, and costs.

Judgment for plaintiffs.

Solicitors: *V. C. Dias; Albert Ogle.*

Ex parte THE DEM. MUT. LIFE ASS. SOCIETY, LTD.

Ex parte THE DEMERARA MUTUAL LIFE ASSURANCE
SOCIETY, LIMITED.

[1931. No. 67.]

BEFORE SAVARY, J.

1931. MARCH 27, 31; APRIL 1, 13.

Revenue—Land sold subject to mortgage—Purchased by mortgagee—Consideration—Duty—Duty on transport and not on sale—Transport duty not assessable on mortgage debt at time of sale—Tax Ordinance, 1929 (now cap. 37), section 11, proviso (2).

Mortgage—Merger of titles of mortgagor and mortgagee—Mortgage extinguished.

Under Roman Dutch law a mortgage becomes extinguished by a merger or *confusio* of the titles of owner and mortgagee in one and the same person. Where, therefore, a mortgagee purchases property mortgaged to him and obtains transport therefor, the transport would be passed free of the mortgage and of all registered encumbrances lower than the said mortgage or registered subsequent thereto, without any cancelment of the mortgage.

Section 11 of the Tax Ordinance, 1929 (No. 8) enacted that the following duty shall be raised, levied and collected:—On every conveyance or transport for immovable property . . . an ad valorem duty of one per centum on the consideration paid for the conveyance or transport . . . provided that the term “consideration” shall include the amount for which the property is sold on conveyed.

Held, that inasmuch as where property subject to a mortgage is sold to the mortgagee the transport is passed free of such mortgage, duty is assessable only on the amount for which the property is sold and not on the amount due under the mortgage at the time of sale.

Appeal brought under the Deeds Registry Ordinance, 1931, (No. 2) from a decision of the Registrar of Deeds. The facts and arguments appear from the judgment.

G. J. de Freitas, K.C., for appellant.

B. F. King, Registrar of Deeds, in person.

Cur. adv. vult.

SAVARY, J.: This is an appeal from a decision of the Registrar on the assessment of duty in respect of a transport to be passed in favour of The Demerara Mutual Life Assurance Society, Limited, (hereinafter referred to as the Society).

On the 11th of March, 1930, the Society purchased at Execution Sale for \$5 a property known as E½ of lot number 268, North Cummingsburg, which had been put up for sale by another party. At the date of the sale the Society was the holder of a registered encumbrance, a mortgage for \$5,500 in their favour. The Society subsequently entered into a contract for sale of the property to S. S. de Freitas.

The Registrar informed the Society by letter dated the 2nd of March, 1931, (1) that their mortgage was not extinguished by their purchase of the property, (2) that duty on the transport would have

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to be assessed on the amount paid for the property as well as on the amount due under the mortgage to it, and (3) that he could not pass transport direct to the sub-purchaser. The appeal arises out of this decision.

Towards the end of the hearing of the appeal Counsel for the Society stated that he would not ask for a direction on point (3) of the Registrar's letter.

It remains for me to deal with points (1) and (2). It is admitted that on the question of whether there was an extinguishment of the mortgage the Roman-Dutch Law applies.

In Maasdorp's Institutes. Vol. II. p. 296, it is stated that a mortgage becomes extinguished by a merger or *confusio* of the titles of owner and mortgagee in one and the same person, and the reason given is that under the Roman-Dutch Jurisprudence a man's own property cannot be under a mortgage to himself, and it seems to me that the first proviso to section 4 (2) of the Deeds Registry Amendment Ordinance, 1925, is a recognition by the Legislature of this principle. It is unnecessary for me to discuss the provisions of this section as the Registrar at the hearing admitted that he could no longer contest the position that under the circumstances of this case the mortgage was extinguished by the merger of the titles of owner and mortgagee in the Society which would be effected when the transport was passed to the Society. It therefore follows that the transport would pass the property to the Society free of their own and all registered encumbrances lower than their own or registered subsequent thereto, without any cancelment of the mortgage by the Society. It is only fair to the Registrar to add that he based his view on the practice which he found existing in his department, which has been judicially recognised, and which he was reluctant to disturb, rather than on general principles of law which to him rather pointed to the fact that the practice was wrong.

This does not conclude the matter, however, as the Registrar maintains that he is still entitled to assess duty on the amount due under the mortgage to the Society in addition to the price paid by the Society for the purchase.

He bases his contention on the definition of "consideration" contained in proviso (i) of section 11 of the Tax Ordinance. 1929. Section 11 provides for duty to be raised, levied and collected on every conveyance or transport at the rate of one per centum on the consideration paid for such conveyance, transport or transfer. It seems to me that these last words refer to the document by which immovable property is transferred in this Colony usually called a transport. In my opinion the words indicate that duty is assessable on the document and in respect of the amount of the consideration paid for the transfer of the immovable property. But proviso (i) proceeds to give a definition of "consideration" as including the amount for which the property is sold and the amount due under any mortgage subject to which the property

is sold or conveyed. "Sold or conveyed" seem to imply, at any rate to a legal mind, two different sets of circumstances, a contract of sale or a transfer of the property by a transport, and it is on this that the Registrar bases his argument. He puts it in this way, that until the transport is passed the extinguishment of the mortgage does not take effect, and, therefore, this property was sold for \$5 plus the amount due under the mortgage to the Society so that in respect of this contract of sale he can assess duty on the consideration of \$5 and the amount due under the mortgage.

In my opinion this view is unsound. I cannot lose sight of the fact that the definition of consideration is contained in a proviso to a section which enacts that duty is to be collected on the consideration paid for the conveyance, transport or transfer.

The only mode of transferring immovable property *inter vivos* in this colony is by a document called a transport so that it seems to me clear that it is only when a transport comes into existence that the question of duty arises, and I cannot agree that the words "sold or conveyed" in the proviso extend the ambit of the substantive part of the section.

I am unable to say exactly what are the cases the words "sold or conveyed" are intended to cover, and, in my view, they are not apt words in relation to the words used in the substantive portion of the section. There the governing words are "paid" and "conveyance, transport or transfer," and, bearing that in mind, I am unable to agree with the submission of the Registrar.

Reference to the Stamp Act of 1870, 33 and 34 Vict. c. 97 which was substantially repealed by the Stamp Act, 1891, 54 and 55 Vict. c. 39, does not assist, as the language there used bears little resemblance to the words used in section 11, but it is instructive to point out that the words "sold and conveyed" occur in the general Stamp Act of 1815, 55 Geo. III. c. 184, and are easily construed in the context, but I have been unable to find, nor has my attention been called to, any Act of Parliament dealing with this subject where the words "sold or conveyed" occur in reference to a similar subject matter.

The words "sold and conveyed" in the Act of 1815 occur in the Schedule, tit "conveyance" and are found in an analogous provision dealing with the assessment of duty in cases where lands are "sold and conveyed" subject to a mortgage, etc.

In my opinion, therefore, duty is assessable in this case only on the amount paid by the Society for the purchase of the property at execution sale.

The appeal succeeds and the decision of the Registrar is reversed. There will be no order as to the costs of this appeal.

Appeal allowed.

Solicitor for appellant: *J. Edward deFreitas.*

R. MATOO v. L. SMITH.

RAMNARINE MATOO v. LOUIS SMITH.

[No. 161 OF 1935—DEMERARA.]

APPELLATE JURISDICTION.

BEFORE FULL COURT: CREAN, C.J., AND STEWARD, J. (ACTING).

1935 AUGUST 8, 12.

Criminal law—Conviction—Penalty—Proper regulation not stated in summons—Defendant not prejudiced thereby—Conviction not set aside—Motor Vehicles Ordinance, 1932 (No. 43), section 6 (5)—Motor Vehicles Regulations, 1932, regs. 16, 41.

Where the proper regulation prescribing the penalty for an offence was not stated in the complaint but the defendant was not prejudiced thereby, a conviction under that regulation was not set aside.

The facts and arguments sufficiently appear from the judgment.

Joseph Eleazar, solicitor, for appellant.

Assistant Attorney-General, for respondent.

Cur. adv. vult.

The following judgment of the court was delivered by the Chief Justice:—

On the 3rd of April last a notice was served on the appellant directing him to refrain from driving or using his motor bus until it was again certified as being fit for use. This was done under regulation 16 of the Motor Vehicles Regulations, 1932, and as appellant did not comply with this notice a summons was issued against him for a breach of section 6 (5) of the Motor Vehicles Ordinance, 1932.

The record of the evidence shows that when this notice was served upon the appellant he was told by the police constable to take his 'bus to Springlands Station and he refused to do so. It is also shown in the record that the appellant three days later was found driving this 'bus bus with 13 or 11 passengers in it. On being told by the police constable that he was not permitted to carry passengers without a renewal of certificate he informed this officer that the 'bus was his and he could do what he liked.

The appellant gave evidence and denied that he was carrying passengers. His evidence was not believed by the magistrate, however, and as he admitted that he did drive his 'bus on the day mentioned without a renewal of the certificate as to its fitness for use he was found guilty and fined in the sum of \$20.

What has caused some confusion in the case is the fact that section 6 of the Motor Vehicles Ordinance, 1932, was mentioned in the summons. It was evidently mentioned in the belief that it

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was the only punishment section applicable to an offence such as this, whereas there is in fact a section in the Regulations which would have been equally suitable for this offence.

This section 6 and the subsections following it, prescribe what is necessary to be done by an owner to get a certificate of fitness of his motor car or 'bus before he obtains registration of it. But, in addition, it is set out in subsection (5) of it, that anyone who drives on a road a vehicle in respect of which a certificate of fitness is not in force shall be guilty of an offence.

A notice under regulation 16, which is the one that regulates the renewal of certificates of fitness was served on appellant forbidding the further use of the vehicle until it was again certified as fit for use. It was found by the learned magistrate that the appellant contravened this regulation and so he was sentenced under this subsection 5 of the Ordinance.

The appellant's main grounds of appeal are that certain formalities in section 6 of the Ordinance were not complied with before the prosecution was instituted. In our opinion those formalities are only necessary when an application is first being made for registration. But not in a case such as this, where the certificate of fitness had been issued and suspended until a new examination was made.

We are bound to say, however, that it would have saved any possibility of confusion if the summons had stated that it was issued under the Regulations. And as Regulation 41 provides a similar penalty for a contravention of the Regulations such as this, there was no necessity to have recourse to the Ordinance itself for authority to impose a penalty. But in our opinion there was nothing to prevent the prosecution so doing.

It is clear from the record of the case, that at the very outset it was brought to the notice of the appellant that the prosecution was for a contravention of Regulation 16; therefore we do not think he was prejudiced in any way at his trial. And as we think there was no evidence admitted which was inadmissible we dismiss the appeal with costs.

Appeal dismissed.

REX v. A. HUSSEIN & M. KHAN.

REX v. ALTAFF HUSSEIN AND MOHAMED KHAN.

[INDICTMENT NO. 12,219—DEMERARA.]

BEFORE CREAN, C.J. 1935. OCTOBER 23.

Confessions—Violence of persons not in authority—Induced by—Admissibility.

If a threat is held out by one not in authority, such threat is not a ground for saying that a statement made on account of it is not admissible.

Statements made by the accused were tendered in evidence, but objected to on the ground that they were not free and voluntary.

S. E. Gomes, Assistant Attorney-General, for the Crown.

J. A. Luckhoo, K.C., for Altaff Hussein.

S. J. Van Sertima, K.C., for Mohamed Khan.

Cur. adv. vult.

CREAN, C.J.: The evidence satisfies me that Capt. Murtland, Inspector Matthey and Inspector Nicole, acted with scrupulous fairness in the taking of the statements of the accused and with an unusually clear appreciation of what preliminary steps are necessary before the confessions of an accused can be offered in evidence.

The acts of the non-commissioned ranks are mainly relied on by the defence as grounds for the rejection of the statements. The violence of the crowd on the 14th May, in the compound of the police station when Mohamed Khan, one of the accused, was brought back there after escaping from detention, is also relied on in conjunction with allegations of violence against Corpl. Hohenkerk and R. C. Skeete.

Mohamed Khan made two statements on that day, one to Sergt. Sukhnanan after he was taken to the cell by him, and a few minutes after the demonstrations of the crowd against him; and one to Inspector Nicole after the lapse of about one hour.

On the evidence as to this happening in the compound of the police station, I find unhesitatingly that Corpl. Hohenkerk used no violence of any sort and that he did not butt the accused with his head as alleged. And I also find that Rural Constable Skeete did not strike the accused as alleged.

The position then was that the accused was assisted by Corpl. Hohenkerk into the guardroom of the station into which some of the crowd followed. He was brought from there into the cell which adjoins it. In this cell he made a statement to Sergt. Sukhnanan after being cautioned in the regular way. This lasted about three-quarters of an hour, and 10 minutes after it the accused was brought to to the Rest House, the headquarters

of the Inspectors, and there made another statement to Inspector Nicole after being cautioned.

I have held that there was no threat or violence by any person in authority, but it is argued by Mr. Van Sertima that these statements were induced by the violence of the crowd and are therefore inadmissible in evidence, independent of the rule as to inducement by persons in authority.

In support of this argument, he has referred me to Phipson's Law of Evidence and several decided cases, particularly the case of *Rex v. Katola* which is reported in the Transvaal Law Reports of 1909. In this case the statements of the accused were not admitted, but it was found as a fact by the learned judge that the native police did beat and kick the accused before the statements were taken. I am also referred to *Rex v. Ibrahim*, *Rex v. Collier and Morris*, 3 Cox.

Mr. Gomes, in replying for the Crown, has referred me to Taylor on Evidence, 11th Edition, pp. 591, 592 and the cases referred to therein, *Rex v. Taylor* and *Rex v. Gibbon*. The judgment of Baron Parke in *Rex v. Moore* is discussed at this page of Taylor on Evidence and is an authority for saying that if the threat is held out by one not in authority, such threat is not a ground for saying that a statement made on account of it is not admissible.

He argues that the conduct of these officious people in the crowd and who had no authority cannot be considered in deciding this issue. Further, that the violence of this crowd cannot operate to exclude a confession made to a person in authority who has not himself sanctioned the violence.

It is recognized that if the impression is shown to have been removed by lapse of time, or by an intervening caution given by some superior authority, a confession subsequently made will be strictly receivable.

Here, there was a very short lapse of time before the statement was made to Sergt. Sukhnanan, but the accused was shut away from the crowd and he was cautioned. Before the statement to Inspector Nicole, there was a considerable lapse of time, about one hour, and a caution by him, and the accused was safe in the Rest House. Consequently, any impression of fear caused by the crowd must have been removed.

The accused, Mohammed Khan, prefaced his statement to the Inspector with the remark: "I come for give me self up and tell the whole story, before me get any lick or so." But, because the accused had a possible fear of the crowd striking him at a time prior to the statement is not, in my opinion, a reason for rejecting his statement after he had been cautioned and the cause of his impression or fear removed.

It seems to me in considering this point, the first question to be asked is whether the violence of the crowd in the compound

was calculated to make the statements of Mohamed Khan untrue. And secondly, if the fear caused by that violence continued to operate up to the time of the statements.

After hearing all the circumstances surrounding this incident, I have no doubt whatever that such circumstances did not influence the accused and induce him to say what was untrue to the Inspector and the Sergeant. I also find that even if he had been in fear of the crowd at one time, there was no reason for that fear to have continued to operate when he was in the safety of the Rest House and cell so as to induce him to say what was not true.

On the evidence given as to the taking of these two statements. I form the opinion that they were free and voluntary, and therefore rule that they are admissible in evidence.

Altaff Hussein the other accused has given evidence to the effect that his statements to the Police had been extorted by violence. He says he was brought to a dam near a clammy cherry tree by Majeed Khan, and 3 policemen. While there he was asked to give a statement by Majeed Khan. He refused. Thereupon, Majeed Khan drew a revolver and fired at him 2 or 3 times from a distance of 2 feet. The accused says not one of the police attempted to stop Majeed Khan, but, on the contrary, they all wanted to beat him. This seems a peculiar story, so peculiar that I do not intend to comment on it, except to say that I do not believe one word of it.

This incident is related as having taken place on the 10th May. On the day following Altaff Hussein made the statement of 11th May the production of which is objected to by his Counsel.

On the 14th May this accused alleges he was taken to John Dey's stelling by the police and Majeed Khan where he was ill-treated and tortured by having his two big toes tied up and cut by a cord. On the day following the 15th May he made a statement and his Counsel objects to its admission in evidence on the ground it was extorted by violence.

Mr. Luckhoo submits that the evidence of the accused is as worthy of credence as that of the police. I have heard Sergt. Estwick and the other police on this episode at John Dey's stelling and they say that the allegations against them are deliberate lies. I think they are right and so I am unable to accept the accused's story of this alleged ill-treatment, and, consequently. I hold that the statement of accused of the 15th May was not obtained by this alleged violence.

That disposes of the contention that these two statements were obtained by threats or violence, and now the only remaining point is that they were obtained by inducements held out to the accused or by promises of favour.

This side of the case has been argued with great earnestness and at great length by Mr. Luckhoo for the accused. But after

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most careful examination of the evidence I am unable to say that there is the slightest justification for holding that there was any promise held out to the accused or that he was induced in any way to make these statements. Consequently, I must rule that they were free and voluntary, and therefore admissible in evidence.

LAKRAJ v. RAMSAWH.

RAMSINGH v. RAMSAWH.

[Nos. 323, 324 OF 1932—DEMERARA.]

BEFORE CREAN, C.J.

1935. DECEMBER, 1, 3, 4, 5, 6, 20.

Remedies—Civil remedy appropriate and reasonable—Not taken—Criminal proceedings instituted—Practice to be deprecated.

The practice of putting the criminal law in motion when a civil remedy is the appropriate and reasonable one, is to be deprecated in the strongest possible terms.

Action for damages for malicious prosecution.

S. L. van B. Stafford, for plaintiffs.

S. J. Van Sertima, K.C., for defendants.

Cur. adv. vult.

CREAN, C.J., in the course of his judgment said: I am satisfied that the criminal proceedings were brought by the defendant to enforce quick payment of an ordinary civil debt and without reasonable and probable cause and with malice. And I think I should say that the practice of putting the criminal law in motion when a civil remedy is the appropriate and reasonable one, is to be deprecated in the strongest possible terms.

Solicitors: *Carlos Comes; W. D. Dinally.*

N. CANNON *v.* OFFICIAL RECEIVER.

NELSON CANNON (Defendant-Appellant),

v.

OFFICIAL RECEIVER (Complainant-Respondent).

[No. 290 OF 1935—DEMERARA.]

APPELLATE JURISDICTION.

BEFORE CREAN C.J., AND STEWARD, J., (ACTING).

1936. JAN. 6, 7, 8, 9.

Appeals—Question of fact—Grounds upon which decisions of judges or magistrates may be reversed—Demeanour and credibility of witnesses.

In an appeal from the decision of a trial judge, or of a stipendiary magistrate, based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal must, in order to reverse, not merely entertain doubts whether the decision appealed against is right, but be convinced that it is wrong.

The Court of Appeal has no right to ignore what facts the trial judge, or stipendiary magistrate, has found on his impression of the credibility of witnesses.

If the estimate which the trial judge, or stipendiary magistrate, forms as to the demeanour or credibility of the accused forms a substantial part of his reasons for his decision his conclusions of fact should not be disturbed by a Court of Appeal.

If there is evidence on which a reasonable jury could have found, as was found by the trial judge or stipendiary magistrate, then his judgment or decision must stand.

S. L. van B. Stafford, for appellant.

S. E. Gomes, Assistant Attorney-General, for respondent.

Cur. adv. vult.

CREAN, C.J.: This appeal is from a decision of the Stipendiary Magistrate, Georgetown, whereby the appellant was convicted and sentenced to 6 months' imprisonment for an offence contrary to section 215 of the Criminal Law (Offences) Ordinance, Chapter 19, and section 62 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 14.

The first of these sections enacts that every one who has been adjudged insolvent shall be guilty of a misdemeanour and on conviction liable to 2 years imprisonment, "if, within 3 years next before the presentation of an "insolvency petition by or against him, he has failed to keep in an intelligible manner the books of account usual and proper in the business (if any) "carried on by him, and such as sufficiently disclose his business transactions and financial position, unless the jury are satisfied he had no intent "to defraud."

The section of the Summary Jurisdiction Ordinance referred to in the charge gives the power of summary trial for offences by debtors such as preferred against the appellant herein. And where any reference is made to the jury in the enactments

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creating the offences it has to be construed as a reference to a Court of Summary Jurisdiction. In other words the Stipendiary Magistrate is substituted for the Jury.

The prosecution before the Magistrate arose out of the bankruptcy of the appellant. On the 30th January, 1935, one of his creditors presented a petition in bankruptcy against him. On that petition a receiving order was made, and, following his public examination, the appellant was adjudicated bankrupt on the 9th of May, 1935.

Long grounds of appeal are given; but, they can be put under three heads. The first is that the decision is one which the Magistrate viewing the evidence reasonably could not properly make and reasons are set out to support this ground.

The second is that inadmissible evidence was admitted by the Magistrate and that there was not sufficient legal evidence to sustain the conviction. Instances of the alleged irrelevant and inadmissible evidence are given.

The third ground is that the decision of the Magistrate was erroneous in point of law and why it was erroneous is set out in the reasons. The first ground we consider is the one of substance.

The Summary Jurisdiction (Appeals) Ordinance under which this appeal is brought seems to codify the law as to the bringing of appeals from a magistrate's court. And to a certain extent also restricts it, for it sets out that certain grounds of appeal may be taken and no others, while the English law is that the jurisdiction of the Court of Appeal is free and unrestricted when sitting on appeals from the decision of a judge without a jury. And has the same right to come to decisions on the issues of fact as well as law as the trial judge. But it would appear that the Court of Appeal must recognise that the onus is upon the appellant to satisfy it that the decision below is wrong, and must recognise the essential advantage of the trial judge in seeing the witnesses and watching their demeanour—as per Lord Atkin in *Powell v. Streatham Manor Nursing Home* (1935) A.C. 243.

In the same case it is stated by Lord Wright that two principles are beyond controversy:

Firstly, it is clear that in an appeal from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced it is wrong.

And secondly, the Court of Appeal has no right to ignore what facts the judge has found on his impression of the credibility of the witnesses.

Another principle laid down by the Privy Council is that if there is evidence on which a reasonable jury could have found as was found by them, then their verdict must stand. This principle appears to us of importance having regard to the word-

ing of section 9 and sub-section (g) of the Summary Jurisdiction (Appeals) Ordinance, which gives the reasons for reversing a Magistrate's decisions. The wording of that subsection is— "The decision was one which the magistrate viewing the evidence reasonably could not properly make." And this is appellant's first ground of appeal.

From the above wording of the subsection it may be taken that the magistrate is put in a position of a jury and so if the above principle were to be followed no finding of his could be set aside unless it were such as a reasonable jury could not have found.

On this first ground of appeal it is submitted there was no satisfactory evidence as to what books other than those kept by the appellant were usual and proper in the businesses carried on by him and as to which of such usual and proper books were not kept by the appellant.

On this point the Magistrate had the evidence of Mr. Vivian Dias who was acting Official Receiver and on whose information the appellant's prosecution was instituted. On the evidence of Mr. Dias he found that the appellant had been carrying on the business of auctioneer, agent, valuer and stock and share dealer. On the evidence of Mr. Dias and that of Mr. Farrar—who is a chartered accountant—he also found that the appellant did not keep the usual and proper books so as to disclose his business transactions and financial position. It was further found by him that a cash book and ledger should be kept in such a business and that the books put in evidence could not possibly shew his financial position.

We have read the evidence of Mr. Vivian Dias and Mr. Farrar and on that we cannot consider that this finding of the Magistrate is unreasonable in any way. He took the appellant to be an ordinary business man, even though he had different branches of business, and as such bound to keep usual and proper books showing his financial position.

The next submission is that the evidence taken altogether proved the absence of any intent to defraud on the part of appellant in not keeping books other than those kept by him. And that the explanations offered by him why he did not continue to keep such other books were uncontradicted and reasonable and should have been accepted by the Magistrate. And on this point it is further argued that even if the Magistrate did reject appellant's evidence he was not warranted in drawing an inference of fraud because there was no connection between those transactions and the charge.

On the question of intent to defraud there was evidence before the Magistrate given by the appellant himself that he received \$19,000 ten years ago from a Mrs. Milne to invest for her before she left the Colony. There was evidence that Mr. Reid, solicitor on behalf of this lady, applied to the appellant for payment of

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this sum in 1934, and when being questioned about this incident before the Magistrate he said he had not paid back anything but had used the money years ago. To the Judge in bankruptcy the appellant said at his public examination that he had no books at all shewing the transactions between him and Mrs. Milne.

There was also evidence given by the appellant that he was indebted to Miss Emily Murray for money lodged by her with him for investment. The fact must have appeared plain to the Magistrate that the sum was not invested for the lady but remains due to her. This transaction occurred in June, 1932, and from what the appellant says, he was unable to find any entry as to it in January or July, 1933. He said to the Magistrate that he had no entry in any book shewing payment to her.

From the evidence given by the appellant himself it is clear that the \$19,000 were entrusted to him by Mrs. Milne for investment by him for her benefit. The money was hers, but there is none of it available to-day, for the appellant says he used the money years ago, and as there is no account in the books of appellant of how this sum was dealt with by him it seems to us that it was quite reasonable for the Magistrate to conclude that this omission to keep a proper account indicated an intention to defraud on the part of the appellant.

We think the Magistrate took a reasonable view of the evidence when he found what the business of appellant was, and that he did not keep the usual and proper books of account as prescribed by the Ordinance. There was evidence which shewed a *prima facie* case of intent to defraud and the appellant went into the witness box to answer that case.

His evidence was given at some length and in it he gives an explanation of how the above sums of \$19,000 and Miss Murray's amount were converted from deposits into ordinary loans.

The Magistrate in his reasons for his decision refers to that evidence, and says the answers of the appellant were unsatisfactory, indefinite and changeable and that he was not a credible witness. The appellant failed to impress him; he says, in short, he has not believed the appellant and therefore found him guilty of the charges.

It seems to be now settled by the Privy Council that if the trial judge's estimate of the man forms any substantial part of his reasons for his judgment his conclusions of fact should be let alone.

In this case the Stipendiary Magistrate saw the appellant in the witness box, he heard his evidence and after hearing him, his estimate of him was that he was not to be believed, and so he found him guilty of the charge. Following the above rule we consider that we are not entitled to interfere with the decision and that it should be let alone, consequently this appeal is dismissed.

Sentence modified to three months imprisonment without hard labour.

Appeal dismissed.

EULALIA WIGHT v. JOHN BOLLERS.

EULALIA WIGHT v. JOHN BOLLERS.

[1935. No. 119.—DEMERARA.]

BEFORE SAVARY, J.

1936. JANUARY 29; FEBRUARY 11.

Slander—Women—Unchastity or adultery—Imputing—Definite or specific charge—Doubt or suspicion—Whether an imputation—Special damage—Civil Law of British Guiana Ordinance, Cap. 7, section 22.

By section 22 of the Civil Law of British Guiana Ordinance, chapter 7, it is provided that words spoken and published which impute unchastity or adultery to any woman or girl shall not require special damage to make them actionable.

The plaintiff sought to recover \$24,000 damages for slander in respect of the following words alleged to have been spoken by the defendant: "You (meaning the plaintiff's husband) may not be his (meaning Oscar Stanley's) father." Oscar Stanley was a child of the plaintiff's marriage. Since her marriage she had always lived with her husband. It was alleged in the statement of claim that "the said words meant and were intended and understood to mean that it was so much a matter of doubt whether the plaintiff had or had not kept her marriage vow of fidelity to her husband that it might well be that the said Oscar Stanley was not issue of the said marriage but the offspring of an adulterous union." No special damage was alleged.

Held, (1) that to impute unchastity or adultery within the meaning of section 22 of the Civil Law of British Guiana Ordinance, chapter 7, means to make a specific or definite charge of unchastity or adultery;

(2) that neither in their ordinary meaning nor with the innuendo pleaded did the words complained of amount to a specific or definite charge of adultery; they did no more than raise a doubt about the plaintiffs chastity; and

(3) that where a speaker makes no definite charge of unchastity against a woman, but uses words which merely convey suspicion or doubt, no action lies without special damage.

Simmons v. Mitchell (1880) 6 A. C. 156 applied.

Action by a married woman for damages for slander under section 22 of the Civil Law of British Guiana Ordinance, chapter 7. At the hearing the defendant took the preliminary point that the statement of claim disclosed no cause of action. The necessary facts appear from the judgment.

S. J. Van Sertima, K.C., (*C. V. Wight* with him), for the plaintiff.

H. C. Humphrys, for the defendant.

Cur. adv. vult.

SAVARY, J.: At the trial of this action an interesting problem in the law of slander is raised on a preliminary objection in point of law, and in view of the fact that, in my opinion, the point, if sound, goes to the root of the plaintiff's claim. I thought it right to reserve my decision so as to have an opportunity of

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considering the matter. The point is not free from difficulty and has given me a good deal of thought, but I give my decision at this stage of the trial with more confidence in view of the fact that the trial in this colony of civil causes of this nature is by Judge alone.

For the purposes of the point the facts alleged in the statement of claim must be assumed to be true.

The plaintiff seeks to recover \$24,000 damages for slander in respect of words alleged to have been spoken by the defendant at the annual meeting of the Demerara Mutual Life Assurance Society, Limited. The plaintiff is the wife of Percy Claude Wight to whom she was married in 1901, and they have since always lived together. There are six children born in the marriage including a son named Oscar who is the person referred to in the alleged slander. The plaintiff's husband is Chairman of the said Society.

The words on which the action is based are set out in paragraph 4 of the statement of claim: "You (meaning the plaintiffs husband) may not be his (meaning the said Oscar's) father."

The meaning of the words spoken is explained in paragraph seven: "The said words meant and were intended and understood to mean that it was so much a matter of doubt whether the plaintiff had or had not kept her marriage vow of fidelity to her husband that it might well be that the said Oscar Stanley was not the issue of the said marriage but the offspring of an adulterous union." This is the innuendo on which the plaintiff takes her stand at the trial and I do her no injustice if I paraphrase it thus, the words raise a doubt as to the paternity of her son and as to her chastity. No special damage is alleged, and in order that the plaintiff should succeed she must bring the words complained of within the category of words that are actionable *per se*.

On this statement of claim, Mr. Humphrys counsel for the defendant, takes the point that it discloses no cause of action and the action should be dismissed. His ground is that the words, the subject of the action, and the meaning annexed to them by the plaintiff, do not amount in fact to a charge or an imputation of unchastity as that expression is understood in the law of slander, but at most merely raise a doubt or convey suspicion about the plaintiff's chastity.

On the other hand Mr. Van Sertima, who appears for the plaintiff, contends that if the words and the meaning annexed to them cast doubt on the paternity of the plaintiff's son, they must, *ex necessitate*, impute chastity to her, and are therefore actionable without proof of special damage.

Before examining these arguments I desire to make some general observations, which appear to me necessary in order to appreciate the nature of the action. Spoken defamatory words are, at common law, actionable whenever special damage has in

fact resulted from their use, but the common law made an exception in three cases where the imputation was so serious that the Court presumed, without any proof, that the person's reputation had been thereby impaired. The common law of England applies to the Colony by virtue of the provisions of the Civil Law Ordinance, Chapter 7.

The exceptions referred to are:

(1) Where the words impute to the plaintiff a crime for which he can be made to suffer imprisonment;

(2) Where the words impute to the plaintiff a contagious or infectious disease tending to exclude him from society;

(3) Where the words are spoken of the plaintiff in relation to his office, profession or trade.

But it was only in 1891, speaking broadly that a fourth class was added by the Legislature when the Slander of Women Act was passed. The provisions of this Act were introduced in the Colony by the Civil Law Ordinance, Chapter 7, and the enactment is to be found in section 22. I set out the exact words; "Words spoken and published after the passing of this Ordinance which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable."

It is by virtue of this enactment that plaintiff brings her suit.

Now, to return to the arguments. Counsel for the defendant submits that the words complained of raise a doubt about the plaintiff's chastity and are therefore not actionable without proof of special damage, on the analogy of the rule of law laid down in the case of words imputing a crime. This rule is discussed in the cases of *Tozer v. Mashford*, (1851) 6 Ex. 539; *Harrison v. King* (1817) 4 Price 46 and *Simmons v. Mitchell* (1880) 6 A.C. 156, and can be stated thus: Where the speaker makes no definite charge of crime but uses words which merely convey suspicion or doubt, no action lies without proof of special damage. See also *Odgers on Libel and Slander*, 6th edition, p. 38.

I have been informed by counsel that no case has been found in which a similar question has been raised or decided with reference to the words of the Slander of Women Act, and my own labours have met with no better success, so that the point at issue in this matter appears to be *res integra*.

After consideration I have reached the conclusion that I should give a similar restricted meaning to the words in the Ordinance dealing with the slander of women, and I hold that to be actionable without proof of special damage the words complained of in their natural meaning, or with the innuendo where an innuendo is necessary, must amount to a specific or definite charge of unchastity. In arriving at this result I am assisted by two circumstances. Firstly, it is to be noted that the Legislature in the Slander of Women Act has adopted language used by judges in defining cases under the common law where slanderous words

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are actionable without proof of special damage, *e.g.*, “words imputing a crime,” “words imputing a contagious disease.” I am of opinion that I should give to the word “impute.” as used in reference to the slander of women, the meaning which has been attributed to it by the Courts when considering the meaning of the same word in the case of slander by imputing a crime. In the interpretation of Statutes there is a rule that where certain words in an Act of Parliament have received a judicial construction and the Legislature has repeated them without any alteration in a subsequent statute the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them. See *Ex parte Campbell* (1870) L. R. 5 Ch. App. 703, and *Barras v Aberdeen Steam Trawling and Fishing Co., Ltd.* (1933) A.C. 402. Although this rule is not strictly applicable to circumstances of this case, it seems to me that I should apply an analogous rule and give to the word “impute” the meaning which the Courts gave to that word, in reference to slanderous words imputing a crime, before the passing of the Act of Parliament dealing with the slander of women.

In the second place I call attention to the fact that the learned authors of the various text books on Libel and Slander, when dealing with the question of words which impute unchastity to a woman do not suggest that these words are to be given a less restricted meaning in cases of this class of slander, and, in fact, a statement in Odgers, 6th edition at p. 61 supports the view which I have expressed. It is as follows: “the words must be such as to convey to the hearers a definite imputation that the plaintiff has in fact been guilty of adultery or unchastity.” It seems to follow from this that words which do no more than raise a doubt about a woman’s chastity would not be within the provisions of section 22 of the Civil Law Ordinance, and therefore not actionable without proof of special damage.

However, this does not dispose of the point because Mr. Van Sertima has further strongly urged that the true meaning of the words the subject of this action, together with the innuendo is that they do impute unchastity to the plaintiff. He contends that the effect of the words is to doubt the paternity of the plaintiff’s son from which it follows that the words impute unchastity *ex necessitate*. Put in another way, he says that if words cast doubt on a woman’s chastity they necessarily impute unchastity to her. Although at first sight this may appear to be an argument of some weight it seems to me that it would give the words a strained or forced construction, and the plaintiff by her innuendo does not so construe them and has supplied the best answer to the argument. As I stated before the meaning assigned by the plaintiff to the words is that the words cast a doubt on the paternity of her son and on her chastity, in my view the remarks of the Privy Council

in the case of *Simmons v. Mitchell* ante, at p. 161 apply with force to this contention of the plaintiff. They are as follows: "It is to be observed that the plaintiff does not in any of his innuendoes declare that words of which he complains were spoken with the intention of imputing to him a felony; that is to say, the crime of murder. The innuendoes do not purport to enlarge the meaning of the words, and if the words themselves convey only suspicion the innuendoes do no more." In my opinion this contention of the plaintiff's counsel fails.

There remains another point made on behalf of the plaintiff that the innuendo should be treated as surplusage and rejected and that I should treat the matter as if there were no innuendo and fall back entirely on the words complained of. This is a well established practice supported by the cases of *Harvey v. French* (1832) 1 Cr. and M. 11. *Barrett v Long* (1851) 3 H.L.C. 395 and *Simmons v Mitchell* previously referred to. But it is equally clear that in order that the rule should avail the plaintiff, I must be satisfied that the words are defamatory.

My view is that the words by themselves are equivocal and not necessarily slanderous. They might be held to be slanderous under certain circumstances, in other words, a meaning might be annexed to them by an innuendo and in that case they might be slanderous. See a discussion of this position in *Odgers on Libel*, 6th edition, p. 109, where the learned author states: "Where the defendant's words if taken literally in the primary and obvious meaning are harmless, it is still open to the plaintiff to show from the surrounding circumstances that on the occasion in question they bore a secondary and defamatory meaning "In such a case, however, an innuendo is essential to show the latent injurious meaning. Without an innuendo there would be no cause of action shown on the record. And such innuendo should be carefully drafted; for on it the plaintiff must take his stand at the trial. He cannot during the course of the case adopt a fresh construction." See *Ruel v. Tatnell* (1880) 43 L. T. 507, and *Simmons v. Mitchell*, ante. In my opinion this point also fails. It would be idle to speculate as to the result if the innuendo had been framed differently.

I have to deal with the case as I find it, and, although it may be said that I have placed too narrow a construction on the words of the Ordinance in view of the fact that the Slander of Women Act was a remedial one, and too restricted a meaning on the words complained of, the history of this branch of the law and the attitude of the Courts to it preclude me in my opinion from breaking new ground and enlarging the rules of law governing actions of this nature. I refer, for this purpose, to one of the recent decisions where this question is dealt with, and wherein previous observations of judges are quoted with approval. The

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case is *Jones v. Jones* (1916) A.C. 481, where the plaintiff, a school master, tried unsuccessfully to get the Courts to enlarge the scope of the law of slander by holding that an untrue verbal imputation of adultery against the plaintiff not made touching him in the way of his calling was actionable without proof of special damage.

Viscount Haldane at p. 489 of the report refers to the action of slander thus: "After examining the authorities, I have come to the conclusion that the Court of Appeal were right, and that the judgment of Lush J., notwithstanding the care which he had obviously bestowed on it, cannot be supported. He seems to have regarded the decided cases as having laid down a broad principle, which could be legitimately extended to a case like the present. My Lords, I think that is not so. The action for slander has been evolved by the Courts of common law in a fashion different from that which obtains elsewhere. As one of the consequences the scope of the remedy is in an unusual degree confined by exactness of precedent. It is not for reasons of mere timidity that the Courts have shown themselves indisposed to widen that scope, nor do I think your Lordships are free to regard the question in this case as one in which a clear principle may be freely extended.

"Lord Herschell, in his judgment in *Alexander v. Jenkins*, (1892) 1 Q.B. 797, 801, remarked of this very point that 'when you are dealing with some legal decisions which all rest on a certain principle, you may extend the area of those decisions to meet cases which fall within the same principle; but where we are dealing with such an artificial law as this law of slander, which rests on the most artificial distinctions, all you can do is, I think, to say that if the action is to be extended to a class of cases in which it has not hitherto been held to lie, it is the Legislature that must make the extension and not the Court.' There is a difference between slander and libel which has been established by the authorities, and which is not the less real and far-reaching because of the fact that it is explicable almost exclusively by the different histories of the remedies for two wrongs that are in other respects analogous in their characters.' And at p. 499 Lord Sumner, after stating that it has often been said that the right to sue for words spoken, when no damage can be proved, ought not to be extended, goes on to quote an observation of Baron Martin in *Allsop v. Allsop* (1860) 29 L.J. Ex. 315, 317. "The law is jealous of actions for mere words, and the rules limiting these actions ought to be adhered to here." And Lord Wrenbury at p. 506, says "This involves a confession which I fear must be made that the law of slander rests not upon any principle whose elasticity will admit new cases but upon artificial distinctions. An artificial and arbitrary rule is not a principle." It is true that these observations refer to slander as it developed in

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the courts of common law, but it seems to me that they apply in substance to the particular kind of slander in this action which was made actionable by statute.

For these reasons the preliminary objection is sustained.

Plaintiff to pay all costs of action up to date, such costs to include fees to counsel. Certified for two counsel.

Leave is given to the plaintiff to amend paragraph 7 of the statement of claim. The amended statement of claim to be delivered and filed within seven days of the payment of costs by plaintiff to the defendant. Amended defence, if necessary, to be delivered and filed within seven days of the delivery of the statement of claim.

Proceedings stayed until payment of costs by plaintiff to the defendant: the order as to stay of proceedings to be effective only if defendant presents his bill of costs for taxation on or before the 9th March, 1936. Case to be put on hearing list again after usual request for bearing. In default of delivery of statement of claim within the time fixed, then it is ordered that the action do stand dismissed with costs.

Solicitors: *A. G. King; E. A. W. Sampson.*

C. A. SMART v. F. VIEIRA.

C. A. SMART v. F. VIEIRA.

[1935.—No. 85. DEMERARA.]

BEFORE STEWARD, J. (AG.). 1936. FEB. 11, 12; MAR. 4.

Landlord and tenant—Non-repair—Notice of—Liability of landlord—Condition precedent—Local Government Ordinance, Cap 84, s. 212.

A landlord is not liable in damages under section 212 of the Local Government Ordinance, Chapter 84, (which section is now repealed by the Fourth Schedule to the Public Health Ordinance, 1935) unless the tenant has given him notice of the non-repair of the premises let to him.

J. L. Wills, for the plaintiff.

K. S. Stoby, for the defendant.

Cur. adv. vult.

STEWARD, J. (Acting): It is well settled law that where the landlord is under statutory duty, as in this case; see Ch. 84, sec. 212, sub. s (2) which is now repealed but was in force at the commencement of this action, or in the case of a covenant to repair, the tenant must give notice to the landlord in order to allow him to enter and do the repairs: see *Morgan v. Liverpool Corporation* (1927) 2 K.B. 131 which says that notice must be given before a landlord can be made liable for non-repair.^(a) Both counsel admitted that notice must be given. I am perfectly satisfied that notice was given by the tenant.

Now comes the question, was there sufficiency of notice? In *Murphy v. Hurly* (1922) 1 A.C. 369 at p. 389, Lord Sumner says "In *Tredway v. Machin*. 91 L.T. 310 the Court of Appeal held, following *Hugall v. McLean*, 53 L.T. 94, that means of knowledge are not equivalent to actual knowledge for the purpose of charging the landlord." In this case the tenant on the 18th August, 1934, pointed out the banisters at the north end of the verandah and said they needed repairing and pointed out the middle rail was loose and the landlord actually shook the banisters and promised to repair them. Here it seems that there was not only actual knowledge on the part of the landlord, but actual knowledge acquired by notice (on the visit on 18th August, 1934) from the plaintiff who drew attention to the fact that a certain part of the structure required attention: see *Griffin v. Pillet* (1926) 1 K.B. at p. 24.

Having held that there was sufficiency of notice, the landlord becomes liable in damages.

Solicitors: *W. D. Dinally, E. D. Clarke.*

(a) And see *Conway v. Martin* (1928) L. R. B. G. 26, Gilchrist, J.

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JOHN HENRY NEWPORT, Appellant, v. EGBERT

HOHENKERK AND D. SMITH, Respondents.

[1934.—No. 87. DEMERARA.]

BEFORE FULL COURT. CREAN, C J., AND STEWARD, J. (ACTING).

1936. JAN. 9, 10, 13; MAR. 13.

Mining claim—Location—Notice and application for licence to be filed within three months—Day of location excluded from said period—Location null and void if documents not filed in time—Person whose location is annulled not to re-locate without permission of Commissioner—Location under different prospecting licence—Effect of—Mining Regulations, 1931, reg. 14 (1).

Appeal—Mining dispute—Objection taken before Warden—Complaint dismissed on another ground—Appeal by complainant—Ground of dismissal bad—Judge considers other points—Objection good—Whether judge entitled to consider that point—Whether “raised in appeal”—Mining (Consolidation) Ordinance, cap. 175, s. 89.

Regulation 14 (1) of the Mining Regulations, 1931, provides that “every person who locates a claim shall within a reasonable time after such location, and in any case not more than three months thereafter, file or cause to be filed a notice together with an application in writing, and if such application and notice be not filed as required the location shall be null and void and thereafter any person may locate a claim in respect of the same land.”

Held, that in the computation of the period of time, the day of the location must be excluded.

A. located a claim on the 29th June, 1933, but did not file a notice or an application as required by regulation 14 (1) of the Mining regulations, 1931. On the 29th September, 1933, B. located the claim.

Held, (1) that the period of three months specified in the regulation did not commence to run until 30th June, 1933, and that A’s location was not null and void until the end of the day of the 29th of September, 1933, and that B’s location on that day was therefore null and void; and

(2) that the proviso to regulation 14 (1) which enacts that the person whose location is annulled by that regulation shall not re-locate the claim without the permission in writing of the Commissioner or Warden previously obtained refers to subsequent locations under the same title and on behalf of the same parties.

Section 89 of the Mining (Consolidation) Ordinance, chapter 175, provides that “in all cases in which . . . any one aggrieved by a decision of the Commissioner, Assistant Commissioner, or of a warden, may appeal therefrom to the Supreme Court, the Court shall have full jurisdiction to hear and determine all questions of fact and of law between the parties *raised in appeal*, and the parties to the proceedings may appeal from any decision of the Court to the Full Court.

In his decision the Warden only dealt with one of the questions argued before him as he considered that the decision on that point was fatal to the case of the complainant (appellant). On appeal to a judge of the Supreme Court, Savary, J., held that the Warden was wrong in his decision, but dismissed the appeal on the ground that one of the objections argued before the warden, but not determined in his decision, was fatal to the case of complainant.

Held, on appeal to the Full Court, that the judge was justified in considering the objection which was raised before the Warden but not dealt with by him in his decision.

Appeal from an order of Savary, J., dated 26th March, 1935.

H. C. Humphrys, for appellant.

J. A. Luckhoo, K.C., for respondent.

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The following judgment of the Court was read by the Chief Justice:—

John Henry Newport is the appellant in this case. He filed a complaint with the warden on the 1st of November, 1933, wherein he asked to be declared the lawful locator of a claim called the Ace of Diamonds No. 4. In this complaint he also asked that the respondents be ordered to vacate this claim and that possession be given to him.

His complaint was heard by the warden who held that the location of the claim by the appellant on the 29th September, 1933, was a re-location and was invalid because it had been done without the previous permission in writing of the Commissioner of Lands and Mines or the warden.

There were other arguments put before the warden on the hearing; amongst them was the submission that in computing time from the day of location, the day of such act of locating is to be excluded from any period of time specified in the Ordinance for the doing of any act. This submission was not dealt with by the warden. He confined his decision almost exclusively to one point, that the re-location was made without permission previously had and obtained and so in his opinion was bad and conferred no title on the appellant.

From this decision the appellant appealed to a single Judge of the Supreme Court. The appeal was heard by Mr. Justice Savary and dismissed. The title of the respondent to occupy this claim was upheld by the learned Judge but not for the same reasons as those given by the warden.

The evidence given before the warden showed that J. Walter Newport located the area of land in question on the 29th June, 1933, under a prospecting licence No. B21476 on behalf of himself and one Drayton. Further that the same person J. Walter Newport located again this same area of land on the 29th September, 1933. This time he located on behalf of J. Henry Newport the appellant herein and under a prospecting licence No. B. 20915.

From these facts it is clear that the locating in June, 1933, was under licence No. 21476 and the locating in September, 1933, was under licence 20915. The acts done to locate in June, 1933, by J. Walter Newport were done by him on behalf of himself and one Drayton whereas in September, 1933, he located on behalf of J. Henry Newport, the appellant.

It seems to us that as the acts of locating by J. Walter Newport were done under different licences and on behalf of different parties they could not be deemed to be acts amounting to re-location. In our opinion to re-locate is to locate afresh, under the same title, and on behalf of the same parties; and, therefore we agree with the view of the learned Judge of the

Supreme Court that there was no re-location by appellant herein and that the view taken by the warden on this point was erroneous.

The substantial point and the one which is really arguable is that set out in paragraph 1 of the grounds of appeal, where it is set out that the learned Judge was in error in entertaining and deciding on the question of computation of time under regulation 14 of the Mining Regulations; 1931, as there was no finding by the warden on this point and it was not "raised in appeal." within the meaning of section 89 of the Mining Ordinance, Chapter 175.

It is perfectly true that the warden grounded his decision almost entirely on the question of re-location and avoided—except for a cursory remark thereon—the question of computation of time.

For that avoidance we have no criticism to offer particularly as it must have appeared to him that the decided cases on the question of computation of time are somewhat conflicting and difficult to abstract a principle from, and we appreciate it is difficult for one possibly without any legal training to give a ruling on a point of law such as this. However, he evidently thought the question of re-location was a decisive one, and one on which he could dispose of the case.

When the appeal from his decision was filed, the ground set out was, that the warden was wrong in holding there was a re-location. There was nothing in the grounds of appeal to the learned Judge of the Supreme Court about the appellant having wrongly computed the time when entering this disputed claim on the 29th September, 1933. And so it is argued by Mr. Humphrys that the only question for the consideration and decision of the learned Judge was that of re-location, and that as he raised in appeal only this ground all others were excluded and therefore he should have succeeded in his appeal. This argument amounts to saying that the learned Judge of the Supreme Court was precluded from considering any other legal aspect of the case even though other legal points were argued before the warden and before him. And the authority for this is section 89 of the Mining Ordinance, Chapter 175, which gives to the Supreme Court full jurisdiction to hear and determine all questions of fact and of law between the parties raised in appeal.

If this section is to be interpreted in the way suggested by the appellant the Judge is not competent to hear or consider any argument on any point that is not raised in the grounds of appeal filed.

This argument does not appear to us to be sound. If it were, there would be nothing to prevent an appellant including in his grounds of appeal only those grounds on which he thought he was likely to succeed. Deliberately, he could confine his appeal

to grounds which he thought were favourable to himself and, by omitting to mention others, he could exclude them from discussion and consideration by the Court.

If that were the true construction of the section gross hardship could be done by the Court in refusing to hear arguments on points not included in the grounds of appeal but which were of such importance and weight that they nullified or governed the grounds given.

Having come to the conclusion that the grounds given for appeal are not the only ones which can be argued, in our opinion there is nothing to prevent the argument on the computation of time raised by the respondent before the learned Judge, particularly, as this point was argued fully before the warden and before the learned Judge.

The respondent's counsel, Mr. Luckhoo, submits that the period of three months referred to in regulation 14 (1) within which an application for a claim licence must be made expired on the 29th September, 1933, and not on the 28th September, 1933, as contended by the appellant; therefore, the claim located on the 29th June was not open for prospecting under another prospecting licence until the 30th September, and consequently the location by appellant under licence 20915 on 29th September, 1933, was null and void.

The reason for this contention is that as the area was located on 29th June, 1933, the person locating has three months from that date to do certain things. If he did not do these things, then the area became an open one again and available for anyone to locate. Here, nothing was done and appellant located on 29th September, 1933, but respondent contends that was void because it was not an open area until the 30th September, 1933, when he located.

It is clear that from these facts the one question emerges, and that is, how is the "three months thereafter" to be computed? In such computation is the day of location to be included or excluded? If it should be included then the location by the appellant on 29th September, 1933, was in order. If on the other hand it is to be excluded then his location was premature and void, for the reason that the area was not open for location until the following day.

A volume of authorities were cited to us on this question of the computation of time by counsel on both sides. We took a note of them, but do not intend to discuss them in detail except a few of them from which a glimmer of principle appears.

The first of these is *In re North, ex parte Hasluck* (1895) 2 Q.B., 264, C.A., a case which has a good deal of bearing on this one. And the view taken there was that where something has to be done which is necessary to complete a title, the first day is

excluded; otherwise, there would be a cutting down of the time allowed for doing the act.

Prior to the decision in *Lester v. Garland* (1808), 33 E.R. 748 it was thought to be law that where a fact or event was mentioned from which a given period of time was to be reckoned, the Court was bound to reckon the portion of the day on which the act was done as though it was a whole day and to reckon it as the first day of the period. Since the decision in that case it has been accepted that there is no general rule on the subject but the opinion expressed by Sir William Grant was that, if there were to be a general rule, it ought to be one of exclusion of the first day as being the more reasonable.

The case of *Young v. Higgon* (1840) 151 E.R. 317, referred to in the argument of counsel and mentioned and discussed by the learned Judge of the Supreme Court in his judgment, is one which has also a good deal of bearing on this appeal. There, the Act of Parliament allowed the party one month within which he could do a certain act. And the opinion was given that unless you exclude both the first and the last day you do not give him a whole month for that purpose. In this case it was suggested by the Court that if one day were taken as a criterion it would be seen that the exclusion of the day from which computation of time is to run is the only reasonable and practicable interpretation.

Another case of importance on this point is *In re Railway Sleepers Supply Coy.* (1885) 29 CD. 204. This case and others were discussed before the learned Judge and from them he took the view that the usual course in recent times has been "to construe the day exclusively whenever anything has to be done in a certain time after a given event or date." He was therefore of the opinion that the proper interpretation of "three months thereafter" in the regulation 14, is that those three months were to be calculated so as to exclude the day of the date on which the licence was issued by the Mines Department.

Mr. Humphrys pointed out that such a method of computation would be a variation of the method at present followed in the department and as an illustration of this he refers to one of the exhibits produced before the Warden on the hearing of the complaint by appellant. This exhibit is a prospecting licence for a year. It is issued on the 24th November, 1932, and it is set out therein that it will remain in force until the 23rd November, 1933. The computation of time in this licence obviously includes the day of date of issue and so it is argued that as that has been the procedure hitherto it should be followed in this case, and this appeal allowed.

There may appear to be some plausibility in this argument but we have no doubt that the learned Judge of the Supreme Court pointed out to counsel that his decision must be founded on what he considers is the correct rule of law applicable to the

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subject and not on the procedure which is being followed. The procedure followed may be of interest, but it is important that such procedure should be in accordance with what is the law on the subject. The learned judge held that this procedure was not in accordance with the generally accepted rule of law on the subject, and so he dismissed the appeal. With his view we are in complete agreement, and so, in our opinion, the appeal fails on this ground.

In the event of this Court being against the appellant on the ground of time, it was submitted that the evidence showed, and that there were clear indications that the claim was abandoned on the day of location by appellant and that it was therefore an open area and available for locating on the day on which he did so. This argument we think may be considered as a second line of defence by appellant. It certainly has not the strength of the first, and if we were to draw an inference from the facts proved that there was abandonment by appellant, it would be a long drawn one and one without foundation, and so we agree with the learned Judge when he decides there is no evidence to support such a contention.

For the reasons we have given we dismiss the appeal with costs.

Appeal dismissed.

Solicitor: *Albert McLean Ogle*, for the appellant Newport.

A. R. C. EWING v. S. L. VAN B. STAFFORD.

A. R. CRUM EWING v S. L. VAN B. STAFFORD *et al.*

[NO. 214 OF 1935—DEMERARA.]

BEFORE STEWARD, J., (Acting).

1936. FEB. 26; MAR. 3, 4, 17.

Solicitor and client—Bill of costs—Common law action—Taxation of bill—Limitation Ordinance, cap. 184, sec. 6 (1)—Legal Practitioners Ordinance, cap. 26, sec. 22 (1).

By section 22 of the Legal Practitioners Ordinance, Chapter 26, it is provided that “a solicitor shall not recover any costs, fees, charges, or disbursements, for any business done by him until he has applied for and obtained a certificate of the registrar as to the actual amount due in respect thereof upon taxation and has rendered account thereof to the party to be charged.”

By section 6 (1) of the Limitation Ordinance, Chapter 184, it is provided that every action and suit for any movable property, or upon any contract, bargain, or agreement relating to movable property, or upon any account or book debt shall be brought within three years next after the cause of action or suit has arisen.

A. R. C. E. engaged R. G. S. as his solicitor to institute an action on a specially indorsed writ. Judgment was signed on December 1, 1928. In 1935 R. G. S. presented a bill of costs for taxation against his client A. R. C. E., and it was taxed on August 31, 1935.

A. R. C. E. sued S. L. van B. S. on a money count. R. G. S. assigned his rights under the bill of costs to S. L. van B. S., the defendant in this action who claimed a set-off against A. R. C. E.’s claim to the extent of the bill of cost. The plaintiff relied on the Statute of Limitations.

Held (1) that it was the rule at common law that a solicitor’s cause of action in respect of services in an action arose when judgment was obtained;

(2) that this is still the rule even though under section 22 of the Legal Practitioners Ordinance, Chapter 26, the solicitor could not enforce his right to costs until he had delivered his bill of costs and had it taxed;

(3) that as more than three years had elapsed since judgment the solicitor’s right to his costs was barred by the Statute of Limitations.

C. V. Wight, for plaintiff.

S. L. van B. Stafford, for defendant.

Cur. adv. vult.

STEWARD, J. (Ag.): This is a trial of a set-off or counter-claim by the defendants for the sum of \$120. The matter arose in this way; the plaintiff sued on a promissory note for \$226.63; the sum of \$134.34 having been paid, to plaintiffs solicitor, and leave to defend was granted to the defendants as to the balance \$120.40.

The facts of the case are that in the year 1928 the plaintiff retained Mr. Sharples, a solicitor, to bring an action against one W. E. Reid for \$1,200 in which action judgment was obtained, there being no appearance of defendant; the judgment was sealed on the 1st December, 1928. That on the 31st August, 1935, Mr. Sharples taxed his “solicitor and client” bill of costs and on the same day assigned the amount due, \$120.40 to Mr.

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Stafford the second-named defendant in this action. Notice of assignment was duly served on the plaintiff; all of which documents were produced.

I am satisfied from the evidence of Mr. Sharples who was called for the defendants, and from that of the plaintiff that in 1928 the plaintiff entered into a special agreement as to costs with Mr. Sharples in regard to the action *Crum Ewing v. Reid*. The agreement was that the plaintiff was to pay all out of pocket expenses and that other costs were to come out of the re-selling of some machinery worth £10,000 belonging to the defendant W. E. Reid and which plaintiff was to purchase at execution. Unfortunately Mr. Sharples was very vague as to his dates and facts, but I am satisfied that there was this special agreement. The costs were never recovered by Mr. Sharples as the machinery was never bought by the plaintiff. The plaintiff paid all the out of pocket expenses of the solicitor. Mr. Sharples said in evidence that he would never have taxed the bill against Mr. Ewing, if he, Mr. Ewing, had not sued Mr. Stafford. As regards the evidence I accept that of the plaintiff. Counsel for the defence said that because the agreement was not in writing the solicitor could ignore it, and counsel quoted Chapter 26, section 25, and could tax his bill and then sue on it in accordance with section 22.

But there is another point and that is one raised in the reply to the defence to the counter-claim, that the debt of \$120.40 is barred by the Limitation Ordinance. Chapter 184, section 6. The important words of that section are "that an action or suit shall be brought within three years next after the cause of action or suit has arisen."

When does the solicitor's cause of action arise? It appears conclusive from the authorities that a solicitor can bring his action for costs at the end of a common law action, that is, at judgment. In the case of *Underwood, Son and Piper v. Lewis* (1894) 2 Q.B. 306 at p. 309, Lord Esher, M.R. says: "When one considers the nature of a common law action, it seems obvious that the law must imply that the contract of the solicitors upon a retainer in the action is an entire contract to conduct the action to the end." Also A. L. Smith, L.J., at p. 313, says; "It seems to me clear upon the authorities from the year 1801 down to the present day that the contract of a solicitor on a retainer such as this is an entire contract, and that, subject to certain limitations, he thereby undertakes to carry on the action till its end." That doctrine is laid down in plain terms in *Harris v. Osbourn* (1834) 2 C. & M. 629, where Lord Lyndhurst said that "when an attorney is engaged to prosecute or defend a cause he enters into a special contract to carry it on to its termination." Again in *Whitehead v. Lord* (1852) 7 Exch. 691, Parke. B. said "The rule as applicable to this case, was correctly laid down in *Harris v.*

Osborn, that an attorney, under a retainer to conduct a suit, undertakes to conduct the suit to its final termination, and he cannot sue for his bill till that time has arrived, subject, however, to the exception there stated, and subject also to the additional exception which arises upon the death of the client, in which case he can sue the personal representatives." I do not find that this doctrine, so far as it applies to common law actions, is really dissented from by Jessel, M.R. in *re Hall & Barker* (1878 9 Ch. D. 538. He there says he will not adopt it in relation to the suits in equity then before him but he enunciates it as the principle applicable in case of common law actions. Then again in the case of *In re Romer & Haslam* (1893) 2 Q.B. 286, the same principle is enunciated. Therefore *prima facie* the contract of the solicitor, when he accepts a retainer in a common law action is an entire contract to carry on the action till it is finished, and he cannot sue for his costs before the action is at an end. Therefore it seems that when judgment was sealed on the 1st of December, 1928, in the case of *Crum Ewing v. W. E. Reid*, then the solicitor could have sued for his costs.

But the argument for the defence on that point is that in this Colony the solicitor's cause of action does not arise till the bill is taxed: *vide* chapter 26, section 22 which reads "a solicitor shall not recover any costs, fees, charges, or disbursements, for any business done by him until he has applied for and obtained a certificate of the registrar as to the actual amount due in respect thereof upon taxation and has rendered account thereof to the party to be charged."

If one looks at *Coburn v. Colledge* (1897) 1 Q.B. 702 at pages 705 and 706 Lord Esher, M.R. says "Before any enactment existed with regard to actions by solicitors for their costs, a solicitor stood in the same position as any other person who has done work for another at his request, and could sue as soon as the work which he was retained to do was finished, without having delivered any signed bill of costs or waiting for any time after the delivery of such a bill. Then to what extent does the statute alter the right of the solicitor in such a case, and does the alteration made by it affect or alter the cause of action? It takes away, no doubt, the right of a solicitor to bring an action directly the work is done, but it does not take away his right to payment for it, which is the cause of action. The Statute of Limitations does not affect the right to payment, but only affects the procedure for enforcing it in the event of dispute or refusal to pay. Similarly, I think section 37 of the Solicitors Act, 1843, deals, not with the right of the solicitor, but with the procedure to enforce that right. It does not provide that no solicitor shall have any cause of action in respect of his costs or any right to be paid till the expiration of a month from his delivering a signed bill of costs, but merely that he shall not commence or maintain any

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action for the recovery of fees, charges or disbursements until then.”

That judgment disposes of that point because section 37 of the Solicitors Act, 1843, says that a solicitor may not enforce an action for recovery of costs until the expiration of a month after delivery of a signed bill of costs and it has been held that the section merely deals with the enforcement of a solicitor’s right of action; therefore it seems to me that the provisions of Chapter 26, section 22 merely mean that a solicitor must tax his bill before he can enforce his right; that his cause of action is not affected, it arises when the action he is retained in is finished, that is when judgment is sealed.

But it appears from the authorities quoted that when judgment has been given and there is no appeal the statute runs from the judgment; subsequent items of costs incidental to the business of the action will not take the costs items out of the Ordinance.

So I have come to the conclusion that the solicitor’s cause of action arose on the 1st of December, 1928, and that time began to run from then. So that when Mr. Sharples taxed his bill and assigned the amount due to the defendant Mr. Stafford on August, 31st, 1935, the action on that bill was barred.

Therefore, there will be judgment for the plaintiff in the sum of \$120.40 and costs fixed at \$25. The counter-claim stands dismissed. Also the plaintiff is to have the costs which were reserved on February 26th, 1936.

Judgment for plaintiff.

Solicitors: *C. V. Wight; R. G. Sharples.*

AJUBUN v. AMIR.

AJUBUN v. ABDUL AMIR.

[No. 38 OF 1935.—BERBICE.]

BEFORE SAVARY, J. 1936. MARCH 6, 20; APRIL 27.

Opposition suit—Claim in detinue—No relation with the property about to be conveyed, mortgaged or leased—No right to oppose.

The law and practice of the Courts seem well settled and recognise only two categories of claims as founding oppositions—

- (a) claims in or to the property about to be conveyed, mortgaged or leased, and
- (b) claims by simple contract debtors against the owner of the property. A claim in detinue, where there is no relation between the article detained and the property sought to be conveyed, mortgaged or leased, is not the subject of an opposition suit.

J. Eleazar, solicitor, for plaintiff.

G. T. Ramdeholl, for defendant.

Cur. adv. vult.

SAVARY, J.: In this opposition action, founded on a claim in detinue, the plaintiff seeks the aid of the Court to prevent the defendant from passing a mortgage of his immovable property until he has satisfied the claim of the plaintiff. The claim in detinue is for the return of certain articles of jewellery alleged to be wrongfully detained by the defendant or for the payment of their value, \$106.50.

At the trial of the action in Berbice, before any evidence was led, the Court raised the question whether the action is sustainable in view of the nature of the claim on which it is based.

Opposition is a form of legal proceeding well known to Roman Dutch law whereby a person, under certain conditions, can successfully oppose or prevent the passing of a transport, mortgage or lease, and the problem in this case can only be solved if I ascertain under what circumstances the right to oppose arises.

Legislation on the subject does not assist much. In the Deeds Registry Ordinance, Ch. 177, which was passed in 1919, the right to oppose is recognized, as appears from the rule 8 of the second schedule to the Ordinance, which enacts that any person having a right to oppose the passing of a transport, mortgage or lease shall do so in the manner and subject to the conditions now or hereafter prescribed by rules of Court. Rules of Court were made in 1920, and 1921, the latter repealing those made the previous year.

The rules are procedural in my view, and confer no new rights but recognise the two categories of existing claims on which actions of opposition can be founded.

The Ordinance neither defines who has a right to oppose nor does it state under what circumstances such a right arises. There

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is no reference to any existing law or practice on the matter, but in order to give efficacy to the enactment, one must conclude that the Legislature intended thereby to recognize a right which at the time of the passing of the Ordinance had received judicial sanction. Therefore, it becomes necessary to inquire under what circumstances such a right arose, and for that purpose to consider certain authorities on the subject.

Formerly the right to oppose was confined to those who had a right to or in the property about to be dealt with or a nexus or claim upon it, but subsequently the law developed in another direction and persons who had personal claims of a liquid character against those who advertised a sale, mortgage or lease were held entitled to oppose. The expression "personal claims of a liquid character" has been understood to mean only debts due and certain in amount, and has never been held by the Courts of the Colony to embrace claims by way of damages the incidents and amount of which are unascertained.

In other words, simple contract creditors constitute the second class of persons entitled to oppose. I have arrived at this conclusion after consideration of the following authorities:—

Administrator General v. Willems (1892) 2 L.R.B.G. 130.

Hogg v. Butts, (1893) 3 L.R.B.G. 88.

Austin v. Austin (1921) L.R.B.G. 75.

Jaikaransingh v. Mooneah & anor (1922) L.R.B.G. 86.

Ferreira v. Cabral (1923) L.R.B.G. 133;

See also *Dalton's Civil Law of British Guiana*, pp. 16, 17.

Mr. Eleazar for the plaintiff admits that he knows of no decision which goes further than I have stated, but he submits that a claim in detinue is not analogous to a claim for damages but rather resembles a liquidated claim and invites me to extend the rule in opposition actions to cover claims of this nature. His contention is that a claim in detinue is in respect of specific chattels or their value. Quite true, but a trial is necessary to ascertain if there was a detention, if it is unlawful, and, lastly, to quantify the value of the articles. Surely a claim of this nature is far different from one for a liquidated amount based on a contract.

It was the necessity for a trial of this nature that the learned Chief Justice, Sir David Chalmers, in the *Willems* case, considered a bar to enlarging the class of claims on which opposition suits could be based. The reason he put forward was that in an opposition action where the claim was not based on a right to or in the property, but on a sum of money, the owner was entitled, on giving security to the extent of the claim, to have his property released. (See p. 140 of the report.)

Rule 8 of the Rules of Court (Deeds Registry), 1921 enacts a similar procedure where the right to oppose is based on a debt.

It was also suggested during the argument that the question

whether the claim is founded on tort or contract may be a determining factor, but, in my opinion, no such principle can be extracted from the decisions. For instance, a claim for damages for breach of contract would not apparently give a right of opposition. As I stated before, the relevant decisions all seem to limit the right to oppose to two categories of claims. Historically, a claim upon the land itself was the first to give rise to that right. It is probable that the practice in many parts of the Netherlands of publicly proclaiming sales of land on three Saturdays or on three Church days originated this right of opposition. We are told that the object of this publicity was partly to prevent land being sold twice over to different parties, and partly to enable persons who had any claims upon the land to assert them before the purchaser took possession. See per Wessels, J., in *Hootpoort Mining and Estate Syndicate, Ltd. v. Jacobs* (1904) Transvaal L.R. 105 at p. 109.

I am not called on to enquire at what stage this right was extended to simple contract creditors, but it has existed for a long period of time and has been recognized by the Court. But it would appear from a passage at p. 137 in the judgment of the learned Chief Justice in the *Willems* case that the right of simple contract creditors to oppose was not judicially recognised in the Colony as late as 1892, although it seemed to have existed before that date.

Now to return to the authorities. In the case of *Administrator General v. Willems et al*, the learned Chief Justice Sir David Chalmers held that a claim for damages in respect of a tort could not found an opposition. In an instructive judgment he reviewed the authorities and analyzed the opinions of text writers on the subject. At page 135 after quoting from Matthaeus *de Actionibus* he proceeds: 'It will be obvious that this enumeration although 'very comprehensive applies only to those who have some sort of right to 'or in the property and not at all to persons having a mere claim or personal 'action against the debtor.' And at page 136, after referring to similar systems obtaining under the old civil law in France, Spain, Trinidad, the Cape, Ceylon and Lower Canada, he states: 'All the systems are similar as to 'their main features, and in all, the faculty to oppose arises in virtue of 'some right to or in the property sought to be disposed of and in no case 'mentioned does it arise upon a personal claim against the owner of that 'property.' The reference to personal claims cannot, I think, be understood as excluding simple contract creditors because the learned Chief Justice had previously stated that the third class of persons who can oppose according to Matthaeus are the '*quasi domini et creditores*.'

In *Austin v Austin*, decided in 1921, the plaintiffs sought to oppose a transport by defendant. The plaintiffs were the children

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of one Austin and the defendant his widow; they alleged that the defendant had not accounted to them in respect of her husband's estate and they had a right of action against her for accounts, which right of action formed the basis of their claim for opposition. Dalton J. held that the statement of claim disclosed no cause of action and at page 76 states: "This right of opposition, as has been decided in these Courts is based upon a right in or to the property to be conveyed or mortgaged, or to a *nexus* upon it, as for example to prevent an undue preference being given thereby to any party. The mere right to sue does not of itself give any right to oppose. That is not questioned. The plaintiff's claim no right to the property sought to be conveyed; they admit defendant's right to it. They claim no *nexus* upon it. They merely say they have a right against her for accounts, a right which, if it exists, of itself gives them no claim at all against her in respect of her interest in the land." In my opinion, these latter words aptly describe the position of the plaintiff in this case. The plaintiff's claim in detinue, if and when established in Court, gives no right to or in the property to be mortgaged, nor is there any relation between the claim and the property but it is suggested that if the mortgage is executed it may have the effect of preventing the plaintiff from obtaining the fruits of her judgment. This can obviously only arise if judgment is for the value of the articles. This is really a plea of hardship which could have been equally well advanced by the plaintiffs in the various cases I have referred to, and it is clear from those decisions that the Courts never even considered such an argument, and in my opinion rightly so, assuming that it had been put forward.

The only other case I desire to quote from is *Ferreira v. Cabral* decided by the West Indian Court of Appeal in 1924. The Court laid down the law thus: "No action in opposition can succeed which is not founded on a liquidated claim, so that if the opposer has to ask for an account to be taken in order to establish what is due to him he cannot successfully oppose."

In my opinion the law and practice of the Courts seem well settled, and recognize only two categories of claims as founding oppositions: (a) claims in or to the property about to be conveyed, mortgaged or leased, (b) claims by simple contract creditors against the owner of the property.

The right of opposition, which in my opinion, is rather a matter of substantive law than a rule of practice, is based on well-defined principles, and my view is that any extension of those principles must be brought about by legislation.

For these reasons I declare the opposition ill-founded and dismiss the action with costs.

Judgment for defendant.

JOHN PEREIRA *et al* v. S. S. M. INSANALLYJOHN PEREIRA *et al*, Plaintiffs.

v.

S. S. M. INSANALLY, Respondent.

[1930. No. 11.—BERBICE.]

BEFORE SAVARY, J. 1931. MAY 13.

Practice—Costs—Taxation of—Scale—Rules of Court, 1900, Appendix I. Part I.

The plaintiffs brought an action against the defendant, a partition officer, for (1) an injunction to restrain him from passing transport of certain lands, and, (2) a declaration that the plaintiffs and others were entitled to have the said lands transported to them.

In their statement of claim the plaintiffs alleged that the value of the lands was \$250. Judgment was given for the defendant. On the question of costs the plaintiffs submitted that the costs should be taxed on the lower scale (*c*) in view of the allegation in the statement of claim that the value of the property in dispute was \$250, while the defendant contended that the property in dispute was of greater value than \$250, and had so alleged in his defence, and he now urged the view that the value should be determined by adjudication, and asked leave to call evidence to that effect on account of the fact that the case was disposed of without calling on the defence.

Held, that the injunction and declaration sought in the action were the main and substantial grounds of relief and not merely additional or consequential, and that the costs must therefore be taxed on the higher scale (*b*) in Appendix I. Part I. of the Rules of Court, 1900.

J. Eleazar, Solicitor, for plaintiffs.

S. I. Cyrus, for defendant.

Cur. adv. vult.

SAVARY, J.: After giving my decision in this matter in favour of the defendant with costs I reserved the question as to whether the costs should be taxed under scales (*b*) or (*c*) in Appendix I., Part I of the Rules of Court.

On behalf of the plaintiffs it was submitted that the costs should be taxed under scale (*c*) in view of the allegation in the statement of claim that the value of the property in dispute is \$250.

On the other hand the defendant contended that the property in dispute was of greater value than \$250 and had so alleged in his defence, and now urged the view that the value should be determined by adjudication, and asked leave to call evidence to that effect on account of the fact that the case was disposed of without calling on the defence.

A decision of the Full Court in the matter of *Fernandes v. DaSilva* (1927) B.G.L.R. 89, seems to me to be against the defendant's contention, and I am bound by it. The Court traced the origin of scale (*c*) and considered its meaning and effect.

In the case of a successful defendant the fees are calculated at the rate of 10% "on the amount or value claimed." It seems to me that the Full Court has interpreted the latter words to mean

that the substantial relief sought in the action must be the recovery of a chattel or land of a value not exceeding \$250. At p. 96 of the report these words occur: "It is conceded, however, that in the case of a successful defendant the expression 'amount or value claimed,' means what it says, that is, the amount of money or the value of the property that is alleged in the claim asking for the recovery of either." Another passage at pp. 97-98 is as follows: "Scale (c) is merely an exception to the general scale of costs in all Supreme Court proceedings, and it follows the abolished inferior Courts in governing special cases in which the allegation is that the debt or damages, or the value of the chattel or land sought to be recovered, does not exceed \$250." The present action is one of opposition to the passing of a number of transports by the defendant, a partition officer, of certain parcels of land and the substantial relief claimed is (1.) an injunction to restrain the defendant from passing the said transports, (2.) a declaration that the plaintiffs and others are entitled to have the said parcels of land transported to them. It is stated in the statement of claim that the value of the property opposed is \$250.

I agree with the construction put on the text in scale (c) by the Full Court, and in my opinion this action does not fall within the class of exceptions therein provided for.

The injunction and declaration sought in this action are the main and substantial grounds of relief and not merely additional or consequential, and in view of the history of this scale (c) referred to in the judgment of the Full Court, I am satisfied that the words in the text bear the meaning that has been given to them and that this case does not come within scale (c).

I am fortified in this view by the Full Court at p. 100 of the judgment calling attention to the fact that the Court was not deciding what the position would be if the substantial relief sought was an injunction or a claim for specific performance.

In my opinion the defendant is entitled to have his costs taxed under the general scale (6) of Appendix I., Part I.

Solicitors: *J. Eleazar; J. F. Henderson.*

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EDWARD JOHN WILLEMS

v.

GUIANA MATCH FACTORY, LIMITED.

[No. 158 OF 1935.—DEMERARA.]

BEFORE CREAN, C.J.

1930. MARCH 16, 17, 18, 19, 20, 23; MAY 18.

Roman Dutch Law—Guardian and ward—Peculium profectitium—Peculium adventitium—Movable property of Ward—Alienation by guardian—Whether leave of Court necessary—Donation—Acceptance—Whether parent can donate to ward and also accept—Claim for retransfer of shares—Delay of 22 months—Laches.

Under Roman Dutch law (see *Rego v. Cappell* A.J. 27.3.1901) where a child acquired property otherwise than from or through his parents, for example, from his maternal grandmother, such property was not *peculium profectitium*, but *peculium adventitium*, and was therefore the exclusive property of the child. But where the property was acquired from or through the child's parents, it was *peculium profectitium*, and belonged in full ownership to the parents.

Under Roman Dutch law a guardian was empowered to alienate the movable property of his ward without leave of the Court.

Under Roman Dutch law, in order to render a donation effective and effectual, it must be irrevocable, and there must be acceptance.

A donation from a parent to his child cannot be accepted by the child, neither can it be accepted by the parent on his behalf. There must be a third party to accept the donation on his behalf or acceptance by an officer of the Court before the donation can be considered as irrevocable.

While the plaintiff was an infant, certain shares in the defendant company stood in his name. They were transferred by his father as his guardian into the names of other persons. More than 11 years after the plaintiff attained his majority, he wrote the defendant company concerning the transfers. Within a few days the defendant company supplied the plaintiff with all the information he required. Fourteen months later, the plaintiff's father died at the age of 84. Seven months after his father's death the plaintiff filed an action against the defendant company claiming, *inter alia*, a re-transfer to him of the shares assigned by his father on his behalf.

Held, that the plaintiff was guilty of laches.

J. A. Luckhoo, K.C., and S.J. Van Sertima, K.C., for plaintiff.

H. C. Humphrys and S. E. Gomes, Assistant Attorney-General, for defendant company.

Cur. adv. vult.

CREAN, C.J.: The plaintiff Edward John Willems was born in the year 1900. He is the son of one Pierre J. Willems and Adriana Francina Willems, whose name before her marriage was Adriana Francina Black.

The defendants are the Guiana Match Factory, Ltd., a company carrying on business in this colony. On their register of shareholders the name of the plaintiff appeared as a holder of 45 shares.

It is alleged that on or about August, 1913, the defendant Company without legal authority purported to transfer 30 of

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those shares into the names of other persons and caused the plaintiff's name to be removed from the register as the owner thereof. It is further alleged by the plaintiff that the defendant Company—again without legal authority—transferred the remaining 15 shares in his name into the name of another person and caused his name to be removed from the register as the holder thereof. It is said by the plaintiff that these acts and transfers were done when he was a minor, and without his knowledge and consent.

The attention of the defendant Company was drawn to these acts and transfers in May and June of 1935 and the Company was asked to put him in his original position on the share list of the Company.

These applications by the plaintiff were immediately refused by the defendant Company and so he instituted this action and now asks for an Order declaring the above transfers to be null and void, an Order compelling the defendant Company to re-transfer and to register the said shares in the plaintiff's name in their books and for an Order directing payment to the plaintiff of all the dividends, bonuses, and profits accrued on the said shares since the date of the alleged wrongful transfers.

To trace the history of these 45 shares which were at one time in the name of the plaintiff in the defendant Company's register, it is necessary to refer to some of the deeds and documents produced in evidence. The first one to be looked at is the Power of Attorney given by the mother of the plaintiff when she was about to leave the Colony. It is dated the 8th of July, 1901, and by it Pierre Willems, the father of the plaintiff, is appointed her attorney.

An Agreement of the 21st of December, 1903, is the next document referred to in the presentation of the case. This agreement is between the mother of plaintiff, signed on her behalf by Pierre Willems as her attorney, and Carl Wieting and Gustav Henry Richter.

It is set out in this document that the mother of the plaintiff is the owner of the factory at Vreed-en-Hoop known as the Guiana Match Factory. The purport of the agreement is that Carl Wieting and Gustav Henry Richter agree to lend \$19,500 to pay off in full the debts due by the factory, and it is agreed that a first mortgage be given to them on the factory to secure repayment of the \$19,500.

On the 21st December, 1903, transport by E. C. Hamley and C. Wieting, as assignees of the plaintiff's mother, was executed in favour of his mother. And on the 4th July, 1904, a transport of the undivided half of property at Vreed-en-Hoop was executed in favour of Pierre Willems.

On the 9th of March, 1905, the mother and father of the plaintiff sold to Black, Limited, the match factory business and

premises at Vreed-en-Hoop for \$45,000. A term of the agreement of sale was that the remainder of the mortgage debt due to Messrs. Wieting and Richter was to be paid. There was another term in this agreement by which the vendors were to pay a sum due to Pierre Willems, the father of the plaintiff. The agreement does not state what was the amount of the debt due to him. It is probable, however, that the vendors of the factory were indebted to him personally but the amount was not agreed upon or fixed at the time this agreement was executed. Under this agreement the father and mother of the plaintiff were each to be allotted 3,700 fully paid-up shares.

A summary of the shares in Black, Limited, shows that in August, 1909, plaintiff's father held 3,700, his mother 1, and 3,700 stood in their four children's names of which he, the plaintiff, was shown as the holder of 925.

On the 1st July, 1910, Black, Limited, agreed to sell their business to Defendant Company for \$41,000. This sum was to be paid by the defendant Company allotting \$7,000 worth of shares to Pierre Willems, \$18,000 to his four children, amongst whom was the plaintiff, and the balance of \$16,000 to Sandbach Parker in payment of their mortgage debt.

The shares in the defendant Company were of \$100 each. The father, Pierre, was to have 70, and his four minor children 180, *i.e.*, 45 each. In 1911 there were 45 shares in the name of the plaintiff. Now there are none; so the plaintiff is suing for a re-transfer of those shares into his name and payment of all the profits thereon.

On the plaintiff's behalf it is said that the legal effect of all these documents was to vest the property in these shares in the plaintiff; and it is stated that the entry of his name in the list of shareholders of the defendant Company shows an unrestricted ownership in him of the shares. It is submitted that as the shares never stood in the name of Pierre Willems, the defendants were wrong in transferring them on his authorisation and are consequently liable to the plaintiff for the value of those shares and the dividends thereon amounting in all to about \$15,000. To escape liability for this transfer of the shares which were in the name of the plaintiff, the onus is on them to show that they did so rightfully and in accordance with the law then prevailing. This is the submission of Mr. Van Sertima for the plaintiff, and it seems to me quite reasonable and sound.

The defendants in their defence admit that the shares above referred to were in the name of the plaintiff prior to the month of August, 1913. But they plead that he was never possessed of these shares, that they were the property of his father Pierre Willems and that, even if the plaintiff had at any time a beneficial interest in these shares in defendant Company, they were under the dominion and control of his father.

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The defendants say that no certificates for any of the 45 shares in the defendant Company, at one time in the name of the plaintiff were ever issued or delivered to him; nor were they ever received or accepted by the plaintiff or by any person on his behalf.

It is admitted by the defendants that they entered the name of his brother Andre and the name of his sister Irene on their register in the place of the plaintiff's name in their Company's register, each in respect of fifteen of the 45 shares which were standing in the name of the plaintiff. But they say they did so in pursuance of two transfers of 15 shares duly executed on the 23rd July, 1913, by Pierre Willems as father and natural guardian of the plaintiff.

They also admit that they entered the name of his sister Irene in the register in place of his name in respect of the remaining 15 shares of the original 45 shares. Again, they say they did so in pursuance of a transfer duly executed by Pierre Willems on the 4th of May, 1915, as father and natural guardian of the plaintiff.

In all of the three transfers which have just been referred to Pierre Willems has directed the defendants to transfer these shares from the name of one of his children into the names of two other children of his. It is set out in each of the transfers of 15 shares that he does so, as father and natural guardian of the plaintiff. The position then, in 1915 was, that there were no shares standing in the name of the plaintiff, in the defendants' register; all of the shares which formerly stood in his name were transferred to his sister Irene and his brother Andre, by direction of his father as the plaintiff was then a minor.

It is submitted by Mr. Humphrys, on behalf of the defendants, that the plaintiff never had any legal title to these 45 shares, and in support of this submission he argues that the plaintiff never agreed to take the shares. It is said that he must have signed the original agreement allotting the shares to him as well as being on the register before he can claim ownership or be a member of the defendant Company.

As an illustration of how it could never have been contemplated in law that an allotment of shares to an infant was a final transfer to him of them without some one agreeing on the infant's behalf to accept them, he instances an allotment of shares not fully paid up, and suggests that the infant could not possibly be held liable in the event of a call on these not fully paid up shares.

It is further submitted that even if these shares were intended as a gift for the plaintiff when he was a minor, that gift was not effectuated. As a reason for this submission it is stated that the Roman Dutch Law contemplates that when a gift is made for a minor, another party must be in existence to accept it, and actually accept it, otherwise the gift is not complete and effectual. That there must be a clear intention to give, such as a deed actually registered, when the gift is immovable property.

Another submission on behalf of the defendants is that the management and administration of the estate of a child, include in Roman Dutch Law the power to alienate that estate if it is movable property without leave of the Court.

And, as a last line of defence, the defendants say that the plaintiff should not be allowed to make this claim on the grounds of laches and acquiescence on his part. They say that it was not until the 15th August, 1933, more than eleven years after the plaintiff had come of age, that he first wrote to them concerning the above transfers and though he was supplied with the information he wanted in the same month, he waited till after the death of his father Pierre Willems in November, 1934, before bringing this action. And by this conduct he has prejudiced the defendants and forfeited any right or claim he may have had to relief in equity, or at all. The Statute as to Limitation, Cap. 184, is also relied upon by the defendants and any other Statute of Limitations applicable.

It is admitted on both sides that Roman Dutch Law was the law prevailing in this colony at the time of these transactions, and therefore governs them; I am not sure it is necessary to give a ruling on the different points raised in the case to come to a decision herein and give judgment. But I think it is desirable to consider what appear to me to be the three important points in the case and so have a final determination of them.

The first question to be answered is who was the owner of these shares before and after they were registered in the name of the plaintiff in the defendant Company's register? As I have already mentioned it is submitted on behalf of the plaintiff that the unrestricted ownership was in him, once his name was put on the list of shareholders.

To get at the root of this question of ownership in Roman Dutch Law, the text-books refer one to the earlier Roman law, and on such reference it is seen that all property acquired by persons in the power of another—such as children in the power of their father—belonged to him in whose power such persons were. Therefore any property acquired by a child belonged to the father and this property was called *peculium*.

There were some exceptions to this, for instance when property was given to a son setting out on military service or acquired in the course of such service. This was the exclusive property of the son and was called the *peculium castrense*. The rule as to the *peculium castrense* was extended by Constantine to the *peculium adventitium* which included all property that came to a son from any other source than from the father. The ownership in this was held by the son though the father had the usufruct. And property which a son acquired from or through his father belonged to the father and was called *peculium profectitium*. To a certain extent the Roman Dutch Law has

followed this ancient classification and property belonging to minors is classified as *profectitium*, or *adventitium*. *Peculium profectitium* is such property as has been derived from the parents themselves, either directly or indirectly, and belongs in full ownership to the father. This doctrine went so far as to include baptismal gifts given by godparents on the ground that they were given more out of regard for the parents than the child, but now there does not appear to be unanimity in the authorities as to baptismal gifts.

This subject is mentioned in *Burge's Commentaries on Colonial and Foreign laws* at page 79 of Volume IV. And it is there set out that the principle of Roman Dutch law that a minor child in British Guiana living with, and maintained by, its parents, could not acquire any property for itself, but for its parents only, refers to property acquired by a child by right of the *peculium profectitium* and not to property acquired as *peculium adventitium*.

The authority given for this view of the Roman Dutch Law prevailing in this colony is the case of *Rego v. Cappell* decided in the year 1901 by the Court in its Appellate jurisdiction. The facts in that case were that a child acquired property from her maternal grandmother, and, therefore she held that property by right of the *peculium adventitium* and not by right of the *peculium profectitium*, consequently the property was her own and not her father's.

The Court at that time evidently considered that there was a decided distinction between property acquired by a child from its parents and property acquired from other sources; for it was argued that a child living with and maintained by its parents could not acquire any property for itself but for its parents only. The Court expressed the opinion that the passage in Van Leeuwen on which that argument was founded referred only to property acquired by a child by right of the *peculium profectitium*.

In this case the plaintiff's name was put on the list of shareholders of the defendant Company by his father. It is not certain if the shares were derived from his father or mother, but it can be taken as quite accurate that he acquired them from his parents. He was living with, and being maintained by his parents at the time, therefore it can be argued with great force, that as those shares were acquired by him when he was a minor, acquired through his parents, and while he was being maintained by, and living with them, that they were acquired by him by right of the *peculium profectitium* and as such the full ownership of them was in the father.

If the shares were the property of the plaintiff, how came they to be transferred out of his name, without an Order of the Court, is the next question arising out of the argument addressed to the Court. It is submitted by counsel for the plaintiff that such a

transfer of the shares in the minor's name could not take place without the leave of the Court first being obtained. In support of this view many of the writers of text books on Roman Dutch Law are referred to, amongst them Lee, Van Leeuwen, Maasdorp and Morice. From these text books it is difficult to find any hard-and-fast rule directing a guardian that he must get leave of the Court before he can alienate the movable property of his ward. They all make it quite clear that he may not alienate or encumber the minor's or ward's immovable property, but the only definite statement of the law and practice as to the alienation of movables is in the first edition of Professor Lee's book on Roman Dutch Law published in 1915, and that is in a footnote to page 57.

It is stated there most definitely that leave of the Court is not required even for the sale of valuable movable property of a minor in this Colony.

Counsel for the plaintiff suggests that the source from which the writer got this information was not the best obtainable in the Colony, and points out that it is significant that this statement is contained in the first edition of the work but omitted from the third edition published in 1931. The omission, however, is obviously not due to the writer having changed his view as to the alienation of movable property. He gives the reason in his preface to his third edition. His own words are: "From January 1, 1917, the system of Roman Dutch Law was replaced in British Guiana by the Common Law of England."

The evidence of Mr. Westmaas, the Clerk of Court, shews that if has not been the practice here to get leave of the Court for the alienation of a minor's movable property. The reported cases emphasize that it is necessary to have such leave before the minor's immovables are alienated by a guardian, but there is never a suggestion in any of these cases that an Order was necessary as to movables.

The above practice indicates that this Court's interpretation of the Roman Dutch Law was that an Order was not necessary, and having regard to the practice and the absence of any definite statement to the contrary in any of the text books, in my judgment a father is not debarred from alienating movables until he has got an Order of Court.

The position now is, that the father according to Roman Dutch Law was the owner of these shares, the shares not being *peculium adventitium*. The name of the plaintiff was entered in the register of Defendant Company opposite 45 of them. It is argued by Mr. Gomes, for the defendants, notwithstanding that fact, there was no gift of those shares because it was a rule of Roman Dutch Law where a gift is made to a minor there must be a formal acceptance of that gift by some competent person. If it were of real or immovable property a registration in the office

of the Registrar of Deeds would be necessary or something equally formal and final. In the gift of movable property it is submitted that there must be a formal acceptance such as a handing over to a third party for the minor.

I am referred to Sir A. Maasdorp's Institutes of Cape Law as an authority for this submission and there it is said at page 241 that acceptance of a gift by a minor would be incomplete without some act done by the father to prove his intention to divest himself of the property, such as delivery to a third party, transfer in the Deeds Registry, or in the case of a cession of action, notice to the debtor of such cession to the child.

The clearest exposition on this subject of donation by act *inter vivos* is, I think, given in *Burge's Commentaries on Colonial and Foreign Laws*, Volume 2 of 1838 edition. In this it is said that in many respects and for many purposes a donation is treated, and by some jurists even described as a contract. It is said that the person to whom the donation is made must be a party to it by the actual acceptance of that which is given. It is further said that a proper donation is that in which the donor makes the gift with the intention that it should become the property of the donee, and in no case revert to himself, and when there exists no other consideration for making it than the desire to exercise his liberality. And that the principal difference between settlements made by donation and those by testament, consists in the irrevocability of the former, whilst the latter are revocable by him at any time before his death. Another important remark referred to in this work is that the irrevocability of a donation depends on the acceptance by the donee. Another relevant reference is where it is said that a donation in which the donor declares *Se donare post mortem suam* is as irrevocable as if the possession of the subject had been transferred by him to the donee.

From these authorities it seems to me that a third party to accept the donation on behalf of the minor or the acceptance by an officer of the Court for the minor is necessary before the donation can be considered as irrevocable and complete. And that there should be an intention clearly expressed at the time of the donation that it is in no circumstances to revert to the father or to the person who is making the donation before it can be considered as irrevocable.

In this case it is alleged that there was a donation of shares by the father to his son, the plaintiff. But as there was no acceptance by a third party for him or by the Court, as there was no intention expressed by the father that they were not in any circumstances to revert back to him, and as there was no expression of an intention that the son was to have them after the death of the father, I cannot see that the essentials for a good donation are present in this transaction. It has been argued by the plaintiff that the entry of his name on the register is an

acceptance, but with that argument I am unable to agree. In fact I am sure that it could be treated as an acceptance at all, but it certainly could not be considered such an acceptance as is contemplated by the above writers on Roman Dutch Law.

The alternative defence of laches and acquiescence is the only remaining one to be dealt with and to deal with that aspect of the case it is necessary to look at the evidence of the plaintiff.

He says he was born at the defendants' Match Factory in 1900 and lived there until 1912. In 1916 he went to New York and returned here in January, 1921. He again left the Colony in November, 1922, and returned in August, 1932. In May, 1933, he went to New York and returned in June, 1933. In September, 1933, he again went to New York and returned in April, 1935. And from the 3rd September, 1935, until February, 1936, he was again absent from the Colony.

It is said by him in his evidence that he did not know until the 14th August, 1933, that he was the owner of shares in the defendant Company. On the following day, the 15th August, 1933, he went to the office of the Registrar of Companies, and searched the returns of Black, Ltd., and the defendant Company. He discovered that his name had been on the defendant Company's register, and on that day he interviewed their Secretary. As a result of that interview correspondence passed between him and them, the substance of which was, that the plaintiff asked the defendant Company to restore his name to their list of shareholders and they refused to do so.

In cross-examination it is admitted by the plaintiff that he and his father wrote to each other every two or three months, and he says he also corresponded with his sisters Irene and Estelle. He admits that he was in the Colony for practically all of the years 1921 and 1922 and during those years did some work for his father. On one particular job which he did for his father he spent about one year.

It is said by the plaintiff that he was told his mother had died in 1930. On his return to British Guiana in 1932, he began to work for the Guiana Timber Corporation, which he says he thought was his father's business. In June, 1933, he saw his father from time to time, and they were on friendly terms when the plaintiff left in September, 1933.

The plaintiff also says he was staying in Georgetown on the 14th of August, 1933, when he got to know that he had once been on the list of shareholders of defendant Company. He states he did not then go to his father but to the office of the Registrar of Companies, He never spoke to his father about these shares because it never entered his mind to do so. He admits that he could have seen his father about the transfer and spoken to him about it; and did not. Instead he went to consult his counsel.

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After saying good-bye to his father the plaintiff left the Colony on the 3rd September, 1933. They parted on friendly terms according to the plaintiff, but he admits that he did not tell his father that he contemplated bringing an action, and the reason given by him for not doing so is that he had not obtained counsel's opinion. His father died on the 2nd of November, 1934, at the age of 84. And in April, 1935, the plaintiff got counsel's opinion. As a result of that opinion he filed this action on the 19th June, 1935.

The plaintiff denies that he waited until his father died before he instituted this suit against the defendant Company. He states that his father left a Will and in that Will he was remembered. He does not say to what extent.

From the evidence of the plaintiff it seems to be quite clear that he knew in August, 1933, that these shares had been transferred from his name to the name of someone else in the defendant's register of shareholders. And it is also clear that he knew such transfer had been made by the defendants on the instructions of his father; yet he did not mention these facts to his father in September, 1933, when he last saw him.

On the above facts, it is submitted by Mr. Gomes for the defendants, that the plaintiff was guilty of such laches as should deprive him of any remedy in a Court of Equity. The defendant Company also rely on any Statute of Limitation as can be considered applicable.

No particular statute has been suggested as being particularly applicable to the facts in this case and I do not think any exists. Nor do I think that this Court can, in the case of a transfer of shares, apply by analogy any of the Statutes of Limitation referred to in the defence. It seems to me the purely equitable defence of laches is the one which should govern a case like this, and that being so, no particular period of time need be considered in giving a decision on the point.

A delay in seeking an equitable remedy is what is called "laches."

In dealing with this question I do not propose to refer to the many cases cited in reference to it; because I am unable to see that any one of them is quite apposite. The principle applicable here is the old one laid down in the case of *Smith v. Clay*, 3 Brown C. C., in 1767, that a Court of Equity always refuses to aid a stale demand and that the exercise of reasonable diligence on the part of the claimant must be shewn before relief is granted by the Court.

The relief claimed in this case is in respect of shares, and from what I see in *Brunyate's* Limitations of Actions in Equity the Court always calls for especial promptness in actions dealing with shares.

The obvious reason for this principle is, that as shares are so

easily negotiable they might pass through the hands of fifty different owners in one year. If relief were granted to a person in regard to those shares after he waited for a year before making his claim, then it would mean that the fifty transfers I have above referred to would be void and the position created by the Court in granting relief would be chaotic and would undermine the business of dealing in shares. In one way shares in a company may be likened to personal chattels in that they very often pass from hand to hand without any further formality being necessary to transfer them. If a very short period of time were not fixed for the repudiation or enforcement of their transfer, it would be impossible to trace them.

In my opinion a Court of Equity cannot by analogy apply any Statute of Limitation to a case wherein the transfer of shares in a public company is the subject matter of the action. In some of the cases referred to in *Brunyate* where shares are the subject of the action, three months have been held to be too great a delay before action was taken, and even one month has been referred to in one of the cases in question.

From the evidence of the plaintiff in this case. I form the opinion that he has not exercised reasonable diligence in bringing this claim, and consequently is barred by his own laches from succeeding in this action.

One of the maxims in equity is that "he who seeks equity must do equity." The plaintiff herein thought in August, 1933, that he had a right of action in regard to the transfer of these shares by his father. He saw his father after that date, and it is to be presumed that he realised his father was the principal actor in this transaction and the one person who knew of it. But he waited until his father died before he brought this case against the defendants who have been quite innocent in the matter. By the delay of the plaintiff they have been deprived of calling the plaintiff's father as a witness to explain the transfer and they have also been deprived of having an opportunity of being indemnified by the father for carrying out his instruction. This delay of the plaintiff does not appear to me to be doing equity to the defendants and on this ground alone, apart from the several other grounds I have already given, this action of the plaintiff should be dismissed with costs.

His Honour certified costs for two counsel.

Judgment for defendant.

Solicitors: *E. A. W. Sampson* for the plaintiff, and
V. C. Dias for the Defendant Company.

J. BEHARRY v. L. S. AUTHORITY.

JAMES BEHARRY, Appellant (Defendant) v. LOCAL SANITARY
AUTHORITY OF ROSE HALL VILLAGE DISTRICT, Respondent
(Complainant).

[1936. No. 117.—DEMERARA.]

BEFORE FULL COURT. SAVARY, C.J. (ACTING), AND VERITY, J.

1936. JULY 3, 6.

By-Law—Regulation of buildings—Sufficiency of space—District By-Laws, 1911, No. 25 (3)—Ultra vires—Local Government Ordinance, chapter 84, section 263.

Section 275 of the Local Government Ordinance 1907 (No. 13), afterwards section 263 of chapter 84, provided that every local authority, with respect to all buildings in its district may make by-laws with respect to.....(e) the sufficiency of space about buildings to secure a free circulation of air; (f) the line of buildings in any street.

By-Law 35 (3) of the Districts By-Laws 1911 made thereunder provided that “no new building or structure shall be erected on any lot within four feet of the boundaries of the lot, and *in cases where a fresh water or draining trench adjoins any of the boundaries of a lot, the distance of any building or structure from such boundaries shall be twelve feet.*”

Held, that the second part of the By-Law was *ultra vires*, inasmuch as the provisions of section 263 of chapter 84 confer no general power to regulate the distance of a building on a lot from a boundary adjoining a drainage trench.

Appeal from the decision of Mr. R. D. R. Hill, Stipendiary Magistrate of the Berbice Judicial District, convicting the defendant for erecting a building in Rose Hall Village District the distance of the said building from the boundaries of the said lot adjoining a drainage trench being less than twelve feet.

Joseph Eleazar, solicitor, for appellant.

D.E. Jackson, acting Assistant to the Attorney-General, for respondent.

Cur. adv. vult.

The following judgment of the Court was read by the acting Chief Justice:—

This is the considered judgment of the Full Court.

This appeal raises the question of the validity of By-Law 35 (3) of the Districts By-Laws, 1911, made under the authority of the Local Government Ordinance, Chapter 84.

The appellant was convicted by the Magistrate of the Berbice Judicial district under the said By-Law 35 (3) for that he erected on a lot of land in Rose Hall Village a building which was less than 12 feet from a boundary adjoining a drainage trench. Mr. Eleazar, for the Appellant, contends that By-Law 35 (3) is *ultra vires*. The Districts By-Laws, 1911, were made under the provisions of section 263 of the said Local Government Ordinance, and the matters in respect of which they may be made are set out in the section.

The By-Law is as follows:—

“No new building or structure shall be erected on any lot within four feet of the boundaries of the lot, and in cases where a fresh water or draining trench adjoins any of the boundaries of a lot, the distance of any building or structure from such boundaries shall be twelve feet.”

It will be seen that it deals with two different matters; firstly, it prohibits the erection of buildings within 4 feet of the boundaries of a lot; secondly, it enacts that where a draining trench adjoins any boundary the distance of the building to the boundary shall be 12 feet.

The second part of the By-Law, which is the subject matter of this appeal, is curiously worded, and appears to make it obligatory on an owner to build 12 feet from the boundary, so that it would be an offence if the building is erected, for instance, 13 feet from the boundary. There are only two matters mentioned in section 263, which it might be said give power to make such a By-Law. Paragraphs (e) and (f) of section 263 (1) refer to the sufficiency of space about buildings to secure a free circulation of air, and the line of buildings in any street respectively.

We have considered the meaning of the statutory power which the Local Authority affected to exercise by making this By-Law and it seems to us that these provisions give no general power to regulate the distance of a building on a lot from a boundary adjoining a drainage trench, and in our opinion the second part of By-Law 35 (3) on which the prosecution was based is *ultra vires* as it contains an excess of the power conferred by the Ordinance.

Mr. Jackson, for the Local Authority, stated that he could not support the conviction as he did not feel justified in arguing that the By-Law was *intra vires*. It is only fair to the magistrate to mention that the point of *ultra vires* was not taken or argued before him.

For these reasons the appeal is allowed without costs, and the conviction is quashed. We allow no costs on the ground that this point was taken for the first time in the Appeal Court.

Appeal allowed.

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M. L. HENDRICKS v. THE NEW DALLY CHRONICLE
PRINTING Co., LTD.

[1936.—No. 78. DEMERARA.]

BEFORE SAVARY, C.J. (ACTING).

1936. JUNE 29, 30; JULY 1, 9, 23.

Judgment—By consent—Agreement—Interpretation—Evidence—Surrounding circumstances—Facts known to parties—Agreement made with reference thereto—Admissibility—Estoppel.

A consent judgment embodies an agreement between the parties, and must be construed by reference to the facts known to the parties, and, in contemplation of which, the parties must be deemed to have used them.

Shipley Urban District Council v. Bradford Corporation, (1936) 154 L. T. 444 considered.

A consent judgment was given in an action ordering the defendant company to deliver up to the plaintiff "140 mixed types." A case of type as understood by printers, contains about 4800 types. The defendant company delivered 96½ cases of mixed type to the plaintiff. On the application of the plaintiff the Court directed that execution should issue forthwith for delivery by the defendant company to the plaintiff of 43½ cases of mixed type being the balance of the 140 cases of mixed type by the judgment in the action ordered to be delivered up to the plaintiff. The marshal proceeded to execute the writ. The secretary of the defendant company admitted that 27 cases which were set aside, were the property of the plaintiff. A director of the defendant company stated that he had 42 cases of type on the premises. No delivery of any type was made under the writ, and the marshal closed the premises of the defendant company.

The defendant company then moved to have the order of the Court, which directed the issue of a writ of delivery, set aside on the ground that the consent judgment was for "140 mixed types" whilst the order directing the writ of delivery to issue speaks of the judgment being for "140 cases of mixed types."

Held, that evidence of the surrounding circumstances was admissible to explain what the parties meant by the words "140 mixed types" and what they understood them to mean.

Quaere: whether the defendant company, by delivering 96½ cases of type to the plaintiff, and thereby accepting the judgment relating to "140 mixed types" as meaning "140 cases of mixed types" can, subsequently, be heard to say that it applies only to 140 pieces of type.

Bartlam v. Evans (1936) 1K. B. 202, 217, considered.

Motion by the defendant company to discharge an order directing a writ of delivery to issue at the instance of the plaintiff against the defendant company.

S. L. van B. Stafford, for the applicant (defendant).

H. C. Humphrys, for the respondent (plaintiff).

Cur. adv. vult.

SAVARY, C.J. (Acting): This is a motion to discharge an order of the Chief Justice made on the 18th May, 1936, directing the issue of a writ of delivery, and the material parts of the order are as follows: "that execution shall issue forthwith, for delivery to the plaintiff of 43½ (forty-three and a half) cases of mixed

type, being the balance of 140 (one hundred and forty) cases of mixed type, by the judgment in this action dated the 16th day of April, 1936, ordered to be delivered up to the plaintiff." The ground of the motion is that the consent judgment in the action is for "140 Mixed Types" whilst the order directing the writ of delivery to issue speaks of the judgment being for "140 case-mixed type" and the writ of delivery accordingly ordered the defendants The New Daily Chronicle Printing Co., Ltd., to deliver 43½ cases of mixed type being the balance of 140 cases of mixed type. When it is pointed out that a case of type as understood by printers contains roughly 4,800 types it will be seen that 140 mixed types, that is pieces of type, is merely a handful, whilst 140 cases would amount to about 600,000 odd pieces of type.

The proceedings were begun by a specially indorsed writ of summons in which Mrs. Hendricks was plaintiff and The New Daily Chronicle Printing Co., Ltd., were defendants. The plaintiff claimed delivery of a large number of articles, described in the writ, which she alleged had been let to the defendant company, and were wrongfully detained by them.

By a consent judgment dated the 16th April, 1936, the defendant company was ordered to deliver to the plaintiff on or before the 4th May, 1936, the articles described in the writ of summons in the action "and now in the possession of the defendants." In the writ the articles let by the plaintiff to the defendant company are set out and the articles involved in this motion are described as "140 mixed types."

The defendant company are the applicants on this motion and Mrs. Hendricks is the respondent, and they will be respectively so described in this judgment.

On the 4th May, the applicants in pursuance of the consent judgment delivered to the respondent 96½ cases of type, which is roughly 400,000 pieces of type. As the respondent considered there was a short delivery of type she obtained, on an *ex parte* application, a writ of delivery for the balance.

On the execution of the writ of delivery by the Marshal although in fact no further cases of type were delivered, type equivalent to 27 additional cases was set apart and admitted by Alfred Hubert Thorne, the secretary of the defendant company, to be the property of the respondent. Just about this time Charles Ramkissoon Jacob, who was described as one of the proprietors, presumably a director, arrived on the scene and stated that he had 42 cases of type on the premises, and as apparently the cases claimed by Jacob would include the whole or part of the 27 cases previously referred to and admitted to belong to the respondent the Marshal concluded that there would be no delivery of 43½ cases as demanded by the writ of delivery, and closed the premises.

As I decided that the onus was on the respondent, evidence

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was led by her, but no evidence was called for the applicants, and the only facts put by them before the Court are those that appear in the affidavits filed in support of the motion.

Mr. Stafford for the applicants, contents that, as the words in the consent judgment are clear and unambiguous, it not competent for the Court to consider any evidence, in order to ascertain any meaning which they do not bear on their face. In other words the Court cannot say that "140 mixed types" mean "140 cases of mixed type." Mr. Stafford quoted several authorities in support of his contention, but in view of the easements referred to later on, it seems clear that his contention is too positive and that the proposition is subject to qualifications.

It has to be remembered that a consent judgment embodies an agreement between the parties, see *Kinch v. Walcott* (1929) A.C. 493; *Huddersfield Banking Co., Ltd., v. Lister & Son, Ltd.* (1895) 2 Ch. 273, 284; and *Re South American and Mexican Co., Ex parte the Bank of England* (1895) 1 Ch, 37, and it seems to me that, where two parties to an agreement use language which they both understand to refer to a particular article or articles, it is not competent for the Court to say that the words refer to something not understood by the parties. Put in another way, the Court is entitled to have facts put before it to show the matter which the parties were negotiating, or the things which must be taken to have been known to both parties to the contract. See *per* Brett, L.J., in *Lewis v. Great Western Railway Co.* (1877) 3 Q.B.D. at p. 208, and *Beal's Rules of Legal Interpretation*, 3rd Edition, at p.p. 131, 132, cited by Mr. Humphrys for the respondent.

In addition, I have derived assistance from a recent decision of the Court of Appeal in England in the case of *Shipley Urban District Council v. Bradford Corporation* (1936) 154 L.T., 444. This was an action for a declaration that a clause in an agreement should be read in a particular way, and, by way of alternative, the Council claimed rectification of the agreement. It is unnecessary to discuss the facts of the case but I may point out that the evidence established that the two parties assigned different meanings to the language of the agreement, and there was no evidence that could lead to the view that they both understood it in the same sense. In that case it was argued at the trial and in the Court of Appeal that the Court's duty was to construe the words *simpliciter*, and give them their plain meaning irrespective of any extrinsic circumstances, an argument exactly similar to Mr. Stafford's. Both Clauson, J., and the Court of Appeal decided otherwise, and held that the Court was entitled to look not only at the wording of the agreement but at facts and circumstances in the contemplation of the parties at the time of the contract. At p. 445 of the report the following passage occurs in the judgment of Clauson, J., "so far as the principal

claim in this action is concerned, the task of the Court, as laid down in a very recent and authoritative opinion expressed by Lord Wright in advising the House of Lords in *Inland Revenue Commissioners v. Raphael*, 152 L.T. Rep. 217; (1935) A.C. 96, at p. 142, is as follows: It has to give effect to the intention of the parties as expressed; that is, it must ascertain the meaning of the words actually used. The words actually used must be construed by reference to the facts known to the parties, and in contemplation of which the parties must be deemed to have used them; and such facts may be proved by extrinsic evidence or appear in recitals or, I may venture respectfully to add, otherwise on the face of the document. The meaning of the words used must be ascertained by considering the whole context of the document, and so as to harmonise, as far as possible, all the parts; particular words may appear to have been used in a special sense, which may be a technical or trade sense, or in a special meaning adopted by the parties themselves, as shown by the whole document.”

I emphasize the words “construed by reference to the facts known to the parties and in contemplation of which the parties must be deemed to have used them.”

Lord Wright, M.R., delivered the principal judgment in the Court of Appeal, and, after analysing the argument of counsel for the appellants and the cases cited on their behalf, quotes with approval passages expressing the view of Coleridge, J., in *Shore v. Wilson*, (1842) 9 C1. & F. 355, and proceeds as follows at page 452: “The learned judge in the present case . . . has applied the principle laid down by Coleridge, J. He has considered whether the primary meaning is not ‘excluded by the context, and is sensible with reference to the extrinsic circumstances in which the writer was placed at the time of writing; that is to say, such primary meaning, as it is called, however plain it may be, is not decisive. We are not here dealing with “£540” written on a plain sheet of paper and 450,000 gallons, written on another plain sheet of paper and saying that, ‘£540’ means £540 *simpliciter* and “450,000 gallons” mean 450,000 gallons and nothing else. We are to read these words as they appear in the middle of the contract, and we have to see in what way they have to be construed in view of their position in the contract, in view of all the surrounding words and in view of such matters of fact, if there be any matters of fact—and I doubt whether matters of fact are material at all in this case—as are proper to be proved in order to put the court in the exact position in which the parties were when they entered into the contract; that is to say, so as to understand the application and effect of the words which they were using. It is very well established that in proper cases, if necessary, words may actually be supplied to give effect to the obvious and apparent purposes

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of the document, though this can only be so if the language taken as a whole in connection with all the circumstances necessarily carries with it the meaning which it is sought to attach to it.”

I content myself with the above passages which appear to me to support the view I take.

The following are the extrinsic circumstances:

(1) The respondent owned a printery which she let to the applicants last year.

(2) When delivery was made, among the articles delivered to and accepted by the applicants were 140 cases of type.

(3) These were checked on behalf of both parties and a list of the articles so delivered was prepared by the applicants, a duplicate original being handed to the respondent. It is headed “Inventory of Machine, Job-Printing and Appliances,” and the applicant’s original was produced and marked M.L.H. 1.

(4) In that list the 140 cases of type are described as “140 mixed types.”

(5) One Holland, an employee of the respondent, who had effected delivery for her, called attention to the omission of the word “cases” from the list, and was informed by one Taylor who took delivery for the applicants that the typist “did that for short.” Holland then added the word “cases” in brackets in his handwriting, the rest of the list being type-written. Each original was then signed by Holland and Taylor on behalf of the respective parties.

(6) The particulars in the writ of summons in this action were taken from the list supplied to the respondent by the applicants, and the type is described in the writ of summons as “140 Mixed Types,” in the same manner as in the list prepared by the applicants, omitting the word “(cases).”

(7) By the consent judgment the applicants were ordered to deliver to the respondent the articles described in the writ of Summons on or before the 4th May, 1936.

(8) On the 4th May the applicants delivered to the respondent 96½ cases of type, amounting to about 400,000 pieces of type.

9) On the 19th May, when the Marshal executed the writ of delivery, pieces of type amounting to about 27 cases, equivalent to over 100,000 pieces of type, were set apart by Thorne and admitted to belong to the respondent, though not eventually delivered to the Marshal.

Applying the principles previously set forth I construe the words used by reference to the facts known to the parties, and in contemplation of which the parties must be deemed to have used them, that is to say, the application of the words used by the parties in the consent judgment is to the 140 cases of type. The surrounding circumstances show that there never was any dispute between the parties as to what the words in the writ or in the

consent judgment applied to, or meant. Even on the hearing of the motion it was not suggested that there was any such dispute, indeed, it would have been difficult to advance such a contention in the face of what happened on the 4th and 19th May, incidents which Counsel for the applicants deemed it wise not to attempt to explain. The whole argument of the applicants is confined within the narrow limits mentioned earlier and bears no relation to the question of the circumstances of the matter or the parties thereto. No protest was made at any time that the consent judgment did not apply to the 140 cases of type, but on the contrary, the judgment was complied with to a substantial extent, and even when Jacob intervened, it was to claim some of the type left, and not to object that they had delivered type to an amount grossly in excess of that stated in the judgment. We hear of this and of the narrow point of construction for the first time when the motion is filed.

In my opinion the view I have expressed is sufficient to dispose of the motion, but I would like to refer to another recent decision of the Court of Appeal in England, where two rules of law were discussed in reference to their application to facts bearing some analogy to those in this matter.

When it is borne in mind that what took place on the 4th May, can only be taken to mean that the applicants then accepted the judgment as binding, and as referring to 140 cases of type, and remembering also the application for a writ of delivery and its execution, the appositeness of the quotation can readily be appreciated. The case is *Bartlam v. Evans* (1936) 1 K.B. 202 and at 217, Scott, L.J., says: "Another way of looking at the question is to treat it as an instance of the rule that a party cannot both approbate and reprobate, and to hold accordingly that a defendant cannot accept a judgment as final and binding and thereafter seek to set it aside as not binding. There is still a third way of looking at the question, as suggested by Slessor, L.J., during the argument—namely, that where a defendant by language or conduct represents to the plaintiff that he accepts a judgment as final and is not going to seek to have it set aside, the plaintiff's position is so liable to be prejudiced by a subsequent change of mind on the part of the defendant, with its consequent application to have the judgment set aside, that the defendant should be regarded as being estopped from any such subsequent application."

As this point was not raised or argued before me, I do not propose to discuss it further, but it seems to me that, applying the rules here quoted, the applicants having accepted the judgment as applying to the 140 cases of type and the words used therein having that meaning, should not be subsequently heard to say that it applies only to 140 pieces of type, which in effect is the gist of this motion.

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Whether it is put on the ground of *quasi* estoppel or estoppel, the result is the same.

A perusal of the narrative, will I am sure, satisfy anyone that this motion is devoid of merits, but that is not necessarily an answer to it, and for that reason I have put in writing my reasons for coming to the conclusion that the motion is ill-founded and must be refused with costs.

Motion refused.

Solicitors: *R. G. Sharples*, for applicant (defendant).
G. R. Reid, for respondent (plaintiff).

SARABJEET PERSAUD v. J. W. FRASER.

SARABJEET PERSAUD *et al*, Plaintiffs,

v.

JOHN WILLIAM FRASER *et al*, Defendants,

[1929. No. 229.]

BEFORE SAVARY, J.

1931. JANUARY 13, 14, 15; FEBRUARY 10, 11; MAY 5; JUNE 9.

Immovable property—Transport—Opposition action—Possession for 30 years—Right to oppose.

Will—Construction—Fideicommissum.

Thirty years' continuous possession gives the person in possession a right to successfully oppose a transport of the property by the owner with the legal title who has been out of possession for that period.

Under a will made when Roman Dutch Law was the common law of the colony there were two devisees (1) a devise to two persons for life and after their death to Robert Fraser his heirs and assigns of four beds of land; and (2) a devise of the residue of the estate to a person for life and after his death to his children.

Held, that the first devise did not create a *fideicommissum* but that the second devise did so.

Action for an injunction to restrain the defendants from passing transport. The necessary facts appear from the judgment.

P. N. Browne, K.C., for plaintiffs.

D. E. Jackson, for defendants.

Cur. adv. vult.

SAVARY, J.: This is an opposition action by the plaintiffs to prevent the defendants from passing transport of "one undivided half part or share of and in the east half of the west half of St. John, being also known as the east half of the western quarter of Plantation Lot Number 21, situate on the west coast of the county of Berbice, in the colony of British Guiana, without the buildings and erections thereon, save and except that portion of the said east half of the western quarter of Plantation Lot Number 21, lying to the north of the public road running through the said Lot 21."

The plaintiffs base their claim (*a*) on Letters of Decree, dated the 23rd of July, 1897, which they allege gave them the ownership of the lands in dispute, and (*b*) alternatively, on a title by prescription.

The defendants deny that the Letters of Decree gave the plaintiffs any title to the lands in dispute and allege that they and their predecessors in title have always been in possession of those lands.

It is not disputed that Plantation Perseverance or Hopetown, also known as Lot 21, is divided into two parts, the eastern half being known as Firebrace and the western half as St. John. Between these two halves, there is a dam. In 1926 Mr. Durham, a Sworn Land Surveyor, made a survey and prepared a plan of Lot 21 for the

partition officer. On that plan, exhibit H.O.D1. St. John appears as divided into two parts, the west half being marked "Western quarter" on the plan. Mr. Durham states that there is no evidence to show that the west half has ever been divided. But in August, 1930, Mr. Durham, at the request of the defendants, made a survey and prepared a plan, exhibit H.O.D2., showing the west half of St. John divided into two parts, the west half of the west half and the east half of the west half. Throughout the hearing both parties have treated the portion coloured pink on H.O.D2., marked "east half of west half" as the property in dispute, although in fact there is no evidence of any actual division having taken place except on the last survey, and it will be equally convenient for me to deal with the matter in this way.

The case for the plaintiffs both on the pleadings and on the evidence is that one Bhowny Persaud became the purchaser at execution sale in 1897 of a parcel of land described as follows in the Letters of Decree: "the western half quarter lot of Lot Number 21, Plantation Perseverance." After the purchase he was put into possession by the Marshal in the presence of Robert Fraser, who was then in possession of a parcel of land which I am satisfied on the evidence is described as the west half of Pln. St. John on exhibit H.O.D2. in other words, he was put into possession of the west half of the west half as well as the east half of the west half as appearing on the said plan. The northern boundary of this land was the public road and Crown lands formed the boundary to the south. Bhowny Persaud built several houses on this land including one occupied by a Commissary since 1898, and sold a house formerly occupied by Fraser to one D'Aguiar in 1907 or 1908, who removed it away from this land. It is practically admitted that no protest was made about the building of the house occupied by the Commissary and it is not disputed that the rent for this house has always been paid to Bhowny Persaud and those claiming through or under him up to the date of this action. The land was also rented out for the planting of rice and other crops and the rents have similarly always been paid to these same persons. The main facts are deposed to by the first named plaintiff, a son of Bhowny Persaud, who was about 13 or 14 years of age in 1897. His evidence has been attacked on account of his age at that time, but I can see nothing extraordinary in his evidence as children of that age frequently take an interest or help in the cultivation of lands of their parents, and, in addition, his story rings true and is materially supported by Louis Vaughn, a retired Commissary, and the other witnesses called to support his case.

Now it is abundantly clear that the Commissary's house is built on the land in dispute and was first occupied by Mr. Vaughn in 1898. Trenches were dug around it and a fence erected. No explanation has been attempted by the defence as to how Bhowny Persaud came to exercise other ordinary rights of ownership in

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respect of this land and built this house on it, which land the defendants say was the property and in possession of Robert Fraser, their predecessor in title, at that time. The house sold to D'Aguiar was also on the land in dispute and the facts about this sale are not in controversy and I accept the first named plaintiff's evidence that after his father took possession of the land and after Fraser left the house at the end of the crop the house was given to his father's cowminder to occupy. In approaching consideration of the defence it is necessary to bear in mind an important difference between the case as made out in the pleadings and the facts proved at the trial.

The principal allegation in the defence is that Frederica Fraser was the owner of the east half of the west half called "the east half of the western-most quarter" in this pleading, and that during the last forty years it has been in the continuous possession of her descendants, whilst the story of the witnesses for the defence is that Robert Fraser was in occupation of the land in dispute only up to 1901 or 1902, and that Bhowny Persaud was in possession of only the west half of the west half up to that time, and that it was only after Fraser left the land in 1902, that Bhowny Persaud occupied the whole of the west half of St. John. The witnesses also state that after Fraser left the land, it is suggested on account of ill-health, neither his wife nor his children occupied the land on his behalf. Fraser died in 1910 and it was said that he had been living at his son's house, the first-named defendant, since 1902. His widow died in 1924, leaving several children and yet apart from this attempted sale and transport of the property no one has, even according to the witnesses for the defence, ever occupied the lands in dispute since 1902, or made any claim to it. It thus appears that although the pleading speaks of forty years' continuous possession before this action, the evidence for the defence if accepted at its full value in fact shows that the defendants or those through whom they claim have been out of possession for the past twenty-seven years.

In view, however, of the legal submissions. I have to decide which story I will accept before I can be in a position to ascertain what are the legal principles applicable.

In my opinion the plaintiffs have satisfied me that Bhowny Persaud through whom they claim was given and took possession of the whole of the west half of Plantation St. John from the public road to the Crown lands at the back from 1897, and that Bhowny Persaud and his heirs have been in continuous possession since. Amos Thompson, a witness for the defendants, admits he saw Bhowny Persaud on the land in 1897, but not on the disputed portion, but I prefer to accept the version of the plaintiffs and their witnesses that he, Bhowny Persaud, took possession of the whole of the western half of St. John.

It may be that under the Letters of Decree which apparently deal

with the western half of St. John as if it had been divided, Bhowny Persaud was entitled to claim possession of the western half of the western half only, and in my opinion, that is all that the Letters of Decree gave him, but the fact is that he was given possession of the whole with or without a good title thereto.

Examination of certain aspects of the defence makes it impossible for me to accept it, for instance, it is said that Fraser never gave up possession of the east half of the west half and yet Bhowny Persaud erected a house on a portion of it, without interference or protest on Fraser's part, and proceeded to let the house to the Commissary and collect the rents. The only ground put forward for Fraser's abandoning the land in 1902, is ill-health, but the same witnesses say that he had rented out rice beds and yet no one collected the rents after his departure. It is natural for a person to give up a property under these circumstances, and leave it to be occupied by anyone who cares to do so, especially when that person has a wife and grown up children? In the cross-examination of the first named plaintiff, he was asked whether he knew that his father had brought criminal proceedings against the Frasers for trespassing on the land in dispute. The witness said he did not know, but surely the implication in the question is that Fraser was out of possession and Bhowny Persaud was in possession. At the same time this suggestion seems at variance with the evidence of Amos Thompson who tries to make out that Fraser never gave up possession of the east half until 1902, and refers to an alleged conversation between Fraser and Bhowny Persaud when he says the latter asked Fraser to quit possession of the east half as he had bought the whole place and Fraser refused. If this were really true it would be all the more extraordinary that Bhowny Persaud was allowed to build the Commissary's house on the east half without any protest or action by Fraser.

Reference was made by Liverpool and Thompson the two witnesses who gave evidence for the defendants, to a number of cases of arrest on both sides indicating that there was trouble between Fraser and Bhowny Persaud, but as their evidence is generally unsatisfactory and I have no reliable evidence as to what really took place, if at all, I can give no weight to the suggestions.

It may well be that Bhowny Persaud was under the impression that he had bought the whole of the western half of St. John and Fraser shared that view, but, in my opinion, there is no evidence to show that Fraser subsequently took any effectual steps to regain possession of the east half or to assert his title thereto. To sum up, I am satisfied that the plaintiffs have made out their case that at the date of the filing of this action they were entitled to rely on a continuous and undisturbed possession of the land in dispute extending beyond 30 years.

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That is my view of the facts and it is not disputed that thirty years' continuous possession gives the person in possession a right to successfully oppose a transport of the property by the owner with the legal title who has been out of possession for that period. *South African Association v. Van Staden* (1892) 9 Juta. 95, and

Jones v. Town Council of Capetown (1896) 13 Juta 43 at pp. 51, 52, clearly support this proposition.

Applying this principle to the facts of the case it would follow that plaintiffs would be entitled to succeed in this action, but the defendants submit that, although in fact the plaintiffs may have been in possession of these lands for thirty years or upwards, their possession began to run against the defendants as a matter of law only from 1910, because of the creation under the will of Frederica Edwards of *fideicommissa* in favour of the defendants.

Under this will there are two devises which the defendants use as the basis of their argument: (1) a devise to two persons for life and after their death to Robert Fraser, his heirs and assigns of four beds of land, two of which comprise part of the testator's building lot in front of Lot 21, commonly known as Plantation St. John, and the other two are described as "two beds of provision land aback of said Plantation St. John;" (2) a devise of the residue of her property, real or personal, to Robert Fraser for life and after his death to his children. Robert Fraser died in 1910.

It is admitted that Roman-Dutch Law applies to the provisions of this will and that the second devise creates a *fideicommissum*, so far as the residue of the estate is concerned, in favour of the children of Robert Fraser, two of whom are defendants. The third defendant is the child of Frederica Elizabeth, the eldest child of Robert Fraser. Frederica Elizabeth, who was married to one Lambert, died in 1921, and her husband in 1924.

In my opinion the first devise does not create a *fideicommissum*. *Fideicommissa* are in the nature of trusts, and to constitute a *fideicommissum* there must be a *fiduciarius* or *fiduciary* and a *heres fideicommissarius* or *fideicommissary* heir. See Lee's Introduction to Roman-Dutch Law, p. 313, and Nathan's Common Law of South Africa, Vol. III., p. 1900. In addition it seems to me that the word "assigns" in the first devise is repugnant to the notion of a *fideicommissum*, and the words "heirs and assigns" merely indicate the nature and extent of the estate that Robert Fraser was to take after the death of the life tenants.

As regards the second devise of the residue of the estate it is admitted by counsel for the plaintiffs that a *fideicommissum* is created or arises but the defendants are placed in a position of difficulty on account of a complete absence of evidence as to the location or extent of the four beds of land previously mentioned, and I am unable to say whether they form part of the land in dispute or not, and equally impossible is the task of ascertaining what comprises the residue of the estate or how far and to what extent the land

in dispute is included in it, as no investigation whatever took place at the trial of any facts necessary to lead me to a conclusion on that point.

In view of the allegation in sub-paragraph 5 of paragraph 7 of the defence it seems clear that this point was not intended to be raised, and it would appear that it was at the trial and only after the evidence was closed that the point occurred to counsel for the defence as it was during his address that he asked leave to amend the allegation in the above mentioned sub-paragraph in order to enable him, consistently with his pleadings, to argue the point.

In view of this position I had the action set down for further consideration on the 5th of May, in order to give the defendants an opportunity of calling evidence to establish the identity and extent, if possible, of the aforesaid four beds and the residue of the estate of Frederica Edwards. I was not unmindful of the difficult task of the defendants but considered it fair to give them an opportunity of doing so.

Amos Thompson, a witness in the action, was recalled for that purpose, but in my opinion his evidence on this point does not materially assist as he was unable to identify the location of the four beds, and admitted that he did not know what lands Frederica Edwards had or occupied.

The burden is clearly on the defence of satisfying me that the lands comprising the residue of the estate of Frederica Edwards in respect of which the *fideicommissum* arose include the lands in dispute or if they form a part thereof to identify such part, and as, in my opinion, they have failed to discharge that burden, I hold that the plaintiffs have been in possession of the lands in dispute for thirty years and upwards and that no *fideicommissum* arose in respect of the whole or any portion of them.

As I stated previously, this disposes of the action since counsel for the defendants admits that possession for such a period gives the plaintiffs a right to successfully oppose the passing of the transport which forms the basis of this action.

The conclusion at which I have derived renders it unnecessary to deliver any opinion on the question raised by the defence, that is, whether possession for less than thirty years but for more than twelve years gives such a right of opposition. The point is an important one, and I think it better that it should be determined in a case where it calls for direct decision. It follows that the plaintiffs are entitled to the declaration and injunction asked for in the statement of claim and the costs of the action. The question of damages was not argued before me and there is no evidence to support such a claim.

Judgment for plaintiffs.

Solicitors: V. C. Dias; A. V. Crane.

IN RE THE NEW DAILY CHRONICLE PRINTING
COMPANY, LIMITED.

Ex parte M. L. HENDRICKS.

[COMPANIES' WINDING UP. 1936.—No. 2.]

BEFORE VERITY, J. 1936. AUG. 18, 19, 20, 24.

Company—Winding up—Petition for—Unable to pay its debts—When deemed to be—Demand under hand of creditor—Under hand of solicitor—Insufficient—Service at registered office of company—Office closed by marshal—Business carried on elsewhere—Whether service there sufficient to establish statutory demand—Admission by solicitor of statutory demand—Estoppel—Companies (Consolidation) Ordinance, cap. 178, s. 126 (a)—Company commercially insolvent—Improper or indirect motive—Grounds for refusing petition.

Section 126 (a) of the Companies (Consolidation) Ordinance, chapter 178, provides that “a company shall be deemed to be unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding two hundred and forty dollars then due, has served on the company, by leaving the same at its registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.”

Held, that a demand signed by the solicitor of a creditor is not a demand under the hand of the creditor within the meaning of section 126 (a).

Quaere: whether if the business premises of a company are closed, and the business of the company is at the time being carried on at the office of the managing director, service of a demand by a creditor at such office is sufficient for the purposes of section 126 (a) of chapter 178.

The solicitor for the company wrote a letter to the solicitor for the creditor in which he referred to “the amount demanded in consonance with the provisions of section 126 of chapter 178,” and stated “your demand for payment was duly served.” It was submitted by the creditor that the company, by reason of the above letter, was estopped from contending that the demand under the hand of the solicitor for the creditor and served at a place other than the registered office of the company was not a statutory demand within the meaning of section 126 (a) of chapter 178.

Held, that such unguarded and perhaps lightly considered words used by the company’s solicitor cannot make that compliance with the statute which is not in fact and in law such compliance.

A creditor filed a petition for the winding up of a company which was indebted to various persons in the sum of \$1,500. At the time of the filing of the petition and on the hearing thereof the immediately available assets

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of the company consisted of (1) furniture and fittings mortgaged to secure the sum of \$600, but possibly inadequate to ensure the realisation of the whole sum of \$600, and (2) \$30 in cash. There were book debts amounting to \$2,100. Of these a sum of \$900 was disputed, and, if an attempt was made to enforce payment, a law suit would result; with respect to the remainder, the sum of \$900 was due by foreign creditors who were prepared to dispute a considerable portion thereof. The primary object of the company was the carrying on of business as publishers and printers but the company at the time of the hearing of the petition, did not own or have in its possession or control any printing presses or necessary machinery for carrying on of its purpose, and had no funds immediately available for the acquisition of the same. The managing director expressed his willingness to make further advances to the company and to provide further capital by the purchase of new shares, but up to the hearing of the petition, he had not done so.

Held, that the company was commercially insolvent and that it was just and equitable that it should be wound up by the Court.

The petitioning creditor in pursuance of a judgment against a company obtained a writ of delivery. The terms of the writ were not complied with, and the marshal closed the premises of the company. On the hearing of the petition it was contended by the company that a winding up order should not be made as the embarrassment of the company and its present inability to pay its debts arose solely from the action of the petitioning creditor in closing the premises of the company and seizing its property under the writ of delivery.

Held, that as the petitioning creditor did nothing except to exercise her legal rights, and as she neither acted wrongly nor fraudulently nor from any improper or indirect motive, there were no grounds for refusing to make a winding up order.

PETITION by M. L. Hendricks that the New Daily Chronicle Printing Company, Limited, be wound up by the Court.

H. C. Humphrys, for petitioning creditor.

S. L. van B. Stafford, for company.

Cur. adv. vult.

VERITY, J.: This petition for the winding up of the New Daily Chronicle Printing Company, Limited, under section 127 of the Companies (Consolidation) Ordinance, chapter 178, is grounded on the allegations that the company is unable to pay its debts, and that it is just and equitable that it should be wound up. The petition is supported by three creditors who appeared at the hearing and gave evidence on behalf of the petitioning creditor and it is opposed by the company, the managing director of which who is also apparently the company's largest creditor, gave evidence on behalf of the company.

The petitioning creditor relies in the first place upon failure by the company to comply with a statutory demand under section 126 (a) of the Ordinance in respect of a judgment debt amounting at the date of the demand to a sum exceeding \$240. The company admits that the debt was then, and as to the greater part is now, due, that a demand was made and that the company has not made payment, but it is submitted on the company's behalf that the demand was not a statutory demand, in that it did not comply with the requirements of the statute, and that

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failure to comply therewith does not raise the statutory presumption that the company is unable to pay its debts.

The demand was in writing signed by petitioning creditor's solicitor, and, it would appear, left at the office of the managing director of the company at a date when the company's premises had been closed by a marshal of this Court purporting to act in execution of a writ of delivery procured at the instance of the petitioning creditor in the suit which gave rise also to the judgment debt, the ground of this petition.

It was submitted on behalf of the company that this is not a demand by the creditor "under his hand" nor was it served on the company by "leaving the same at its registered office" as required by the terms of the statute and that it was not therefore a statutory demand. Mr. Humphrys for the petitioning creditor submitted that a demand under the hand of the creditor's solicitor was a demand under the hand of the creditor and that, under the particular circumstances, the registered office of the company being closed and service at such office being therefore ineffective to secure notice to the company, service at the office of the managing director where in fact the business of the company was being then carried on was service sufficient to comply with the terms of the statute.

It is to be observed that the purpose and effect of section 126 (a) of the Ordinance is to create a means whereby the inability of a company to pay its debts may be legally presumed. Whether or not it is in fact insolvent, and whether or not in fact it has means to pay the debt it "shall be deemed unable to pay its debts" if it fails to comply with a demand made under this section. Save for the enactment itself no such statutory presumption arises from failure to comply with a demand for payment and the statute has laid down with precision both the nature of the demand and the method by which it is to be made. The sole validity of the demand in order that it may effect its statutory purpose resides, therefore, in its compliance with the statutory requirements. That departure from a rigid observance of the precise terms of the section in the face of impossibility may be held to be sufficient compliance therewith appears in the case of *The British and Foreign Gas Generating Apparatus Company, Limited*, (1865) 13 W.R. 649, and it may be that in the particular circumstances of this case service of the demand at the office of the managing director as being more likely to secure actual notice to the company might rightly be held to be sufficient compliance with the section. Such considerations do not arise, however, in relation to the nature of the demand itself for no considerations either of convenience or possibility attach in this case to the signing of the demand by the solicitor rather than by the petitioning creditor herself.

No decided case was cited to me by either party nor have I

been able to call to mind any case in which judicial interpretation has been given to the meaning of the words "under his hand" favourable to the submission that such words include "under the hand of his solicitor," but in the interpretation of statutory requirements it is the established rule that effect must be given to the plain meaning of the words of the statute when they are clear and explicit. The greater care must be exercised in this regard when the rights of the parties in the particular instance are rights created solely by the statute.

The words appear, moreover, to be an analogy between the principle involved in the present case and that in the case of *Prince Blucher* (1931) 2 Ch. 70. By section 16 of the Bankruptcy Act, 1914, a proposal for compromise by a debtor thereunder is required to be "signed by him." In the case to which I have referred the debtor being too ill to attend to his business, such a proposal was signed on his behalf by his solicitor, and it was held by the Court of Appeal that, in the absence of any words extending the right of signature, as, in the Statute of Frauds, "or some other person thereunto by him legally authorised," such right was confined to the debtor himself by the clear and explicit words of the statute, and that the Court was not able to extend that right by giving a judicial interpretation to the statute which would in effect be an alteration of the plain terms thereof.

I am unable to distinguish in essence between the meaning of the words "signed by him" and "under his hand." and I am unable to extend the meaning of the words to include "under the hand of his solicitor" or to add to the statute any such alternative.

The demand in the present case, being under the hand of the solicitor and not under the hand of the creditor, is not a statutory demand within the meaning of section 126 (a) of the Ordinance and failure to comply therewith in the terms of the section does not raise the statutory presumption that the company is unable to pay its debts.

It has, however, been further submitted on behalf of the creditor that by the letter of the 12th of June, 1936, from the company's solicitor, the company is estopped from saying that this demand is not a statutory demand within the meaning of the section. It is true that the solicitor refers to "the amount demanded in consonance with the provisions of section 126 of chapter 178" and states "your demand for payment was duly served" but such unguarded and perhaps lightly considered words cannot make that compliance with the statute which is not in fact and in law such compliance.

While, however, the petitioning creditor has for the reasons I have given failed to establish neglect on the part of the company to meet by payment or otherwise a demand under section 126

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a) it is still open to her to prove to the satisfaction of this Court under section 126 (c) that the company is unable to pay its debts, and evidence has been adduced with that aim.

I must therefore consider what is the nature and effect of that evidence and whether or not I am satisfied thereby that the company is unable to pay its debts.

There is but little real conflict as to the facts upon which the petitioning creditor seeks to satisfy the Court.

It has been established that the petitioning creditor has sought and has been unable to secure payment of a judgment exceeding the sum of two hundred and forty dollars; it is admitted by the managing director of the company that the company was unable to pay this debt when it became due; that it was unable to pay this debt on the date when its property was seized by the marshal of this Court under a writ of delivery; and that it is unable at the present time to pay this debt. The petitioning creditor and other creditors have given evidence as to other debts due to them by the company amounting in all to the sum of approximately one hundred and sixty-eight dollars (\$168); Mr. C. R. Jacob, the managing director, states that the company owes him approximately eleven hundred dollars (\$1,100) of which six hundred dollars (\$600) is secured by a mortgage on the property of the company. None of these debts amounting in all to approximately fifteen hundred dollars (\$1,500) is the company in a position to pay, the funds at its immediate disposal amounting to no more than \$6.33 on the bank and a sum of twenty-five dollars (\$25) which Mr. Jacob believes to have been in the safe at the time of the seizure by the marshal. It is also established that while the primary object of the company as disclosed by its memorandum of association is the carrying on of business as publishers and printers, the company does not own nor have in its possession or control any printing presses or necessary machinery for carrying on of its purpose and has no funds immediately available for the acquisition of the same.

On these grounds the petitioning creditor asks that the company be wound up.

The company replies that while admitting its inability at the moment to pay the debt of the petitioning creditor or such other of the sums claimed by its creditors as it is prepared to admit, while it has no funds immediately at its disposal and no machinery wherewith it can immediately carry on its business of printing and publishing, yet this state of affairs amounts to no more than a condition of temporary financial embarrassment from which, within a reasonable time, it can readily recover.

It is submitted that Mr. C. R. Jacob is willing, and he so expresses himself to make still further advances to the company to enable it to meet its present obligations and to provide further funds by way of taking up shares to the value of five thousand

dollars (\$5,000), whereby the company could secure the necessary machinery to proceed with its business.

It is submitted that there is due to the company from two of its shareholders the sum of nine hundred dollars (\$900) due in respect of shares allotted to them.

It is submitted that there are debts due to the company from advertisers, subscribers and otherwise amounting to twelve hundred dollars (\$1,200), of which sum nine hundred dollars (\$900) may be considered recoverable.

It is further submitted that under normal conditions and with efficient management the current revenue of the company can be reasonably expected to exceed current expenditure by a substantial margin while its presently outstanding resources are sufficient to cover its existing liabilities.

To these submissions and the evidence supporting them consideration must be given. The debts alleged by and on behalf of the petitioning creditor are not and cannot for the most part be genuinely disputed, even though they may not be immediately admitted by the company without further investigation. There is no evidence before me, however, from which I can conclude that any appreciable part thereof will or can be eventually repudiated, and the fact remains that the company has now to meet and is unable to meet liabilities approximating fifteen hundred dollars (\$1,500) in amount. To meet these liabilities the company has not at the moment any immediately available resources beyond at the most Thirty Dollars (\$30) in cash and furniture and fittings mortgaged to secure the sum of six hundred dollars (\$600) but possibly inadequate to secure the whole of that sum.

The outstanding resources of the company by means of which, if given time, it is submitted the company can meet its obligations, restore its position and proceed with the carrying on of its business consist as to nine hundred dollars (\$900) in the problematical right of the company to recover that sum from two of its shareholders, a prospect which Mr. Jacob himself considers doubtful and which would appear almost inevitably to involve further litigation.

As to a further nine hundred dollars (\$900) these resources consist of the right to recover from advertisers and others sums now alleged to be due to the company. While not expressly admitted it is not denied that there is a possibility that in a number of cases foreign advertisers are prepared to repudiate their liability in respect of some part of the sums alleged to be due by them, and it would appear that a large proportion of the twelve hundred dollars (\$1,200) stated to be due to the company is owed by persons outside the jurisdiction of this Court, from whom, should they repudiate liability, recovery would be both slow and expensive.

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Examination of such of the books of the company as have been tendered, and consideration of all the evidence adduced, appear hardly to substantiate Mr. Jacob's optimistic assumption that, should the company be enabled to resume operations and disentangle itself from this difficulty in which it is involved by reason of the marshal's possession of its property, it would be able within a reasonable time to meet its liabilities and to conduct its business under conditions which would provide it with a substantial surplus of revenue over expenditure.

Mr. Jacob has expressed his willingness under certain circumstances to make further advances to the company and to provide further capital by the purchase of shares, but the fact remains that he has not actually done so, that he is under no obligation whatever to do so, and is at liberty to withdraw his offer at any moment should he feel disposed to do so. Should he withdraw his offer the whole future of the company must collapse and all assumptions as to its prospects fail to materialize.

From these facts the inevitable conclusion appears to be that the company is in fact commercially insolvent. I am not only satisfied that the company cannot now pay its debts as they become due, but that there is no prospect based upon reasonable certitude that it will be able to do so within a reasonable time, or that it will ever be able to resume its activities under such conditions as would justify its continuance.

Under these circumstances the petitioning creditor is a judgment creditor who cannot get paid a debt presently payable and is *prima facie* entitled as of right to a winding up order.

The respondent company submits however, that she is not so entitled inasmuch as the embarrassment of the company and its present inability to pay its debts arise solely from her action in closing the premises of the company and seizing its property under the writ of delivery. It is submitted that the closing of the premises was a wrongful act, of the result of which the petitioning creditor cannot now be allowed to take advantage, and it is suggested that her action in seeking and working out execution by writ of delivery was fraudulent.

It is not necessary that I should attempt to conclude whether or not the marshal of the Court has duly exercised his powers under the writ of delivery. It is sufficient that I should find whether on the evidence adduced on the Wearing of this petition it is established that the petitioning creditor has so wrongly conducted herself as to render it unjust and inequitable that she should be allowed now to say that she is unable to obtain payment of her debt and is entitled to a winding up order. She was clearly entitled to enforce her judgment by writ of delivery; at no time, on the evidence before me, was delivery made, nor could the marshal cause delivery to be made of the articles called for thereby; she was clearly entitled to require that the marshal

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should then proceed to execute his further powers under the writ, and it is no wrong on her part but failure on the part of the company to make the delivery called for which has resulted in the company being deprived temporarily of the means of carrying on its business, a deprivation which the company can determine whensoever it decides to carry out the terms of the judgment to which it consented. I can find no evidence on this petition to justify the conclusion that the petitioning creditor has acted wrongfully or fraudulently, or from any improper or indirect motive.

I am satisfied that the company is unable to pay its debts; that the petitioning creditor is entitled to a winding up order and that it is just and equitable that the company should be wound up.

I shall therefore make the usual order for the winding up of the respondent company.

Company wound-up.

Solicitors: *G. R. Reid*, for petitioning creditor,
R. G. Sharples, for company.

IN THE MATTER OF THE ESTATE OF DAVID PHILLIPS.
DECEASED.

[1936. No. 143.—DEMERARA].

BEFORE SAVARY, J. 1936. SEPTEMBER 21; OCTOBER 26.

Remuneration—Executors and administrators—Out of pocket expenses—Trouble and loss of time—Deceased Persons Estates Administration Ordinance, chapter 149, section 48.

The commission assessed by the Registrar and payable to an executor or administrator does not cover expenses and charges incurred by him in the course of the administration, but is intended to remunerate him for his trouble and loss of time.

Decision of Sir Crossley Rayner, C.J., in *re Young* (1914) L.R.B.G. 8 not followed.

Application under proviso (a) to subsection (7) of section 45 of the Deceased Persons Estates Administration Ordinance, chapter 149 to set aside directions of Mr. E. M. Duke, Registrar of the Supreme Court, given in the matter of objections by Genevieve Phillips to the accounts filed by Joseph Alexander in his capacity as executor under the will of David Phillips, deceased.

The decision of the Registrar was as follows:

“There were two beneficiaries under the will of the deceased—Genevieve Phillips and Ursula Phillips.

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2. According to the law of this colony an executor is entitled to commission for his services, and, in this particular case, the executor applied for, and obtained, an order of the Registrar assessing his commission.

3. *In David Young*, deceased (1914) L.R.B.G. 8, the then Chief Justice, Sir Crossley Rayner, stated that "It should be clearly understood that the commission which the law of this colony allows to an executor is not a perquisite which he is entitled to put into his pocket, but is a payment made to him to cover the costs and expenses he is put to in performing his duty as an executor, and to remunerate him for his time and trouble. If instead of spending his own time and trouble he prefers to employ a legal practitioner to act for him, he must pay the costs himself out of his commission. He is not entitled to pocket the commission and charge the estate with the expenses of administration as well."

4. Acting on this authority I must disallow the following items objected to in the account of the executor.

Item.		\$	c.
Part of 3	Solicitor's fee advising executor as to his position due to disagreement of 2 devisees...	5	00
Part of 11	Solicitor's charges representing executor before Registrar when application for leave to sell was opposed by Genevieve Phillips...	35	00
Part 12	Paid application for commission ...	3	00
Part 13	Paid solicitor's fee for preparing account...	<u>5</u>	<u>00</u>
	Total	...	<u>\$48 00</u>

5. With respect to the part of item 11 objected to, I must point out that the fee is excessive, and it is very curious that Ursula Phillips the other beneficiary has not been asked to pay any portion of it. If a fee is properly charged against the estate, then as soon as the *quantum* is ascertained, the amount must be borne equally by each of the two beneficiaries. As one of them is bearing no share, it is unreasonable to ask the other to pay anything.

6. Item 7, being fee \$5, to solicitor for preparing agreement of sale, was objected to. It should, indeed, have been included in item 10, but it was not. I have seen the agreement, and I allow \$2.50 being one half of the sum of \$5.00 which was actually paid.

7. The result is that payments made by the executor, amounting to \$50.50 must be disallowed.

8. The commission assessed by the Registrar amounts to \$13.44.

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9. The sum of \$203.62 is payable by the executor to Genevieve Phillips. Particulars are as follows:—

Receipts	...	...	...	\$ 518 91
Liabilities and payments	\$148.72 less \$50.50 disallowed	...	...	98 22
Commission payable to executor	2% of \$500..	\$12 50		
	5% of \$10.50..	52		
	5% of \$ 8.41..	<u>42</u>		<u>13 44</u>
For distribution	...	...	...	<u>\$407.25</u>
½ being share of Genevieve Phillips			...	\$203 62

10. If the sum of \$35 ordered to be paid personally by Genevieve Phillips as costs on an originating summons has not yet been paid by her, then the net amount payable to her is \$168.62.

11. In accordance with subsection (7) of section 45 of the Deceased Persons Estates Administration Ordinance, Chapter 149 as amended by section 5 (b) of Ordinance 13 of 1932 I direct Joseph Alexander of 25, D'Urban Street, Georgetown, executor of the estate of David Phillips, deceased, to amend his account in accordance with this decision within 7 (seven) days from date; in default thereof the said account will be amended accordingly by the Registrar of the Supreme Court."

S. J. Van Sertima, K.C., for the applicant, Joseph Alexander.

A. J. Parkes, for the respondent Genevieve Phillips.

Cur. adv. vult.

SAVARY, J.: This is an application by Joseph Alexander, executor of the estate of David Phillips, deceased, under the provisions of section 45 (7) (a) of the Deceased Persons Estates' Administration Ordinance, Ch. 149, for an order directing the Registrar to allow certain items in the executor's account disallowed by him, or, in the alternative, to allow them at the figure assessed by the Judge.

The Registrar disallowed four items in the account, which are set out in his decision, because he felt himself bound by the case *In Re David Young*, (1914) L.R.B.G. 8. The Registrar understood that case to decide that the commission allowed by law to an executor is a payment made to him to cover the costs and expenses he is put to in performing his duty as an executor, and in my opinion the Registrar has correctly interpreted the principle of that decision.

Although in effect I am called on to decide whether that decision of the then learned Chief Justice, Sir Crossley Rayner, is correct, I have to determine two points, firstly, whether the items

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disallowed by the Registrar are charges ordinarily properly allowable against the estate of a deceased person; secondly, whether the commission to which a personal representative is entitled under the provisions of section 48 of the Deceased Persons Estates' Administration Ordinance aforesaid is intended to cover such charges.

In order to arrive at the correct principles governing the points under discussion it is necessary to refer to some well settled rules of English law.

(1) A personal representative is entitled to be allowed as against the estate of a deceased person all reasonable expenses incurred by him in the conduct of his office, except those which arise from his own default.

(2) A personal representative is allowed the expenses of employing an agent, accountant or solicitor in proper cases, but will not be allowed charges paid for work which he can and ought to do himself.

(3) A personal representative is entitled to no allowance, at law or in equity, for personal trouble or loss of time in the execution of his duties, except in cases where a testator has in his will fixed some remuneration for his executor.

(4) It is competent for the Court in special circumstances to allow a personal representative remuneration in respect of acts done in connexion with the estate.

The rules of the Court of Equity will be found discussed in *Williams on Executors*, 12th Edition, pages 1,213 to 1,219 and *Walker on Executors*, 5th edition, pages 336 to 343.

Now to return to the first point to be determined.

The Registrar disallowed four items in the applicant's account, and Mr. Van Sertima who appears for him, has abandoned any claim to the third item. "Paid application for commission." This is quite proper as obviously it is not an expense incurred in administering the estate but is a charge purely for the benefit of the executor.

The other three items are for charges paid to his solicitor for work done, as he alleges, in connexion with his administration of the estate. I was informed of the circumstances which led to his employing a solicitor, and I bear in mind the fact that the executor is a labourer, and I have come to the conclusion that they were proper cases for the employment of a solicitor, and that these charges or such amounts as I will direct the Registrar to allow, are ordinarily allowable against the estate of the deceased.

The next question to ascertain is whether these charges are intended to be covered by commission allowed the executor by the Registrar. In my opinion they are not. It is with some diffidence that I have come to a conclusion different to that arrived at by the late Sir Crossley Rayner, but it appears to me that the view taken by him is not sound.

Section 48 aforesaid provides that every executor or administrator is entitled to any remuneration fixed by the testator or to a commission assessed by the Registrar on a scale laid down in the section.

It appears to me clear that generally speaking, when the remuneration is fixed by will it is for the executor's trouble and loss of time unless words are used which make it clear that they are intended to cover any charges. See on this point *Wilkinson v. Wilkinson*, (1825) 2 S. & St. 237; *Jones v. Mason* (1887) 56 L.J., Ch. 600; *Forster v. Ridley* (1864) 46 E.R. 993, *Denton v. Davy* (1836) 12 E.R. 716 at p. 725.

In no text book have I found any statement to warrant the view that an executor's remuneration is intended to cover any out of pocket expenses of administration, and I have found no case that leads to such a conclusion. The case of *Jones v. Mason* ante is easily distinguishable because the will there in question expressly provided that the remuneration was to cover the collecting of rents.

Section 48 enacts that the executor or administrator is to be entitled to his remuneration "in respect of his administration, distribution and final settlement of the estate." These words seem to connote personal labours and not out of pocket expenses, and it might be urged that the word "remuneration" which occurs repeatedly in the section, is a misnomer, when, if the principle laid down by the late Sir Crossley Rayner was applied the result would be that personal representatives far from being remunerated would in some cases be losing money.

I may here mention that a view similar to mine was held in respect to commissions which it was the practice in India to allow to personal representatives and Australian legislation speaks of a commission being allowed for their pains and trouble. See *Walker*, pp. 341, 342 and *Williams on Executors*, pp. 1,217, 1,218 and *Denton v Davy*, ante.

For these reasons I have come to the conclusion that the rule laid down in the case of *Re Young*, ante, is incorrect, and the commission assessed by the Registrar and payable to an executor or administrator does not cover expenses and charges incurred by him in the course of the administration but is intended to remunerate him for his trouble and loss of time.

There remain the question of quantum. I agree with the Registrar that the amount of the second item, \$35, is excessive. I was informed there were three attendances before the Registrar and I allow \$15 for that item.

I therefore direct the Registrar to allow items 1 and 4 at the figure appearing in the account and item 2 at the sum of \$15.

The application is granted with costs fixed at \$22.30. Certify for counsel—his fees being \$12 out of the total amount.

F. BOSTON v. M. K. KAMALL.

FIZHERBERT BOSTON, Appellant,

v.

M. K. KAMALL, Respondent.

[1936—No. 135. DEMERARA.]

BEFORE FULL COURT: SAVARY, C.J. (AG.) AND VERITY, J.

1936. SEPT. 18; OCT. 31.

Criminal law—Procedure—Summary conviction offence—Evidence—Indictable offence disclosed—Continuance of hearing for offence Charged—Discretion of Magistrate—Judicial discretion—Summary jurisdiction (Procedure) Ordinance, cap. 14, s. 34—Summary jurisdiction (Offences) Ordinance, cap. 13, s. 35—Magistrate’s reasons of decision—Form they should take.

Section 34 of the Summary Jurisdiction (Procedure) Ordinance, chapter 14, provides that “if on the hearing of a complaint it *appears to the Court* that the cause ought to be tried as an indictable offence before the Supreme Court or if the Attorney-General intimates to the court his opinion in writing to that effect, all further proceedings in the cause as for a summary conviction offence shall be stayed, and depositions shall be taken, and the cause shall in all other respects be dealt with as if the charge had been originally one for an indictable offence.”

Held, that the magistrate has a discretion as to whether he will deal with a matter summarily or indictably, and that, so long as he exercises that discretion judicially, the Supreme Court will not interfere.

Anderson v. Strick, A.J. 22.7.1913, and *Seepersaud and others v. McKenzie*, A.J. 25.11.1901 considered.

Judicial discretion must be exercised according to the rules of reason and justice and not according to private opinion: according to law, and not humour. It is not to be arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself. It must be exercised on all the circumstances of the case, in other words, on the material before him, on the facts of the case he is investigating, not on irrelevant, extraneous or insufficient materials.

Sharp v. Wakefield (1891) A.C. 179, and *Stevens v. Walker* (1936) 52 T.L.R. 502 applied.

The appellant was charged summarily under section 147 (iv) of the Summary Jurisdiction (Offences) Ordinance, chapter 13, with the offence of being found in a dwelling house for an unlawful purpose. He was convicted and fined the sum of \$20. On appeal, it was argued that as the evidence disclosed the indictable offence of either burglary or larceny in a dwelling-house the misdemeanour merged in the felony and the magistrate had no jurisdiction to deal with the matter summarily. The magistrate stated that in his opinion the circumstances in which the offence took place were not of sufficient importance to warrant the matter being tried as an indictable one.

Held, that there was no ground for interfering with the discretion exercised by the magistrate.

A magistrate should give the Appeal Court a precise statement of the grounds of his decision. This is best done by stating shortly and concisely his findings of fact, and by referring to any provisions of the law or legal principles applied to those facts. It is not necessary to present an analytical examination of the evidence to show the method by which his conclusions are arrived at, and he is not expected to write a dissertation on the law.

Appeal from a conviction by Mr. F. O. Low, acting Stipendiary

Magistrate of the Essequibo Judicial District. The facts and arguments appear from the judgment.

J. L. Wills, for the appellant.

S. E. Gomes, Assistant Attorney-General, for the respondent.

Cur. adv. vult.

SAVARY, C.J. (AG.): This is the considered judgment of the Full Court,

This appeal raises an interesting and important question concerning the power of magistrates under the provisions of section 34 of the Summary Jurisdiction (Procedure) Ordinance, chapter 14, to hear and determine summary jurisdiction complaints, the evidence in support whereof appears to sustain a charge of an indictable nature.

The appellant was charged summarily before Mr. Low, the magistrate of the Essequibo district, with the offence of being found in a dwelling house for an unlawful purpose, and was convicted and fined the sum of \$20 and costs, and, in default of payment, it was adjudged that he should be imprisoned with hard labour for one month.

The only ground of appeal raised before us was that the evidence disclosed the indictable offence of either burglary or larceny in a dwelling house, and, accordingly, the misdemeanour being merged in the felony, the magistrate had no jurisdiction to deal with the matter summarily.

The Court however called the attention of counsel for the appellant to the provisions of section 34 aforesaid which appears to make consideration of the point of merger unnecessary.

The words of the section are: "If on the hearing of a complaint, it appears to the Court that the cause ought to be tried as an indictable offence before the Supreme Court, or if the Attorney-General intimates to the court his opinion in writing to that effect, all further proceedings in the cause as for a summary conviction offence shall be stayed, and depositions shall be taken, and the cause shall in all other respects be dealt with as if the charge had been originally one for an indictable offence."

It would appear from these words that a wide discretion is given to magistrates, but the argument for the appellant is to the effect that so soon as the evidence establishes, or appears to found, an indictable offence it is the duty of the magistrate to stay the summary proceedings and proceed indictably.

We do not agree with this contention, and have come to the conclusion that, under section 34, the magistrate has a discretion as to whether he will deal with the matter summarily or indictably, and that, so long as he exercises that discretion judicially, the Court will not interfere.

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The section does not make the exercise of the discretion subject to any limitations or restrictions.

We may refer to the well known definition of “judicial discretion” by Lord Halsbury in *Sharp v. Wakefield* (1891) A.C. 173. At p. 179 he says: An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and ‘discretion’ means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke’s Case*, 5 Rep. 100a; according to law, and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

It may perhaps be more helpful if we adopted the language of Lord Wright, M.R., in the recent case of *Stevens v. Walker* (1936) 52 T.L.R., 502. He states that the discretion which a Judge has to exercise must be exercised on all the circumstances of the case, in other words, on the material before him, on the facts of the case he is investigating, not on irrelevant, extraneous or insufficient materials.

The magistrate has stated for the information of this Court that in his opinion the circumstances in which the offence took place were not of sufficient importance to warrant the matter being tried as an indictable one.

We are not prepared to say that there was no material in this case to justify that view, and in the absence of any indication by the Legislature as to what the magistrate is to be guided by, we do not propose to interfere with his discretion in this case.

In the local case of *Anderson v. Strick*, App. Jur. 22nd July, 1913, Mr. Justice Hill took a similar view, that is, that the matter is one for the magistrate’s opinion and discretion.

The earlier case of *Seepersaud and ors. v. McKenzie*, App. Jur. 25th November, 1901, although it appears to be in conflict with this view can, I think, be reconciled if it is borne in mind that the language used is with the reference to the matter then before the Court.

Our researches have not discovered a similar section in the law of England, but we may call attention to section 35 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13, which deals with somewhat analogous powers in respect of complaints of assault and similar offences: “if, on the hearing of any complaint for an offence under this Title, the Court finds that offence to have been accompanied by an attempt to commit felony, or is of opinion that the case is, from any other circumstances, a fit subject for prosecution by indictment, the Court shall abstain from any adjudication thereupon, and shall deal with

the matter in all respects in the same manner as if the Court had no authority finally to hear and determine it.”

The ambit of section 34 of Chapter 14 is much wider than that of section 35 of Chapter 13, which it may be considered is no longer necessary.

Section 35 of Chapter 13 is a reproduction of section 46 of the Offences against the Person Act, 1861, which was a re-enactment of section 29 of a similar Act of 1828, (9 Geo. IV. c. 31). The first part of section 35 seems to impose a duty on a magistrate when hearing a summary charge of assault or a kindred offence to stay the summary proceedings if he “finds that offence accompanied by an attempt to commit felony.” The language could certainly be clearer, and it may well be that this accounts for conflicting decisions in England under the corresponding section: see *Wilkinson v. Dutton* (1863) 32 L.J.M.C. 152, and *In re Thompson* (1860) 30 L.J.M.C. 19.

It seems to us that, if the Legislative desired that no discretion should be left to the magistrate under circumstances similar to those that give rise to this appeal, nothing would have been easier than to have said so in simple language.

For these reasons the appeal fails and is dismissed with costs fixed at \$25.

One last word. A document of 13 pages, one page less than the notes of evidence, contains the magistrate’s reasons, and we can do no more than repeat what we have stated more than once. A magistrate should give the Court a precise statement of the grounds of his decision. In view of the functions of this Court this is best done by stating shortly and concisely his findings of fact and by referring to any provisions of the law or legal principles applied to those facts. It is not necessary to present an analytical examination of the evidence to show the method by which his conclusions are arrived at, and he is not expected to write a dissertation on the law.

Appeal dismissed.

R. MARTIN v. W. A. D'ANDRADE.

ROBERT MARTIN AND CARLOS CHRISTIAN, Appellants,
(Defendants)

v.

WILLIAM ALBERT D'ANDRADE, Respondent (Complainant).

[1936.—No. 191. DEMERARA.]

BEFORE FULL COURT: SAVARY, C.J. (AG.) AND VERITY, J.

1936. SEPTEMBER 25, 29; OCTOBER 31.

Judgments—Rule of law, construction of Ordinance—Relating to—Supreme Court—Old appellate jurisdiction—Single judge—Decision of—Binding on magistrates—Judicial comity—On Full Court unless palpably incorrect—Full Court—Decision of—Binding on magistrates, judges of first instance and Full Court—Inconsistent decisions of old appellate Court or Full Court—Full Court to consider matter afresh.

Criminal law—Customs—Offences—Harbours, keeps or conceals—Acquires possession—Prohibited, restricted or uncustomed goods—Knowingly—Meaning of—Customs Ordinance, cap. 33, s. 168, (f), (g)—Joint offence—Two or more persons charged—Whole penalty on each defendant.

A judgment of a single judge sitting in the old appellate jurisdiction of the Supreme Court laying down a rule of law or determining the construction of an Ordinance, if not in conflict with a subsequent decision of the Full Court, is binding on magistrates, but not, strictly speaking, on the Full Court. Following the rule of judicial comity, however, it would be followed by the Full Court unless the Full Court is satisfied that the judgment of the single judge sitting in the appellate jurisdiction is palpably incorrect. But judgments of the Full Court laying down principles of law or settling the interpretation of Ordinances or Statutes are binding on magistrates, judges of first instance, and the Full Court. But judicial comity does not prevent the Full Court from considering previous inconsistent decisions of the old Appellate Court or of the Full Court and forming its own view as to which should be followed.

Paragraphs (f) and (g) of section 168 of the Customs Ordinance, Chapter 33, provide that "every one who . . . (f) knowingly harbours, keeps or conceals . . . any prohibited, restricted or uncustomed goods . . . or (g) knowingly acquires possession of any of those goods . . . shall for each of those offences forfeit treble the value of the goods and of the duty payable thereon or five hundred dollars, whichever is the largest sum . . ."

Held: (1) that the word "knowingly" in paragraph (f) of section 168 qualifies only the words "harbours, keeps, or conceals," and not the words "prohibited, restricted or uncustomed" in the said paragraph, and that in a prosecution under the said paragraph the burden is on the defendant to prove (i) that the goods were not uncustomed goods or (ii) if they were uncustomed goods, that he did not know that the goods were uncustomed.

Caetano v. Reid, A.J. 19.12.1913; *Davis v. Low* (1916) L.R.B.G. 30; and *de Barros v. Benson*, Full Court, 21.7.1933, followed. *Da Paiva v. Reid*, A.J. 16.4.1910, and *Phillippe v. Allt* (1914) L.R.B.G. 76 not followed.

(2) that in prosecutions under paragraph (g) of section 168 (i) the burden is on the prosecution to prove that the defendant knew he had acquired possession of the goods the subject of the charge, inasmuch as the word "knowingly" qualifies only the words "acquires possession" and not the words "any of those goods," (ii) the burden is on the defendant to prove that the goods were not uncustomed goods; and (iii) the burden is on the defendant, if the goods are uncustomed goods, to prove that he did not know that the goods were uncustomed.

(3) that where two or more persons are jointly charged with committing an offence under section 168 of the Customs Ordinance, Chapter 33, the

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penalty prescribed by the section must be imposed on each and every person convicted.
R. v Dean (1843) 152 E.R. 102, applied.

Appeal by defendants from a conviction by Mr. V. C. Dias, acting Magistrate, Georgetown Judicial District, on a charge for that they knowingly acquired possession of certain uncustomed goods, to wit, 12 pounds of saccharine, contrary to section 168 (g) of the Customs Ordinance, Chapter 33. Each of the defendants was fined \$1,883.52, being treble the value and duty.

J. A. Luckhoo, K.C., for appellant Martin.

H. C. Humphrys, (L. A. Hopkinson with him) for appellant Christian.

S. E. Gomes, Assistant Attorney-General, for respondent.

Cur. adv. vult.

SAVARY, C.J. (Ag.): The considered judgment of the Full Court is as follows. The appellants were convicted by Mr. Dias, who was acting as a Magistrate of the Georgetown district, of having knowingly acquired possession of 12 pounds of uncustomed saccharrine, and were fined \$1,883.52 and costs each. The charge was laid under section 168 (g) of the Customs Ordinance, Ch. 33, and the material words for the purposes of this appeal are "Everyone who knowingly acquires possession of uncustomed goods shall for each offence forfeit treble the value of the goods and of the duty payable thereon or \$500, whichever is the larger sum." A number of questions were argued on the hearing of the appeal but they can be summarized as follows:

- (A) As the word "knowingly" occurs in the subsection the burden is on the prosecution to prove (1) that the goods were uncustomed. (2) that the defendants knew they were uncustomed.
- (B) The words "with intent to defraud" qualify this section as well as others and the Crown, therefore, has the burden of proving such intent.
- (C) Even if the burden is on the appellants the evidence negatives guilty knowledge on their part.
- (D) The appellants were charged with jointly committing an offence in respect of which there was one penalty and therefore each person was liable to be fined only half the penalty, *i.e.*, treble the value of the goods and of the duty, in other words, $\frac{1}{2}$ of \$1,883.52 each.

With regard to question (A), although it may be said that the wording of the section invites argument, and could be simplified, we are not prepared to disturb several previous decisions on the point. Some are judgments of single judges sitting in the old appellate jurisdiction of the Court, and the most recent is a decision of the Full Court.

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In view of the submission of counsel for one of the appellants as to the effect of previous judgments of this Court, it is necessary to state what the true position is. A judgment of a single judge sitting in the old appellate jurisdiction of the Supreme Court laying down a rule of law or determining the construction of an Ordinance, if not in conflict with a subsequent decision of the Full Court, is binding on Magistrates, but not, strictly speaking, on this Court. Following the rule of judicial comity, however, it would be followed by this Court unless the Full Court is satisfied that the judgment of the single judge sitting in the appellate jurisdiction is palpably incorrect.

But judgments of the Full Court laying down principles of law or settling the interpretation of Ordinances or Statutes are binding on magistrates, judges of first instance, ^(a) and this Court: see *The Vera Cruz*, (No. 2) (1884) 9 P.D. 96, *Palmer v. Johnson* (1884) 13 Q.B.D. 351, 355, *Kelly & Co. v. Kellond* (1888) 20 Q.B.D. 569, *London Street Tramways Co., Ltd. v. London County Council* (1898) A.C. 375, 380, *Great Western Railway Co., v. Mostyn Steamship (Owners)* (1928) A.C. 57, 82, and *Marshall v. Lindsey County Council* (1935) 1 K.B. 516, 522.

But judicial comity does not prevent the Full Court from considering previous inconsistent decisions of the old appellate Court or of the Full Court and forming its own view as to which should be followed: see *Glaskie v. Watkins* (1929) 2 K.B. 181, 195.

Therefore we do not propose to discuss the first point raised but content ourselves with stating certain principles laid down in cases to which we call attention later and with which we respectfully agree.

They are as follows:

- (a) the word “knowingly” in subsection (f) of section 168 qualified only the words “harbours, keeps or conceals,” and not the words “prohibited, restricted or uncustomed” in the subsection;
- (b) in a prosecution under the said subsection the burden is on the defendant to prove (i) that the goods were not uncustomed goods; or, (ii) if they were uncustomed goods, that he did not know that the goods were uncustomed.

The cases which support these views are *Caetano v. Reid*, App. Jur. 19th December, 1913, *Davis v. Low* (1916) L.R.B.G. 30, and *de Barros v. Benson*, in which judgment was given on the 21st July, 1933, this last being a decision of the Full Court. The cases of *Da Paiva v. Reid*, App. Jur. 16th April, 1910, and *Phillippe v. Allt* (1914) L.R.B.G. 76, which appear to be in conflict with those first mentioned, do not commend themselves to us.

Applying those principles to this appeal we lay down the following rules:

In prosecutions under section 168 (g) of the Customs Ordinance, Ch. 33 (1) the burden is on the prosecution to prove that the

defendant knew he had acquired possession of the goods the subject of the charge; this follows from the fact that the word "knowingly" qualifies the words "acquired possession" only, and not the words "any of those goods"; (2) the burden is on the defendant to prove that the goods were not uncustomed goods; (3) the burden is on the defendant if the goods are uncustomed goods, to prove that he did not know that the goods were uncustomed.

Point (B) with regard to the extent to which the words "with intent to defraud" govern the words in section 168 (g), has already been dealt with by this Court in the case of *Licorish v. D'Andrade*, (1931-37) L.R.B.G. 147, decided on the 19th May, 1933, and, in our view, the point does not affect the propositions we have previously laid down.

The third point (C) arises on the evidence and, in our opinion, the evidence does not negative guilty knowledge on the part of either appellant, and we agree with the conclusions of the Magistrate on the facts.

The last point (D) raises an interesting and important question. The submission is that as the appellants were charged with jointly committing an offence in respect of which there was one penalty, each was liable to be fined only $\frac{1}{2}$ of the total amount of the penalty. Examination of the operative words of section 168 shows the fallacy of the contention. The words are "Everyone who . . . knowingly acquires uncustomed goods shall for each of these offences forfeit treble the value of the goods"

It appears to us that this point is expressly covered by the decision of *B. v. Dean* (1843) 152 E. R 1102. In that case there was an information for penalties under the Smuggling Prevention Act, 3 and 4 William 4, c. 53, s. 44, where language similar to that under discussion was the subject of the decision. The informant charged the defendant with being concerned in the shipping of goods without payment of duties; with knowingly harbouring goods which had been imported and illegally unshipped without payment of duties, and with two other similar offences. Lord Abinger, C. B., and Barons Alderson, Gurney and Rolfe all held in the Court of Exchequer that every person offending against the Statute could be punished and visited by a separate penalty, and rejected the contention that the several persons concerned in the transaction were liable to one penalty divisible among them. We quote one short passage from the judgment of Alderson, B. At p. 1104, he says: "We must look at the statute to see whether it was intended that every person offending should be punished, or merely that every offence should be punished. The question is, whether an offence which is committed by several persons is to be visited by one penalty, or each person is to be visited by a penalty. Here each person

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who is concerned in the transaction is plainly subject to a penalty under the Act of Parliament.”

At pp. 165 and 166 of the 2nd edition of *Highmore's Customs Laws*, published in 1907, the learned author dealing with section 186 of the Customs Consolidation Act, 1876, which corresponds to section 168 of the Customs Ordinance, says: “The terms of this section are very wide and subject to penalties every person concerned, and, accordingly, each of several partners in a firm can be separately convicted of the same offence.”

On this point we are unable to distinguish this case from the one the subject of this appeal, and we have come to the conclusion that the Magistrate was right in fining each offender separately.

For these reasons the appeal is dismissed with costs, the conviction is upheld.

Costs of appeal fixed at \$35.36

Appeal dismissed.

(a) In *Jeffrey v. Mendes* (1928) L.R.B.G. 43, Sir Anthony De Freitas, C.J., sitting as judge of first instance in the original jurisdiction of the Supreme Court—being of the opinion that a judgment of the Full Court constituted by Berkeley, C.J. (Ag.), and Douglass, J., and sitting in its appellate jurisdiction from the decisions of magistrates' courts, was clearly erroneous—declined to follow it. In the course of his judgment (at p. 45 of the report) he said that the doctrine of *stare decisis* “should not be so overstated as to provoke a display of wit such as was exercised by Dean Swift when he made Gulliver say in his report on English law, that if once English judges go wrong they make it a rule never to come right.”—
Editors Note

WILL OF WALTER MITCHELL, DECD.

IN THE MATTER OF THE TRUSTS OF THE WELL OF WALTER
MITCHELL, DECEASED,

AND

IN THE MATTER OF THE SUPREME COURT OF JUDICATURE
ORDINANCE, CHAPTER 10.

[1936. No. 235.—DEMERARA.]

BEFORE SAVARY, C.J. (ACTING). 1936. OCT. 23; NOV. 6.

Will—De Saffon's will, 1784—Charitable trust—Objects—Orphans or half-orphans, natives of Colony of Demerary, issue of lawful marriage—Preference prayed for the poorest and the most needy, and for the issue of white parents—Benefits of trust to cease at age of 16—Saffon Establishment—No identification—Mitchell's will, 1862—To form or found a Church College or other charitable Institution similar to Saffon Establishment though not with same exclusion but under similar rules for which purpose appointing the Legislature his residuary heir leaving the arrangement to superior judgment of Governor and Court of Policy—Charitable trust—Institution on similar rules to Saffon Establishment—Saffon Establishment unknown to exist in 1862—Charitable trust—Funds not sufficient to establish an Institution—Failure of mode of carrying out charity—Cypres doctrine—Application of—Application of De Saffon's will to Mitchell's will though not with the same exclusion—Meaning of "though not with the same exclusion"—Children not orphans or half-orphans, children not born in county of Demerara, children not issue of a lawful marriage, children not under 16 years, children not the poorest or the most needy, children not born of white parents—Whether excluded.

In 1784 P. L. de Saffon bequeathed his residuary estate on trust in favour of ten orphans of half-orphans natives of the Colony of Demerary, without distinction of sex, but nevertheless born in lawful marriage, and he authorised the Court of Justice of the Colony of Demerary to select them from time to time, as vacancies may arise. He directed that on a beneficiary attaining the age of 16 years he shall cease to be such, and he concluded by praying the Court to give preference on every occasion to the poorest and most needy, and to those who are the issue of white fathers and mothers.

By Ordinance No. 1 of 1838, (now the Colony (Counties) Ordinance, Chapter 3), the county of Demerara is that portion of the Colony of British Guiana formerly known as the Colony of Demerary.

In 1862 W. Mitchell bequeathed his residuary estate to form or found a church college or other charitable institution in this Colony similar to the Saffon Establishment *though not with the same exclusion* but under similar rules for such purpose appointing the Legislature his residuary heir leaving the arrangement to the superior judgment of the Governor and Court of Policy.

There were no records to show what the Saffon Establishment was at the time of the will of W. Mitchell or that such an establishment existed at that time.

At the end of December, 1935, the sum of \$38,660.20 stood to the credit of the Walter Mitchell Fund.

An originating summons was taken out by the Legislative Council of British Guiana for the determination of the following questions:—

(a) whether on a true and proper construction of the words *though not with the same exclusion* contained in the said will, the testator intended to exclude as his beneficiaries—

- (1) children who are neither orphans nor half-orphans;
- (2) children—whether orphans or half-orphans or not—who are not born in lawful wedlock;
- (3) children—whether orphans or half-orphans or not—who were not the issue of white fathers or mothers;
- (4) children—whether orphans or half-orphans or not—who were not born in the county of Demerary in this Colony; and
- (5) children who are either not the poorest or most needy of those eligible to be selected as such beneficiaries.

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(b) whether on a true and proper interpretation of the terms and provisions of the said will it is incumbent on the part of the Legislature to form or found a church college or some other charitable institution similar to that of the Saffon Establishment or whether in the event of the funds bequeathed by the said testator being insufficient for that purpose it is within the power and discretion of the Legislature to arrange for the maintenance and education of the said beneficiaries in such manner as it may deem advisable.

Held, (1) that the residuary bequest in the will of Walter Mitchell was a charitable bequest as the purpose was the maintenance and education of orphans and there was a general intention in favour of charity;

(2) that there being no records to show what the "Saffon Establishment" was at the date of the will, or that such an establishment existed at the time, and the fund not being sufficiently large to warrant the founding and maintaining of any institution, the mode of carrying out the charity failed;

(3) that where there is a general intention in favour of charity, but the mode by which the gift is to be effected cannot be applied, the *Cypres* doctrine is invoked by the Court, and the gift is carried out as nearly as possible to the original intention;

(4) that a charity may be *cy-pres* to the original object, which seems to have no trace or resemblance to it, but which may be very properly adopted if no other can be found having a nearer connection;

(5) that inasmuch as the testator, Walter Mitchell, left the "arrangement to the superior judgment of the Governor and Court of Policy" the Court would not require that a scheme be submitted to it for its approval, and it was competent for the Legislative Council to formulate a scheme subject to the conditions laid down herein for the maintenance and education of orphans and half-orphans.

(6) that, on the true construction of de Saffon's will, a charitable trust was created in favour of orphans or half-orphans, and he laid down the following conditions to be observed by those carrying out the trust: (a) that the beneficiaries should be natives of the Colony of Demerary; (b) that there should be no distinction of sex; (c) that beneficiaries should have been born in lawful marriage; and (d) that they should enjoy the benefits of the trust up to the age of 16 years. In addition to these conditions, the testator also directed the Court of Justice of the Colony, which was charged with carrying out the trust to give preference to (a) the poorest and the most needy, and (b) the issue of white fathers and mothers; but these were not conditions or limitations affecting the class of persons that were eligible, but merely directions given to the Court in case of competing claims which no doubt they would follow in ordinary circumstances.

(7) that the words in Walter Mitchell's will *though not with the same exclusion* only referred to that part of the will of Pierre Louis de Saffon which limits beneficiaries thereunder to children born in lawful marriage, and that the words in question would not exclude—

(a) children who are orphans or half-orphans;

(b) children who are not born in lawful wedlock;

(8) that beneficiaries under the will of Walter Mitchell are not limited to children born in the county of Demerara, and that the testator's intention was to benefit orphans and half-orphans of the Colony as it existed in 1862;

(9) that beneficiaries under the will of Walter Mitchell are not limited to children of white fathers and mothers, inasmuch as the provision in de Saffon's will relating to children of white fathers and mothers was in the nature of a direction to the trustee and not as a condition delimiting the class;

(10) that orphans selected under the will of Walter Mitchell need not be the poorest or the most needy, inasmuch as the provision in de Saffon's will relating to this matter was in the nature of a direction to the trustee and not a condition delimiting the class;

(11) that the trust created under Walter Mitchell's will applies to orphans and half-orphans, and that the conditions limiting the class of beneficiaries are that—

(i) they must be born in the Colony as it existed in 1862, that is, as it is known to-day;

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- (ii) they may be of either sex;
- (iii) they may be legitimate or illegitimate;
- (iv) they may enjoy the benefits of the trust up to the age of 16 years.

Originating Summons taken out by the Legislative Council of British Guiana, as trustees under the will of Walter Mitchell deceased, for the determination of the following questions:—

(a) whether on a true and proper construction of the words *though not with the same exclusion* contained in the said will, the testator intended to exclude as his beneficiaries—

- (i) children who are neither orphans nor half-orphans;
- (ii) children—whether orphans or half-orphans or not—who were not born in lawful wedlock;
- (iii) children—whether orphans or half-orphans or not—who were not the issue of white fathers or mothers;
- (iv) children—whether orphans or half-orphans or not—who were not born in the County of Demerary in this Colony; and
- (v) children who are either not the poorest or most needy of those eligible to be selected as such beneficiaries.

(b) whether on a true and proper interpretation of the terms and provisions of the said will it is incumbent on the part of the Legislature to form or found a church college or some other charitable institution similar to that of the Saffon Establishment or whether in the event of the funds bequeathed by the said testator being insufficient for that purpose it is within the power and discretion of the Legislature to arrange for the maintenance and education of the said beneficiaries in such manner as it may deem advisable.

Pierre Louis de Saffon, the resident owner of three plantations in the Colony of Demerary made his will in the French language on the 25th February, 1784, in the Colony of Demerary. This will is deposited in the records of the Registrar's Office. A translation of it appears in the preambles to the de Saffon Trust Ordinance, 1896 (No. 21) and the de Saffon Trust Ordinance, 1904 (No. 5). The following excerpts are taken from that translation. The testator made the following disposition of his residuary estate: "I make and institute as my universal heirs and legal of all my property . . . 10 orphan children or half-orphans, natives of this Colony, without distinction of sex, but nevertheless of lawful wedlock, and who in case of the decease of one of them shall always be replaced by others, authorising for this purpose the most Honourable Court of Justice of this Colony, upon information which will be given of their decease to the said Court by the testamentary executors hereinafter named, or their successors, praying the Court always to give preference to the poorest and the most necessitous, and those who are born of white parents, in favour of whom the clear and ascertained revenue of the said plantations shall be divided and the allowance from them they shall

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enjoy up to the age of 16 years after which they will be replaced by others . . . And for the execution of the present testament I appoint, name and institute Messrs. A. Albinus and Chevalier de Cornet, inhabitants of this Colony, as my executors and as guardians of the said minors as far as regards the ownership of all that I shall leave at my death . . . with the direction and administration of the said succession . . . And besides with all such power that in case of death, departure or absence from the said Colony, or other sufficient incapacity of one of them, the other shall be obliged to substitute another competent person in the place of the one absent in case he had not himself named the said person, and so on perpetually, wishing and intending that at all times there should be two Administrator Guardians.”

Subsequent to the date of the will the Colony of Demerary and the Colony of Essequibo were united into one Colony under the name of the Colony of Demerary and Essequibo; and in the year 1831, the Colony of Demerary and Essequibo and the Colony of Berbice were united into one colony under the name of the Colony of British Guiana. By Ordinance No. 1 of 1838 the colony of Demerara is that portion of the Colony of British Guiana formerly known as the Colony of Demerary.

Walter Mitchell died on the 24th day of March, 1862, leaving a last will and testament dated the 4th day of March, 1862, which was deposited in the Registrar’s Office (now Supreme Court Registry) on the 27th of March, 1862, No. 49. He directed his executors, after payment of his debts and the legacies under his will, on receipt of moneys, to cause the same to be invested at good interest in Government or other safe securities which investments shall continue until all the monies shall be realised, the interest as soon as received being again re-invested on good security. The testator further said that the whole of his estate being so realised by his executors, and on the executors being discharged “I request that the Legislature of the Colony will have the investments continued as I have hereinbefore mentioned for a period of fifteen years from my death when the capital and interest shall be at the disposal of the Legislature of the Colony in order to form or found a church college or other charitable institution in this Colony similar to the Saffon Establishment *though not with the same exclusion* but under similar rules for such purpose appointing the Legislature my residuary heir leaving the arrangement to the superior judgment of the Governor and Court of Policy.”

By the de Saffon Trust Ordinance 1896, (No. 21 and the de Saffon Trust Ordinance, 1904 (No. 5),—now the de Saffon Trust Ordinance, Chapter 246—the powers and duties conferred by the will of Pierre Louis de Saffon on the most Honourable Court of Justice of the Colony of Demerary (in 1896 the Supreme Court of British Guiana) were transferred to the Governor in Council,

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By article 3 of the British Guiana (Constitution) Order in Council, 1928, Chapter 2, it was provided that the Legislative Council, constituted by the said Order in council, should be substituted for the Court of Policy.

A Committee of the Court of Policy which was appointed "to inquire and report as to the best manner of giving effect to the intentions of Mr. Walter Mitchell as to the disposal of his estate" presented its report to the Court of Policy on the 27th day of February, 1883. The Committee reported that "the Fund is not sufficiently large to support any separate institution and it therefore became the duty of the Committee to consider in what way the intentions of the testator could be most nearly complied with. The Committee recommended that there should be Scholarships for Boys and for Girls. With respect to the Scholarships for Girls the Committee suggested that the "Mitchell Scholarship should entitle any Girl holding it to a free education at the *Saffon Institution*," and they stated that they had "communicated with the Lady Principal of the *Saffon Establishment* and had ascertained that that Lady is willing to give the scheme as regards the scholarships for Girls a fair trial."

Another Committee of the Court of Policy submitted a report on the 26th day of July, 1894, in which they said that they "venture to suggest that, whatever may be the determination arrived at by" the Court of Policy "with respect to the application of the Mitchell Trust, provision to give due effect thereto should be made by a Public Ordinance."

A Committee of the Legislative Council submitted a report on the 1st day of October, 1932, in which they stated that "it is to be regretted that this suggestion was not acted on, and the present Committee recommends that as soon as the Council has decided upon the best means of giving effect to Walter Mitchell's intentions as expressed in his will, an Ordinance should be passed to give permanent, and legal force thereto, and that all existing regulations should be repealed."

In the Revised laws of 1930 the term 'trustees' was substituted for the term 'administrator guardians' appearing in the will of Pierre Louis Saffon: De Saffon Trust Ordinance, Chapter 246, section 2.

E. G. Woolford, K.C., for the Legislative Council.

Walter Mitchell provided in his will that in the event of its not becoming possible to form or found a church college—the establishment which seems to have been the chief aim of the testator—that some other charitable institution should be established similar to the Saffon Establishment and run on similar lines—"under similar rules," are the exact words employed—"though not with the same exclusion." The amount at the credit of the Trust on 31st December, 1935, was \$38,660.20 as appears from the

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latest Report by the Colonial Treasurer. Walter Mitchell's will is dated 4th March, 1862, and was deposited in the Registrar's Office on the 27th March, 1862, The executors administered the estate until 27th June, 1866, and were eventually discharged by order of the Court of Policy, the then Legislature of the Colony;

2. Under de Saffon's will the order or method governing the selection of the beneficiaries should be as follows: An orphan should first be chosen; if this is not possible then a half-orphan should be selected. In either of these cases the beneficiary should be a native of the county of Demerary, and should be the offspring of parents who have been married—preference being given to the poorest and most needy, and to those who are the issue of white fathers and mothers.

3. By the terms of de Saffon's will all children are excluded from its benefits who are not either orphans, or half-orphans and who are not born in lawful marriage, these are definite exclusions. The words in Mitchell's will, namely, "though not with the same exclusion," therefore, have reference to those children who are excluded under de Saffon's will, and show that Mitchell in his will wished his bequest to apply to every child, whether orphans or not and irrespective of whether they were born in lawful wedlock or not.

4. A more difficult point is the interpretation of the words "though not with the same exclusion" in Mitchell's will with reference to the following provisions in de Saffon's will "praying the Court to give preference on every occasion to the poorest and most needy and those who are the issue of white fathers and mothers." Are they so largely an integral part of the De Saffon directions that they cannot be separated from the other directions, namely "ten orphan children, or half-orphans, natives of this Colony, without distinction of sex however, born in lawful marriage"? If so, the words "though not with the same exclusion" govern them also and the provisions in de Saffon's will "praying the Court to give preference on every occasion to the poorest and most needy and those who are the issue of white father and mothers" are not incorporated in. and do not form part, of Walter Mitchell's will. On the other hand, it would seem that these directions appear to be designed to control the selection of eligibles only after the other qualifications for admission have been satisfied.

5. It is clear that admission to the benefits of Mitchell's foundation should be made after consideration of all the *personal* qualifications of the applicants, and should not be based on an educational test. If you allow the present educational test to continue, the applicant's fitness for election can only become possible after, the beneficiary has in fact received a fair education at his parents or some one's expense and *not* Mitchell's. This claim would nullify the intention of the testator who required his benefactions

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to reach children—presumably poor and needy ones, *irrespective of their ages or educational fitness*—to which no reference whatever has been made in any of the provisions of his will as a prerequisite to any child becoming entitled to share in the benefits of his charitable bequest. At the present time the beneficiaries under the trust of Walter Mitchell are selected entirely on educational qualifications: see the Regulations passed in 1928 and amended in 1930 and 1934. There are no directions in the will to limit the benefits of the trust to children of any particular age, and the trust should not be run on a strictly educational basis. As there is nothing in Walter Mitchell's will to indicate this, the Regulations were *ultra vires*.

6. Counsel referred to the following official publications (1) Report of Committee of Court of Policy dated 27th February, 1883; (2) Report of Committee of Court of Policy dated 26th July, 1894; and (3) Report of Committee of Legislative Council dated 1st October, 1932.

S. E. Gomes, assistant Attorney-General, did not adduce any arguments as he said the whole case was fairly presented by counsel for the Legislative Council.

Cur. adv. vult.

SAVARY, C.J. (Ag.): An originating summons was taken out in this matter at the instance of the Legislative Council of British Guiana, the Attorney General of British Guiana being the respondent thereon, for the determination of certain questions arising on the will of Walter Mitchell, deceased.

Mr. Woolford, K.C., appeared on behalf of the Legislative Council, and Mr. S. Gomes represented the Attorney-General.

This will is dated 4th March, 1862, and the testator died 20 days thereafter.

The material portion of the will on which these questions arise is as follows “. when the Capital and Interest shall be at the disposal of the “Legislature of the Colony in order to form or found a Church College or “other charitable institution in this Colony similar to the Saffon Establishment though not with the same exclusion but under similar rules for such “purpose appointing the Legislature my residuary heir leaving the arrangement to the superior judgment of the Governor and Court of Policy.”

The de Saffon Trust was created by the will of Pierre Louis de Saffon, dated the 25th February, 1784, and, in order to assist in solving the points raised on this summons, it is necessary to examine the trust so created and to ascertain the conditions or restrictions imposed in respect of it.

De Saffon created a charitable trust in favour of orphans or half orphans, and laid down certain conditions to be observed by those carrying out the trust.

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They were:

- (1) that the beneficiaries should be “natives of this colony”; which at that time comprised what is now the County of Demerara;
- (2) that there should be no distinction of sex;
- (3) that beneficiaries should have been born in lawful marriage;
- (4) That they should enjoy the benefits of the trust up to the age of 16 years.

In addition to what I have described as conditions, the testator also directed the Court of Justice of the Colony, which was charged with carrying out the trust, to give preference to (a) the poorest and most needy orphans and (b) to the issue of white fathers and mothers. In my opinion these were not conditions or limitations affecting the class of persons that were eligible, but merely directions given to the Court in case of competing claims which no doubt they will follow in ordinary circumstances.

This being the position under the will of de Saffon the question arises as to the meaning to be given the portion of Mitchell’s will previously set out, which contains the bequest in dispute, and in which reference is made to the “Saffon establishment.”

Before discussing the matter I may set out some relevant facts.

At the end of 1882 the fund of the Mitchell trust amounted to \$9,322.95 in cash and a sum of \$4,188.94 owed by the Rector and Vestry of St. George’s; on the 1st April, 1894, it stood at the sum of \$19,387.81, and on the 1st January, 1935, the amount was \$38,660.20. Two reports on the Mitchell trust were presented to the Court of Policy, dated the 27th February, 1883, and the 26th July, 1894, respectively, and a similar report dated the 1st October, 1932, was laid before the Legislative Council. Certain suggestions were put forward by the various committees, the most important being that an Ordinance should be passed to give effect to the testator’s intentions and regulating the carrying out the trust. Owing to difficulties which have given rise to this summons, no Ordinance has been passed.

On the 20th December, 1928, regulations known as “Mitchell Foundation Regulations, 1928” were made by the Legislative Council which provided for 3 scholarships, and laid down the conditions governing their award. The regulations were amended in 1930 and 1934.

It is admitted that the Mitchell Trust Fund has in the past been utilised for awarding scholarships to those considered eligible, the conditions of eligibility varying from time to time. No doubt the Trust Fund was administered in this manner as it was clear that the amount was insufficient to establish and maintain a separate institution.

I now come to the specific questions raised on the summons.

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The answers to the first five questions depend on the meaning to be given to the words "though not with the same exclusion" occurring in Mitchell's will and used with reference to the de Saffon Trust.

I have previously set out what I consider to be the conditions laid down by de Saffon in his will in order to ascertain the class of orphans and half orphans who are eligible as beneficiaries under his will, and, in my opinion, the words under consideration apply only to that condition under the will of de Saffon which limits beneficiaries to children born in lawful marriage, in other words, under the trusts of Mitchell's will illegitimate children are not excluded. De Saffon begins by designating the class of beneficiaries, orphans or half orphans, and then proceeds to lay down positive and negative conditions in order to ascertain those in that class who are eligible. The draftsman of Mitchell's will used the singular "exclusion" and therefore intended it to apply to one condition only, and as that condition of de Saffon's will is the only one of a really exclusive or negative character, I have arrived at the conclusion that those words in Mitchell's will refer to the condition about legitimacy in de Saffon's will.

It would follow from this that the words in question would not exclude—

- (a) children who are orphans or half orphans;
- (b) children who are not born in lawful wedlock.

There still remains the questions raised in (a) (4) as to whether beneficiaries under the will of Mitchell should be limited to children born in the County of Demerara. I am of opinion that no such restriction arises under Mitchell's will.

De Saffon describes himself as of the "Colony of Demerary," and in describing the orphans and half orphans who should be the object of his bounty, he described them as "natives of this colony." At that time there was a separate colony of Demerary as distinct from the Colonies of Berbice and Essequibo, but in 1862 the Colony comprised the three counties of Demerara, Essequibo and Berbice which fact was no doubt known to the testator. This change was effected by an Ordinance passed in 1838, the Colony (Counties) Ordinance. The trustee of the Mitchell Trust was described in his will as the "Legislature of the Colony," which meant the whole colony as it is now known, and the testator's intention, so far as it can be gathered from his will, was to benefit orphans and half orphans of the colony as it existed in 1862.

This disposes of the questions (a) (1), (2) & (4).

With regard to questions (a) (3), whether, children of white fathers and mothers only are eligible, as I have previously pointed out, this was in the nature of a direction to the trustee and not a condition delimiting the class, and in my view there is nothing in Mitchell's will to suggest that he intended to incorporate this

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direction in his will, and it follows that beneficiaries under his will are not limited to this class. For the same reason it follows that question (a) (5) must be similarly answered and that orphans selected need not be the poorest or the most needy.

To put my conclusions in positive form I hold that the trust created under Mitchell's will applies to orphans and half orphans, and that the conditions limiting the class of beneficiaries are that;

- (1) they must be born in the colony as it existed in 1862 that is, as it is known to-day;
- (2) they may be of either sex;
- (3) they may be legitimate or illegitimate;
- (4) they may enjoy the benefits of the trust up to the age of 16.

This brings me to question (b) which is as follows:

“Whether on a true and proper interpretation of the terms and provisions of the said will it is incumbent on the part of the Legislature to form or found a Church College or some other charitable institution similar to that of the Saffon Establishment or whether in the event of the funds bequeathed by the said testator being insufficient for that purpose it is within the power and discretion of the Legislature to arrange for the maintenance and education of the said beneficiaries in such manner as it may deem advisable.”

The question really calls for two separate answers, and with regard to the first part of it, the difficulty is that it was admitted by both parties before me that there are no records to show what the “Saffon Establishment” was at the date of the will, and, in fact there is nothing to indicate that such an establishment existed at that time, but it is agreed that forty or fifty years ago, and perhaps before, orphans or half orphans who were beneficiaries of the de Saffon trust were placed under the care of a person who conducted a secondary school in Georgetown and was paid a monthly sum for their maintenance and education. Under the circumstances what becomes of this bequest? In my opinion it is clearly a charitable bequest as the purpose is the maintenance and education of orphans and there is a general intention in favour of charity. It is the mode of carrying out that purpose which has failed for the reason just stated and also because the fund is not sufficiently large to warrant the founding and maintaining of any institution.

Under the circumstances, as the Court always leans in favour of charity I pray in aid a well known principle of the law of charitable trusts in order to prevent the gift lapsing.

It is well established that if there is a general intention in favour of charity, but the mode by which the gift is to be effected cannot be applied, the *cy-pres* doctrine is invoked by the Court, and the gift is carried out as nearly as possible to the original intention. A charity may be *cy-pres* to the original object, which seems to have no trace or resemblance to it, but which may be

very properly adopted if no other can be found having a nearer connection: *Attorney-General v. Ironmongers' Co.*, (1841) Cr. & Ph., 208, 227; *In re Davis* (1902) 1 Ch. 876, and see the cases collected and discussed in *Tyssen's Charitable Bequests*, 2nd edition, at pp. 181-183, 196-197, 199 *et seq.* This leads me to the second part of the question, which is, whether the Legislature, under the circumstances, can formulate a scheme for the maintenance and education of orphans and half orphans.

In cases of this nature the practice is to submit to the Court of Equity a scheme for approval, but it appears to me that, the principles affecting the carrying into effect of the trust having been settled by this decision the formulating of the scheme may be left to the Legislative Council. The words at the end of the bequest where the testator leaves "the arrangement to the superior judgment of the Governor and Court of Policy" justify the view that it is competent for the Legislative Council to formulate a scheme subject to the conditions laid down in this judgment for the maintenance and education of orphans and half orphans. It is for the Legislature to decide how best the scheme can be carried into effect, but I may be permitted to suggest that the general principles and conditions affecting the carrying into effect of the trust be embodied in an Ordinance, the details being settled by regulations made under it.

Solicitors: *F. Dias, O.B.E.; Crown Solicitor.*

D. A. BACCHUS v. D. A. SARRABO.

D. A. BACCHUS v. D. A. SARRABO.

[1936. No. 48.—DEMERARA.]

BEFORE DE FREITAS, J. (ACTING).

1936. Nov. 10, 11, 12, 13, 14, 16, 17, 18, 27.

Slander—Imputing a crime—Presumption of damage—Reasonably capable of defamatory meaning—Act tending to effect a public mischief—Plaintiff's reliance on defence—Amendment of claim—Judgment for defendant—Costs—Discretion.

At a meeting of the Village Council of Golden Grove and Nabaclis the defendant spoke the following words of and concerning the plaintiff “the same way you caused the exhumation of a dead body . . . you are always giving trouble in this Council and causing meetings to adjourn: wherever you go you are always making disturbance and giving trouble.”

Held that no reasonable person present at the meeting could understand the words to mean, and that the words are not reasonably capable of conveying the meaning that the plaintiff had committed the misdemeanour of doing an act tending to effect a public mischief.

It is competent for the plaintiff in an action for slander to rely on the defendant's version of what he admits having said, but it is usual, if not compulsory, for the plaintiff in such a case to amend his claim.

J. A. Luckhoo, K.C., for plaintiff.

S. I. Cyrus, for defendant.

Cur. adv. vult.

DE FREITAS, J. (Ag.): In this action the plaintiff is seeking to recover from the defendant \$5,000 as damages for slander.

The words complained of and alleged to have been uttered by the defendant are set out in paragraph 3 of the Statement of Claim which reads thus:—

“On Friday, January 24th, 1936, at a meeting of the Village Council of the Golden Grove and Nabaclis District held at the Village Office at Nabaclis, East Coast, Demerara, the defendant falsely and maliciously spoke and published of the plaintiff in his presence and hearing and to Bhup Singh, William Agostini, John McRae, Joseph Bristol, Arthur Young and others the words following, that is to say:—“You know you have committed one of the worst crimes in Nabaclis and Golden Grove.” “By murdering your child which caused the exhumation of the body.”

It is not disputed that these words are actionable *per se*, and, if proved to have been used and published by the defendant, would without any proof of special damage entitle the plaintiff to succeed, for “the law presumes” as was stated by Lord Justice Bowen in *Ratcliffe v. Evans* (1892) 2 Q.B. 524 at p. 528 “that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's absolute right” to reputation. No special damage has been proved or alleged.

The defence is a denial of the use of the words by the defend-

ant. The sole issue, therefore, for my decision is as I conceive it one purely of fact, subject only to a point of law. submitted by the learned counsel for the plaintiff which I shall deal with later,

[After discussing the evidence the learned judge found that in the face of all the conflicting evidence it was impossible for him in the exercise of his functions as a jury to say that he was satisfied beyond reasonable doubt that the plaintiff had discharged his burden of proof, and continued:]

The learned counsel for the plaintiff has, however, made a submission in writing which is certainly ingenious, but in my opinion untenable. His proposition is this: "that a plaintiff is entitled to succeed if a material and defamatory part of the words complained of is proved to have been used; and that the exact offence need not be specified; words involving a general charge of criminality will suffice, provided they impute that the plaintiff is guilty of some offence for which he can be made to suffer corporally by way of punishment."

As a general proposition I have no fault to find with it, but the fallacy lies in its application to the facts in this case

In applying his proposition to the present case, Mr. Luckhoo has argued that the words "The same way you caused exhumation of a dead body" admitted to have been used by the defendant coupled with the words "you are always giving trouble in this Council and causing meetings to adjourn; wherever you go you are always making disturbance and giving trouble" show that the plaintiff was accused of having committed the misdemeanour of doing an act tending to effect a public mischief. He bases his argument on the following two extracts from the defendant's evidence:

"I meant that he (the plaintiff) was a troublesome man and that he might have caused that (the exhumation) to give somebody else trouble."

"I felt that he (Bacchus) wanted to put somebody into "trouble."

Now, it is well known that in actions of libel or slander it is irrelevant, except perhaps on the question of damages, to consider the meaning which the writer or defamer intended should be placed on the statement or words used; but even if it were relevant, the learned counsel had omitted to notice the answer given by the defendant in cross-examination when he said that "knowing Bacchus (the plaintiff) to be a troublesome man he came to the conclusion that he (the plaintiff) must have caused the exhumation on account of any report he may have heard" and that he "never at any time suspected Mr. Bacchus of having murdered his daughter".

I am aware that it is competent for a plaintiff to rely on the defendant's version of what he admits having said, but it is usual, if not compulsory, for the plaintiff in that case to amend his claim:

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see *Tournier v. National, etc., Bank* (1924) 1 K.B. 461, 470, 478, 487. No such amendment has been made or asked for.

I hold, however, that the words “the same way you caused the exhumation of a dead body” are not reasonably capable of conveying the meaning counsel now wishes to assign to them even if such an innuendo had been pleaded in the Statement of Claim, which is not the case.

Furthermore, I entertain grave doubts as to whether any of the villagers present knew or had ever heard of the misdemeanour of doing an act tending to effect a public mischief, but assuming they did know or had heard of it, sitting as a jury, I have no hesitation in saying that no reasonable person present at the meeting did or could understand the words to mean that the plaintiff had committed that misdemeanour.

It follows from what I have said that the plaintiff must fail in his action. He has instituted it, I have no doubt, to vindicate his reputation and good name, and although he has not succeeded in recovering damages, he has at any rate won the satisfaction of knowing that it has been proved by the evidence not only of the witnesses but also by that of the defendant himself that his character is free of any evil imputation. They have all testified that he is held in esteem and respect by all as a man of good repute and as a good Councillor.

Taking all the circumstances of this unfortunate case into consideration, I think I shall be doing full justice to the parties if in the exercise of my discretion I make no order as to costs in dismissing the action.

I enter judgment for the defendant without costs.

Judgment for defendant.

Solicitors: *F. I. Dias; J. E. Too-Chung.*

S. I. CYRUS v. I. L. CUMBERMAC.

SAMUEL IGNATIUS CYRUS, Plaintiff.

v.

IVAH LAGURE CUMBERMAC. Defendant.

[1936. No. 149.—DEMERARA.]

BEFORE VERITY, J. 1936. DEC. 8, 9, 10.

Evidence—Onus of proof—Reasonable doubt—Agreement for lease of immovable property for period exceeding one year—Not in writing—Specific performance—Part performance—Acts of—Occupation of premises—Payment of rent and issue of receipts therefore—Agreement for 3 years or upwards—Enforceable for definite period.

Where there is such doubt with regard to the facts of a matter that it is impossible for the Court to say that the plaintiff has discharged the burden of proof which is placed upon him, there must be judgment for the defendant.

Where, however, there is no such reasonable doubt, the Court does not take up the position that it is difficult to come to a conclusion, that it maybe painful or unpleasant to come to a conclusion, and, therefore, no conclusion should be come to. Difficulty and unpleasantness and painful results are not to be considered.

The occupation of premises for a period, the payment of rent and the issue of receipts for rent during that period are in themselves evidence of the existence of a contract of tenancy; and the tenant is entitled to show what were the terms—a monthly tenancy from month to month, or a tenancy for a period.

In an action for specific performance of an oral contract relating to immovable property which is required to be evidenced in writing by proviso (*d*) to section 3 of the Civil Law of British Guiana Ordinance, chapter 7, it is necessary for the plaintiff to show that by the acts of part performance, through faith in the defendant's conduct, he is in a worse position, by reason of a breach of such faith, than he would have been, had he not relied on the faith of the defendant's word.

Where there is a contract the duration of which is expressed in the form of a definite period followed by an indefinite period the contract can be enforced so far as the definite period is concerned. So, where there is an agreement for lease for a period of 3 years or upwards specific performance can be decreed so far as the period of 3 years is concerned.

Action for specific performance. The necessary facts appear in the judgment.

C. V. Wight, for plaintiff.

H. C. Humphrys, for defendant.

Cur. adv. vult.

VERITY, J.: In this case the plaintiff is seeking a decree for specific performance of an agreement of lease of certain premises situated at lot 215, King Street, Georgetown. The plaintiff himself is a member of the Bar, and the defendant was represented during the material part of these transactions by Mr. Clarke, who is also a member of the legal profession being a solicitor of the Supreme Court, and who was, at the time this agreement was alleged to have been entered into, the attorney of the defendant and who is now her husband. It appeared to me when these proceedings opened that it was regrettable in the extreme that

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such a dispute between two members of different branches of what has always been considered an honourable profession should be made public in this way, and, therefore, I suggested before the proceedings had been entered into in this Court publicly that it was desirable, if it could be secured, that a settlement should be made in this case. The suggestion which I threw out, however, was not acceptable on the part of the defendant, counsel for whom intimated that it would be useless to endeavour to make a settlement at that stage. The hearing was, therefore, proceeded with.

In spite of what their position is, however, the parties having appeared before this Court their evidence and conduct have to be considered in exactly the same way as any other member of the public who may come to this Court for relief in a dispute. The evidence given before the Court will have to be considered as if given by any other member of the public, and the Court will have to make up its mind as to which side has told the truth in regard to the dispute.

It has been said on behalf of the plaintiff that it would be necessary in order that a decision should be arrived at in this case for the Court to decide which of these two parties is speaking the truth in regard to these transactions. It has been suggested on the part of the defendant that subsequent events may not be essential to the issue, but the Court, having heard the witnesses and having considered the testimony the witnesses have given, may come to the conclusion that if is not sufficiently satisfactory to enable the Court to come to a definite conclusion as to what is the true position, and, therefore, the burden is on the plaintiff to satisfy the Court as to the true position. That, of course, is a position which the defendant is always entitled to take up and which perhaps puts the defendant in a more favourable position in the action. There can be no doubt that any Court, whether it is a Court composed of judge and Jury or a Court comprised of a judge only, may be brought into this position where there is such doubt with regard to the facts of the matter that it is impossible for the Court to say that the plaintiff has discharged the burden of proof which is placed upon him and therefore there must be judgment for the defendant. If there is no such reasonable doubt the Court does not take up the position that it is difficult to come to a conclusion, that it may be painful or unpleasant to come to a conclusion and therefore no conclusion should be come to. Difficulty and unpleasantness and painful results are not to be considered.

The question the Court has to consider then is whether it is in a position to be able to determine without reasonable doubt what are the facts of the case. There can be no doubt that in this case the conclusion to come to is that either one or the other

parties has falsely represented to the Court what occurred during the month of December last year and the result is undoubtedly unpleasant; but nevertheless that is not a matter for consideration on which this Court has to proceed.

There can be no doubt that there is sad contradiction between these two parties as to what were the events early in December which led to the plaintiff's occupation of the premises. The plaintiff alleges that in the early part of that month, after discussion with the defendant and her attorney, there was an agreement whereby the plaintiff was to lease from the defendant the premises at a certain rental for a period of three years or upwards. The defendant's attorney, on the other hand, states that there was no such discussion whatever. He does not say that the lease was discussed and no conclusion arrived at; he does not say the lease was discussed, but, nevertheless, it was decided that no lease be granted and thereupon the plaintiff entered upon a monthly tenancy. He said definitely there was no discussion whatever of any lease, the agreement was based on the ordinary, monthly tenancy and the rent to be paid thereby.

There was no possibility of reconciling the two parties on the basis of misunderstanding. It is quite impossible that two intelligent men can get together and discuss the tenancy of a building and that one should leave with the impression that a question of lease had been discussed and the other should leave with the impression of no discussion of a lease whatever. It is therefore impossible to reconcile these two stories; either one is false and the other true or *vice versa*.

It is necessary before any point of law can be considered that the Court should arrive at a determination as to what the agreement was in regard to the premises. The plaintiff himself has given evidence and so has the defendant's attorney, but the defendant herself has not gone into the witness-box. There is therefore before the Court the testimony only of the plaintiff on the one side and of the defendant's attorney on the other side. There has also been tendered in evidence certain correspondence, which the plaintiff avers supports his version of this transaction that it was in the nature of an agreement for a lease, and which on the other hand the defendant submitted does not have that effect.

The plaintiff says that the defendant wanted the place of which he was in occupation—the lower flat of the premises, the property of the defendant, at the corner of South Road and King Street. He states that on December 4, he was spoken to by the defendant in regard to his tenancy of those particular premises on the lower flat at the corner of South Road and King Street, and the defendant then intimated to him that she would require possession of those premises. After some discussion it was suggested that he might take other premises of the defendant

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situated on the upper flat of another house on the same lot—the third building from the corner. He states that at the conclusion of that interview the defendant intimated to him that her attorney would discuss with him the terms of tenancy which it was suggested he may take on these new premises. He states that either on the same day or the following day he did discuss this matter with the defendant's attorney, who then agreed with him that there should be a lease of these new premises for a period of three years or upwards, and the question of rent still remained not altogether at that time finally settled. There was a discussion as to the amount of rent, that the defendant's attorney desired him to pay \$12 per month or \$144 per annum while he on the other hand did not desire to pay more than \$11 per month or \$132 per annum. The defendant's attorney at that time suggested they might come to an agreement on the basis of payment of \$11.50 per month and \$138 per annum during the existence of the lease. The plaintiff further states that on December 6, he confirmed the arrangement whereby this middle course shall be adopted for the sum of \$11.50 per month and wrote the defendant a letter.

Considering the plaintiff's version of this transaction one has to take into consideration not only the oral testimony given, but the testimony of the documents. It is alleged by the plaintiff in his letter to the defendant on June 26th that the defendant offered to him and he accepted the tenancy of the other place and she agreed to execute an agreement of lease. That was a general statement by the plaintiff on June 26th last of the agreement which had been arrived at. The statement of Claim filed by the plaintiff discloses what is alleged to be the fact with regard to that agreement.

Paragraphs 2 to 4 are as follows:

“ 2. On or about the 4th day of December, 1935, the defendant offered to the plaintiff verbally the lease of premises situate on the upper flat of a building at lot 215, King Street, Georgetown, which was then vacant, on the following terms:—

(a) that the said building be let to the plaintiff with an understanding to execute a lease between the parties in respect of the same within one year from the 15th day of December, 1935, for a period of three years or upwards;

(b) that the sum payable be at the rate of \$144 per annum payable monthly at the rate of \$12 per month;

(c) that possession of the said premises be taken over by the plaintiff as such tenant from the 15th day of December, 1935, on the aforementioned terms;

(d) that an agreement be executed between the parties embodying the terms of the said agreement hereinbefore mentioned.

3. On the 5th day of December, 1935, the defendant's attorney

Edward Darnell Clarke, a solicitor practising in this colony, repeated on behalf of the defendant the said offer to the plaintiff and on a suggestion by the plaintiff reduced the proposed rental to the sum of \$138 per annum or \$11.50 per month.

4. On the 6th day of December, 1935, the plaintiff accepted in writing the said offer of the defendant.”

If the Statement of Claim is strictly interpreted it is not borne out by the evidence of the plaintiff who stated that what was intended to be conveyed by the Statement of Claim was that the defendant offered on December 4 and on December 5, it was concluded and the net result was the term set up by the plaintiff in paragraph 2 of the Statement of Claim as the term of agreement arrived at on December 4, between the defendant and himself. If that is the interpretation that should be placed upon this particular paragraph of the Statement of Claim, I am afraid it is not strictly consistent with the precise terms of the Statement of Claim.

I have to consider and balance his evidence as against that of the defence to come to a conclusion as to the weight I shall attach to the evidence given by Mr. Clarke in the witness-box on behalf of the defence, and I must also consider the weight that should be attached to the evidence tendered on behalf of the defendant in relation to that fact. The defendant herself has not given evidence in the witness-box as to the alleged conversation which took place between herself and the plaintiff on December 4. Although her attorney states that no such conversation took place he has not substantiated his allegation on that count by showing that she was not in a position to make such a statement possible. It seems possible that some time during December 4, the defendant met the plaintiff and some conversation took place between them. It therefore appears to me somewhat rash on the part of the defendant's attorney to say that he is prepared to swear that such conversation never took place, while the plaintiff is swearing on oath that it is so. The defendant has not entered the witness-box. There can be no doubt that in considering the weight that should be attached to the evidence there are various things in the documentary evidence that have been produced—the letter of December 6, the letter of June 26, the time that letter was sent and also the statement set out in paragraphs 2 and 3 of his Statement of Claim—and if the plaintiff was not telling the truth as regards this transaction, his method of expressing himself in the letter of December 6, the long delay of the letter of June 26 and paragraphs 2 and 3 of his Statement of Claim which do not set out with that accuracy which one would expect from a member of the Bar, the facts which he intended to plead and which he avers are true. I have to take these matters into consideration in arriving at a determination as to the truth or otherwise of the evidence given

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by him. The letter of December 6, was intended to confirm the agreement which he says was made by the defendant on December 4 and 5. One would expect when such a letter is written for such a purpose reference will be made to the outstanding particulars of the agreement come to, at any rate as to what the terms of tenancy were on which he agreed to take the premises on December 15. He did not, but on June 26 he definitely asserted that there was an agreement of lease.

The position, therefore, is this. There was some sort of tenancy and the plaintiff entered into occupation in the middle of December. He received notice to quit and on June 26 he replied that there was an agreement for the lease of the premises which he had been called upon to quit. We have, therefore, this occupation by the plaintiff of the premises, and after six months an attempt made by the defendant to make him quit on one month's notice. The plaintiff resisted the notice on the ground of an agreement of lease. Either on May 13, the defendant had taken up an attitude which he knew could not be based on facts when she served that notice on the plaintiff, or on June 26, the plaintiff took up an attitude which he knew could not be based on facts.

To arrive at a decision as to which of these two stories appears to be probable, I think it is necessary that one should take into consideration the case with which either of these two stories can be adopted. I think it is perfectly a simple matter for the defendant knowing there was no reduction of the terms of agreement to writing, knowing no lease had been executed, knowing that there was no document, not even the letter written by the plaintiff on December 6, to disclose the terms of agreement, to adopt the attitude that this is a monthly tenancy which can be terminated by a monthly notice. At that time, it must be borne in mind the relationship between the two parties was by no means friendly.

It is a general rule, it is said, that it is difficult to prove a negative, but that is not always correct. In a case of this kind, it would be a very easy thing to prove a negative where the defendant knew that there was no document in writing at all upon which the plaintiff could rely. It is easier for the defendant who must have known that there was no evidence in writing of the alleged agreement to deny the existence of any such agreement with some amount of success than for the plaintiff to establish in the circumstances the existence of an oral agreement claimed by him to have been made and entered into between the parties.

While I have come to the conclusion that there can be no doubt that the plaintiff in his letter of December 6, was exceedingly vague—and it is regrettable that a letter of that nature should be in such vague terms—at the same time it must be remembered that towards that time there was pleasant relation-

ship between the two parties. I am also of the opinion that the plaintiff had not expressed in his Statement of Claim with that clarity which one would expect, the position of affairs of which he was prepared to give evidence. While one is satisfied that there was regrettable delay in the letter written by the plaintiff to the defendant, and while one fully appreciates that all these things, unfortunately for the plaintiff, can be viewed with discredit, yet I have come to the conclusion that I am satisfied that the plaintiff in his letter of December 6, 1935, was confirming the agreement he had come to with the defendant and her attorney for the lease of the premises set out in that letter. That letter purported to be an acceptance of the offer of the defendant to the plaintiff and is indefinite. I am asked by the defendant to say that that letter is consistent with reference to a monthly tenancy on a rental of \$11.50 per month: It must be admitted that it would have been wiser for the plaintiff in accepting the terms of the offer to have referred specifically to the agreement of lease, but I conform to the former view.

The Court is asked to determine whether or not the plaintiff is entitled to succeed in this action on the ground that there was part performance of the agreement to enable the Court so to find. It has been submitted by the defence that even if there was in fact an agreement as alleged by the plaintiff such an agreement is contrary to the Statute of Frauds which enacts that any such agreement must be evidenced in writing. But where there is such part performance by the plaintiff according to the principles laid down in decided cases the plaintiff would be able to give oral evidence of the terms of such agreement on the ground that it would be inequitable that the defendant be permitted to rely on the Statute of Frauds in order to defeat the plaintiff. The principles as laid down are well accepted but difficulty has arisen from time to time in regard to the application of those principles to the existing facts.

The Court, therefore, acting on the principles, on which any present day Court will act. that the defendant should not be allowed to take advantage of the operation of the Statute of Frauds, if there was part performance by the plaintiff, and if by that part performance he had been placed in a worse position than he would have been otherwise, would permit such part performance to apply in the absence of a memorandum in writing. The question is: Has there been such part performance as would justify a Court of Equity in coming to the conclusion that such acts proved the existence of such a contract as the plaintiff has set up and in which he desires a decree to be given? The occupation of the premises for a period, the payment of rent and the issue by the defendant of receipts for rent during that period—these acts in themselves are evidence of the existence of a contract of tenancy, and

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the plaintiff is entitled to show what were the terms—a monthly tenancy from month to month or a tenancy for a period. It is also necessary for the plaintiff to show that by those acts through faith in the defendant's conduct, he is in a position worse than he would have been had he not relied on the faith of the defendant's word, by reason of a breach of such faith. That is the whole basis of an action to enforce a contract such as this.

The question in this case is: Is the plaintiff placed in such a position? There can be no doubt that his occupation of the previous premises on the lower flat was terminated. There is a difference of opinion as to how the tenancy came to be terminated. The plaintiff swore that on his being turned out of those premises he required before entering into occupation of the other premises that a term of years be granted him, and on that agreement he entered the premises. On the faith of the defendant's promise to grant him a term of years he occupied those premises. But for such a promise it is probable that the plaintiff may have sought a tenancy elsewhere.

There can be no doubt that the defendant is allowed to take advantage of the fact that this agreement of the lease is not evidenced in writing, if the position of the plaintiff was not definitely worse than it would have been had the defendant not promised him the security of tenure desired. I think therefore on this ground that the Court should interfere and assume the position that the contract existed as evidenced by that part performance and not allow the Statute to operate. The plaintiff has satisfied the Court that the equitable doctrine of part performance should be allowed to operate in this case. The terms are set out in the evidence by the plaintiff himself and by documentary evidence.

It has been submitted by counsel for the defendant that the terms were not definite but were uncertain as regards the number of years because of the plaintiff's claim of an agreement for three years or upwards and that a Court of Equity would not grant specific performance of a lease the duration of which is uncertain. Accepting the plaintiff's evidence as to the terms of the contract that the term was for three years or upwards, that is to say there was a definite period of three years followed by an indefinite period, I think it is an acknowledged principle that where there is a contract the duration of which is expressed in the form of a definite period followed by an indefinite period that contract can be enforced as far as the definite period is concerned. If a contract can be enforced in regard to such period then specific performance of such a contract can be decreed for a period of three years as claimed. The plaintiff's claim that the agreement was to be for three years or upwards, I interpret as a fixed term of three years with the possibility of another term uncertain: The Court can therefore grant specific performance of the fixed term.

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On the whole I am prepared to accept the evidence of the plaintiff in preference to that of the defendant. I find that an oral agreement to execute a lease between the parties was actually made and entered into between them as deposed to by the plaintiff. Having come to a conclusion on the facts of the case and also as to the principles of law applicable to those facts I give judgment for the plaintiff and order that the lease on the terms set out by the plaintiff in his Statement of Claim be executed by the defendant. I also make an order as to costs.

Judgment for plaintiff.

Solicitors: *A. G. King; E. D. Clarke.*

EDITOR'S NOTE.—The above text is a newspaper report of the oral judgment as revised by the trial judge.

MANGRU, IN HIS CAPACITY AS EXECUTOR UNDER THE WILL OF
SUNDAR, DECEASED, PLAINTIFF.

v.

KALLA, DEFENDANT.

[1936. No. 16.—DEMERARA.]

BEFORE DE FREITAS, J. (ACTING).

1936. NOVEMBER 26, 27; DECEMBER 2, 5, 11, 18.

Immovable property—Title—Transfer—Transport—Only means—Deeds Registry Ordinance, chapter 177, ss. 12, 21—Contract of sale—Equity—Doctrines of—Application—Civil Law of British Guiana Ordinance, chapter 7, s. 3 (B), proviso (b)—Execution sale—Opposition—Abandonment of—Proceedings by way of injunction—Whether a bar—Bequests—Executor—Assent by—Evidence of—Judgment against executor personally—Executor a beneficiary—No debts of estate—Levy on interest in estate—Whether regular.

S. bequeathed certain immovable property to K. and M. and appointed M. as executor, M. obtained probate of the will of S. on 27th June 1933. There were no debts due by the estate of S. deceased save and except the sum of \$27 due for rates on the immovable property which sum was a charge thereon and was repayable over a period of 25 years. In August, 1933, M. in his capacity as executor of S. advertised in favour of K. and himself transport of the said property. He however, included a building which K. claimed to be his own property and not the property of the estate of S.: the transport was not passed M. in his capacity as executor of S. then caused the immovable property of the estates: of S. including the said building to be sold for \$500 at public auction and advertised transport thereof in favour of the purchaser A.A.C. K. opposed the passing of the transport on the ground that his building was included in the property sought to be conveyed. In action No. 353 of 1933 brought in respect of the said opposition the Court, by order dated 19th March, 1934, declared K. to be the owner of the building, and ordered M. personally to pay K. his costs of the action. The costs were not paid and on the 4th December 1934, the Registrar of Deeds passed an affidavit by K. for a levy on, as the property of M., one undivided half of the immovable property bequeathed to M. under the will of S. The levy was made on the 12th December, 1934, and the property levied upon was adver-

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tised in the *Gazette* of 15th, 22nd and 29th days of December, 1934, for sale at execution on the 2nd January, 1935.

At the trial of this action which was instituted by M. in his capacity as executor of S. against K. for (a) a declaration that the levy was illegal, unjust and not well founded and (b) an injunction restraining the sale at execution the following other facts were proved or admitted. In order to pay for the expenses of obtaining probate of the will of S, K. and M. borrowed the some of \$30 from B, and they signed a joint and several note in favour of B. The sale of execution was opposed by A.A.C., on the grounds (1) that he was entitled to the return of \$70 moneys paid by him in respect of the purchase at public auction of the property of the estate of S., the consideration therefor having totally failed and (2) that M. had no legal title in the property vested in him at the date of the levy. The opposition by A.A.C. was declared by Order of the Court dated 18th January, 1935, in cause No. 15 of 1935, to be deserted and abandoned and the sale at execution was re-advertised on the 26th January, 2nd and 9th February, 1935, to take place on the 12th February, 1935. Opposition was entered by P.C.W. on the 9th February, 1935, and opposition action No. 45 of 1935, was filed by him; this was dismissed on the 12th November, 1935. On the 4th, 11th and 18th January, 1936, the property levied upon was re-advertised for sale on the 21st January, 1936 and on the 20th January, 1936, the writ in this action was filed. No steps were taken, subsequent to the 19th March, 1934, to enforce the contract of sale, if any, made between the executor of S. and A.A.C. for the sale of the immovable property of the estate of the deceased. The executor did not file any account of his administration of the estate of the deceased.

Held (1) that no transfer of immovable property can take effect unless perfected by transport, and that, notwithstanding the sale to A.A.C. the title to the immovable property remained in the name of M. as executor of the estate of the deceased S.:

Mangia v. Safayan (1917) L.R.B.G. 58, and

Gangadia v. Barracot (1919) L.R.B.G. 216, followed.

(2) that, in this Colony the doctrines of equity are only, with reference to the sale of land, applicable subject to sections 12 and 21 or the Deeds Registry Ordinance, Chapter 177, which in effect, retain the old law on the subject referred to under (1) hereof;

Cornwall v. Henson (188899) 2 Ch. 714, considered.

(3) that A.A.C. having abandoned his opposition to the execution sale would be estopped from taking proceedings by way of injunction to restrain the sale at execution at the instance of the defendant K.;

Robertson v. Yarde (1919) L.R.B.G. 55 followed.

(4) that any expression or act done by an executor which shows his concurrence to the thing bequeathed will amount to an assent, and that the plaintiff as executor assented to the dispositions of the will very shortly after obtaining probate when he agreed with the defendant to transport the pro-property to the defendant and himself, and advertised it in the *Gazette*;

(5) that had the plaintiff transported the property in accordance with the terms of the will, he could have recovered the defendant's portion of the indebtedness under the promissory note by proceeding against the defendant's half of the property;

(6) that, even if the plaintiff had not so assented, he as executor would be holding the property of the estate of S. in trust for the defendant K. and himself inasmuch as there were no other *cestuis que trust* and there were no creditors of the testator; that the plaintiff held the legal estate as executor and was the sole beneficial owner of one undivided half of the property left I by S., and that it was competent for the defendant K. to levy execution on that undivided half to enforce the judgment held by him against the plaintiff M. individually.

Quaere: whether A.A.C. could succeed in an action for specific performance against the executor of the estate.

Action for a declaration and for an injunction. The facts and arguments appear in the judgment.

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S. I. Cyrus, for plaintiff.

A. J. Parkes, for the defendant

Cur. adv. vult.

DE FREITAS, J. (Acting): The plaintiff in this action claims:—(a) An order of the Court declaring the execution levied at the instance of the defendant on the property described in the *Official Gazette* dated the 4th January, 1936, to be illegal, unjust and not well founded, (b) An injunction restraining the said sale at execution, (c) Damages, (d) Costs.

The facts proved or admitted, giving rise to this action are as follows:—

The plaintiff, Mangru, was appointed Executor under the last will of his mother Sundar who died on 1st May, 1933. The will (Exhibit 12), is dated 24th February, 1933, and Probate thereof was granted to the plaintiff on the 27th June, 1933. By the said will the Testatrix devised and bequeathed all her property to her reputed husband, Kalla, the defendant, and her son Mangru *alias* Nanan, the plaintiff, in equal share. The inventory filed by the plaintiff (Exhibit 13) for Estate Duty and dated 2nd June, 1933, shows the property of the deceased to consist of South half of East half of lot No. 19 Albouystown as fully described in Transport No. 54 of the 25th January, 1913, and South half of West half of lot No. 22 Albouystown as fully described in the same transport both valued at \$600. The one and only debt of the Estate is declared to be \$27.61 due to the Mayor and Town Council as Special Rates for the latter half of the year 1931 and for the years 1932 and 1933; and in the Memorandum of Legacies and Bequests appended to the said inventory, the defendant Kalla and the plaintiff Mangru are set down as entitled each to one-half of the said properties.

The plaintiff in order to obtain Probate borrowed the sum of \$30 on a promissory note signed jointly and severally by himself and his step-father Kalla, the defendant, for the sum of \$37—\$7 being for interest. Kalla in his evidence admitted borrowing this amount jointly with the plaintiff who told him that that sum was required for Probate purposes, but stated that he did not know how the money was spent. In Paragraph 4 of his Defence, however, he has admitted that the \$30 was expended in obtaining Probate of the Will. In August, 1933, the plaintiff in his quality as Executor of the Estate of Sundar, deceased, proceeded to give effect to the dispositions of the will of his testatrix, by advertising in the *Official Gazette* a transport of the aforesaid properties to himself and the defendant Kalla, “the devisees under the aforesaid will of the said Sundar, deceased,” the last advertisement of which appeared in the *Official Gazette* of the 26th August, 1933 (Exhibit I). This transport was never passed as the defendant Kalla refused to join the plaintiff in a mortgage of

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the same property to one M. B. Correia and presumably because a building on the land which the defendant claimed as his own was not excluded (See Exhibit 6A). The plaintiff, two months later, instructed the auctioneer to sell the property at public auction and it was sold to one Alexander Augustus Correia for the sum of \$500. When transport was advertised the defendant entered an opposition on the ground that a building claimed by him as his own property was not excepted in the advertisement of the transport. This opposition was followed by an action which on 19th March, 1934, was decided in favour of the plaintiff Kalla, the defendant in the present action, and the present plaintiff, defendant in that action, was ordered to pay the costs of the action personally, the Court presumably being of the opinion that he had improperly resisted the claim.

In December, 1934, the defendant Kalla, in order to satisfy the judgment held by him against the plaintiff for costs, levied execution on one undivided half part or share of and in the properties above mentioned with one undivided half part or share of and in all the buildings and erections thereon, as per inventory, the property of Mangru, save and except three buildings thereon the property of others. The sale at execution was advertised in the *Official Gazette* of the 15th December, 1934, and numbered 4. (Exhibit 4.)

This sale was opposed by the said Alexander Augustus Correia on the ground "that the Estate of the said Sundar deceased was indebted to him in the sum of \$70 for moneys advanced towards the purchase price of the immovable property of the deceased including the portion thereof levied upon, consideration whereof has failed thereby entitling him to the return of such moneys advanced and that Mangru had no legal title in the property vested in him at the date of the execution" (Exhibit 6). This opposition was subsequently withdrawn and the sale was re-advertised on the 26th January, 1935. Opposition to the re-sale was entered by the Auctioneer, Mr. Percy C. Wight, who instituted an opposition action, which however was dismissed in November, 1935. On the 4th January, 1936, the sale at execution of the same property was again advertised, the former opposition by Mr. Wight having been declared by the Court bad and not well-founded. On the 20th January, 1936, the writ in this action was issued and an interim order of injunction was granted to the plaintiff restraining the sale at execution, and on the 5th February, 1936, it was ordered that the injunction be continued until the final determination of this action or until further order.

In Paragraph 4 of the plaintiff's reply he alleges that "this action is brought to permit the purchaser of the said property to acquire legal title thereto and to permit the plaintiff as executor to complete the administration of the estate."

Considering that the value of the property in question is alleged to be \$500 including the building belonging to the defendant which at the hearing was stated by Counsel for the plaintiff to be valued at \$300 it is difficult to conceive a more senseless and wasteful expenditure of time and money than has been incurred in the administration of this Estate.

The question I have to decide in this action is whether the execution levied by the defendant on the undivided half of the property mentioned above is illegal.

Mr. Cyrus on behalf of the plaintiff has in the course of a very long argument most strenuously urged that it is illegal for the following reasons:—

Firstly, because the property has been sold by the plaintiff as the executor to pay the debts of the Estate, and that from the date of that sale at auction the property was in equity no longer owned by the Estate, but by the purchaser and further that the defendant is estopped from questioning the validity of that sale, as he did not when opposing the transport to the purchaser do more than claim one of the buildings on the land in respect of which he obtained judgment; and that “the sale could not be impeached as it has been by the levy herein.”

Secondly, because the estate was still being administered by the Executor and it was not competent therefore for the defendant “to levy on the equitable interest of the plaintiff personally in his hands as executor” while debts of the estate were unpaid.

As to the first point, I more than once in the course of the argument indicated to Counsel that until the Court of Appeal ruled to the contrary I should adhere to my opinion that in this Colony no transfer of immovable property could take effect unless perfected by transport. This was the law before the coming into force on the 1st January, 1917, of the Civil Law Ordinance and still continues to be the law, notwithstanding the provisions of section 3 (B) as to the application of the doctrines of equity as administered in England.

If authority were needed in support of my view of the law it can be found in the local cases of *Mangia v. Safayan and ors.* (1917) L.R.B.G. 58 and *Gangadia v. Barracot* (1919) L.R.B.G. 216. In the former case at page 60 the law is stated by Sir Charles Major, C.J., thus:—“There is but one method of acquiring the ownership of real property in this Colony, namely by conveyance, or “transport” or the legal equivalent thereof. The person holding the conveyance of this property is the plaintiff and she and none other is to-day the owner of it.” In the latter case, which was an opposition suit by the purchaser of the property levied on to the sale at execution, Mr. Justice Dalton at p. 217 says:—“At the time those cases were decided,” (*i.e.* before the passing of the Civil Law Ordinance) “and so long as the common law remains unchanged, it is quite clear that a purchase of immov-

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able property, not completed by delivery *coram lege loci* (in this Colony by formal transport before a judge) is insufficient to debar a judgment creditor of the vendor from having such property taken in execution and sold to satisfy his debt. Has the law on this point been changed by the Civil Law Ordinance of 1916, which introduced the English common law in place of Roman Dutch law?"

The learned judge then proceeds to deal with the provisions of the Civil Law Ordinance and concludes thus:—

"And, it seems to me, that will still be the law after January 1st next (1920), when the Deeds Registry Ordinance, 1919, which repeals the subsection 3 (4) (c) of the Civil Law Ordinance I have referred to above, comes into force, if sections 11 and 20 (now sections 12 and 21 of Chapter 177) be read together."

By section 3 (B) of the Civil Law of British Guiana Ordinance (Ch. 7) it is enacted that from and after the date aforesaid (*i.e.*, 1st January, 1917) save as provided by.....this Ordinance or by any other ordinancenow or at any time hereafter in force the common law of the colony shall be the common law of England as at the date aforesaid including therewith the doctrines of equity as then administered or at any time hereafter administered by courts of justice in England, and the Supreme Court shall administer the doctrines of equity in the same manner as the Supreme Court of Judicature in England administers them at the date aforesaid or any time hereafter."

It is obvious therefore that in this Colony the doctrines of equity are only, with reference to the sale of land, applicable subject to sections 12 and 21 of the Deeds Registry Ordinance (Ch. 177) which in effect retain the old law on the subject, as the Civil Law Ordinance, 1916 did by section 3 (4) (c) which was repealed on the coming into force of the Deeds Registry Ordinance. (See also proviso (b) to s. 3 of Ch. 7 as to oppositions).

It must not be forgotten that even in England the statement that in equity the purchaser becomes the owner of the property is only a general statement subject to qualification. In *Cornwall v. Henson*, (1899), 2 Ch., p. 714, Cozens-Hardy, J., says—"It is often stated that the effect of a contract for the sale of land is to make the purchaser in equity owner of the land. I think this statement too wide.....If by reason of delay or other circumstances the Court declines to grant specific performance the purchaser is not treated as being in equity owner of the property." The reversal of this case on the facts by the Appeal Court does not affect the correctness of this statement of the law (*Dart on Vendors and Purchasers*, 8th edition, Vol. 1, p. 266).

It is unnecessary for me therefore in the view I have taken to consider the question of estoppel raised by Mr. Cyrus, for whether the sale was valid or not the title remained in the vendor and not in the purchaser.

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I may say however that the plaintiff's solicitude for the purchaser seems very strange to me, in view of the fact that the purchaser himself appears to have treated the contract of sale as at an end when in December, 1934, he opposed the levy by the defendant on the ground that there was a sum of money due to him by the plaintiff on a consideration which had failed, and having abandoned his opposition he would according to the decision in *Robertson v. Yarde* (1919) L.R.B.G. p. 55 be estopped from taking injunction proceedings to restrain the sale at execution at the instance of the defendant.

I think it is very doubtful without expressing any definite opinion, whether the purchaser Correia could succeed in an action for specific performance, having regard to his conduct and dealings with the plaintiff through his agent A.B. Correia and all the other circumstances of the case. The agent Correia in his evidence stated that shortly after the decision in the opposition suit by the defendant, he decided to stand by his contract of purchase, without the building claimed by the defendant, but not the slightest attempt appears to have been made to have the transport passed although the decision was given on the 19th March, 1934.

As to the second submission by Mr. Cyrus, I am of the opinion that as the plaintiff holds both the legal title and the sole beneficial interest in one undivided half of the abovementioned properties it was competent for the defendant to levy execution on that undivided half to enforce the judgment held by him against the plaintiff individually.

Under rule 40 of Order 36 of the Rules of the Supreme Court as amended in 1920 any one wishing to take in execution any immovable property to satisfy a judgment of the Court has to comply with the requirements of the rule by filing an affidavit of the facts and documents upon which he claims to take the property in execution, and the Registrar who is the examiner of titles in this Colony has first to be satisfied that the judgment debtor is *prima facie* the owner of the property sought to be taken in execution. From my own experience I know with what care in recent years, as opposed to the old practice of founding title on a five-year possession—titles are now investigated.

One may therefore justly assume that in the absence of evidence in rebuttal of the *prima facie* title any property levied on has been proved to the satisfaction of the examiner of titles to be the property of the judgment debtor.

In the present case the plaintiff has not condescended to give any evidence before me but has contented himself with calling the witness Correia to prove that he purchased at public auction the property in question for his brother-in-law and that he has very foolishly been advancing various sums of money to the plaintiff

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for nearly all of which he has taken promissory notes from the plaintiff.

Most of this money has been used by the plaintiff for his own use or wasted in useless litigation. I am pressed by Counsel for the plaintiff to hold that as the estate is still being administered by the executor and that all the money had by him has been spent in the proper administration of the estate, the plaintiff as such executor in the exercise of his right of retainer is entitled to hold the property of the Estate to repay himself, and therefore no creditor of his can levy execution on that property.

The cases cited by Mr. Cyrus in support of this part of his argument with which I shall presently deal briefly do not in the least assist him in his contention, for they are not applicable to the particular facts of this case; indeed, they contain statements of law in direct opposition to his submission.

I am of the opinion that the plaintiff as executor assented to the dispositions of the will very shortly after obtaining Probate, when he agreed with the defendant to transport the property to himself, and the defendant, and advertised it in the *Official Gazette*, and I can see no reason why he should not have done so, seeing that the only debt owing by the Testatrix was \$27, for rates which are funded and can be paid by small yearly instalments and are a charge on the land. The \$30 borrowed was a joint and several debt of the plaintiff and defendant. Had the plaintiff transported the property in accordance with the terms of the Will, he could have had the right of recovering the defendant's portion of the indebtedness by proceeding against his half of the property if as suggested by Mr. Cyrus the plaintiff was in danger of never being paid. The law does not require any exact form in which an assent is to be made; hence any expression or act done by the executor which shows his concurrence to the thing bequeathed will amount to an assent (*Walker on Executors* p. 165; see also *Attenborough v. Solomon* (1913) A.C. H.L. at p. 83.

The plaintiff has never filed any account of his administration of the estate as required by the Deceased Persons Estates' Administration Ordinance (s. 45, Ch. 149) and has done nothing so far as I can see to carry out his testatrix's wishes beyond advertising the transport.

But even if he had not assented what would be his position? He would be holding property in trust, for whom? He and the defendant are the sole beneficiaries under the will; there are no other *cestuis que trust*; there are no creditors of the testator. He holds the legal estate and is the sole beneficial owner of one undivided half of the property left by his mother. By what process of reasoning are his own creditors to be prevented from levying execution on property which is his in every sense of the word? The case might be different if for instance a creditor of

the plaintiff were to issue execution on the whole property, of one-half of which the defendant is the beneficial owner. In that case much of Mr. Cyrus' arguments would apply.

The executor's right of retainer, to which Mr. Cyrus so constantly referred in the course of his argument if at all relevant to this case is a point in favour of the defendant and not of the plaintiff. That right is a right in the executor to pay himself out of the assets of the Estate a debt due to him by the testator in preference to other creditors of the testator. But there are no creditors of the testator in this case, and even assuming he has properly incurred debts for the Estate neither his right of indemnity against the estate nor his right of retainer could preclude his own personal creditors from proceeding against property retained by him by virtue of those rights, he being the beneficial owner. To do so would be most illogical and would be to grant him an immunity from process by way of execution which neither law nor equity would countenance. His creditors would have the right to be substituted to the right of the executor to indemnity: *In re Evans* (1887) 34 Ch. D. 597 at p. 601).

I shall now briefly refer to the cases cited by Mr. Cyrus in support of his argument. In *Stevens v. Hince* (1914) 110 L.T. 935, a case which I am afraid Mr. Cyrus did not consider very carefully, it was held that whilst it was true as a general proposition that a judgment creditor cannot under a writ of *fieri facias* seize goods which are at the equitable disposition *only*, of the judgment debtor, it is not true where the whole of the equitable and beneficial interest in the chattels is vested in the judgment debtor. In *Scarlett v. Hanson* (1883) 12 Q. B.D. 213 (C.A)—another case cited by Counsel for Plaintiff—the principle is laid down that a judgment debtor who has the legal and beneficial interest in the goods can be levied on. This case however does not concern executors. In *Re Morgan, Pillgrem v. Pillgrem* (1881) 18 Ch. D. 93 at p. 101, Fry, J., states the law thus: "In my judgment nothing is plainer than this, that the property which can be taken under an execution is only that property to which the execution debtor is beneficially entitled and that no property of which he is only a trustee can properly be taken." In *Ray v. Ray* (1815) Cooper's Rep. 264; 35 E.R. (Ch.) p. 553 it was held that after a lapse of six or seven years, equity will not restrain by injunction a creditor of an executor from taking in execution the goods of a testator for the executor's own debt.

I have given the best consideration I can to the arguments of Counsel for the plaintiff, and the conclusion I have come to is that the levy in question is not illegal and that his client is not entitled to succeed. I cannot refrain from thinking that the plaintiff is deliberately endeavouring through pique, stubbornness, ignorance or bad advice to prevent his step-father, the defendant, from securing the fruits of his judgment.

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The injunction granted on the 5th February, 1936, is dissolved, and this action is dismissed with costs.

I certify for Counsel, and give leave to appeal if necessary.

Judgment for defendant.

Solicitor for defendant: *W. D. Dinally.*

IN THE MATTER OF SMITH BROTHERS & COMPANY, LIMITED,
(IN VOLUNTARY LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES (CONSOLIDATION)
ORDINANCE, CHAPTER 178.

[1936. No. 270.—DEMERARA.]

BEFORE VERITY, J. 1936. DECEMBER 3, 21.

Company—Winding up by Court—Creditors and Contributories—Meetings of—General power of Court to order—Companies (Consolidation) Ordinance, Cap. 178, s. 131 (1)—Voluntary winding up—First meeting of creditors—Committee of Inspection—No resolution to appoint—Whether sufficient if done subsequently—Cap. 178, ss. 180, 185 (1)—Inadvertence in applying to Court.

Where a company is being wound up by the Court, the Court may, by virtue of section 131 (1) of the Companies (Consolidation) Ordinance, chapter 178, which provides that “the Court, as to all matters relating to a winding-up, may have regard to the wishes of the creditors or contributories, and the Court, if it thinks fit, may direct meetings of the creditors or contributories to be called,” order that the first meeting of creditors be re-summoned, on good grounds for such a course being shown.

Re Radford and Bright, Ltd. (No. 2). (1901) 1 Ch. 735 applied.

Section 185 (1) of the Companies (Consolidation) Ordinance, cap. 178, provides that “where a company is being wound up voluntarily, the liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding-up, or to exercise, as respects the enforcing of calls or any other matter all or any of the powers which the Court might exercise if the company were being wound up by the Court.”

Held, (1) that the right conferred upon a creditor by section 185 does not enable the Court to determine such questions save in accordance with the provisions of the Ordinance and in the exercise of its lawful powers.

(2) that section 185 does not enable the Court to exercise the powers it might have exercised if the company was being wound up by the Court save in regard to such matters as are limited by the word “the enforcing of calls or any other matter” by which words the exercise of the power of the Court is to be deemed to be restricted to questions of a like nature to the enforcing of calls.

A company went into voluntary liquidation in January, 1936, when a liquidator was duly appointed but at the first meeting of creditors no committee of inspection was appointed, and no application was made to the Court for the appointment of such a committee. A further meeting of the creditors was called by the liquidator on the 25th November, 1936, when it was resolved that an application be made by G.R.R. to the Court for the appointment of certain named persons as a committee of inspection. This application was made to the Court by G. R. R., and it was supported by the liquidator and other creditors.

Section 180 of the Companies (Consolidation) Ordinance provides that “every liquidator appointed by a company in a voluntary winding up shall

IN THE MATTER OF S. BROS. & CO., LTD.

within seven days from his appointment, send notice to all persons who appear to him to be creditors of the company that a meeting of the creditors of the company will be held on a date, not being less than fourteen nor more than twenty-one days after his appointment . . . At the meeting to be held . . . the creditors shall determine whether an application shall be made to the Court . . . for the appointment of a committee of inspection, and, if the creditors so resolve, an application may be made accordingly to the Court at any time, not later than fourteen days after the date of the meeting, by any creditor appointed for the purpose by the meeting.”

Held, that a resolution for the appointment of a committee of inspection can only be passed at the statutory meeting of creditors held under section 180, and that as the said resolution was not passed then but at a subsequent meeting, the application must therefore be refused.

The Companies (Consolidation) Ordinance, chapter 178, makes no provision analogous to that of section 240 of the Companies Act, 1929, whereby the creditors of a company may make the appointment of a committee of inspection at a meeting subsequent to the first meeting.

Semble, that where a resolution has been duly passed under section 180, but through inadvertence, an application is not made to the Court within the time limited by the said section, the Court, if it thinks fit, may hear the application.

Clyde Marine Insurance Co. Liquidation (1921) 58 Scotch L. R. 324 considered.

ORIGINATING SUMMONS taken out by George Rodhouse Reid as attorney of Percy John Chaplin, receiver of the estate of William Smith, deceased, creditors of Smith Brothers and Company, Limited, in voluntary liquidation for an order that George Rodhouse Reid, Carlos Gomes and Arthur George King, be appointed a committee of inspection of Smith Brothers and Company, Limited.

G. R. Reid, solicitor, for the applicant.

Carlos Gomes and *A. G. King*, solicitors for certain creditors.

Cur. adv. vult.

VERITY, J.: This is an application made by George Rodhouse Reid, the duly constituted attorney in this Colony of Percy John Chaplin, the Receiver appointed by a judgment of the High Court of Justice (Chancery Division) in England in an action for the administration of the estate of William Smith, deceased, a creditor of Smith Brothers and Company, Limited, in voluntary liquidation.

It appears that the Company went into voluntary liquidation in January, 1936, when a liquidator was duly appointed, but at the first meetings of creditors no committee of inspection was appointed and no application made to the Court for the appointment of such a committee.

Subsequent to the proceedings in the High Court of Justice in England a further meeting of creditors was called by the liquidator on the 25th of November, 1936, and the following resolution was passed thereat:

“That an application be made to the Court by Mr. G. R. Reid for the appointment of a Committee of Inspection consisting of Mr. C. Gomes, Mr. A. G. King, and Mr. G. R. Reid.”

IN THE MATTER OF S. BROS & CO., LTD.

The present application is made in pursuance of this resolution and it was supported at the hearing by Mr. Reid in person and by Mr. Gomes and Mr. King who are solicitors representing certain creditors. The liquidators' consent to the application was intimated by Mr. Reid who stated that he was instructed by the liquidator in that sense.

The application appears to be made under the provisions of section 180 of the Companies (Consolidation) Ordinance, Chapter 178, of the laws of this colony, but it is to be observed that this section prescribes that the liquidator, shall within seven days from his appointment give notice of a meeting of creditors to be held on a date not less than fourteen days and not more than twenty-one days after his appointment and by subsection (2) of section 180 it is prescribed that at the meeting held in pursuance of the foregoing provisions, the creditors shall determine whether an application shall be made to the Court for, *inter alia*, the appointment of a committee of inspection, and that if the creditors so resolve, an application may be made to the Court at any time not later than fourteen days after the date of the meeting.

It is to be observed that at the statutory meeting of creditors held in accordance with the provisions of section 180 of the Ordinance no such determination was resolved and no application made to the Court. It is clear that the further meeting of creditors held on the 25th of November, 1936, was not a meeting held in pursuance of the provisions of this section and that this application is not made in accordance therewith.

It is further to be observed that Chapter 178 of the laws of this colony makes no provision analogous to that of section 240 of the Companies Act, 1929, whereby the creditors may make appointment of a committee of inspection, at a meeting subsequent to the first meeting.

It was submitted by the applicant that by section 185 of Chapter 178 application may be made to the Court "to determine any question arising in the winding up or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company was being wound up by the Court."

The right conferred upon a creditor by this section does not however enable the Court to determine such questions save in accordance with the provisions of the statute and in the exercise of its lawful powers, nor does this section enable the Court to exercise the powers it might have exercised if the company was being wound up by the Court save in regard to such matters as are limited by the words "the enforcing of calls or any other matter," by which words I deem the exercise of the power of the Court to be restricted to questions of a like nature to the enforcing of calls.

If it was otherwise and if the Court might exercise in all mat-

ters arising in the winding up those powers which it may exercise in the case of a winding up by the Court then it might have been open to the Court by virtue of section 135 (1) of Chapter 178 to order that the first meeting of creditors be re-summoned on good grounds for such a course being shown: see *in re Radford Bright Ltd (No. 2)*, (1901) 1 Ch. 735. This section does not appear, however, to be applicable to a voluntary winding up and no application has in any event been made to the Court with that intent.

It appearing that there is no statutory authority for the meeting of creditors held on the 25th November, 1936, nor for the present application to the Court I have had in consideration the question as to whether or not there resides in the Court any power to grant the application. I have not been referred to any apt authority by the way of decided cases in this regard, but I have referred to the note of a Scotch case (*Clyde Marine Insurance Co. Liquidation (1921)*, 58 Scotch L.R. 324) set out in the English and Empire Digest, Vol 10 p. 995. From this note it would appear that in the course of a voluntary winding up the creditor failed *per incurium* to present the petition within the statutory fourteen days but nevertheless upon the application of the liquidator thereafter the Court granted the prayer of the petition. I cannot make reference to the report of this case no Scottish Law Reports being available, but a reference to this case in Halsbury's Laws of England (Hailsham Edition) Vol. 5, p. 761, note (b) also indicates that failure to make application within fourteen days was in that case by reason of advertence.

In the present case inadvertence cannot be alleged. At the statutory first meeting of creditors no determination was resolved that application should be made to the Court for the appointment of a committee of inspection, and it is only at a meeting held long after, that the action of the statutory meeting is, in effect, set aside and that it is then resolved that this application be made. In the absence of such legislative enactment as has been effective in England since 1929, I am unable to hold that it was within the powers of a subsequent meeting of creditors to determine that application should be made to the Court for the appointment of a committee or that the Court may now, in confirmation of the resolution passed at such a meeting make such appointment.

This application must therefore be refused.

Application refused.

R. B. OF CANADA v. R. C. HAYNES.

ROYAL BANK OF CANADA, Plaintiff,

v.

ROBERT CLARENCE HAYNES, Defendant.

[1936. No. 264.—DEMERARA.]

BEFORE CREAN, C.J. 1937. JAN. 18, 19; FEB. 1.

Action—Limitation of—Judgment—Not charged upon or payable out of immovable property—Whether movable property—Civil law of British Guiana Ordinance, cap. 7, s. 4 (2), proviso (c)—Limitation Ordinance, cap. 184. ss. 6 (1), 6 (2), 15—Judgment more than 10 years old—Execution on—Leave to issue—Rules of Court, 1900, Order 36, rule 20—Opposition on foot of judgment—Action to enforce opposition—Whether abuse of process of Court.

Section 6 (1) of the Limitation Ordinance, chapter 184, provides that “every action and suit for any movable property...shall be brought within three years next after the cause of action or suit has arisen.”

Proviso (c) to section 4 (2) of the Civil Law of British Guiana Ordinance, Chapter 7, and section 6 (2) of the Limitation Ordinance, chapter 184, enact that rent arising out of immovable property, and any sum secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of immovable property shall for the purposes for the Limitation Ordinance be deemed to be movable property.

Section 15 of the Limitation Ordinance provides *inter alia* that nothing in that Ordinance shall affect the rights of the Crown or apply or extend to any judgment.

Held, (1) that the word “judgment” in proviso (c) to section 4 (2) of chapter 7 and in section 6 (2) of chapter 184 means a judgment which is charged upon or payable out of immovable property.

(2) that a judgment which is so charged is subject to the limitation of time contained in section 6 (1) of chapter 184.

(3) that a judgment which is not so charged is free from any limitation of time within which an action can be brought on the foot of it.

A obtained a judgment against B. on August 28, 1922, but never applied for execution thereunder. In 1935—more than 10 years later—there was advertised in the *Gazette*, notice of the intention of B. to pass a mortgage. A entered opposition thereto, and within the prescribed time, filed an action to enforce the opposition.

B contended that the procedure adopted by A, constituted an abuse of the procedure of the Court; and that the judgment being more than 10 years old, A’s only remedy was under Order 36, rule 20 of the Rules of Court, 1900, which provides that “where ten years have elapsed since the date of the judgment the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly; and such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried. And in either case such Court or Judge may impose such terms as to costs or otherwise as shall be just.”

Held that, as it would have taken a certain amount of time to get the leave of the Court to issue execution under Order 36, rule 20 of the Rules of Court, 1900, and the transport might have been passed before such leave was granted the procedure adopted by A. did not constitute an abuse of the process of the Court.

Action to enforce an opposition to a mortgage. The facts and arguments appear in the judgment.

G. J. De Freitas, K.C., for plaintiffs.

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J. A. Luckhoo, K.C. and S. L. Van B. Stafford, for defendant.

Cur. adv. vult.

CREAN, C.J.: In this case the plaintiffs claim payment of the sum of \$203.32 being the unpaid balance which they allege was due to them on foot of a judgment obtained in the Supreme Court of British Guiana on the 28th August, 1922, in an action filed by them in Berbice in the year 1921.

The judgment was for \$282.42 and according to its terms this amount was to be recoverable from the defendant by instalments of \$5 a month. In default of payment by the defendant of any of these instalments the plaintiffs were given the right to recover against him the whole sum remaining unpaid at that date.

The plaintiffs also claim in this action an order of the Court declaring the opposition entered by them to the defendant mortgaging his property in New Amsterdam to be just, legal and well founded. And they further ask for an injunction restraining the defendant from passing this mortgage.

These proceedings were instituted by way of specially indorsed writ but on the defendant filing an affidavit that he had a defence leave was given to him to defend. Leave was also given to the plaintiffs to amend their claim by reducing it from \$242.82 to \$203.32. This reduction was asked for on the ground that it had been omitted to Credit defendant with payments amounting in all to \$39.50 the last of which was paid in November, 1928.

A defence is filed by the defendant in which payments amounting to \$144.50 on foot of this judgment are stated by him to have been paid to plaintiffs.

Another ground of defence is that any unpaid balance of this judgment is prescribed by virtue of the provisions of the Civil Law of British Guiana Ordinance, chapter 7, and by the Limitation Ordinance, chapter 184 of the Laws of this Colony.

It is further pleaded by the defendant that as the plaintiffs could have obtained, within the prescribed period, leave of the Court to issue execution for any unpaid balance of this judgment and thereby recover the amount alleged to be due, these proceedings are an abuse of the process of the Court and should be dismissed.

It is argued by Mr. Luckhoo for the defendant that a person must have a good cause of action before he can oppose a transport of property such as was done by the plaintiffs in this case. It is said by him that the judgment debt on which the plaintiff's ground their claim is barred by the statutes of limitation, consequently it is not a recoverable debt. And, if it is not a recoverable debt, it is submitted that it cannot support the opposition proceedings entered by the plaintiffs, nor this action which of necessity the plaintiffs had to file to follow up those proceedings.

In support of this branch of the argument I am referred to the

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Limitation Ordinance, which is chapter 184 of the Laws of British Guiana. The particular sections to which I have been referred are sections 15 and 6. Section 6 of this Ordinance deals with actions for movable property and it puts a limit of 3 years on the bringing of any action or suit for movable property. There is a subsection to it and it sets out that rent arising out of immovable property and any sum secured by any mortgage or judgment or otherwise charged upon or payable out of immovable property shall be deemed movable property.

There does not appear to me to be any difficulty whatever in interpreting the first part of this section for it clearly says that actions and suits for movable property must be brought within 3 years. But the second part of the section which is subsection (2) has caused a great deal of argument. It is argued that as the word "judgment" is contained therein, then a claim or a suit on a judgment must be brought within 3 years next after the cause of action or suit has arisen.

In this suit the action is founded on a judgment dated in the year 1922 and as there is no payment on foot of that judgment since 1928 it is contended that as this action was not brought within 3 years of that date the judgment debt is barred and cannot found this action.

It must be argued by the defendant that this judgment should be deemed movable property if he is to plead this Limitation Ordinance as a defence. Because in section 15 of the same Ordinance it is set out in the most clear and unambiguous way that nothing in the Ordinance shall in any way affect the rights of the Crown or apply or extend to any "judgment."

Notwithstanding the clear wording of this section 15 it is courageously argued by Mr. Luckhoo that it should only be read as applying to rights of the Crown. And if that interpretation is not put upon it, then at best, this section should only be treated as a saving clause, and as it is in conflict with the prior section 6, then section 6 should prevail.

The reason for the defendant's anxiety to have section 6 considered as the guiding one is because it might be possible for some to read subsection (2) of it in such a way as to conclude therefrom that any judgment should be deemed movable property and therefore any action on foot of such judgment must be brought within 3 years.

As I read the subsection (2) it seems to me clear that the judgment referred to therein is a judgment registered as a mortgage or a judgment charged on lands. It sets out that any sum secured by any mortgage, judgment or lien or otherwise charged upon or payable out of immovable property is to be deemed movable property. The judgment sued upon in this case is not charged upon or payable out of any immovable property; consequently, I

am unable to see how it can be deemed movable property by that subsection and any action on it limited to 3 years.

The judgment on which this action is brought has not been converted into a mortgage or made a charge on any immovable property. It has remained a judgment and therefore in my opinion it is untouched by subsection (2.)

It is such a judgment as is contemplated by section 15 and is therefore free from any limitation of time within which an action can be brought on foot of it.

The next law on which the defendant relies in his defence that the debt is time barred is the Civil Law of British Guiana Ordinance, chapter 7, and to section 4 with the subsections and proviso I am specially referred.

The first subsection to this section appears to be quite clear and easily understood. It enacts that title to immovable property may be acquired by sole and undisturbed possession for thirty years and gives the Supreme Court power to issue a declaration of such title.

The second subsection is also quite clear. It limits the time to 12 years within which an action to recover immovable property may be brought. The same time limit is put on an entry or distress upon immovable property. This subsection is almost identical in its wording with section 14 of the Limitation Ordinance, chapter 184. What it enacts is exactly the same thing, consequently it is difficult to see why they should both remain on the Stature book.

The two subsections I have said appear to me to be quite clear. One gives a title by prescription if there has been possession for 30 years. The other enacts that suits to recover immovable property must be brought within 12 years. But the proviso to these two subsections is not quite so clear: It reads:—

“Provided that (a) sections ten to seventeen inclusive of the Limitation Ordinance shall apply as if the twelve years herein mentioned were a term of limitation under that Ordinance; and (b) thirty years shall be the utmost allowance for periods of disability preventing the running of the statute; and (c) rent arising out of immovable property and any sum secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of immovable property and any legacy payable out of immovable property shall be deemed to be movable property for the purpose of the Ordinance aforesaid.”

Part of this proviso,—that is proviso (c) is again a repetition of words used in the Limitation Ordinance. The words are exactly the same as those used in the proviso to section 14 thereof.

It is argued by Mr. de Freitas for the plaintiffs that this proviso is meaningless and useless and therefore ought to be rejected and disregarded. He submits that it is quite unintelligible because it has no bearing on what is enacted in the subsections preceding it. And that in construing the proviso it

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has to be remembered it is a proviso upon the preceding enacting subsections and according to ordinary rules of construction it must be limited in its operation to the subject matters of the enacting sections.

On the defendant's behalf Mr. Luckhoo says the meaning of the proviso is as clear as noon-day, perfectly intelligible, and easy to follow—and that it has a bearing on the enacting subsections. This view of the proviso I fear is largely induced by his desire to read into it that the word “judgment” mentioned therein should be deemed as movable property. With that view I am unable to agree because from the context I take the view that “judgment” mentioned therein is a judgment which is charged upon immovable property, not such a judgment as issued upon in this case.

It was said in one of the House of Lords cases to which I have been referred that there may be and are many cases in which the terms of an intelligible proviso may throw considerable light upon ambiguous words used in an enacting section. But the proviso which has provided this argument does not appear to me to be one of those. In my opinion the two subsections are free from any ambiguous words which tend to make their meaning obscure. They seem to me to deal quite clearly and concisely with their subjects:—title by prescription and limitation of actions for recovery of immovable property. But I am not prepared to say the same of the proviso: In fact, I am of opinion that it should be removed from the Statute book, and if it is possible to discern what was its intention, then that intention might be put in other words. As it stands it is quite mystifying. It says that sections ten to seventeen inclusive of the Limitation Ordinance shall apply. Today, there is no section seventeen or sixteen in this Ordinance, and so to any one who is not familiar with the growth of the legislation it is difficult to find out where and how these two sections disappeared.

My interpretation of the law as it stands to-day is, that there is no limit to the time within which a suit can be brought on foot of a judgment. I would say such a position was not intended; therefore some amendment to section 15 of the Limitation Ordinance, chapter 184, appears necessary.

In my opinion the proviso to section 4 of the Civil Law of British Guiana Ordinance, chapter 7, serves no useful purpose where it is placed and as it is presently worded. If the substance of what it intends to enact is retained in the law, it would be better I think to incorporate it in the Limitation Ordinance.

The remaining point for decision arises out of the contention that as the plaintiffs had already obtained a judgment of this Court, they could have obtained leave to issue execution on it and by so doing recover the amount due on it, therefore these proceedings are an abuse of the process of the Court. In other

words, there was a remedy open to the plaintiffs and they are restricted to that remedy because in a Rule of the Supreme Court it is set out how they can apply for leave to levy execution where ten years have elapsed since the date of the judgment. And by this Rule 20 of Order XXXVI a Judge may, if satisfied that the party so applying is entitled to issue execution make an order to that effect.

In support of this contention I am referred by Mr. Stafford to the case of *Pontifex v. Ross* heard by Mr. Justice Sheriff in 1892, in which he held that the opposition of the execution creditor was ill-founded. But that case should be distinguished from this. There the plaintiff had already obtained a writ of execution, and so was in a position to levy at any time on the property of the defendant. Here the plaintiffs have never applied for the issue of execution, and, consequently, were never in a position to levy on the property. If they had been in possession of a writ of execution it is possible there would have been no necessity to bring this action, because they could have acted on it *instanter*, and without having to apply to a Judge for leave to issue execution. If a person brings an action without any necessity he runs the risk of having it stayed as an abuse of the process of the Court.

In this case I am not satisfied that there was no necessity to bring this action. It would have taken a certain amount of time to get leave of the Court to issue execution on their judgment after the lapse of 10 years. And as pointed out by Mr. deFreitas the transport of the defendant's property might have been passed before the leave to issue execution was granted and so the plaintiffs would have been deprived of their remedy against this property.

It has been argued that the plaintiffs had ample time to apply for execution on their judgment: and, as it is dated the 28th August, 1922, that cannot be denied. But if a creditor gets a judgment of the Court. I know of no law which casts a duty on him to levy execution immediately on it. He is entitled to think, and come to the conclusion that it would be a great hardship on his debtor to proceed at once to enforce his judgment either against his property or person. The judgment creditor may even think that it is more beneficial to his own interests to give the debtor time and so elect to do nothing in the way of enforcement as the plaintiffs have done in this case. If he adopts that course I think he is entitled to do so. Consequently, I cannot hold that the institution of this action was an abuse of the process of the Court.

For all the reasons I have set out I give judgment for the plaintiffs in the terms of their amended claim.

Judgment for plaintiffs.

Solicitors: *A. G. King* for plaintiff.

R. G. Sharples, for defendant.

JOHN PEREIRA v. A. E. DYETT AND KAMPTA.

JOHN PEREIRA.

v.

ALFRED ERNEST DYETT AND KAMPTA.

[1929. No. 18—BERBICE.]

BEFORE SAVARY, J. 1931. JUNE. 26.

Partition—Decision of partition officer—Appeal from—Determination by Local Government Board—Effect of Finality—No power in Board to vary or modify—Application to Court—Not made within 2 months—Out of time—District Lands Partition and Re-Allotment Ordinance, 1936, (No.16), s. 17 (now cap. 169, s. 16).

When the Local Government Board has determined an appeal from the decision of a partition officer the only tribunals competent to review it are the Magistrate's Court and the Supreme Court. It has no power to amend or to modify its determination.

Section 17 of the District Lands Partition and Re-Allotment Ordinance, 1926 (now section 16 of chapter 169) enacts that "the claimant to . . . any share or holding who is dissatisfied with a decision of the officer may . . . appeal to the Board therefrom and the Board shall have power to hear and determine the appeal . . . Provided that the claimant . . . may apply to the magistrate's court or to the Supreme Court in any manner and for any remedy now provided by law but if that application is not made within two months . . . after the determination of the appeal, the decision of . . . the Board . . . shall be final."

An appeal was made to the Board from the decision of a partition officer. On the 25th March, 1929, the Board determined the appeal and notice of its decision was given in the *Gazette* of the 30th March, 1929. On the 25th June, 1929, the Board purported to make another determination in the matter and notice of its decision was given in the *Gazette* of the 29th June, 1929. On the 24th August, 1929, the Board purported to make a third determination in the matter, and notice of its decision was given in the *Gazette* of the 24th August, 1929. At the foot of this notice it was stated that the notices respecting the decisions of March and June 1929 were cancelled. The plaintiff filed his writ on the 21st October, 1929.

Held, (1) that the decision of the Board given on the 25th March, 1929, was final, and was the only valid and effective one; and

(2) that the plaintiffs action was therefore out of time.

J. Eleazar, Solicitor, for plaintiff.

P. W. King, Crown Solicitor, for first named defendant.

E. A. Luckhoo, Solicitor, for second named defendant.

SAVARY, J.: In this action, originally brought against the first named defendant, the plaintiff claims a declaration that he is the owner of certain pieces of land forming part of Plantation Salton situate on the Corentyne Coast, in the county of Berbice. The second named defendant was added as a party when the matter first came on for trial.

The action arises out of the partition of Plantation Salton by the defendant Dyett, and among other pleas, the defendant Kampta has expressly raised the question that the action is out of time. It is unnecessary for me to discuss the merits of the dispute between the plaintiff and the defendant Kampta or the evidence relating thereto in view of the opinion which I have formed on

the point of law raised by this defendant, and, in order to decide this point, I set out shortly the course of events in the partition.

In 1926 the defendant Dyett was appointed under the provisions of the District Lands Partition and Re-allotment Ordinance, 1926, the officer to partition Pln. Salton and made his award on the 24th of October, 1927, which was published in the "Official Gazette" of the 24th of December, 1927. The defendant Kampta who claimed to be joint owner of some of the lands awarded to the plaintiff by the partition officer appealed under the provisions of the Ordinance to the Local Government Board (hereafter referred to as "the Board") against the decision of the partitioning Officer.

On the 25th March, 1929, the Board determined the appeal and notice of its decision was given in the "Official Gazette" of the 30th of March, 1929.

The partition officer had awarded to the plaintiff lot 5, sections A, B, C and E; and lots 5 and 28, section D; lots 18 and 20, sections A, B, C and E; and lots 18, 20, 29 and 30, section D, but the Board varied the award of the partition officer by allotting to the plaintiff and the defendant Kampta jointly lots 18 and 20, sections A, B, C and E; and lots 18, 20, 29 and 30, section D. The plaintiff thereupon wrote to the Board and on the 25th of June, 1929, as a result of his representation, or for some other reason, the Board purported to make another determination in the matter and notice of their decision was given in the "Official Gazette" of the 29th of June, 1929. By this notice it appears that the Board purported to vary to a substantial extent its previous decision of the 25th of March, 1929, and it is worthy of note that no reference whatever is made in the notice to the previous decision. It would appear, therefore, that, as from the 25th of June, 1929, there were in existence two decisions of the Board in the appeal, substantially differing one from the other.

By a notice appearing in the "Official Gazette" of the 24th of August, 1929, the Board purported to give a third decision dated the 24th of August, 1929, in which exactly the same parcels of land were awarded to the plaintiff and the defendant Kampta as in their decision of the 25th of June, 1929, but at the foot of this notice it is stated that the notices respecting the decisions of March and June are cancelled. I pause here to call attention to the fact that it is not stated that those decisions were cancelled, but only the notices in respect of them. In the view that I take, it becomes unnecessary to decide the effect of this footnote.

In this state of affairs I am called upon to decide which is the determination of the appeal by the Board in respect of which the two months' period of limitation runs, and without any hesitation, I come to the conclusion that the decision of the 25th of March, 1929, is the only valid one made under the provisions of the Ordinance.

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Section 17 of the Ordinance provides that if no application is made to the Magistrate's Court or to the Supreme Court within two months after the determination of an appeal by the Board, the decision of the Board shall be final, and the word "final," in my opinion, means that the decision of the Board is no longer subject to review after that period. But in this case the first decision was made on the 25th of March, 1929, so that when the Board purported to give a second decision on the 25th of June, 1929, more than two months had elapsed since its first decision which had, in consequence of the lapse of time, become a final decision under the terms of the Ordinance.

There can be no doubt that the Ordinance recognises the Magistrate's Court or the Supreme Court as the only ones competent to review decisions of the Board, and yet, if the action of the Board in giving its second and third decisions were valid, it would follow that, whilst after the lapse of two months from a decision by the Board on an appeal, the Magistrate's Court or the Supreme Court would not be competent to entertain an action arising out of the decision for a review of it, the Board itself would be competent to do so even after the lapse of two months or more, and vary or cancel it, as the case may be, and as it purported to do in this manner. The logical effect would be that there would be no finality in any partition of lands and the primary object of the Ordinance would be defeated.

Such a state of affairs could never have been contemplated by the Ordinance and the mere statement of the position taken up by the Board shows its unsoundness. In addition the Board is in the position of a quasi-judicial tribunal when hearing appeals from partition officers, and one would expect to find an extraordinary power such as was assumed by the Board in this case expressly conferred on it by the Ordinance. No such provision exists in the Ordinance.

The jurisdiction and powers of the Board under the Ordinance are contained within the four corners of it, and, in my opinion, the Board has no inherent power such as it assumed in this case. Further, it seems to me that no such inherent power exists in any judicial or quasi-judicial tribunal which has or is given jurisdiction to adjudicate upon or determine the rights of parties after the decision is signed and perfected. A power to review decisions settling the rights of parties is only given, if at all, to another and usually, a higher tribunal, subject to certain conditions, one of which is a limitation of time. The reason for this is a sound one, otherwise there would be no finality to decisions, and parties would be in a state of confusion as to their rights.

In my opinion, when the Board has determined an appeal and published its decision, the only tribunals competent to review it are those expressly mentioned in the Ordinance, that is, the Magistrate's Court or the Supreme Court.

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For these reasons I hold that the decision of the Board given on the 25th of March, 1929, is the only valid and effective one and that the subsequent decisions on the 25th of June, 1929, and the 24th August, 1929, were *ultra vires* and are mere nullities. It may be that the plaintiff has been prejudiced by the action of the Board but that is no ground for my overriding the provisions of the Ordinance.

As the plaintiff filed his action on the 21st of October, 1929, it follows that the point raised by the defendant Kampta is a good one and the action is out of time.

There will be judgment for the defendant Kampta with costs and for the defendant Dyett with costs up to, but not including, the trial, on the ground that he did not expressly plead the point of limitation on which my judgment is based.

Judgment for defendants.

Solicitors: *J. Eleazar; Crown Solicitor; E. A. Luckhoo.*

F. R. NILES v. CROWN LIFE.

FANNY RACHEL NILES, administratrix of the estate of
A. T. NILES, Deceased, Plaintiff,

v.

THE CROWN LIFE INSURANCE COMPANY, Defendant.

[1936. No. 126.—DEMERARA]

BEFORE CREAN, C.J. 1937. FEBRUARY 16.

Contract—Life insurance—Uberrimae fidei—Application for policy—Change in health of applicant—Policy not yet issued—Non-disclosure—Policy voidable.

A policy of life insurance is voidable where an assured does not disclose to the company issuing the policy any change in his health which has arisen between the application for the policy and the issue thereof.

Action by an administratrix of the estate of a deceased person claiming certain moneys on a policy of life insurance issued by the defendant company on the life of the deceased.

Abraham Vanier, solicitor, for plaintiff.

J. A. Luckhoo, K.C., for defendant.

CREAN, C.J.: The claim in this case is founded on a contract of life insurance. Contracts of this kind are known as contracts *uberrimae fidei* and may be avoided if there is concealment of a material fact though made without any fraudulent intention.

Here, the deceased filled in his application form and gave his age as 37 when in actual fact he was 12 years more. He stated he had not been attended by a physician within the five years immediately prior to his examination. But the uncontradicted evidence shows that this statement is not true as he was attended by Dr. Bissessar shortly before the signing of his form.

He was also attended by the same doctor on the 8th November, 1935 and on the 16th November his complaint was diagnosed as a duodenal ulcer and he was sent to the Public Hospital where he was operated upon and was in bed for 44 days prior to his death in February, 1936.

The premiums on the policy were paid on the 18th December, 1935, and 24th January, 1936, and the policy issued on the same date. On these facts it is argued for the insurance company that there was change in the insurability of the deceased and that such change in his health should have been disclosed to them before they accepted the premiums and issued the policy. In the application form there is a clause which seems to have cast a duty on the deceased to notify any change in his health before issue of the policy.

The fact that the deceased did not give his correct age is not stressed by the defendant though it seems to me a difference of

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12 years would have strongly influenced the rate of premium charged on this policy.

The main point relied on is that the deceased did not communicate to the defendant company the change in his health—and consequently his insurability—before they accepted his premiums and issued their policy; and having failed to do this, he concealed a material fact and so gave reason for avoiding the contract.

The evidence shows that this change was not notified to defendants and in my opinion such concealment avoids this contract of insurance and consequently the plaintiff cannot recover the amount she claims.

It is an accepted principle that the utmost good faith is required in contracts of this kind. A party is required not only to state all matters within his knowledge which he believes to be material to the question of insurance, but all which in point of fact are so. If he conceals anything that he knows to be material it is a fraud but, besides that, if he conceals anything that may influence the rate of premium it will vitiate the contract: *Dalglish v. Jarvie* (1850) 42 E.R. 89.

I gather from Mr. Vanier's submissions that he asks the Court even if it cannot award him the amount claimed by plaintiff that a reasonable sum should be awarded her. To do that would be to disregard the law on the matter: consequently his application cannot be granted.

Case dismissed with costs.

Judgment for defendant.

G. BOOKER v. T. D. WIDDUP.

GEORGE BOOKER, Appellant (Defendant),

v.

T. D. WIDDUP, Respondent, (Complainant).

[1936. No. 244.—DEMERARA.]

BEFORE FULL COURT. CREAN, C J., AND VERITY, J.

1937. MARCH 3.

Criminal law—Motor bus—Conductor—Certificate—Revocation by Inspector General—Conductor not heard before—Audi alteram partem—Application of—Acting as conductor of Motor bus after revocation of certificate—Conviction—Quashing of—Motor Vehicle Ordinance, 1932 (No. 43), s. 43 (2).

Section 43 (2) of the Motor Vehicles Ordinance, 1932 (No. 43) provided that “a certificate to act as conductor of a motor bus may at any time be suspended or revoked by the Inspector General upon the ground that by reason of his conduct or physical disability, the holder is not a fit person to hold such a certificate.”

G. B. was the holder of a certificate as a bus conductor. His certificate was cancelled by the Inspector General, but he was not given an opportunity, before the cancellation, of showing cause why the certificate should not be revoked. He was convicted for acting as conductor of a motor bus after his certificate as a conductor was revoked by the Inspector General.

Held, that as the bus conductor was condemned without being given an opportunity of being heard, the cancellation of the certificate was illegal, and the conviction must therefore be quashed.

Appeal by the defendant from a conviction by Mr. J. H. S. McCowan, Magistrate of the Georgetown Judicial District, on a charge of acting as a conductor of a motor bus after his conductor’s certificate had been revoked by the Inspector General of Police.

L. M. F. Cabral, for the appellant.

S. E. Gomes, Assistant Attorney-General, for the respondent.

The following judgment of the Court was delivered by the Chief Justice:—

This is an appeal from the Stipendiary Magistrate of Georgetown who convicted the accused of acting as a conductor of a bus after his licence had been revoked by the Inspector General of Police. He was fined the sum of 130 dollars and costs.

The defendant was convicted under section 43 of the Motor Vehicles Ordinance, 1932, and by that Ordinance a certificate to act as a conductor may at any time be suspended or revoked by the Inspector General upon the ground that, by reason of his conduct, the holder is not a fit person to hold such certificate.

Leave was given to counsel for appellant to call the appellant in this Court. He was called and gave evidence to the effect that he was not given an opportunity of being heard in his defence. In other words, his licence was revoked and he was

not given an opportunity of showing cause why it should not be revoked.

The section of the Ordinance on which he was convicted does not make any provision for a person being heard in his defence: consequently, there was nothing to lead the Inspector General or the police to think that a holder had a right to be heard in his defence before his licence was revoked.

The analogous English Act is the Road Traffic, Act, 1930, and it provides that a licence may be revoked in the same terms by the Commissioners by whom it was granted.

It further provides, however, that any person who feels aggrieved by the revocation of such licence may, by notice in writing to the Commissioners require them to reconsider the matter, and shall, on the reconsideration, be entitled to be heard either personally or by his representative. Also he has got a right of appeal to a Court of Summary Jurisdiction from the reconsideration by the Commissioners.

The English Act clearly gives a man a right to be heard on the rehearing which he can require, and in the Motor Vehicles Ordinance on which defendant was convicted there is no right given to him to require a reconsideration nor is he given a right to be heard.

The revocation contemplated by the section under which the defendant was convicted is therefore a final judgment and the defendant is entitled to the benefit of the maxim *Audi Alteram Partem* that is, No man shall be convicted unheard.

Mr. Gomes has very fairly stated that he cannot support this conviction, and, in fairness to the Magistrate, it must be stated that this point was not raised in his Court and so he was not given an opportunity of considering it.

We think that in the circumstances no order should be made as to costs.

The order of the Court is that the appeal be allowed and the conviction quashed.

Appeal allowed.

CHATTOO v. G. CORT.

CHATTOO, *et al*, Appellants (Defendants) v. GORMANSTONE
CORT, Respondent (Complainant).

[1936. No. 271.—DEMERARA.]

BEFORE FULL COURT: CREAN, C.J., AND VERITY, J.
1937. MARCH 4.

Improperly impounding animal—Stray—Pounds Ordinance, Chapter 93, section 10(c)—Complaint under—Essentials to be proved—Evidence—Inferences—To be drawn by Court.

In a complaint brought under section 10 (c) of the Pounds Ordinance, chapter 93 for taking, with the view of making the animal a stray, any animal from private premises or land of which he is not the owner or occupier or person authorised by the owner or occupier in writing there must be evidence (1) that the land is private land; (2) the defendant is not the owner or occupier; and (3) that the owner or occupier did not give the defendant an authority in writing.

A magistrate may not decide a case on the inferences drawn by witnesses; he must decide it on the inferences drawn by himself from the facts to which they swore.

Appeal from the decision of Mr. R. D. R. Hill, stipendiary magistrate of the Georgetown Judicial District, convicting the appellants for an offence under section 10 (c) of the Pounds Ordinance, chapter 93.

J. A. Luckhoo, K.C. (E. V. Luckhoo with him) for appellants. Respondent did not appear.

Cur. adv. vult.

The following judgment of the Court was read by the Chief Justice:—

The accused were charged with unlawfully taking 16 head of cattle the property of the complainant from private land of which they were not the owners or occupiers or persons authorised by the owners in writing with the view of making the said animals stray. The taking of cattle in these circumstances is an offence under section 10 (c) of the Pounds Ordinance, Chapter 93. The Respondent does not appear.

It is submitted that it was essential to prove that the land was private land before the accused could be convicted on this charge of taking cattle from the land. That submission appears to us to be quite reasonable; for if a man takes cattle from his own land or from the land of another with that person's authority, from the wording of the section it is not an offence; even, if taken with the view of making the cattle stray.

On reading the record of the Case we cannot see that there was any evidence offered as to the land in question being private land or to its identity or its nature—There is nothing in the Ordinances which creates this offence from which it could be said that

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the prosecutor is expressly exempted from proving this fact. From the record it is quite clear he has not done so. All that was necessary for the prosecutor to do was to go into the witness box and say he was the owner of the land and that he gave no permission. If he had done that the foundation for his prosecution was laid. But as the case stands we would have to assume that he owns this land before we can begin to consider the case and that we have no power to do. Strict proof of essential facts is necessary in every criminal case.

Apart from the above essential point the reasons given by the learned magistrate lead us to think that he decided the case on the inferences drawn by the witnesses whom he heard and not on any inference drawn by himself from the facts to which they swore. The evidence of admissions by Soodhoo the appellant might have been sufficient to convict him alone, had the essential preliminary proof been given by the prosecutor as to the nature and ownership of the land.

For these reasons the appeal is allowed and the convictions are quashed—Costs to appellants.

Appeal allowed.

IN THE MATTER OF THE B. G. BUILDING SOCIETY.

IN THE MATTER OF THE BRITISH GUIANA BUILDING
SOCIETY, LIMITED.

[COMPANIES WINDING-UP No. 1 OF 1937].

BEFORE VERITY, J. 1937. MARCH 8. 10.

Companies—Companies (Consolidation) Ordinance, chapter 178—Not registered under—Statutory corporation—Unregistered company—Chapter 178, section 241—Not excluded by incorporating Ordinance—Trading corporation—Winding up by Court—Conditions.

Section 241 of the Companies (Consolidation) Ordinance, chapter 178, provides that “any partnership, association or company incorporated by Ordinance, consisting of more than seven members and not registered under this Ordinance (hereinafter included under the term ‘unregistered company’) may be wound up under this Ordinance and that an unregistered company shall be deemed to be registered in that county of the Colony where its principal place of business is situate.”

Held, that a statutory corporation consisting of seven or more members and carrying on business may be wound up by the court if the incorporating Ordinance does not exclude the application to the statutory corporation of the provisions of section 241 of the Companies (Consolidation) Ordinance, chapter 178.

PETITION by shareholders and creditors of the British Guiana Building Society, Limited, that the Society be wound up by the Court.

G. J. de Freitas, K.C., for petitioners.

Francis Dias, O.B.E., solicitor, for the Society.

J. A. Luckhoo, K. C., and *B. B. Marshall*, for certain shareholders and creditors.

Cur. adv. vult.

VERITY, J.: This is a petition by certain shareholders and creditors of the British Guiana Building Society, Limited, praying that the Society may be wound up by the Court under the provisions of the Companies (Consolidation) Ordinance, Chapter 178.

The Society is a body incorporated by the British Guiana Building Society, Limited Ordinance, Chapter 223. It is not a building society registered under the provisions of the Friendly Societies Ordinance, Chapter 214, nor a company registered under Chapter 178.

It is submitted that the provisions of section 241 of the Companies (Consolidation) Ordinance, Chapter 178, are applicable to the present petition. This section refers to “any partnership, association or company except a railway company incorporated by Ordinance, consisting of more than seven members and not registered under this Ordinance” and is in terms a transcript of section 199 of the Companies Act, 1862.

The question which I have had first to consider is whether or not the provisions of section 241 may rightly be held to cover a statutory body corporate such as this Society. After considera-

tion of the various authorities cited by Counsel for the petitioners I have arrived at the conclusion that the word of the section are sufficiently comprehensive to include the present case, which in my view falls within the principle laid down in the case of *Wey and Arun Junction Canal Company* (1867) L.B. 4 Equity Cases. page 197, in which the Vice Chancellor held that although "the special Act incorporating the Company contemplates it is true its existence in perpetuity," yet "the 199th section of the Act of 1862 which is very comprehensive in its language, gives the Court the power to wind up this Company." He stated further "The effect of the Winding-Up Order is not to repeal the special Act but only to give the Court control over the affairs of the corporate Company." The same Vice Chancellor (Sir R. Malins) gave further consideration to this question in the case of the *Bradford Navigation Company* (1870) L.R. 10 Equity cases, p. 331 in which after hearing the point more fully argued he said. "I am unable to see that a canal company, or any company established by Act of Parliament except a railway Company is not within the provisions of this Act"—the Companies Act, 1862. That there is a limit to the comprehensive scope of the provisions of section 199 of that Act is shown, however, by the case of the *Bristol Athenaeum*, (1889) L.R. 43 Chancery Division p. 236 in which it was held that this section is only applicable to trading associations inasmuch as unregistered Companies are to be wound up at their "place of business" and "business" must ordinarily be trading under the Act. These principles have been held to be applicable to various institutions, associations or companies, and it appears to me that this Society falls within them. It is a trading association of more than seven members not registered under the Ordinance and as such, whether incorporated by Ordinance or not, is embraced by the provisions of section 241, from the operation of which it is not excluded either by the terms of the section as are railway companies incorporated by Ordinance nor by the Ordinance incorporating it, as in the cases of the Hand-in-Hand Fire Insurance Company and the British Guiana and Trinidad Mutual Fire Insurance Company.

I am satisfied therefore that the Society may be wound up under the Companies (Consolidation) Ordinance as an unregistered Company and it remains to be determined whether it is just and equitable that the Society should be so wound up.

The Society does not oppose the winding-up and the petitioners are supported by other shareholders and subscribers represented by Counsel. It is true that two shareholders have asked that the matter be postponed for a month to enable proposals for reconstruction to be made effective. In the view of the Society, however, as represented by its Solicitor no useful purpose would be served by such a postponement. With this view I am disposed to agree. It would appear from the uncontested allegations con-

IN THE MATTER OF THE B. G. BUILDING SOCIETY.

tained in the petition that the Society is no longer able by reason of its financial condition to carry out the objects for which it was incorporated and there seems every reason to conclude that its position would grow rather worse than better during such period of delay as is suggested.

The winding-up of this Society has been characterized by its solicitor as a calamity and it is no doubt a matter for concern and for regret. It is for this reason that I have taken time to consider my decision. It appears beyond doubt, however, that the petitioners are entitled to bring these proceedings, and that it is in the interest of the members of the Society as well as of its creditors that the Court should assume control of its affairs by means of the order prayed. I must therefore make the winding-up order. There will be the usual order that the costs of the petitioners and of the Society be taxed and paid out of the assets of the Society.

Winding-up order made.

Solicitor for petitioners: *J. E. de Freitas.*

WILLIAM C. FRASER. Appellant (Defendant)

v.

JACK ALLY, Respondent (Plaintiff).

[1936. No. 284—DEMERARA.]

BEFORE FULL COURT: CREAN, C.J, AND VERITY J.

1937. MARCH 2, 12.

Village Councils—Unqualified persons—Election—Sits and votes—Penalty—Local Government (Village Councils) Ordinance, 1935 (No. 16), section 7—Election petition—Ord. No. 16 of 1935, section 27.

The remedies provided by section 7 and 27 of the Village Councils Ordinance, 1935 (No. 16) are mutually exclusive. If a person desires, he may, within 10 days of the election, bring an election petition under section 27 on the ground that a disqualified person was elected to a Village Council. He may, however, wait until the disqualified Councillor has sat and voted, and bring an action under section 7 claiming 10 dollars per day for every day on which the Councillor sat and voted.

J. Eleazar, solicitor, for appellant.

S. J. Van Sertima, K.C., (*C. A. Burton* with him), for respondent.

Cur. adv. vult.

The following judgment of the Court was delivered by the Chief Justice:—

This appeal is from an order of the Stipendiary Magistrate of the Berbice Judicial District, by which the appellant is ordered to pay a penalty of \$100 and costs for voting at the Village Council of Rose Hall.

The claim was brought under section 7 of the Village Councils Ordinance of 1935, which sets out that a disqualified person who sits and votes at the Council is liable to a penalty of \$10 for every day on which he sits and votes.

It was found by the learned Magistrate that the appellant sat and voted at 10 meetings and consequently was liable to the above penalty imposed upon him.

The first ground of the appeal is that the Magistrates' Court had no jurisdiction. It is argued that this contravention of the Ordinance was a matter which could only be heard by way of election petition. And as the time is limited for the filing of election petitions to 10 days from the date of election, this claim or complaint should not have been heard.

It is quite correct, as submitted by Mr. Eleazar, that 10 days from date of election is the limit of time within which an election petition can be filed. But the Ordinance has a special section providing for the hearing of a complaint, such as the respondent filed in this case, and there does not appear to be any limitation to the time within which he may file this complaint.

We can see no reason why the respondent should have proceeded by way of election petition. If he had done so, he was bound to file his petition within 10 days from the date of the election. He decided, however, to file his case under a different section, and as there does not appear to us to be any limitation of time in the Ordinance as to such filing, it is impossible to rule that the complaint was filed out of time.

In the analogous English Act there is a provision that proceedings such as these shall not be instituted after the expiration of six months from the date on which the disqualified person so acted. There is no such provision in the Village Councils Ordinance here, and while it might be desirable to limit the time—particularly as power is given to any registered voter to recover the penalty—it is not for the Court to import words into a Statute which are not here.

The remaining point in the grounds for appeal is that it was not proved in the Magistrate's Court that the appellant was in arrears of rates.

It is admitted that if the *Official Gazette* relative to the payment of rates in this Council were produced to the learned Magistrate then that production could be taken as proof of nonpayment of rates by the appellant.

During the argument of the case, it was candidly admitted by Mr. Eleazar that on his objecting to the learned Magistrate's taking judicial notice of the *Official Gazette* without its actual production in Court, it was produced. Though this evidence might not have been forthcoming if Mr. Eleazar had not objected, still, when the learned Magistrate's attention was called to the fact and the *Gazette* was subsequently produced to him he was entitled

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to look at it and accept it as evidence of non-payment of rates by the Appellant.

Sections 26 and 88 of the Evidence Ordinance give the Judge a very wide discretion as to the admission of evidence and at what stage of the proceedings he can accept it. At the hearing of this case the learned Magistrate accepted the evidence as to non-payment of rates by the appellant after objection was made. We are unable to see any reason why he should not have done so, and as this appears to us to be the only substantial ground for the appeal we dismiss it with costs. Costs measured at \$15.

Appeal dismissed.

JAMES HENRY, Appellant (Defendant),

v.

DAVID FOO, Respondent (Complainant).

[1936. No. 69.—DEMERARA.]

BEFORE FULL COURT: CREAN, C.J., AND VERITY, J.

1937. MARCH 3. 12.

Appeals—Conditions precedent—Strict compliance—Notice of grounds of appeal—Copy served—Unsigned—Whether a Copy—Summary Jurisdiction (Appeals) Ordinance, chapter 16, section 8 (3).

Section 8 (3) of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16 provides that “the appellant shall within fourteen days after, draw up a notice of the grounds of appeal and lodge it with the clerk and serve a copy thereof on the opposite party”.

The notice of the grounds of appeal was signed by counsel, but the copy served on the opposite party was not signed, neither did his name appear thereon.

Held, that strict compliance with the conditions precedent to an appeal is necessary before an appeal can be entertained, and that the Court had no jurisdiction to entertain the appeal.

Appeal from a decision of Mr. F. O. Low, acting stipendiary magistrate of the Essequibo Judicial District, convicting the appellant for trespass.

S. I. Cyrus, for appellant.

H. C. Humphrys, for respondent.

Cur. adv. vult.

The following judgment of the court was read by the Chief Justice:—

A preliminary objection is raised by Mr. Humphrys to the hearing of this appeal on the ground that the appellant has not complied with section 8 (3) of the Summary Jurisdiction (Appeals) Ordinance.

This Ordinance enables anyone who is dissatisfied with a decision of a Magistrate, to appeal therefrom to this Court, but the appeal is to be filed in the manner prescribed by and subject to the conditions set out in the Ordinance.

One of those conditions is, that the appellant shall, within fourteen days after receipt of the notice, draw up a notice of the grounds of appeal, in the form prescribed and lodge it with the Clerk and serve a copy thereof on the opposite party. A further section of the Ordinance directs that every notice of the grounds of appeal shall be signed by the appellant or by his counsel or solicitor.

Admittedly, at the foot of the copy of the notice of the grounds of appeal, the name of the appellant or his counsel or his solicitor does not appear and so it is argued by Mr. Humphrys that as an appeal is not a matter of common right but of special statutory provisions, the party wishing to avail himself of a right of appeal must strictly comply with the provisions of the Statute giving such right.

The Statute giving the right of appeal is the Summary Jurisdiction (Appeal) Ordinance, Chapter 16. One of the provisions thereof is that the notice of the grounds of appeal must be signed and a copy thereof served on the other party. In this case, the copy of the notice omits the signature. Consequently, it is submitted that as one of the conditions precedent to the hearing of an appeal has not been fulfilled, the appellant cannot be heard.

For the appellant it is said that even though in the copy of the notice of the grounds of appeal there is no signature, as required by the Ordinance, the respondent is not injured in any way or prejudiced in this hearing. It is further argued by Mr. Cyrus, on behalf of the appellant, that, notwithstanding the fact that the copy of the notice does not bear a signature, it is a "copy" within the meaning of section 8 of the Ordinance and therefore it is a compliance with the section. And if it cannot be considered a "copy" then it should be considered as a "true copy." which means that the copy is so true that nobody could by any possibility misunderstand it.

And finally, leave to amend the notice is asked for by the appellant in the event of this Court finding that section 8 has not been complied with.

There is no doubt that the document served on the respondent was not likely to be misunderstood by him and therefore might be considered as a "true copy" of the notice filed in Court. But we are not really concerned about that. The Ordinance directs a "copy" to be served, and not an abbreviation of it, or the substance of it and it is our duty to give effect to the Ordinance.

From our reading of the decided cases on this point, beginning with the case of *Cook and Another v. Vaughn* decided in 1838, we consider that the document served on the respondent herein

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was not a copy of the notice as contemplated by the section, and therefore the appellant is still confronted with the point of noncompliance raised against him.

The most recent decision on a case of this kind, where an appellant has not complied with the Act which enables him to appeal, is the case of the *Duke of Atholl v. Read* heard in 1934.

The appellant in that case transmitted to the High Court a copy of the notice of appeal and case stated before he gave them to the respondent therein. According to the Statute under which the appeal was filed, it was enacted that the notice of appeal and copy of the case was first to be given to the other party. It was argued in that case that the prosecution were in no way prejudiced by what had happened and that they should not be debarred from obtaining the opinion of the High Court by reason of a slip. Nevertheless, the High Court—King's Bench Division—held that strict compliance with the statute is a condition precedent which cannot be waived. And unless the conditions precedent are fulfilled, the Court had no jurisdiction to entertain the appeal.

The above case is a very strong authority in support of the respondent's arguments that strict compliance with the Ordinance is necessary before an appeal can be entertained. In that case, both the Court and the other party were served with the proper documents in plenty of time for the hearing of the appeal, but as "B" was served before "A" and the Statute enacted that "A" should be served before "B," the Court held that there was non-compliance with the Act and until it was complied with the Court had no jurisdiction.

In this appeal it is clear that section 8 of the Ordinance, which gives jurisdiction, has not been complied with, therefore, with a great deal of regret we feel bound to come to the conclusion that this appeal cannot be heard and must be struck out.

As to the final argument of counsel for the appellant and his application to amend the notice of the grounds of appeal, it is only necessary to say that his position cannot now be rectified. It would be impossible, in the circumstances, for the appellant to comply with the Ordinance which directs him to do certain acts within a given time. That time has already elapsed; consequently, it is not now possible for him to do so.

We have had the opportunity of reading the record of proceedings before the learned Magistrate, and as a consequence, we feel obliged to say that it appears to us very doubtful whether the maps produced, grounding the claimant's case, were admissible in evidence to support the conviction. Therefore, the claim to the land in dispute, in our opinion, should not be considered as *res judicata* between the parties.

This appeal is dismissed with costs measured at \$15.

Appeal dismissed.

S. A. HUTCHINS v. J. M. B. ALLEN.

SYLVIA ALEXANDRA HUTCHINS

v.

JANE MARY BELLE
ALLEN.

[1936. No. 258.—DEMERARA.]

BEFORE CREAN, C.J.

1937. FEBRUARY 23, 24; MARCH 15.

Immovable property—Contract of sale—Non-Completion—Default of purchaser—Deposit—Whether recoverable—Part payment—Damages and expenses—Restitution to vendor.

If a deposit is paid during negotiations for a sale and, through the default of the purchaser, the contract is not completed, the vendor is entitled to retain the deposit.

Where, however, the money is not paid by way of deposit but is paid as part of the purchase price, the purchaser, if the contract is not completed, is entitled to the return of the money paid. Provided that, if the contract is not completed by reason of the purchaser's default, the vendor is not liable to return the whole of the moneys paid but only such part as exceeds the damages and expenses which he has suffered and incurred by reason of the non-completion of the contract.

Opposition action for specific performance or, in the alternative, return of moneys paid by the plaintiff to the defendant as part of purchase price of certain land in McDoom Village.

K. S. Stoby, for plaintiff.

J. L. Wills, for defendant.

CREAN, C.J.: This action arises out of negotiations which took place between the plaintiff and the defendant as to the sale of the south-half of a sub-lot in McDoom Village.

The sale to the plaintiff was never completed, but the same property was sold by the defendant to another party subsequent to the above negotiations and transport of it was advertised by the defendant.

The plaintiff entered opposition to this intended transport and, following that, filed this writ asking for a declaration that her opposition be declared just, legal, and well-founded. She now asks for an order restraining the defendant from passing transport of this property, and as an alternative relief she asks for repayment of a sum of \$125 which, she alleges, was paid to the defendant as part payment of the purchase price of \$1,600 agreed on between them during the negotiations for sale.

The defendant pleads that the plaintiff has mistaken her remedy against the defendant. Alternatively, that if there were a valid contract between the parties for the sale of this lot, time was of the essence of such contract. And as the negotiations began in January, 1936, and between that date and the 6th July, 1936, only a sum of \$100 as earnest money was paid by the plaintiff, it is pleaded by the defendant that the plaintiff failed within the

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time specified or alternatively, within a reasonable time to complete the purchase; and consequently, she had a right to rescind the contract for sale.

It is further said by the defendant in her defence that at all material times she was ready and willing to complete the said sale and that the plaintiff's unreasonable delay and conduct was equivalent to a repudiation of the sale.

The evidence shews that the bargain between the parties was that the plaintiff should purchase this lot for \$1,600, from the defendant. In pursuance of this bargain, the plaintiff paid some monies to the defendant and in proof of this, receipts for \$50, \$25 and \$25 are produced by the husband of the plaintiff. The receipts were given in February and March, 1936, and a paid cheque for \$30 dated January 30, 1936, is also produced by him

For the plaintiff, the only witness who gives evidence is her husband and that evidence is so unsatisfactory that it would be impossible to put any reliance on it whatever. His description of what he did to raise funds for the completion of this safe must lead anyone to the conclusion that the plaintiff had no money to buy this property up to July, 1936, when defendant refused to grant any more time for the raising of the purchase price.

It was put to Mr. Stoby early in the hearing of the case that if he relied on this witness to support his claim for specific performance of the contract, his claim was not likely to succeed. But he submitted that time was not of the essence of the contract and that there was another phase of the case which was apparent from the receipts signed by the defendant for the monies received from the plaintiff.

All these receipts acknowledge having received from the plaintiff the different sums mentioned therein, but it is stated in each that the amount is received on account of the \$1,600, being the purchase price of the property.. One of the receipts states that the money therein is part payment of the purchase price.

It appears to me that there are only three points of importance in this case, the first being that raised by Mr. Wills, that a plaintiff is not allowed to go outside what he has set out in his opposition in framing his case in the action following the lodging of opposition and that in this case he has done so. From my reading of the opposition proceedings and the Statement of Claim herein, I am unable to see that there has been anything done contrary to Rule 9 of the Supreme Court (Deeds Registry) Rules, 1921, and consequently, I must rule against the defendant on that point.

The next point is that of the claim for specific performance, and after hearing the evidence of the plaintiff's husband, and that of the defendant and Mr. Williams, I have no hesitation in finding that the plaintiff was at no time up to July, 1936, in a position to find the money to complete this purchase. I consider that the repeated and unreasonable delays of the plaintiff justified the

defendant in coming to the conclusion that the plaintiffs efforts to raise the balance of the purchase money were not serious and entitled her to consider the contract as at an end.

In my opinion she was perfectly justified in offering her property for sale again in July, 1936; for I accept her evidence that the plaintiff suggested to her one month as a reasonable time within which to complete the sale and that on her suggestion the ultimate agreement was that it should be completed within two months from the 21st February, 1936, the date on which the first receipt was given. And I accept the defendant's explanation of why this time-limit was not put into this document when she says she agreed to its being omitted therefrom on being informed by the plaintiff's husband that he had got a mortgage for the balance of purchase money which indicated that he was in a position to complete the purchase immediately.

On the above evidence I hold that the plaintiff is not entitled to specific performance, as by her repeated delays she has precluded herself from insisting on completion of the contract. The only remaining point, therefore, is in regard to the money lodged with defendant on foot of this contract. The plaintiff says the amount was \$125 and was paid as part of the purchase money.

The defendant says the amount she received was \$100 and that such sum was paid her as a deposit or earnest money as a guarantee for the performance of the contract, or a security for the completion of the purchase.

The amount involved in this issue is not large, but the question of distinguishing between a payment as a deposit during negotiations for a sale, and a payment as part payment of the purchase money is of some importance and requires a reference to the settled principles of law on the subject.

I think it may be taken that if a deposit is paid during negotiations for a sale and nothing more is said about it, it is according to the ordinary interpretation of business men, a security for the completion of the contract. That has been the meaning put on the term "deposit" by the decisions on the subject. And according to the law of the vendor and purchaser the inference is that a deposit is paid as a guarantee for the performance of the contract and where the contract goes off by default of the purchaser the vendor is entitled to retain the deposit: *Collins v. Stimson* (1883) 1 Q. B. D. 142.

It is admitted by counsel for the plaintiff that if the money paid by the plaintiff in this transaction is considered as a deposit, then he has no claim to it. But he argues that it cannot be so considered having regard to the wording in the first receipt given by the defendant wherein it is said that the money paid is on account of the purchase price of the property.

For the defendant it is said that the money paid should be forfeited as it was earnest money and therefore lost by the plaintiff,

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who failed to perform her contract. And even though it is mentioned in the receipt that the money was paid on account of purchase money it is submitted that the plaintiff had lost her right to the return of it, because of her repudiation of the contract by her protracted delay in producing the purchase money.

The authority I am referred to in support of this contention is the case of *Howe v. Smith* (1884) 27 Ch. D. 84 where the purchaser paid £500 “as a deposit and in part payment of the purchase money”; the contract providing that the purchase should be completed on a day named. In this case it was held that the deposit of £500, although to be taken as part payment of the contract when completed, was also a guarantee for the performance of the contract, and that the plaintiff having failed to perform his contract had no right to a return of the deposit.

The above case must be distinguished from this one because in the only writing produced herein the word “deposit” is not used. The documents say that the payments are made on account of the purchase money and nothing to indicate that they were paid by way of deposit. In other words there is nothing to show the money was deposited as a “deposit.”

A point of this kind as to the right of the purchaser to the return of the deposit money, must, in each case, be a question of the conditions of the contract. So if the contract contain any clause inconsistent with such an intention it will be excluded. And on reading the receipts produced in this case it is my opinion that the payments were made on account of the purchase money and not by way of deposit.

There is no doubt that a deposit and a part payment are two distinct things, and this distinction is realised by Mr. Wills, the defendant’s counsel; for, to supplement the writings produced, he has called oral evidence to prove that the money herein was really paid as earnest money or as a deposit.

This oral evidence is a contradiction of what is written in the documents, and naturally it has been argued that oral evidence cannot be accepted to contradict, vary, add to, or subtract from, the terms of the documents. There are exceptions to this rule of evidence, but I cannot say that this case can be classed as one of them: therefore, I must hold that this oral evidence tendered by the defendant cannot be admitted and so the contract must be interpreted to mean that the money paid by the plaintiff was not paid as a deposit but as part payment of the purchase money and as such recoverable on the non-completion of the sale.

There is even a dispute between the parties over what was the exact amount paid by the plaintiff. The defendant says definitely that she only received the amounts for which she gave receipts, which is \$100, whereas the plaintiff’s husband says he paid \$125. I have already said that his evidence is completely unreliable and therefore I think the defendant’s evidence is the correct

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version and so I find that the amount she received from the plaintiff was \$100 only.

It has been held by me that the defendant is entitled to consider the original contract for sale as rescinded. If she had been the plaintiff, she would have been entitled to take active proceedings in equity to assert her right and to secure entire restitution. The fact that she is the defendant herein does not in my view preclude her from being compensated for any outgoings which she has incurred owing to the conduct of the plaintiff which led to the rescinding of the contract. Consequently: in equity, she is entitled to deduct these expenses from the amount paid by plaintiff on foot of the purchase money. That amount I take from her evidence to be \$60.60 and deducting that from the \$100 part of purchase money there is a balance of \$39.50 for which amount there will be judgment for the plaintiff.

But as the defendant has succeeded on the major issue of the case seven-eighths of the costs of these proceedings are allowed to her, the defendant to tax her costs and to be paid and seven-eighths thereof, no costs to plaintiff.

Judgment for defendant.

Solicitors: *E. D. Clarke; W. D. Dinally.*

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[1936 No.—286. DEMERARA.]

ALBERT GRAHAM v. S.S. BORGFRED.

[1936. No. 289.—DEMERARA.]

BEFORE VERITY, J. 1937. MARCH 8, 22.

Admiralty actions—Vice-Admiralty Court—Vice-Admiralty Court Rules, 1883—Abolition of Vice-Admiralty Court—Colonial Courts of Admiralty Act (53 & 54 Vict. c. 27), ss. 2, 3, 7, 16—Supreme Court—Jurisdiction vested in—New rules not made—Vice-Admiralty Court Rules, 1883 so far as applicable—Change of rubric—Use of old rubric—Whether irregularity or a nullity—Amendment—Application for—Granted.

The writ of summons in an Admiralty action was intituled “In the Vice-Admiralty Court of British Guiana.” By 53 and 54 Vict. c. 27, s. 17 the Vice-Admiralty Court in this colony was abolished, and the jurisdiction previously exercised by it is now by virtue of sections 2 and 3 of 53 and 54 Vict. c. 27 and of section 29 of the Supreme Court of Judicature Ordinance, chapter 10 exercised by the Supreme Court. Section 7 of 53 and 54 Vict. c. 27 provided for the making of Rules of Court regulating the procedure of the Supreme Court in its Admiralty Jurisdiction, and section 16 provided that, in default of such Rules, the Rules in force at such commencement under the Vice-Admiralty Courts Act, 1863 (that is to say, the Rules of the Vice-Admiralty Court, 1883) “shall so far as applicable have effect in the Colonial Courts of Admiralty.” No Rules have been made under section 7. The forms, including the form of writ of summons, in the Vice-Admiralty Rules, 1883 bear the heading “In the Vice-Admiralty Court” and refer to the Court as “Our Vice-Admiralty Court.”

All the documents in the action were headed “In the Vice-Admiralty Court of British Guiana.” The documents were all filed in the Supreme Court Registry and bear the filing stamp of that registry. The writ and other documents requiring seal bore the seal of the Supreme Court. The action was entered and numbered in the Registry as an action in the Supreme Court; such documents as bear the signature of the Registrar were signed by the person who is Registrar of the Supreme Court who used that title in an order of Court dated 8th February, 1937. A motion by the defendant was made before the Chief Justice who is a Judge of the Supreme Court; and the arrest and the release of the defendant ship were effected by marshals of the Supreme Court.

On an application by the plaintiff to amend the rubric in the writ of summons and all subsequent proceedings by substituting the words “In the Supreme Court of British Guiana Admiralty Jurisdiction” for the words “In the Vice-Admiralty Court of British Guiana.”

Held, that the plaintiff had faithfully complied with the Vice-Admiralty Rules, 1883 and the forms thereunder; that the rubric in those Rules ought to have been altered by the plaintiff in compliance with section 16 of 53 and 54 Vict. c. 27; that the proceedings have come before the proper Court in substantial compliance, indeed in too literal a compliance, with the Rules; that the error which occasioned the application, while no doubt an error of haste, inadvertence or carelessness was conducted by failure of the Rules themselves to make adequate provision as to how such proceedings should be intituled.

Held, further, that the application to amend should be granted except in so far as it relates to the bail bond the sureties whereof were not parties to the application.

Swain v. Henry A. J. 1. 7. 1903; Davson & Co. v. Proprietors of land in New Amsterdam L.J. 25. 5. 1909 and In re McGowan & Co., Ltd., Insolvency Jurisdiction 19.10.1905 followed.

GARNETT & CO., LTD., v. S. S. BORGFRED.

Motion by Garnett & Co., Ltd., to amend the rubric in the writ of summons and all subsequent proceedings by substituting the words "In the Supreme Court of British Guiana Admiralty Jurisdiction" for the words "In the Vice-Admiralty Court of British Guiana."

Similar motion by Albert Graham.

S. J. Van Sertima, K.C., for Garnett & Co., Ltd., applicants.

J. A. Luckhoo, K.C., for Albert Graham, applicant.

G. J. De Freitas, K.C., for the defendant, respondent to motions.

Cur adv. vult.

VERITY, J.: This is an application by way of motion on behalf of the plaintiffs to amend the Rubric in the Writ of Summons and all subsequent proceedings herein by substituting the words "In the Supreme Court of British Guiana Admiralty Jurisdiction" for the words "In the Vice-Admiralty Court of British Guiana" and for consequential enlargement of time for tiling pleadings.

By the Act of Parliament, 53 and 54 Victoria, Chapter 27, section 17, the Vice-Admiralty Court in this colony was with others abolished. The jurisdiction previously exercised by that Court, however, is by virtue of sections 2 and 3 of the Act and of section 29 of the Supreme Court of Judicature Ordinance, Chapter 10, now exercised by the Supreme Court. Section 7 of the Act provides for the making of Rules of Court regulating the procedure of the Court in exercise of its jurisdiction under the Act, with the proviso that Rules so made "shall not come into operation until they have been approved by Her Majesty in Council." Section 16 of the Act provides that if Rules of Court have not been so approved on the commencement of the Act, the Rules in force at such commencement under the Vice-Admiralty Courts Act, 1863 "shall so far as applicable have effect in the Colonial Courts of Admiralty." No Rules of Court have been made in this colony under the Act, but section 44 (d) of Chapter 10 provides that in default of such Rules, the practice and procedure shall be as near as may be and with the necessary modifications in accordance with the Rules of the Vice-Admiralty Court, 1883. These Rules are those referred to in section 16 of the Act.

It is worthy of observation that in the Act there are used the words "so far as applicable" while in the local Ordinance the words used are "as near as may be and with the necessary modifications." In my view, if these latter words have any meaning inconsistent with or different from the words "so far as applicable" they are inoperative, for it is not competent for the local Legislature to vary the terms or effect of an Act of Parliament applicable to this colony. The practice of the Supreme Court therefore in the exercise of its Admiralty Jurisdiction is, until Rules be made by the proper Authority and approved by the King in Council, that prescribed by the Rules of 1883 "so far as applicable."

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Those Rules prescribe that every action shall be commenced by Writ of Summons, set out those things which must be contained in such Writ and require that the Writ shall be issued under the seal of the Court. Rule 5 states that the form of Writ "will be found in the Appendix" and other Rules, as occasion requires, make reference to such forms. Rule 199 prescribes that these forms "shall be followed with such variations as the circumstances may require" and that "any party using any other forms shall be liable to any costs occasioned thereby." The forms in every applicable case bear the heading "In the Vice Admiralty Court" and refer to the Court as "Our Vice-Admiralty Court."

With these Rules and with these forms the plaintiffs have faithfully complied and their compliance has been followed by the defendant. Such compliance, is under section 16 of the Act only required so far as these Rules are applicable and it may well be considered that the description of the Court as "the Vice-Admiralty Court" is not now applicable. The parties to the present action are not, however, singular in this literal compliance with Rule 199, for the like description of this Court appears in certain other actions to which my attention has been drawn by the Registrar at my request.

The plaintiffs submit that this misdescription is a matter of form, amendment of which should now be allowed. The defendant, on the other hand, submitted as a preliminary objection that there are no proceedings before the Supreme Court to which this motion may be related and that there is nothing before the Supreme Court to be amended inasmuch as all previous proceedings have been before a non-existent or pretended Vice-Admiralty Court. The defendant further submits that such proceedings are therefore a nullity, incurable by any amendment. It is right that I should say that counsel for the defendant clearly stated that there is no desire on the part of the defendant to evade liability by opposition to this motion, but merely a desire to have the matter decided on a legal basis by correct legal proceedings free from danger of future difficulty.

The first point to be decided is therefore, whether there are any proceedings in the Supreme Court in regard to which this application may properly be made.

All proceedings prior to this notice of motion are headed "In the Vice-Admiralty Court of British Guiana." Examination of the record discloses that the documents have all been filed in the Supreme Court Registry and bear the filing stamp of that Registry; that the Writ and other documents requiring seal bear the seal of the Supreme Court; that the action is entered and numbered in the Registry as an action in the Supreme Court, that such documents as bear the signature of the Registrar are signed by Mr. Duke, the Registrar of the Supreme Court, who, in an Order dated the 8th February, 1937, signs as such, using the

words, "Registrar of the Supreme Court." that a motion by the defendant was made before the Chief Justice, who is a Judge of the Supreme Court: and that arrest and release of the defendant ship were effected by Marshals of the Supreme Court.

This case may therefore at the outset be distinguished from the case of *The John*, 1 Dodson's Reports, page 380. In that case the proceedings were taken in a Court entirely devoid of jurisdiction by reason of its unauthorised constitution, whereas, in the present case, every essential step has been taken in fact in the Court and by the Officer vested with jurisdiction and all pleadings have been duly filed in the Registry of that Court and sealed with its seal. The sole error has been misdescription of the name of the Court occasioned by too close adherence to inapt Rules which, nevertheless, for some forty years had been allowed to regulate the proceedings of the Supreme Court in the exercise of its Admiralty Jurisdiction.

Counsel for the defendant also cited certain local cases in which appeals were not allowed, because of misdescription of the name of the Court from which the appeal was made. It is unnecessary to refer to these cases further than to observe that in matters of appeal strict compliance with the statute creating the right of appeal is necessary to the jurisdiction of the Appeal Court. I am unable to find in them authority for a conclusion that the jurisdiction of the Supreme Court rests upon the terms in which it may be described in the proceedings.

I am satisfied that, however the Court may have been described, these proceedings have in fact been filed in the Registry of this Court and sealed with its seal; that steps have been taken by both parties thereto before this Court, the proper Court and a Court of competent jurisdiction. This Court must therefore take cognizance of the proceedings, but it is open to it to decide whether such misdescription as appears in the record of proceedings before it, is of such a nature as to render those proceedings null, or as to be an irregularity which may be cured by amendment.

In *Smythe v. Wiles* (1921) 2 K. B., p. 66., Lord Justice Bankes adopted with approval the words of the learned author of *Chitty's Archbold's Practice*, 14th Edition, page 445 "where the proceeding adopted is that prescribed by the practice of the Court and the error is merely in the manner of taking it, such an error is an irregularity but where the proceeding itself is altogether unwarranted and different from that which, if any, ought to have been taken, then the proceeding in general is a nullity."

The application of this general principle in specific instances is not perhaps without difficulty. Counsel for the defendant cited a number of cases: *The Attorney-General v. Hotham* (1827) 3 Russell's Reports, 415, in which proceedings before Commissioners in a matter in which they had no jurisdiction were held to be a

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nullity; *Hanson v. Shackelson* (1835) 4 Dowling's Reports, page 48, in which a Writ entered on a Sunday was held to be a nullity: and *Clarke v. Smith* (1858) 2 Hurlstone & Norman, page 753, in which it was held that the date of a writ could not be amended, when such an alteration prevented the operation of the Statute of Limitations. On the other hand, I have made reference to the local cases of *Swain v. Henry*, A.J., 1.7.03, in which it was held that an appeal wrongly intitled in the Appellate Jurisdiction could nevertheless be heard in the general jurisdiction to which it had been entered for hearing properly, although by an oversight; *Davson & Co., v. The proprietors of certain land in New Amsterdam, L.J.*, 25.5.09, in which although pleadings were by a series of mistakes headed "Limited Jurisdiction," in a matter beyond such jurisdiction, yet it was held that the action should be heard by the Court in its general jurisdiction: *In re McGowan & Co., Ltd.*, Insolvency Jurisdiction, 19. 10.05 where a preliminary objection taken to the hearing of an appeal from the Liquidator's decision on the ground that the proceedings were not properly intitled was overruled. I have also referred to the cases of *Pleasants v. The East Dereham Local Board* (1882) 47 L.T.R., p. 439, in which a Writ required to be tested by the Lord High Chancellor bore the name of a Chancellor not then holding office. In this case the Writ complied in all respects with the requirements of the General Orders and Forms, with the exception of the inaccuracy of the teste; it was properly issued and dated and duly sealed, and Chitty, J. held that the objection was of a "highly technical character" and the error one which the Judge had power to set right by amendment. In *Taylor v. Roe* (1893) 68 L.T.R., p. 213, a notice of motion was by mistake marked with the name of the wrong Judge and an amendment was allowed. In the case of *Markham Cremer Law*, W.N., 1914, page 258, preliminary objection was taken to a motion to commit on the ground that the notice was defective, being intitled in the matter of one only of the persons sought to be committed. Sargant, J., over-ruled the objection as being "a mere technicality."

These cases disclose the manner by which the general principle should be adapted to particular circumstances, and from them I conclude that where proceedings have (even by an oversight, as in *Swain v. Henry*) come before the Court vested with jurisdiction to determine the issue and where there is substantial compliance with the Rules, a mere non-compliance by way of error in the description of the jurisdiction, of the Judge having seisin of the action, or in the title of the proceedings, is an irregularity which the Court can and should cure by allowing an amendment.

In the present case the proceedings have come before the proper Court in substantial compliance, indeed in too literal a compliance with the Rules, and the error which occasioned this motion, while

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no doubt an error of haste, inadvertence or carelessness was, moreover, conducted by failure of the Rules themselves to make adequate provision as to how such proceedings should be intituled.

I am of the opinion that such an error is no more than an error in the manner of taking the proceedings and that the proceedings themselves are not unwarranted nor different from those which ought to have been taken and if my view is correct as to the nature of the error and as to the real nature and existence of these proceedings, then I ought to give leave to amend. I so direct in regard to all proceedings, save and except the Bail Bond filed on the 31st December, 1936, to which, perhaps, other considerations may properly apply. It is a bond entered into by persons not party to the proceedings and who have no right to intervene on the hearing of this motion. The plaintiffs, if they are so advised, may be content to rely upon the bond as it now stands, or the bondsmen may, if they so desire, enter into a fresh bond or consent to the amendment of the existing bond. On the other hand, if neither of these courses commends itself, I shall be prepared to take into further consideration such part of this motion as relates to the bond, when opportunity should be given for the bondsmen to be heard.

The enlargement of time for filing pleadings prayed as consequential will be allowed.

The necessity for the motion having arisen from the plaintiffs' default and the defendant having also fallen into like error and having unsuccessfully resisted the application, each party will bear their own costs of this motion up to and including the entering of the present Order.

Order made on motion.

Solicitors: for the plaintiffs, *V. C. Dias; F. Dias, O.B.E.*
for the defendant, *J. E. de Freitas.*

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H. B. OUTAR v. S. E. OUTAR & R. SINGH.

[1935. No. 54.—DEMERARA.]

BEFORE CREAN, C.J. 1937. FEBRUARY 17; APRIL 12.

Matrimonial causes—Barrister practising as a solicitor—Prohibition—Legal Practitioners (Definition of Functions) Ordinance, 1931 (No. 15), section 4—Act of a barrister practising as a solicitor—Whether nullity.

In matters within the matrimonial Jurisdiction of the Supreme Court a party may transact business in the registry either in person or by a solicitor. In such matters a barrister is not entitled to practise as a solicitor. Where, therefore, a barrister, acting on behalf of a petitioner applying for a decree of dissolution of marriage, extracted a citation on behalf of a petitioner, the citation and subsequent proceedings were set aside as a nullity.

Petition for dissolution of marriage. When the petition was filed there was no solicitor on the record. The citations were extracted by Mr. E. G. Woolford, K.C., acting as counsel for the petitioner. At the trial objection was taken to the validity of the proceedings on the ground that a barrister at law was not empowered or authorised to practise as a solicitor in matters within the matrimonial Jurisdiction of the Supreme Court.

E. G. Woolford, K.C., for petitioner.

K. S. Stoby, for respondent

Cur. adv. vult.

CREAN, C.J.: It has been argued in this case that as the petition is not signed by a solicitor, but by a barrister, the proceedings thereunder are a nullity and so should be set aside.

The ordinance on which this argument is founded is the Legal Practitioners (Definition of Functions) Ordinance, 1931, and by that Ordinance a barrister is to have exclusive right of audience in this Court when sitting in its probate, divorce, matrimonial or admiralty jurisdiction. This is enacted by section 4 thereof, and subsection 2 enacts that in every case mentioned above, a barrister shall be instructed by a solicitor on the record.

According to the Rules of Court (Matrimonial Causes), 1921, proceedings before the Court shall be commenced by petition, preferred unto the Supreme Court of British Guiana. The proceedings herein were begun by petition, but as that petition was signed by the petitioner and his counsel, who was not instructed by a solicitor, it is contended that non-compliance with the Ordinance of 1931, which makes it imperative for a barrister to be instructed by a solicitor, renders this petition and the subsequent proceedings thereunder a nullity.

There can be no doubt about the right of a petitioner to sign a petition and file it himself, without the aid of a barrister or a

solicitor. In this case the petition is signed by the petitioner and in addition by a barrister. The fact that it is signed by a barrister, as well as by the petitioner, does not in my opinion make it bad. The signing by the barrister is, I think, merely superfluous and not such an irregularity as to make it a nullity. If it were declared to be a nullity, the effect of that would be to penalise the petitioner, because another person elected to sign the petition in addition to himself. The subsequent proceedings, however, cannot be considered in the same light. The documents filed in furtherance of the petition are signed by counsel alone and therefore clearly indicate that he is acting professionally for the petitioner in the conduct of the proceedings without being instructed by a solicitor. Rule 9 of the Rules of Court (Matrimonial Causes), 1921, does not provide for this. It sets out that the petitioner or his solicitor may take the several steps herein named.

From reading the above, it is clear to me that a barrister has a right of audience only in a matter such as this and it seems to me equally clear that such barrister must be instructed by a solicitor, which means that the different acts leading up to the hearing in Court must be done by the solicitor and not by the barrister.

It has been argued that the Ordinance makes it imperative for a solicitor to be on the record, when a barrister appears on the hearing, and that as the Ordinance has not been complied with, the proceedings herein are a nullity and should be set aside. This argument appears to me to be quite sound. In a case where the Court is satisfied that substantial justice requires any of its own regulations to be waived or any slip remedied, it will interfere for that purpose. But where a matter is directly regulated by Act of Parliament, there does not appear to be any power in the Court to waive or condone non-compliance with the Act of Parliament or Ordinance (*Smith v. Baker*, 1862, 2 H. and M., 498). And as there has been non-compliance with the Ordinance of 1931, the proceedings, as from the filing of the petition, must be set aside with costs.

The position of the case now is—the petition on the file is regular, the subsequent proceedings irregular and not in accordance with the Ordinance.

Solicitors: *V. D. P. Woolford*, for petitioner.
T. A. Morris, for respondent.

H. G. MATTHEWS v. U. A. MATTHEWS.

HENRY GREGSON MATTHEWS, Petitioner,

v.

URSULA ALICE MATTHEWS, Respondent,

[1936. No. 53.—DEMERARA.]

BEFORE VERITY, J.

1936. Nov. 24, 25, 26, 27; DEC. 1, 2, 3; 1937. APRIL 15.

Dissolution of marriage—Malicious desertion—Meaning of—Deliberate, definite and final repudiation of marriage against will of other without just cause or legal justification—Evidence—Element of time—Restitution of conjugal rights—Petition for—Not necessary to found a petition for divorce or ground of malicious desertion.

Malicious desertion must at least include a deliberate, definite, and final repudiation of the marriage state by one spouse against the will of the other, and without just cause or legal justification.

The existence of this determination on the part of the deserting spouse may be deduced from conduct of varying kinds but it is essential that its existence must be proved or properly inferred from the evidence if it is desired that the Court should dissolve the marriage on the ground of malicious desertion.

The Court will not lightly determine the marriage bond where there is no clear and convincing evidence of such final repudiation, nor by its decree will the Court convert into final dissolution what may well be but a temporary withdrawal,—the result of hasty disagreement or misunderstanding.

In many cases the element of time will be one for consideration in ascertaining whether or not the desertion is in fact evidence of final repudiation. The efforts of the petitioner to secure or afford opportunity for the return of the respondent, will be for consideration in ascertaining whether or not the withdrawal is against the will of the petitioner.

The law of this Colony does not require that there be refusal on the part of the respondent to comply with an order for the restitution of conjugal rights before a decree of dissolution of marriage be pronounced on the ground of malicious desertion.

Petition by a husband for dissolution of marriage on the ground of the malicious desertion of his wife. The necessary facts appear from the judgment.

E. G. Woolford, K.C., for petitioner.

J. A. Luckhoo, K.C., (*A. T. Peters* with him) for respondent.

Cur. adv. vult.

VERITY, J.: This is a petition by a husband for the dissolution of his marriage on the ground of malicious desertion. The proceedings included also a prayer by his wife for judicial separation on similar grounds, but there being no evidence of desertion for the statutory period of two years, this prayer was abandoned and the sole issue remaining is that of the alleged malicious desertion of the husband by the wife.

There does not appear ever to have been reported a comprehensive definition by the Courts of this Colony of the term “malicious desertion,” but consideration of cases decided in the Courts of both South Africa and Ceylon gives assurance that under the

Roman Dutch system of law from which this ground for divorce has been adopted and to which one may rightly refer for guidance in this regard, malicious desertion must at least include a deliberate, definite, and final repudiation of the marriage state by one spouse against the will of the other and without just cause or legal justification.

The existence of this determination on the part of the deserting spouse may be deduced from conduct of varying kinds, but that its existence must be proved or properly inferred from the evidence is essential if it be desired that the Court should dissolve the marriage on this ground.

The Court will not lightly determine the marriage bond where there is no clear and convincing evidence of such final repudiation nor by its decree will the Court convert into final dissolution what may well be but a temporary withdrawal, the result of hasty disagreement or misunderstanding.

It may be desirable that the law should prescribe, as in the case for petitions for judicial separation, some period beyond which alone could such a petition as the present be brought, not with the object of substituting statutory desertion for malicious desertion, but for securing a reasonable period within which the erring spouse might have time for consideration and the aggrieved spouse have opportunity for seeking by every means just reconciliation. This is a view which in my opinion might well receive consideration in the proper quarter, but, be that as it may, no such period is prescribed by the existing laws of the Colony, nor do those laws require that there be refusal on the part of the respondent to comply with an order for the restitution of conjugal rights before a decree of dissolution of marriage be pronounced on the ground of malicious desertion as is required in South Africa.

Nevertheless, it is in accordance with what I conclude to be the fundamental principles of the divorce laws of this Colony that the respondent should be shown by evidence of his or her conduct definitely to have reached a final determination to repudiate the obligations of the marriage state, and also that it should be shown by evidence of the petitioner's conduct that such repudiation is against his or her will.

While, therefore, it is not required by the laws of this Colony that there should be any defined period of desertion nor that legal proceedings should have been instituted to secure either the return of the deserting spouse or refusal of return in obedience to an order of the Court, yet in many cases the element of time will be one for consideration in ascertaining whether or not the desertion is in fact evidence of final repudiation. The efforts of the petitioner to secure or afford opportunity for the return of the respondent, moreover, will be for consideration in ascertaining

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whether or not the withdrawal is against the will of the petitioner.

It is in accordance with these principles that I approach consideration of the facts in the present case.

The parties to these proceedings have been married for over twelve years and are the parents of six surviving children, of whom the youngest is but seven years of age. The petitioner assures me that up to the time of the respondent's departure from his home in November, 1935, she was a good wife to him, that he desired her to stay with him and that any time within five months after her departure he would gladly have had her back. The respondent assures me that but for certain charges brought by her husband reflecting on her moral character she would have brought no prayer for separation and this prayer she has now in fact withdrawn.

Under such circumstances the Court will be careful that by no unnecessary word are the unfortunate causes of division in any measure aggravated, nor, whether a decree *nisi* pronounced or not, shall all hope of reconciliation be extinguished.

I have heard a great deal of evidence and have given that evidence most careful consideration. This has led me to the conclusion that there have been two main causes for the present unhappy separation of the parties to these proceedings. Firstly, the suspicion of the wife in regard to the relations of the petitioner with one of his customers, Isabella Ross, and secondly, in so far as the existing attitude of the respondent is concerned, the charge brought by the petitioner against her in regard to her relations with Violet Williams.

For the purpose of this petition it is unnecessary that I should determine whether as a fact the petitioner has been guilty of improper intimacy with Isabella Ross. It is sufficient that I should express the view which I hold, after consideration of all the evidence, that it is not established by such evidence that the petitioner has been guilty of such intimacy, but that nevertheless so imbued was the respondent with suspicion in this regard that her conduct towards the petitioner led to frequent quarrels and was the real source of those differences which led to her departure from his home in November, 1935.

It would be unnecessary also to refer to the charges brought by the petitioner against his wife in regard to the incident of the 4th of November involving Violet Williams, were it not for the light which that charge may throw upon the intentions of both husband and wife at the time of their separation and their conduct since then. It is in my view unfortunate that the petitioner either made or attempted to prove this charge which, after most careful consideration, I must find to be without foundation. Direct evidence is given by the petitioner alone. It purports to be supported by a letter which he states was handed to him by his

wife but which is not in her handwriting. The petitioner suggests that it is in the handwriting of Violet Williams. Careful examination of her handwriting and of specimens of the petitioner's handwriting has led me to the conclusion that there can be but little doubt that the letter (exhibit 1) was written by the petitioner himself. The circumstances of the incident as related by the petitioner, apart from the evidence of the respondent and Violet Williams, confirm my view as to the falsity of this allegation.

I have, however, to give closer consideration to the actual circumstances of Mrs. Matthews' departure from her home and the conduct of both parties thereafter, in order that I may ascertain whether or not the facts as I find them indicate that the respondent had finally determined to repudiate the marriage state and whether or not her departure was against the will of her husband. Acceptance of the petitioner's evidence in its entirety would in itself hardly lead to such a conclusion and modified as it must be by the evidence of the respondent and her witnesses it drives me irresistibly to an opposite conclusion. Violent as may have been the quarrels occasioned by the wife's suspicions, and extravagant as may have been the language used by both parties. I am satisfied that the respondent and her stepfather are telling the truth when they state that Mrs. Matthews' leaving home during the second week in November was a matter of mutual arrangement reached in the hope that lapse of time might heal the breach and lead to re-union. Mutual recriminations, defiant threats, even physical force are by great misfortune not uncommon in the course of married life when suspicions just or unjust are aroused. Time, patience and a real desire for reconciliation not infrequently lead to a restoration of happier circumstances. This I believe to have been the feeling of the respondent and at least the outward attitude of the petitioner. Whether it was in fact his real motive in consenting to or inducing her departure or whether some less honest motive lay behind his conduct, subsequent events may be found to disclose.

What, therefore, was the conduct of each party thereafter? It is difficult to determine this in detail with accuracy, but from the evidence of the petitioner himself it is patent that on no occasion after what I have found to be their temporary separation by mutual agreement has he taken one step either to secure or to allow his wife's return. On the other hand, it is proved that the wife, the spouse who is alleged to have conceived the deliberate and final determination to repudiate the marriage state, has continually approached her husband personally, by letter and through the mediation of others. It is true that each interview resulted in a quarrel and that her personal letters are couched at times in objectionable terms, but nevertheless they do not indicate a determination to be done with her husband or her marriage, and it is beyond doubt that every approach made by her or on her behalf

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has been met by the petitioner's blunt refusal to furnish money, to see his children, to discuss reconciliation, or to take any of those steps which might well have led to his wife's return. On the evidence of the petitioner himself, of Mr. Peters' letter, of the respondent and her witnesses, we have, it is true, the use of hasty and defiant words in the course of quarrels but also efforts on the respondent's part to assert her rights and her position as a wife and on the petitioner's part an apparently fixed determination to follow no course which might lead to reconciliation. Although moreover, the petitioner states that up to five months after his wife left him he had kindly feelings for her and would gladly have had her back, yet within fourteen weeks he filed his petition for divorce in spite of the fact that, as I have found, the original separation was by mutual consent and that he had refused Mr. Peters' offer of mediation within fifteen days of that separation.

Neither party has told the whole truth in this case. Each has no doubt made the best of his or her story. Nevertheless, the impression left upon my mind during the hearing of the evidence and upon further consideration would render it in my view a patent misuse of terms to describe this separation as malicious desertion on the part of the wife. I cannot, therefore, declare that the respondent has maliciously deserted the petitioner, the decree prayed must therefore be refused and the petitioner be dismissed.

I will consider any application that may be made with regard to costs.

I should perhaps add that after the conclusion of the evidence I requested counsel to interview me in Chambers. I then indicated to them an expression of my hope that the parties might yet be reconciled and expressed my willingness to defer the delivery of my judgment in order that further opportunity might be afforded to that end. This hope, has, I regret, proved fruitless, up to the present time. I am fully aware that the original differences which unhappily arose between these persons have been aggravated by the nature and course of the legal proceedings which have ensued and that the prospect of a resumption of their married life has grown more remote. It has nevertheless been my duty in accordance with the laws of this Colony as I understand them to refuse on this petition a dissolution of marriage. I would, however, recommend to both parties a further consideration of their obligations to each other and their responsibility towards their young children.

Petition dismissed.

F. A. NORVILLE, R. A. HILL, & R. V. EVAN WONG

F. A. NORVILLE, Judgment-creditor,

AND

R. A. HILL, Judgment-debtor.

AND

R. V. EVAN WONG, Garnishee.

[1931. No. 146.]

BEFORE SAVARY, J. 1931. AUGUST 17, 24, 27, 31.

Practice—Attachment of debts—Debt—Nature of—Action for work and labour—Consent to judgment—Debt created thereby.

Where a person consents to judgment in an action for work and labour done a debt is created which can be made the subject of garnishee proceedings, even though judgment may not have been given on the consent at the time of the garnishee order *nisi*.

Application to make absolute a garnishee order *nisi*. The facts appear from the judgment.

P. N. Browne, K.C., for judgment-creditor.

H. C. Humphrys, for judgment debtor.

Cur. adv. vult.

SAVARY, J.: On the 6th August, 1931, a garnishee order *nisi* was issued in this matter returnable on the 17th August, when the order was made absolute after hearing the parties.

Shortly after the Registrar called my attention to certain facts whereupon I cancelled my order and directed that the application be set down for further consideration on the 27th August.

Two points were discussed on that day: (1) whether there was an attachable debt owing by the garnishee to the debtor; (2) whether the sum of \$150.23 paid into Court by the garnishee was paid in this action by virtue of the garnishee order *nisi* or in an action of *Hill v. Wong* in which Wong had consented to judgment. In *Hill v. Wong* action, No. 96 of 1931, the plaintiff sued on a specially endorsed writ to recover the sum of \$138.11, a balance alleged to be due to him for work and labour done. The defendant Wong was given leave to defend and filed a statement of defence on the 21st April, 1931, and on the 1st May a reply was filed. On the 6th August a consent to judgment for the amount claimed and costs was filed by the defendant Wong; on the 17th August the plaintiff Hill applied for judgment in terms of the consent as filed and on the 18th August judgment was given accordingly.

The sum of \$138.11, the subject of the suit of *Hill v. Wong*, is the basis of these garnishee proceedings.

The application for a garnishee order *nisi* was filed on the 6th August the same day that Wong consented to judgment in the other suit of *Hill v. Wong*, and it was not disputed that this consent was filed before the garnishee proceedings were instituted.

The first question for decision is whether in the circumstances this sum of \$138.11 could be the subject of attachment proceedings on that day.

For the judgment creditor Mr. Browne submits that the effect of the consent to judgment is to establish evidence of a debt even before judgment is given, whilst Mr. Humphrys contends on behalf of the debtor that an attachable debt is created only when judgment is given in terms of the consent. I agree with the submission of counsel for the judgment creditor that the cases of *Jones v. Thompson* (1858) 6 W.R. 443 and *Dressee v. Johns* (1859) 28 L.J. C.P. 281, can be distinguished.

In those cases it was decided that a mere verdict for damages by a jury does not constitute an attachable debt until the Judge has pronounced judgment in conformity with the verdict, so that if this principle of law could be applied to this first point, the application would fail. But in my opinion where the claim in the action is for debt and there is a subsequent consent to judgment there is an attachable debt from that moment so long as the consent stands. A consent under these circumstances is, to my mind, an acknowledgment of the debt; it revives the debt from that moment, so to speak, and that is sufficient to ground this application. A verdict for damages by a jury is merely making certain or fixed what was before an unliquidated claim for damages. It is the antithesis of a claim for debt.

The verdict of the jury has no effect until the Judge pronounces judgment and is not an acknowledgment of a debt since no debt was alleged to have existed. I hold therefore that there was an attachable debt due from the garnishee to the debtor when these proceedings were instituted. On the second point I have no doubt that Wong intended to pay the amount into Court by virtue of the garnishee order *nisi* served on him. He handed to the clerk at the Registry at the time the deposit was made, an affidavit which showed clearly that he so intended, and in my opinion, the clerk made a mistake in depositing the amount to the credit of the suit of *Hill v. Wong*, instead of to this suit. In addition there was no authority to receive the money in the suit of *Hill v. Wong* without the leave of the Court or a Judge as a defence had already been filed.

The garnishee was entitled to pay the money into Court under the provisions of the Rules of Court dealing with attachment of debts. I make the order absolute and direct payment to the judgment creditor of the money paid in by the garnishee and I direct the judgment debtor to pay the costs of the hearing of the 27th August only. If at the hearing of the 17th August, my attention had been called by the judgment creditor's counsel to the material facts, further consideration of the matter would have been unnecessary. I direct the Registrar to vary the Act of Deposit in conformity with my judgment.

Solicitor: *H. B. Fraser*, for plaintiff.

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ANTONIO PEREIRA, Plaintiff,

v.

ANTONIO PONTES PEREIRA, Defendant.

[1934. No. 219.—DEMERARA.]

BEFORE VERITY, J. 1937. JANUARY 5, 6; APRIL 15.

Land—Lot—Subdivision—Title—Half lot—Known as half lot—Construction—Metes and bounds—Limitation of area, reference to diagram or plan—Not defined or described in title by reference to—Meaning.

Where the title defines the boundaries or refers to land as “known as the half lot” then land actually possessed and dealt with in a certain division enclosure or boundary and known as such a half lot is to be taken to answer that description, but where land is described in the transport as “North half lot” or “south half lot” then the owner by transport is entitled to the mathematical half of the whole lot in question.

Best v. Foster, Full Court, July 7, 1866 and,
Wills v. Gonsalves, G.J. 12.12.1904 considered.

Meaning of “lot” where not defined or described by reference to metes and bounds, limitations of area, or reference to any diagram or plan considered.

H. C. Humphrys, for plaintiff.

S. J. Van Sertima, K.C., for defendant

Cur. adv. vult.

VERITY, J.: In this case the plaintiff is the owner of a parcel of land described in the transport from which he derives his title as “north half of lot number 12, Charles Street in New Charlestown District in the City of Georgetown,” and the defendant is the owner by transport of a parcel of land described therein as “south half of lot number 12 situate in New Charlestown, City of Georgetown.”

The plaintiff acquired his half lot by judicial sale transport on 23rd of November, 1925, and alleges that in or about January, 1934, he became aware that the defendant had been occupying a part of the north half of lot 12 lying between the northern boundary of the south half lot and a paling immediately north of such boundary. He alleges that the defendant was the tenant of the plaintiff’s predecessors in title in respect of this piece of land and that the defendant not only paid rent to them but also acknowledged the plaintiff’s title, agreed to lease from him at a rental of \$15 per annum and paid him the sum of \$10 on account of rent in January, 1934. Subsequently, the defendant, it is alleged, claimed the land as his own property and repudiated the agreement for a lease.

The plaintiff’s claim for a declaration, injunction and damages rests upon these allegations.

The defendant denies that the land in dispute is the plaintiff’s

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property and avers that it forms part of the south half of lot 12 of which he is the owner by transport, or, alternatively, that he had prior to January, 1917, acquired ownership thereof by prescription. He further claims that the plaintiff is barred from bringing this action by the operation of subsection (2) of section 4 of the Civil Law of British Guiana Ordinance, Ch. 7. He denies payment of rent to the plaintiff's predecessors, any admission of the plaintiff's title, any agreement to lease or payment to the plaintiff on account of rent.

It will be convenient first to consider the evidence in regard to the alleged tenancy by the defendant of the piece of land in question. The allegations are supported by the evidence of the plaintiff himself and of the witnesses Leila and Walcott. Neither the testimony given by these persons nor their manner of giving it impresses me favourably. Each as to the facts he relates is unsupported, and, in the face of the denials of the defendant, I am not prepared to accept their evidence.

I am therefore thrown back upon the history of the land and examination of the title thereto in order that I may determine the issue.

Title to lot 12 has been traced to the year 1820 when concession or lot 12 was amongst other lots conveyed by transport to John McDowell by H. J. Van de Water as special attorney of C. A. Baron van Grovestein and M. J. Retemeyer representatives and administrators of Le Repentir.

In 1824, 1834, and 1842 further transfers of lot 12 were effected, and in 1843 the north half of lot 12 was conveyed by Henry Marks to Abraham Swart.

No further documents of title were produced in evidence until the judicial sale transport dated 23rd November, 1925, under which the plaintiff secured his title to the north half of lot 12.

It is to be observed that at no time during the history of lot 12 or north half thereof as disclosed by the documents produced in evidence is lot 12 or the north half thereof defined or described by reference to metes and bounds, limitations of area or reference to any diagram or plan.

It appears, however, to be common ground that in the month of January in the year 1820 George Baker, a sworn surveyor, made a survey of a part of the front lands of Le Repentir at the request of A. Barkey and Baron Van Grovestein, the representatives of the plantation. In 1934 each party to this action sent a surveyor to survey and make a plan of lot 12 and each surveyor purports to have used as a basis of his survey the plan made by Mr. Baker of his survey of January, 1820.

The land surveyors in 1934, however, appear to have proceeded upon their surveys by different methods and actuated by different principles. Each appears to have accepted as his starting point the north-west corner of lot 10 as this now appears fixed by a

paling in present existence. From this point, however, the methods of the surveyors diverge. Mr. Parker proceeds to accept existing palings indicating the boundaries of lots 11 and 12 while ignoring the paling indicating the division of lot 12 and having accepted such boundaries he divides lot 12 into two equal parts and finds the boundary between the north and south halves to be that shown upon his plan and claimed by the plaintiff as the true boundary. Mr. Durham proceeds strictly on the basis of Baker's plan and the note thereon. Each lot is therein stated to be seven roods wide and Mr. Durham proceeds to lay down boundaries each seven roods distant from the last. Having reached the northern boundary of lot 12 he measures $3\frac{1}{2}$ roods therefrom and so finds the southern boundary of the north half of lot 12 to coincide with the existing paling ignored by Mr. Parker and claimed by the defendant as the true boundary.

The diagrams of Baker, Mr. Parker and Mr. Durham cannot be considered as authoritative in deciding what are now or what were at any time the true boundaries of lot 12 or of either half thereof but examination of such plans does serve a useful purpose in that they define the bases upon which the divergent claims of the parties are built.

Determination of this issue involves consideration of such rules as may have been laid down from time to time by the Courts of this Colony in regard to the definition of lots of land such as these, and it must be seen what principles would appear to emerge from these rules and how far the plaintiff's method of seeking to establish his claim is in accord with those principles.

No cases were cited to me bearing upon this matter directly, but the earliest case to which I have been able to make reference in the case of *Best v. Foster* decided in the Supreme Court of this colony on the 7th of July, 1866. This case also was a dispute as to the true division of a lot of land into halves, and similar questions arose regarding the method ascertaining what is meant by such a phrase as "the north half lot" or "south half lot" and by what means the Court should determine its meaning.

In the course of the judgment of the Court it is said "the real question is one of boundary as to which they (the plaintiffs) say that the north half of lot No. 8 . . . necessarily means and includes at all times a full and exact half of the whole lot . . . This proposition indeed is one of alarming magnitude for it really extends to this: that every portion of land in Georgetown though actually enclosed and built on and separately occupied may be dissected by a surveyor out of the depths of his consciousness or by reference to some map lost sight of long ago and when so dissected is to be divided between its former hapless owner or possessor and his neighbours on each side from whom or from some of whom he must hope by similar process to obtain some strips of land in compensation. Now beyond question the original meaning of

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such a phrase as the north half of lot 8 was to be ascertained by some original allotment evidenced probably by a plan of it and based upon an equal division of the whole of that lot. But it would indeed be a serious conclusion and one which we are satisfied might set a very large proportion of the proprietors of this city by the ears that all the known and actual corporeal divisions have no proper force and value in connection with the descriptions by which they are known but may be set aside by a surveyor's inferences from or even actual reference to former allotments of which they either formed part or bear or share the descriptions. We are satisfied on the other hand that corporeal property which has been actually possessed and dealt with in a certain division, enclosure or boundary and is known as such and such a half or quarter lot is to be taken to answer that description not only *prima facie* but so as not to be altered or negated by merely showing that it is not equal or proportionate in dimensions to other enclosures known also as other fractions of the same lot."

The Court in this case entered judgment on grounds other than those referred to above and the remarks which I have quoted must therefore be considered rather as *obiter dicta* than as the expression of an authoritative decision. They were, however, discussed in the case of *Gonsalves v. Wills*, an appeal heard in the Supreme Court of this Colony on the 12th day of December, 1904, when the Court having referred to the concluding sentence cited as part of the judgment in *Best v. Foster*, made the following comment thereon: "This may be true if the transport defined boundaries or transported the portions of land known as the quarter or half lot. In the present case however, (*Wills v. Gonsalves*), the respondent has title for 'north half lot' and the appellants for 'south half lot.' No reference is made to any plan nor are any boundaries stated. The transports are perfectly plain and unambiguous in terms and the Court cannot go outside the transports to find out if anything different is meant than what is stated in the transports."

Although I have made such research as is possible in the absence of a complete and adequately indexed collection of the decisions of this Court between 1904 and the present date I have found no other authorities having bearing upon this particular aspect of the matter. From these two cases, the latter a decision of the Full Court in a case on appeal, it would appear that the principle adopted in the past has been that where the title defines the boundaries or refers to land as "known as the half lot" then land actually possessed and dealt with in a certain division, enclosure or boundary and known as such a half lot is to be taken to answer that description, but that where land is described in the transport as "north half lot" or "south half lot" then the owner by transport is entitled to the mathematical half of the whole lot in question, a proposition more or less self-evident if

such questions of prescription as arose in that case and as have been raised in the present case are for the moment left out of account. It carries us little further, however, unless it be first ascertained what is the whole lot which is to be divided. That in the present case is the major issue in the light of the decision in *Wills v. Gonsalves*, for if the plaintiff has satisfied me by the evidence he has adduced that lot 12 is as laid down on Mr. Parker's plan, then if I am to follow *Wills v. Gonsalves*, the plaintiff is entitled to a mathematical half of the lot so laid down.

How then is a lot of land to be identified and defined in the absence from the transport of reference to any diagram or of limitation by metes and bounds, or by area, or any more precise description than that of "lot number 12 in the New Charlestown District?"

It appears to me that this can only be done by the production of evidence from which may be rightly inferred what was the actual parcel of land upon the sale of which the parties agreed; what, for instance, was the parcel known by them as lot No. 12, what was the parcel into possession of which the purchaser entered and which he continued to occupy as lot No. 12, and whether at the time of any subsequent sale the nature or extent of that lot has so varied that the parcel of land sold by B to C is not the same as that sold under the same description by A to B.

There are, no doubt, difficulties in securing evidence of this nature and effect, and it may be desirable that consideration be at some time given to the possibility of securing some ready method of arriving at a definition of such descriptions of land by lot and number when no authoritative diagram or schedule exists to which reference may be made.

The question in the present case is however, whether the plaintiff has adopted the means which in my present view are the only means of arriving at a determination, or any other means to which reasonable argument might be addressed.

It does not appear to me that he has done so. There might be reasonable grounds for inferring that the representatives of the plantation Le Repentir, having requested a surveyor to lay out the front lands of the plantation in lots and having in January, 1820, received the plan of his survey made in pursuance of that request, adopted the same; that when in November of the same year they made transport of certain lots to the predecessors in title of the present owners they intended that the description of a lot so transported as "lot 12" should refer to the lot laid out by their surveyor and numbered 12; and that the purchaser accepted such description as having such reference and entered into possession of and occupied the lot of land conforming to the delineation and within the boundaries of lot 12 on the surveyor's plan. It might further be inferred that in view of the frequent changes in ownership without alteration in description between the years 1820

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and 1843 the parcel of land described as lot No. 12 in the transport from Henry Marks to Abraham Swart in the latter year remained identical with that originally sold under that description in 1820. It might reasonably have been argued that since the date of the division of lot 12 the north half has continued to be the mathematical northern half of the lot 12 as it was in 1843, in view of the statutory prohibition of the division of lots in Georgetown, into less than half lots and the opinion upheld by the Courts in *Gonsalves v. Wills* and in *Camacho v. Pimento and another* to which latter case I am referred by counsel for the plaintiff, that prescriptive title cannot be acquired in respect of less than half a lot. By this course of argument it might reasonably have been submitted that the north half of lot No. 12 now means the north half by equal division of lot No. 12 as laid down in Baker's plan, and further argument might then have proceeded as to precisely what Baker's plan defines as lot 12.

I am not prepared to say that this course of argument would necessarily have succeeded for it tends no doubt towards the evils referred to in the judgment in *Best v. Foster* but it is the only course which appears to me capable of being based upon the evidence adduced in this case, and it is possible that further evidence in support thereof might have been procurable had it been followed. It is not, however, the course which the plaintiff has pursued. Rather is it the course adopted by the defendant with results which if it were to be adopted by the Court would probably be fatal to the plaintiff's claim.

The course which the plaintiff's case has pursued is far different, and is it one to which reasonable arguments may be addressed? The plaintiff, having utilized Baker's plan in order to fix one point for the purposes of survey, forthwith abandons it in almost every material particular. He lays down boundaries which do not conform to the boundaries either as they appear on the plan or as they are described in the surveyor's note and he discards entirely what was described by counsel for the defendant as the characteristic of Baker's allotments, that all lots should be of the same size. He divides the area occupied by lots 10, 11 and 12 so that no two of these lots are of the same size and none of them of the size stated by Baker to be that allotted by him. The only conclusion to be drawn from this course is either that Baker's plan was never adopted for the purposes of the original sale of these lots, or that since such sale, at some time and by some means of which there is no evidence, the nature and extent of the allotments have been varied. His grounds for abandoning the document upon which he professes at any rate in part to base his claim are Chalmers' plan and the personal observations of his surveyor in 1934.

Chalmers' plan is a plan compiled in 1894 from unknown or at least unrevealed sources, and is not the record of actual survey by

its compiler. It is drawn on so small a scale that differences between it and Baker's diagram are infinitesimal and are such as might be caused by bad drawing. Apart therefore from the comparative untrustworthiness of a compiled plan as against the plan of an actual survey, but little reliance can apparently be placed upon the apparent differences which Chalmers' plan discloses. The personal observations of Mr. Parker are those of palings which he found in existence on his visit in April, 1934, and which he appears to have assumed, on grounds which are not disclosed, indicated occupation of the present boundaries for a period exceeding twelve years. Mr. Parker expressed himself as being bound by occupation for such a period, but only it would appear in so far as the boundaries of whole lots are concerned, for in arriving at the area of the North half lot he ignores a paling of the existence of which there is evidence covering a period of twenty-seven years.

While it may be true that by section 4 (2) of the Civil Law Ordinance, chapter 7, undisturbed occupation for twelve years bars entry or action to recover possession there is no evidence of occupation for that period in this case which would entail of necessity the acceptance of the existing palings as the true boundaries between lots 10, 11 and 12 at the present time. Still less is their existence proof of the true boundaries of lot 12 in 1843 when the division first was made and the "north half" and "south half" of lot 12 came into being as proper descriptions of two parcels of land then separately disposed of. That is what the plaintiff must establish to succeed in his present claim, for it appears to me to be beyond doubt that in so far as title by transport is concerned the "north half of lot 12" can mean nothing more and nothing less than the north half of an equal division of lot 12 as lot 12 existed at the time of its division. I am unable to accede to the suggestion that it is possible that the "north half of lot 12" has no reference to a specific and defined parcel of land at the time when division first was made, but means a parcel of land expanding or contracting in proportion to the possible expansion or contraction of an adjoining parcel of land called south half of lot 12 by encroachment upon or ejection from lands which form no part of the lot.

I have discussed at some length the possible courses open to the plaintiff in this case in his endeavour to establish the extent of his holding in accordance with such principles as have hitherto received judicial approval and as now occur to me to be applicable to the plaintiff's problem, but I am careful that it should not be assumed that I attempt to lay down by my judgment in this case and in relation to the very limited evidence adduced herein any settled rule under which Georgetown, or any district thereof, may be "dissected by the surveyor out of the depths of his consciousness or by reference to some map lost sight of long ago."

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Nor is it either necessary or desirable that I should in the absence of evidence which would support the plaintiff's claim enter into the questions of prescriptive occupation or limitation.

The plaintiff is claiming that a certain strip of land forms a part of the "north half of lot 12." He has failed to satisfy me, in accordance with the principles which appear to me to be applicable to this case, that the land he claims does in fact form part of his holding so described and he is not therefore entitled to the relief claimed.

There must be judgment for the defendant with costs.

Judgment for defendant.

Solicitors: *J. Edward de Freitas; V. C. Dias.*

J. C. CHONGLOP v. J. E. LAM; T. DICKMAN, Garnishee.

[1936. No. 63.—DEMERARA.]

BEFORE LANGLEY, J. 1937. APRIL 12, 16.

Practice—Attachment of debts—Judgment debtor—Order for costs in favour of garnishee against—Garnishee order nisi—Not taxed before—Taxed before hearing—Set off by garnishee—Whether permissible—Rules of Court, 1900, and 1932,—Order XXXVI, rules 73 and 76.

In an action brought by A. against B. the Court, by an interlocutory order, directed B. to pay to A. the sum of \$24 as costs, and, by final judgment delivered on the 9th March, 1936, ordered B. to pay to A. the costs of the action. In his claim A. had sought a declaration that the sum of \$200 paid to him by B. was forfeited to him A; but the Court declared that such sum was not forfeited.

On the 16th March, 1936, C. obtained judgment against B. for the sum of \$221.11 including interest and costs.

On the 25th March, 1937, at the instances of C. a garnishee order *nisi* was made calling on A. the garnishee to attend in Chambers on the 12th April, 1937, on the hearing of an application on the part of C. that A, should pay to C. the sum of \$200 referred to above.

On the 5th April, 1937, the costs of A. in his action against B. were taxed in the sum of \$188.89.

On the hearing of the application C, admitted that the amount to be attached could only be \$176, that is to say, the sum of \$200 less the amount of costs, \$24, fixed by the interlocutory order. He, however, submitted that as the garnishee failed to tax his costs before the order *nisi* was made, the garnishee had no fixed claim in respect of the costs of the order of the 9th March, 1936, against the judgment debtor which he could set off at the date when the order *nisi* was made, and that, therefore, the garnishee order must be made absolute in respect of the sum of \$176.

The garnishee stated that the long delay in taxing the costs arose because he had in his possession sufficient funds belonging to the judgment debtor to meet the costs when taxed. He argued that the foundation of the debt in respect whereof the set-off is claimed was the 9th March, 1936, the date of the order of the Court awarding the costs, and that, as the costs were now fixed by taxation, he was entitled to set-off those costs against the sum of \$176.

Held, (1) that had the costs not been taxed at the date of the hearing of the application for the garnishee order absolute, the Court would have made an order directing that the taxation of such costs should take place within a prescribed time as a means of determining the liability of the judgment debtor to the garnishee;

(2) that the garnishee was entitled to set-off the sum of \$188.89 the amount of the taxed costs against the sum of \$176 owing by him to the judgment debtor because (a) in garnishee proceedings the garnishee must be placed in no worse position than that in which he would have been placed, had the rights of the judgment debtor not been transferred to the judgment creditor; (b) in garnishee proceedings the judgment creditor must be placed in the same position as the judgment debtor would be in regard to the recovery of the debt sought to be attached; and if at any time prior to the date of the garnishee order *nisi* the judgment debtor had initiated proceedings against the garnishee to recover the sum of \$200 in his custody the garnishee could have set-off the costs due to him by the judgment debtor, and (c) it was immaterial that the costs were not taxed before the date of the garnishee order *nisi*, as they arose from a judgment dated more than a year prior thereto and were fixed by taxation before the hearing of the application for a garnishee order absolute.

Summons by the plaintiff and judgment creditor for a garnishee order absolute against Thomas Dickman.

J. E. deFreitas, solicitor, for judgment creditor;

E. D. Clarke, solicitor, for garnishee;

E. N. Small, attorney of judgment debtor, present.

Cur. adv. vult.

LANGLEY, J.: The facts disclosed in this case appear to be that on the 16th March, 1936, the judgment creditor obtained judgment against the judgment debtor in the sum of \$175.58 plus interest thereon and \$35 costs. The accumulated interest amounted to \$10.53 making a total indebtedness of \$221.11.

The affidavit of the judgment creditor dated the 25th March, 1937, was considered and an order *nisi* was then made calling on the garnishee to attend the hearing on the 12th April, 1937, of the application of the judgment creditor that he—the garnishee—should pay to the judgment creditor a sum of \$200 alleged to be due from the garnishee to the judgment debtor.

Shortly the history of the latter debt is that in an action (No. 274—1935 Demerara) the garnishee applied to the Court to set aside a contract entered into between the judgment debtor and himself on the 5th April, 1935, on the grounds that the judgment debtor had failed to pay the outstanding balance of \$1,800 due under the terms of the contract for the purchase of certain land. The Court ordered that the said contract should be rescinded as from the 18th April, 1935, that the garnishee should not be entitled to forfeit the deposit of \$200—paid by the judgment debtor on account of the purchase price—but that the judgment debtor should pay the garnishee's costs in the action. The costs were not fixed by the Court, neither was an order made directing that costs should be taxed.

During the earlier proceedings in this last mentioned action, at

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one stage, the Court order the judgment debtor to pay the garnishee \$24 costs.

The costs relative to the rest of the action were not taxed by the garnishee until the 5th April, 1937, which was some twelve days after the order *nisi* was made in this present action (*i.e.*, 25th March, 1937).

Counsel for judgment creditor admits that the sum of \$24 costs cannot be attached so that the total sum now in issue as to attachment is \$176.

The submission of Counsel for the judgment creditor is that as the garnishee failed to tax his costs before the order *nisi* was made, the garnishee had no fixed claim against the judgment debtor which he could set off at the date when the order *nisi* was made.

In support of this submission Counsel quoted the following two cases—

(1) *In re Sampson et al* (1874) 44 L.J.Q.B., 31, but on reference to the case in Court, agreed that it hardly helped his cause.

(2) *Tapp v. Jones and Pooley*, (1875) 44 L.J.Q.B. p.p. 127-129 stressing the following quotation from the judgment of Field, J., on p. 129: “The object is to bind debts due from the garnishee to the judgment debtor for the benefit of the execution creditor; and if at the time of the order for attachment the garnishee was entitled to a set-off, that ought to be taken into account. The date of the attachment order is the time at which the state of the accounts between the parties is to be ascertained, and I think that the debt is bound from that date.”

The submissions of Counsel for the garnishee are—

(1) That at any time between the date of making of the order *nisi* directing the garnishment and the hearing of the issue in Court, the Court can settle the question as to whether the set off is good against the debt which it is sought to attach.

(2) The foundation of the debt in this case is the date of the Order of the Court awarding costs (*i.e.*, 9th March, 1936).

Counsel for the garnishee has stated that the long delay in taxing costs occurred because the garnishee had in his possession sufficient funds belonging to the judgment debtor to meet the costs when taxed.

(3) The garnishee disputed the claim of the judgment creditor to attach this deposit in his hands.

The powers of the Court appear to be governed by—

Rule 73 of Order XXXVI of Rules of Court, 1900, as amended by Rules of Court, 1932; and

Rule 76 of Order XXXVI of Rules of Court, 1900,—and such action, as Court takes, fails under the provisions of the latter Rule.

The position in the *Sampson* case does not appear to have been appreciated, as there the issue was not a question of account

between the garnishee and the judgment debtor, but, one of the intricate priorities between the garnishee and several other creditors of the judgment creditor.

This case, however, is of assistance as Lush, J., in the penultimate paragraph of this judgment reviews the position of the right to attach a debt, and makes it quite clear that the state of accounts between the garnishee and judgment debtor ought to be gone into so that the garnishee may not be in a worse position than if he had been sued for the debt by the judgment debtor.

The second case (*Tapp v. Jones and Pooley*) again has little direct bearing on the circumstances of this case as it deals principally with an admitted debt due from the garnishee to a judgment debtor, but one which was not payable in one sum, but by instalments.

The issue was, briefly, whether the Court could make a single order attaching the sums actually due, and also the further instalments when they become due; or whether it would be necessary to initiate separate garnishee proceedings as each instalment became payable.

Counsel for the judgment creditor stressed the above mentioned quotation from the judgment of Field, J., and interpreted that as meaning that as the amount of the debt—(*i.e.*, in this case the untaxed costs), was not ascertained at the date when the order *nisi* was made, the garnishee was not entitled to set off that amount.

It would appear that the reference to the date of set off, (if any) being that of the date of attachment of the debt—(*i.e.*, the date of the order *nisi*) does not limit the subjects of set off, but provides finality to the period of accounting. It fixes that date as the termination of the period during which the accounts of transactions between the garnishee and the judgment debtor shall be taken into consideration by the Court.

Conversely, no transaction taking place between the garnishee and the judgment debtor can be taken into account—as against a judgment creditor seeking to attach a debt—if it arises after the date of the order *nisi* of the Court.

In considering this matter the primary principle governing the relations between the parties is that the judgment creditor shall be placed in the same position as the judgment debtor would be in regard to the recovery of the debt sought to be attached. Equally with that, however, is the converse aspect that the garnishee must be placed in no worse position than that in which he would have been placed had the rights of the judgment debtor not been transferred to the judgment creditor.

Applying these principles to this case it would appear to be unlikely that the judgment debtor at any time, prior to the date of the Court's order *nisi* directed to the garnishee, would have initiated proceedings against the garnishee to recover the deposit

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of \$200 in his custody, but it is quite certain that the garnishee would have set off the costs due from the judgment debtor had the latter attempted to do so.

Therefore, it would be contrary to the first principle to place the judgment creditor in a better position than the judgment debtor himself would have been, by refusing to allow this set off.

Conversely, it would be contrary to the second principle to place the garnishee in a worse position than he would have been if proceedings had been taken by the judgment debtor.

Neither does it alter the position if counsel for the garnishee did not think fit to tax his Bill of Costs until after the order *nisi* in the case had been made by the Court.

This debt was definitely created by the Court on the 9th March, 1936, and all transactions invoking costs—apart from trivial amounts arising on taxation—occurred before that judgment was delivered.

Although the amount of the costs had not been fixed prior to the date of the order *nisi* it has been since and, consequently, there was no issue of account to be tried between the parties at the date of the hearing, (*i.e.*, 12th April, 1937).

Had taxation not taken place, acting under the provisions of Rule 76, the Court could, and would, have made an order directing such taxation should take place within a prescribed time as a means of determining the liability of the judgment debtor to the garnishee.

The submission of Mr. Small, attorney for the judgment debtor that the property of the garnishee was materially improved whilst in the occupation of the judgment debtor, has no bearing on the issues now before the Court.

The Court orders that the order *nisi* made by Mr. Justice Verity in this case on the 25th March, 1937, be discharged.

On the question of costs, it appears from the record that the judgment creditor was made aware of the transactions between the garnishee and the judgment debtor by Mr. Small, prior to the date upon which these garnishee proceedings were initiated.

That information created a duty for his counsel—which was in fact performed eventually—at once to interrogate Mr. Small. That would doubtless have disclosed the action in the Court, and that further information would disclose the actual position on the Court records.

Probably, all this information was available to the judgment creditor; if not, it should have been; and therefore there should be nothing in the nature of surprise at the defence raised by the garnishee.

Counsel for the garnishee has submitted that the costs were not taxed because the garnishee held the deposit which was substantially sufficient to cover that debt, although the subsequent taxation showed the deposit to be exceeded by the costs due.

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This was a practical position to take up, although it would have been better to clear up the position by taxation.

Under these circumstances there appears to be no failure on the part of the garnishee affecting the judgment creditor in the matter. An examination of the Court record would have disclosed that costs were given in favour of the garnishee but that taxation had not taken place.

With all the facts available—though possibly not appreciated—the judgment creditor has thought fit to bring these proceedings and having failed he must pay the costs of the garnishee.

Garnishee order nisi not made absolute.

FRANCIS EDWARD DE ABREU, APPELLANT (PLAINTIFF),
 v.
 EDWARD DARNELL CLARKE, RESPONDENT (DEPENDANT).
 [1936. No. 123.—DEMERARA.]
 BEFORE FULL COURT: CREAN, C.J., AND LANGLEY, J.
 1937. APRIL 21, 22, 30.

Pleading—Striking out—Interlocutory application—Issue capable of argument—Not utterly irrelevant—Order not made—Action for realisation and sale of mortgaged property—Defence of registered moneylender—Reply that defendant was solicitor for plaintiff at the time and was guilty of fraud in the transaction—Reply related to defence—Circumstances under which a pleading may be struck out—Where at a glance pleading obviously bad—When pleading may not be struck out—Where it admits of plausible argument—Where possibility of relevancy—Rules of Court, 1900, Order 17, rule 39.

The plaintiff sued the defendant for recovery of moneys due on a mortgage deed, and for sale of the mortgaged property. In his defence he pleaded that the plaintiff was a money-lender, that he was not registered as such under the Money-Lenders Ordinance, Chapter 68, that the plaintiff is precluded in law from recovering against the defendant on the mortgage sued upon, and from enforcing payment of the mortgage capital and interest as provided for in the mortgage deed, and that the transaction was illegal and void, and that the mortgage deed was void.

In his reply the plaintiff pleaded, *inter alia*, as follows:—

2. The plaintiff admits that the defendant made in his favour the 3 promissory notes referred to in paragraphs 1, 2 and 6 of the Defence but says that the same were made in the following circumstances:—

(a) The defendant is a solicitor of the Supreme Court of British Guiana and was at all material times and still is practising his profession in this colony. The defendant was the sole solicitor and legal adviser of the plaintiff from the year 1912 to the month of April, 1936, except for a period of 3 years from 1928 to 1931 when the defendant was absent from the colony.

(b) In the month of April, 1932 the defendant at his office lot 7, Croal Street, Georgetown, verbally informed the plaintiff.

(i) that during his said absence from the colony he became indebted to Percy Claude Wight who was one of the defendant's attorneys during his said absence, in a sum of over \$2,000 for moneys paid and advanced on his behalf, and

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(ii) that his immovable property the east quarter of lot 176, North Cummingsburg, Georgetown, which is herein sought to be foreclosed and which was then mortgaged to The Demerara Mutual Life Assurance Society Limited, was by transport in his name at the time of his departure from the colony but was then in the name of the said Percy Claude Wight who was holding the same for the defendant on account of the said indebtedness.

(iii) that the said Percy Claude Wight had demanded and was pressing him for payment and had threatened to institute bankruptcy proceedings against him unless the said indebtedness was paid immediately and that he the defendant had not the money to pay the said debt or any part thereof, as he had not re-established himself in his practice as a solicitor since his return to the Colony of British Guiana in the year 1931.

(c) The defendant implored the plaintiff to come to his assistance by paying the said indebtedness due to the said Percy Claude Wight and so free him the defendant from the said threatened bankruptcy proceedings and thereby enable him the defendant to recover his said property.

(d) The defendant at the same time proposed to and advised the plaintiff that in order that he the plaintiff should be fully secured in the repayment of the said advances he the plaintiff should also pay The Demerara Mutual Life Assurance Society, Limited, the amount due to them on the mortgage on the said property and that he the defendant would then pass a new mortgage in favour of the plaintiff for all moneys so to be paid and advanced by him as aforesaid, and would also insure his life and assign the policy thereon to be issued to the plaintiff as securities for the said advances.

(e) The plaintiff believed in the good faith of the defendant as his solicitor and being desirous of assisting the defendant to re-acquire his property and remove the pressure that was being exerted as aforesaid agreed to the said proposals and advice and acted in good faith thereunder as hereinafter mentioned.

6. The plaintiff says that all the documents giving effect to each and every of the transactions herein were drawn up and prepared by the defendant as solicitor for and on behalf of the plaintiff and the defendant was his sole legal adviser in reference thereto, the plaintiff being without any independent legal advice.

7. Since the date of the transport, the 18th July, 1932, for the property the east quarter of lot 176, Middle Street, North Cummingsburg, Georgetown, owned by the defendant and mortgaged to the plaintiff, the defendant has been and is still in possession and has collected and is still collecting and receiving the rents thereof.

9. Alternatively, if the plaintiff was a money lender as alleged, which is specifically denied, the plaintiff says that at the time of the verbal agreement referred to in paragraph 2 hereof and mortgage and at all material times the defendant concealed from him the plaintiff the advice that he was a money-lender of which the plaintiff was unaware, in that the defendant was the plaintiff's solicitor and legal adviser, had full knowledge of all the plaintiff's transactions, and that the plaintiff had made occasional loans to friends and relations and that the plaintiff was not registered as a money-lender, and the defendant refused and neglected to advise the plaintiff accordingly, as it was the defendant's duty to do.

10. In the further alternative, the plaintiff says that at time of the said verbal agreement and mortgage and at all material times, the defendant fraudulently and designedly encouraged, induced, procured and advised the plaintiff to enter into the transactions abovementioned with the fraudulent intention of thereafter of setting up the defence of illegality, as he has done, and thereby of defrauding the plaintiff of the repayment of the moneys advanced as aforesaid.

Particulars of Fraud.

(a) the defendant as the plaintiff's solicitor and legal adviser had full knowledge of the plaintiff's transactions and knew that the plaintiff had made occasional loans and advances to friends and relations.

(b) the defendant knew that the plaintiff was not registered under the Money-lenders Ordinance, Chapter 68.

(c) it was the duty of the defendant to advise the plaintiff not to enter into the transactions with him the defendant.

(d) the defendant deceived the plaintiff by wilfully refusing and neglect-

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ing to advise the plaintiff as to his true rights and interests and the effect of the said transactions on such rights and interests.

(e) the duty owed by the defendant to the plaintiff by virtue of the relationship of solicitor and client, conflicted with the interests of the defendant and the defendant ought not to have requested the plaintiff to advance him moneys for the recovery of his property.

(f) the defendant wilfully refused to fulfil the terms of the mortgage deed by not paying the instalments of interest and capital due: the defendant refused to pay the premiums on his life policy assigned to the plaintiff as a security under the agreement dated the 14th July, 1932, referred to in paragraphs 4 and 5 of the Defence and caused the same to lapse. The defendant further refused to pay the taxes and rates on the said property when due and has caused the same to be taken in execution therefor. By such breaches the defendant fraudulently intended that the plaintiff should foreclose the said mortgage so as to give him the opportunity to plead the illegality set out in paragraphs 8 and 9 of the Defence.

(g) The defendant, still the solicitor and legal adviser of the plaintiff since the passing of the said mortgage on the 25th day of July, 1932, and in further pursuance of his preconceived intention to defraud the plaintiff, influenced, induced and advised the plaintiff to advance and the plaintiff did advance him on two separate transactions the aggregate sum of \$13,800 with which the defendant purchased in the name of one Ivah Cumbermac with whom he lives in concubinage and whose attorney the defendant is, the following properties, to wit,—Centre one-third of lot 175, Middle Street, North Cummingsburg, Georgetown, and lot 215, King and South Road, Lacytown, Georgetown.

(h) The defendant on the 28th day of August, 1933, and the 11th day of September, 1933, caused the said Ivah Cumbermac to execute a mortgage on each of the said properties for the capital sums of \$5,300 and \$8,500 respectively in favour of the plaintiff and to insure her life for the sums of \$1,500 and \$2,000 respectively and to assign the policies issued thereon to the plaintiff in further security for further repayment of the said advance. The defendant purchased the said properties for the sums of \$4,550 and \$8,200 respectively.

(i) The defendant in pursuance of the said fraudulent design wilfully refused and neglected to pay the instalments of interest and capital due on the said mortgages, and the rates and taxes due to the Mayor and Town Council on the said properties and caused to be taken in execution therefor, and wilfully allowed the said assurance policies on the life of the said Ivah Cumbermac to lapse for non-payment of premiums, the first half-yearly premiums only on the said policies being paid.

11. The plaintiff says that the defendant ought not to be permitted to allege or plead that the plaintiff was a money-lender and that he carried on the business of a money-lender, as he has done, for the reasons herein set out.

12. The plaintiff further says that this Honourable Court will not permit the defendant who is one of its officers, to set up his own fraudulent conduct to enrich himself at the expense of the plaintiff, his former client, by reason of the circumstances herein set forth.

A summons was taken out by the defendant for an order that the said paragraphs in the reply be struck out on the ground that the same were unnecessary and scandalous and contrary to the rules of pleading, and tend to prejudice, embarrass and delay the fair trial of the action. The judge in chambers ordered that paragraphs 2, 6 and 7 of the Reply should stand, and that paragraphs 9, 10, 11 and 12 of the Reply be struck out on the ground that they were unnecessary and scandalous and contrary to the rules of pleading and tend to prejudice, embarrass and delay the fair trial of the action.

Leave was granted to the plaintiff to appeal from the order striking out paragraphs 9, 10, 11 and 12 of the Reply. The grounds of appeal were as follows:—

- (1) The issues raised in the said paragraphs admit of plausible argument.
- (2) The said paragraphs are relevant and material to determine the issue—
 - (a) whether the plaintiff was a money-lender in terms of the Money-Lenders Ordinance, Chapter 68;
 - (b) whether the transactions sued on are money leading transactions within the meaning of the said Ordinance and therefore illegal;
 - (c) whether the defendant as solicitor for the plaintiff will be permitted through his concealed fraud to take advantage of his wrongful act.

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(3) It was not competent for the learned judge, and he proceeded on a wrong principle, when he decided the plaintiff could not succeed on the issues raised in the said paragraphs, as the said issues were immaterial if the plaintiff was a money-lender.

(4) By reason of the exceptional circumstances of the case the discretion exercised by the learned judge would manifestly prejudice the proper trial of the case and defeat the ends of justice.

Held, (1) that without indicating any view as to what may be the ultimate decision of the questions raised in the paragraphs in dispute, they do admit of argument, they are not obviously bad at the first glance, and so the plaintiff should not be precluded from raising them for proper argument at the hearing of the action.

Mayor of the City of London v. Horner, (1914) 111 Law Times Reports 111 applied.

(2) that in the said paragraphs the plaintiff endeavoured to state the reasons why he should not be considered as a money-lender, they dealt with the only issue raised by the defendant, namely, whether the plaintiff is a money-lender or not, they must therefore be considered as material to that issue, and cannot be considered as utterly irrelevant to that issue; that if there is even a possibility of a statement being considered relevant it should not be struck out; that in this case *at this stage of the proceedings*, it is not proved that the paragraphs in dispute are irrelevant; and that the question as to whether the said paragraphs constitute a good answer to the defendant's plea that the plaintiff is a registered money-lender should be left to the Court to consider when the action comes on for trial.

Rickards v. Attorney-General (1845) 12 C1. & F. 30, and

Tomkinson v. South Eastern Railway (1887) 57 Law Times 358 applied.

Appeal from an order made in chambers, of His Honour Mr. John Verity, First Puisne Judge, striking out certain paragraphs of the plaintiff's reply on the ground that they were unnecessary and scandalous and contrary to the rules of pleading and tended to prejudice, embarrass and delay the fair trial of the action. On the hearing of the application, Verity, J., held that the statements in the paragraphs, if substantiated, would constitute no answer to the defence if the defendant proved that the plaintiff was an unregistered lender, and he therefore struck out the paragraphs.

J. A. Luckhoo, K.C., (*C. R. Browne* with him), for appellant (plaintiff).

H. C. Humphrys, for respondent (defendant).

C. R. Browne, in reply.

Cur. adv. vult.

The following judgment of the Court was read by the Chief Justice:—

This action is brought by the plaintiff to recover \$6,390.88, alleged to be due to him on foot of a mortgage passed and executed by the defendant in his favour on the 25th July, 1932. It was instituted by way of specially endorsed writ and presumably brought in that way in order that the plaintiff might get summary judgment.

The defendant, however, filed an affidavit in which he asked for leave to defend. In that affidavit, he says that the plaintiff

was a money-lender at the time of the loans to him, and as he was not registered as such, the mortgage and agreement following it as to the policies of insurance are therefore void and unenforceable.

In this affidavit, the defendant says also that he wishes to counterclaim that the mortgage and agreement be set aside by the Court, and concludes his affidavit by saying that he has a good defence to the action on the merits, and that such defence goes to the whole of the plaintiff's claim.

Leave to defend was given by the Court on this affidavit and the defence was duly filed.

In the defence it is admitted by the defendant that the plaintiff gave him loans amounting to \$5,800, as alleged in the plaintiff's claim, but it is pleaded by him, that as the plaintiff was an unregistered money-lender at the time of the loans, the plaintiff is debarred from recovering them, that the transaction is illegal and void, and that the mortgage passed and executed by him to the plaintiff and on which this action is founded, is also void.

Though the defendant in his affidavit for leave to defend, states that he intends to counterclaim, and that he has a good defence to the action on the merits we can see no reference in the defence to a counterclaim. Nor does there appear to be any reference whatever to the merits of the case.

In answer to the defence, the plaintiff filed a Reply in which he denies he is a money-lender and he sets out, amongst other things, that the defendant was his solicitor at the material times of this transaction, and if he were a money-lender there was a duty on the defendant to advise him accordingly. Further, he says that the defendant fraudulently encouraged him to enter into these transactions with the intention of setting up the defence that the transaction was illegal and so defrauding him of the repayment of the moneys advanced.

A very long account of the circumstances surrounding the transaction is set out in the particulars given of the alleged fraud and by reason of these facts the plaintiff says that the defendant should not be permitted to plead that the plaintiff was an unregistered money-lender.

It is further pleaded in this Reply that this Court should not allow the defendant, who is one of its officers, to set up his own fraudulent conduct to enrich himself at the expense of the plaintiff, his former client.

On the 12th August, 1936, an application was made by the defendant for an order that the paragraphs of the Reply containing the above facts be struck out on the ground that they were unnecessary and scandalous, contrary to the rules of pleading, and tended to prejudice, embarrass and delay the fair trial of the action. This order was granted by the Judge in Chambers and

accordingly the paragraphs were struck out for the reasons alleged by the defendant.

From the order of the Judge in Chambers, the present appeal is filed. The grounds of appeal say that the questions raised in the paragraphs admit of plausible argument, that they are relevant and material to the issue, and that the learned Judge proceeded on a wrong principle in granting the order to strike them out.

In support of the appeal, very many authorities were cited to us by Mr. Luckhoo for the appellant (plaintiff). And he submits that the allegations in the paragraphs which were struck out were relevant and material to the issue in the case and therefore should have been allowed to remain on the proceedings. Further, that he had no prior opportunity of pleading these reasons as his writ was a specially endorsed one, in which form of writ only the bare statement of claim is set out. The facts as to the making of the mortgage were set out and it is contended that that was all that was necessary or competent for him to do in this form of writ.

For the defendant, the respondent, it is argued by Mr. Humphrys that even if it were assumed that the defendant fraudulently concealed facts from the plaintiff, it would not affect the one and only issue raised in the defence which is, whether or not the plaintiff was an unregistered money-lender at the times these loans were made.

In the paragraphs which were struck out, it is definitely set out that the defendant must have acted fraudulently in negotiating these loans in view of the defence he now sets up. But, at the same time, and in the same paragraphs, the plaintiff is endeavouring to state—perhaps, not as clearly and concisely as he might have done—the reasons why he should not be considered as a money-lender and that statement, in our opinion, cannot be considered as utterly irrelevant to the issue raised.

It may be taken to be an accepted rule in the system of pleading that one party has no right to dictate to the other how he shall plead. But there is an exception to this rule, and that is when a pleading is unnecessary or scandalous or tends to prejudice, embarrass or delay the fair trial of the issue, then it will be struck out.

From our reading of the paragraphs in dispute, it appears to us that the plaintiff does set out certain facts, which he pleads are good reasons why he should not be considered an unregistered money-lender. Those allegations, we think, must be considered as material to the issue, because they deal with the only issue raised by the defendant. And if there is even a possibility of their being considered as relevant, then we feel it is better to let them remain on the pleadings and so give the trial Judge an opportunity of hearing all about them and deciding whether they are good reasons or bad reasons.

The case of *Rickards v The Attorney-General*, (1845) 12 Cl. & F. 30 is one from which a principle emerges on the question of striking out statements in a pleading for irrelevancy. It was here laid down by Lord Brougham that in order that a statement in a pleading may be struck out, it must be clearly impertinent. It must be not only that the Court inclines to think it should not have been put there; that is not enough, it must appear clearly that it cannot be relevant. The impertinence or irrelevancy must be proved, and though we have heard arguments as to why the paragraphs struck out should not be considered as relevant, we are unable to say, and have no right to say, at this stage of the case, that it is proved that they are irrelevant.

Another case which is rather similar to the present is *Tomkinson v. The South Eastern Railway Co.*, (1887) 57 *Law Times Reports*, 358. In that case, the defence consisted of 13 paragraphs and there was an application to strike out the greater portion of them on the ground that they were irrelevant or unnecessary. This application was made under the same rule as the application herein was made. The ruling given in that case was that reasonable latitude should be given to that rule. It was said: "Parties must be allowed to plead reasons why, as in the present instance, a particular act said to be *ultra vires* is not *ultra vires*. They may be bad reasons, but they are reasons why the act complained of is not *ultra vires*, and reasons which the Court will have to consider when the action comes on for trial." And the judgment goes on to lay down that it is not the meaning of the rule that any matter alleged in the defence as a reason should be struck out merely because it is a bad reason. It is said that the obvious meaning of the rule is to prevent either party to an action from prejudicing, embarrassing or delaying the fair trial of the action by stating in his pleading utterly irrelevant matter.

The plaintiff in this case has set out reasons in his Reply, why the particular loans to the defendant, which are said to be illegal money-lending transactions, are not illegal money-lending transactions, and on the authority of the above case, he would appear to be within his rights in so doing, as the facts alleged are not utterly irrelevant to the issue raised in the action.

Another important aspect of this appeal is that raised by the plaintiff (appellant) in his notice of appeal, where he states that the issues raised by the paragraphs in dispute admit of plausible argument, and therefore should be allowed to remain as part of the pleadings. If they are not permitted to remain, it is submitted on his behalf that he would be precluded from raising them at the trial.

In support of this branch of the argument, we are referred to the case of the *Mayor of the City of London v. Horner* (1914) 111 *Law Times*. In this case, certain allegations in the defence were struck out as embarrassing under the same rule, as the

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paragraphs in this case were struck out. And on appeal, they were reinstated on the broad principle that it was not so manifest on the view of the pleadings—merely reading through the pleadings—that the point raised was one which did not admit of plausible argument. In other words, unless the point made is obviously bad at the first glance, then the person making it in his pleadings ought not to be precluded from raising it for proper argument at the hearing at the action.

And, though we are not prepared to indicate any view, as to what may be the ultimate decision of the questions raised in the paragraphs in dispute, we are bound to say that we think they do admit of argument, and, consequently, are of opinion it would be better if they were reinstated in the Reply.

For the reasons given, the appeal is allowed with the costs thereof and the costs on the original application (in any event) and leave is granted to the defendant to file a subsequent pleading to the above Reply within ten days from date.

Appeal allowed.

Solicitors: *W. D. Dinally* for the appellant, and *J. Gonsalves* for the respondent.

H. HUMPHREY v. J. A. FONTANELLE.

HENRY HUMPHREY v. JAMES A. FONTANELLE.

[1935. No. 298.—DEMERARA.]

BEFORE VERITY, J. 1937. MARCH 16, 17; APR. 15; MAY 4.

Lottery—Sweepstake—Gambling Prevention Ordinance, Cap. 95. s. 2 (1)—Definition of lottery—Interpretation—Whether foreign lottery included—Cap. 95, s.8—Whether applies to foreign lottery—Cap. 95. s. 4 (d)—Whether applies both to vendor and purchaser of tickets or chances—Illegality in selling—Whether also illegal to purchase—Contracts immoral or illegal—Ground of objection—Public policy—Not for sake of defendant.

Section 2 (1) of the Gambling Prevention Ordinance provides that “lottery” includes any game, method, or device whereby money or money’s worth is distributed to or allotted in any manner depending upon, or to be determined by, chance or lot, held, drawn, exercised or managed within the colony. The Ordinance, in various sections, makes reference to “a lottery whether held within or without the colony,” “a foreign lottery,” and “whether the lottery is conducted or held in or out of the colony.”

Held, that it is the intention of the Ordinance to include lotteries held out of the colony only when so specifically provided.

Section 8 of the Gambling Prevention Ordinance provides that “every sale or contract for the sale of a lottery ticket is hereby declared to be void, and no action shall be maintainable by anyone in respect of that sale or contract, except by the purchaser for the return of the money or other consideration (if any) paid therefor.”

Held, that section 8 refers only to tickets for lotteries held within the colony and not to tickets foreign lotteries or lotteries held outside the colony.

The plaintiff, the defendant and N. St. Rose each contributed an equal third part of the purchase money of a ticket in a sweepstake known as the Thirtieth Annual Derby Sweep organised by the St. Andrew’s Race Club of Grenada, British West Indies. The ticket was purchased by them in this Colony and a prize of \$1,901.04 was won in respect thereof. By the terms of the transaction each party should have received one-third of the prize money. The total amount of the prize was received by the defendant, but, after deducting expenses, he passed to the plaintiff one-sixth only of the proceeds and retained in his hands one-half of the third share which the plaintiff should have received in accordance with the terms upon which the ticket was purchased. The action was in respect of the sum so retained.

By section 4 (d) of the Gambling Prevention Ordinance, chapter 95, it is provided that “any one who . . . receives directly or indirectly any money or money’s worth for or in respect of any chance in, or event or contingency connected with, a public lottery, whether held in or out of the colony, or sells, or offers for sale, or gives, or delivers, any lottery ticket, including any ticket for any foreign lottery . . . shall on conviction thereof be liable to a penalty not exceeding one thousand dollars or to imprisonment for a period not exceeding twelve months.”

Held (1) that section 4 (d) in relation to its context relates only to the vendor of tickets or chances, and therefore, while the sale of foreign lottery tickets is prohibited under heavy penalties, the purchase is not so prohibited.

(2) that, as it was illegal to sell a foreign lottery ticket, it was illegal to purchase one, that the plaintiff and the defendant while under no penalty were parties to the illegality, that any dispute which may arise between them is not properly an issue for decision in a Court of law, nor should the Court allow itself to be the medium through which distribution of unlawful gains is to be made.

Gorenstein v. Feldman, 27 T.L.R. 457, applied.

The objection that a contract is immoral or illegal as between plaintiff and defendant is not allowed for the sake of the defendant, but is founded on general principles of policy which the defendant has the advantage of, contrary to the real justice, between him and the plaintiff.

H. HUMPHREY v. J. A. FONTANELLE.

E. G. Woolford, K.C., for plaintiff,
C. A. Burton, for defendant.

Cur. adv. vult.

VERITY. J.: In this case the plaintiff seeks to recover from the defendant the balance of a third share in prize-money won in respect of a sweep-stake ticket purchased in the names of both parties and one St. Rose. A cheque for the amount of the prize was received by the defendant, who divided the proceeds in the proportion of one-third to St. Rose, one-sixth to the plaintiff and one-half to himself. This, he states, was the proper division of the prize, being in due proportion to the shares of the purchase money contributed by each party. The plaintiff asserts that he subscribed one-third of the purchase money and is entitled to one-third of the prize.

It is convenient to determine in the first place the issue of fact. The plaintiff avers that he was requested by the defendant to join with him and with St. Rose in the purchase of the ticket, the cost of which was two shillings; that he subscribed one-third share (sixteen cents) and, in addition, advanced to the defendant a further sum of eight cents to make up the price of the remaining two shares. He is substantially supported by the evidence of Benjamin McKenzie, who was present, and Phillip Waddell, the vendor of the ticket.

The defendant, on the other hand, avers that the sum of eight cents only was contributed by the plaintiff; that St. Rose contributed sixteen cents and that he himself subscribed the remaining twenty-four cents. He is supported in a measure by St. Rose, who states that he handed the defendant sixteen cents outside the shop and that the defendant then had one shilling in his hand. He did not enter the shop and does not know what transpired therein. The defendant further states that at the time the ticket was purchased he wrote the names thereon and the amount subscribed by each. St. Rose states that when the defendant showed him the ticket, immediately after the purchase, the figures were written thereon.

The plaintiff admits the writing of the names but denies that the figures were then written on the ticket and in this he is supported by both McKenzie and Waddell.

I have examined the ticket with care and there appears to me such a difference in the appearance of the writings of names and figures, both as to colour of ink and depth to which it has penetrated the paper, as to lead me to the conclusion that the figures were not written at the same time or with the same ink as the names.

This conclusion fortifies me in my personal impression, based upon my observation of the witnesses, that the plaintiff, McKenzie, and Waddell, should be believed, rather than the

defendant and St. Rose. If, as I believe, those figures were written by the defendant at some subsequent time and if, as I believe, he has falsely sworn that he wrote them at the same time as he wrote the names, then grave reflection is cast upon the whole of his evidence in regard to the purchase of the ticket.

I am not unmindful of the evidence as to the subsequent conduct of the parties: of Harrington's evidence, which I simply do not believe; of the discrepancy between the evidence of the plaintiff and Green as to when the former first told the latter of the amount of his share; or of Green's signing without protest a receipt for \$309 only. These matters, capable of innocent explanation, are not in my view vital if I am right in my conclusion that the plaintiff has told the truth as to the purchase of the ticket, nor do they vitiate that conclusion, which provides, moreover, the most reasonable explanation of the plaintiff's immediate protest on learning that Green had received on his behalf from the defendant the sum of \$309 only.

I desire to make it clear that my view of the untrustworthy character of the defendant's evidence does not reflect in any way upon the integrity of his witness, Sergeant-Major Schilling.

I find the facts of the case to be, therefore, that the plaintiff, the defendant and St. Rose each contributed an equal third part of the purchase money of a ticket in a sweepstake known as the Thirtieth Annual Derby Sweep organised by the St. Andrew's Race Club of Grenada, British West Indies; that the ticket was purchased by them in this colony and a prize of \$1,900 odd was won in respect thereof; that by the terms of the transaction each party should have received one-third of the prize-money; that the total amount of the prize was received by the defendant, but that after deducting expenses he passed to the plaintiff one-sixth only of the proceeds and retains in his hands one-half of the third share which the plaintiff should have received in accordance with the terms upon which the ticket was purchased.

It was submitted by Mr. Burton, however, that this action is not maintainable by reason of section 8 of the Gambling Prevention Ordinance, chapter 95, and, further, that by reason of section 4 (*d*) of the Ordinance, the plaintiff is seeking to recover moneys arising from an illegal contract and cannot succeed.

It is necessary, therefore, to determine, firstly, whether this sweepstake is a lottery within the meaning of section 8, and secondly, whether the transaction in which the parties engaged is an illegal transaction.

It is clear that a sweepstake, such as this, is in fact a lottery in the ordinary sense of the word: "a distribution of prizes by chance or lot," *Taylor v. Smetten* (1883) 11 Q.B.D., 207, and *Allport v. Nutt* (1845) 1 C.B., 974. But, is it a lottery within the meaning of section 8 of the Ordinance? I am of the opinion that it is not. By section 2 (1), it is enacted that, unless the

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context otherwise requires, "lottery" includes any game, method or device whereby money or money's worth is distributed or allotted in any manner depending upon or to be determined by chance or lot, held, drawn, exercised or managed within the colony. It is to be observed that this interpretation clause employs the word "includes" and not the word "means." From the use of this word, it would appear that the clause is extensive rather than restrictive in its definition of the word "lottery," but, nevertheless, it concludes with an apparently restrictive phrase "within this colony." I am inclined to the view that this clause is one of those cases in which the context of the statute is sufficient to show that the word "includes" is equivalent to "means and includes" and affords an exhaustive explanation of the meaning which, for the purposes of the Statute and subject to the immediate context, must be attached to the word defined (see *Dilworth v. Commissioners of Stamps*, 1899, A. C., 105). I am drawn to this view by perusal of the Ordinance which, in various sections, makes reference to "a lottery whether held within or without the colony," "a foreign lottery" and whether the lottery is conducted or held in or out of the colony," and from these references I conclude that it is the intention of the Ordinance to include lotteries held out of the colony only when so specifically provided.

I am of the opinion, therefore, that section 8 does not apply to the present case, but that does not end the matter for it is submitted that, nevertheless, by the operation of section 4 (*d*) this transaction is an illegal transaction which no Court will enforce.

The present case must be distinguished from the many English authorities relating to wagering contracts, for these, while void, are not illegal. The distinction is clearly to be seen in two South African cases *Dodd v. Hadley*, 1905, Transvaal Reports, page 439, and *Meyer v. Legge*, 1909, Transvaal Reports, page 266. The former case related to moneys staked on the result of a horse race, not in itself an illegal transaction, while in the latter case the action was brought to recover a share in a prize won in an illegal lottery. In *Meyer v. Legge*, the learned Chief Justice said: "This case differs from *Dodd v. Hadley*, because there the main transaction was merely void and unenforceable; it was not illegal and criminal as in the case here," and Smith, J., said "The claim in this action is really one made by one party to an illegal transaction against another party to an illegal transaction and therefore the Court cannot enforce it."

If the statute, upon which the decision in *Meyer v. Legge* is based, was identical with our Ordinance and the facts precisely parallel with those now under consideration, the case would be directly in point. The Court is one entitled to the greatest respect, and the reasons given for the decision are reasons with

which I find myself in complete accord. The statute there provides that "any person who shall sell or dispose of any ticket in a lottery or offer to sell or dispose of or take or purchase or have any share therein. . . . shall be guilty of a contravention of this Law." The lottery appears to have been a local lottery and within the terms of the section.

Section 4 (d) of Chapter 95 provides that "any one who receives directly or indirectly any money or money's worth for and in respect of any chance in or event or contingency connected with a public lottery, whether held in or out of the colony, or sells or offers for sale or gives or delivers any lottery ticket, including any ticket for any foreign lottery, . . . shall on conviction thereof be liable to a penalty not exceeding one thousand dollars or to imprisonment for a period not exceeding twelve months."

It appeared to have been assumed by counsel in the course of argument that this section was directed equally against the vendor of lottery tickets and the winner of prizes, but further consideration of this subsection in relation to its context satisfies me that it relates only to the vendor of tickets or chances, and that the buyer is aimed at by section 6 of the Ordinance. This latter section, however, does not include foreign lotteries or those held outside the Colony and it would not appear that the buyer of such tickets is guilty of any offence under the Ordinance.

While, therefore, the sale of foreign lottery tickets is prohibited under heavy penalty, the purchase is not so prohibited. I am of opinion, however, that the whole transaction, is nevertheless, an illegal transaction. It would be unreasonable to conclude that the Ordinance contemplates that a transaction in the course of which one party must of necessity commit a criminal offence may, nevertheless, be a lawful transaction on the part of the other. This view was taken by Coleridge J. in the case of *Gorenstein v. Feldman* (1911) 27 T.L.R., p. 457. In that case the plaintiff alleged that she bought from the defendant one-eighth of a ticket in the Hamburg State lottery; that the ticket had won a prize; that the prize had been paid to the defendant; but that the defendant refused to pay over to the plaintiff the share to which she was entitled. By the Statute, 9 Geo. 1, c. 19, "any person . . . who shall . . . sell or dispose of any ticket or tickets in a foreign lottery . . . shall be liable to a penalty." The Statute makes no reference to the liability of a purchaser. In giving judgment for the defendant, Coleridge, J., said: "the money which was claimed in the action was money on the sale of a share in a lottery ticket. All such sales were prohibited by law, and therefore any money paid for such a purpose shared the illegality. As it was illegal to sell a share, it was illegal to buy a share. Persons who sought the aid of the local Courts to recover money after such a sale would not meet with success."

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In the present case I am satisfied that the transaction into which the parties entered was an illegal transaction prohibited by statute under severe penalty. No question of agency arises. Both plaintiff and defendant are principals and, both, while under no penalty, were parties to the illegality. Any dispute which may arise between them is not properly an issue for decision in a Court of law, nor should the Court allow itself to be the medium through which distribution of unlawful gains is to be made.

The plaintiff cannot, therefore, succeed in this action, even though I have found that the defendant has in his hands moneys which by the terms of this unlawful agreement he has no right to detain.

It may be well in this connection to refer to the words of Lord Mansfield in *Holman v. Johnson* (1775) Cowper's Report, pp. 341 and 343. "The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is even allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, between him and the plaintiff by accident, if I may say so. No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, then the Court says he has no right to be assisted. It is upon that ground that the Court goes; not for the sake of the defendant but because they will not lend their aid to such a plaintiff."

These words are doubtless well-known. They express the principle in terms which have probably never been bettered, and it is as well that persons who enter into transactions, in the face of statutory prohibition, should bear them in mind.

In this case there must be judgment for the defendant.

In view of my findings, as to the nature of the evidence given and tendered by the defendant, I must refuse to exercise my discretion as to costs in his favour and there will be no order as to costs.

Judgment for defendant.

PADMEY v. RADHIA.

PADMEY, administratrix of the estate of BHAGWAN, deceased,
Appellant.

v.

RADHIA, Respondent.

[1931. No. 240.]

BEFORE FULL COURT: DE FREITAS, C.J., AND SAVARY, J.

1931. SEPTEMBER 18.

Solicitor—Duty to client—Breach—Negligence—Contentious matters—Non-contentious matters—Damages.

The law affords to clients means of redress in relation to solicitors. A solicitor (or a legal practitioner acting as a solicitor) cannot charge for work which is useless towards accomplishing the object his client has in view, although performed through inadvertence or inexperience and not with the design of imposing on his client. In matters which are contentious a solicitor is liable for the consequences of his ignorance or non-observance of rules of practice; for his want of care in the preparation of an action for trial. Thus a solicitor is liable for negligence where before bringing or contesting an action he fails to make proper investigation into the matter, or knowing that the client has done some act which will preclude him from obtaining a decision in his favour, neglects to point this out to the client; where he advises the client to enter into litigation though success is improbable and though counsel's advice is against the action being brought or contested; where he brings an action in the wrong Court: where he fails to prepare a case properly for trial; where he does not communicate an offer of compromise to his client: where he advises a hopeless appeal which could not benefit his client and in other respects.

In non-contentious matters it is a solicitor's duty to carry them out according to regular methods. Thus, he is guilty of negligence where he fails to explain adequately to the client any document which is to be executed by the client, such as a deed or will, or bill of sale; where in drawing up an agreement on behalf of his client he fails to insert a necessary stipulation and in other respects.

A solicitor holds himself out to his clients as possessing adequate skill, knowledge and learning for the purpose of properly conducting all business that he undertakes whether contentious or non-contentious. If, therefore, he causes loss or damage to his client owing to the want of such knowledge as he ought to possess or the want of such care as he ought to exercise, he is guilty of negligence giving rise to an action for damages by his client.

Appeal by the defendant from a decision of Mr. F.O. Low, acting Stipendiary Magistrate. Georgetown Judicial District.

B. B. Marshall, for appellant.

S. E. Wills, for respondent.

The judgment of the Court was delivered by the Chief Justice, who said *inter alia*:—

Unless there is a valid explanation of the apparent circumstances of this case, it would seem that they afford yet another example of the carelessness or incompetence of a legal practitioner acting as a solicitor in the performance of professional work at the expense of his client. It would be well for the public to know that the law affords to clients means of redress in relation

to such solicitors. A solicitor (or a legal practitioner acting as a solicitor) cannot charge for work which is useless towards accomplishing the object his client has in view, although performed through inadvertence or inexperience and not with design of imposing on his client. In matters which are contentious, a solicitor is liable for the consequences of his ignorance or non-observance of rules of practice; for his want of care in the preparation of an action for trial. Thus, a solicitor is liable for negligence where, before bringing or contesting an action, he fails to make proper investigation into the matter, or, knowing that the client has done some act which will preclude him from obtaining a decision in his favour, neglects to point this out to the client; where he advises the client to enter into litigation though success is improbable and though counsel's advice is against the action being brought or contested; where he brings an action in the wrong Court; where he fails to prepare a case properly for trial; where he does not communicate an offer of compromise to his client; where he advises a hopeless appeal which could not benefit his client and in other respects.

In non-contentious matters it is a solicitor's duty to carry them out according to regular methods. Thus, he is guilty of negligence where he fails to explain adequately to the client any document which is to be executed by the client, such as a deed or will or bill of sale; where in drawing up an agreement on behalf of his client he fails to insert a necessary stipulation; and in other respects.

A solicitor holds himself out to his clients as possessing adequate skill, knowledge and learning for the purpose of properly conducting all business that he undertakes whether contentious or non-contentious. If, therefore, he causes loss or damage to his client owing to the want of such knowledge as he ought to possess or the want of such care as he ought to exercise, he is guilty of negligence giving rise to an action for damages by his client.

Solicitors: *S. Wood Ogle*, for appellant.

P. G. DOOBAY v. R. THOMSON.

PUNDIT GHARBARAN DOOBAY, Appellant (Defendant),

v

R. THOMSON, Commissary of Taxation, Respondent, (Complainant.)

[1937. No. 47.—DEMERARA.]

BEFORE FULL COURT: CREAN, C J., AND VERITY, J.

1937. APRIL 19, 20; MAY 10.

Criminal law—Acting as house agent without licence—Acts as or carries on business of house agent—Separate offences—Acting once—Offence—Holding out—Whether material—Tax Ordinance, cap, 37, s. 25—Miscellaneous Licences Ordinance, cap, 108, s. 10—Offence in second part of year—Conviction—Penalty—Amount of annual licence—Whole to be imposed.

Section 25 of the Tax Ordinance, cap. 37 provides that “everyone who acts as or carries on the business of a house agent shall take out an annual licence for so doing and pay for the licence the sum of fifty dollars a year.” Section 10 of the Miscellaneous Licences Ordinance, chapter 108, provides that “every one who fails or neglects, without lawful excuse, to take out any licence required to be taken out by him under the provisions of any Ordinance for the raising of colonial taxes shall be guilty of an offence, and, on conviction thereof, shall pay for each offence a sum of not less than two dollars and not more than forty-eight dollars, and shall in addition, with all costs, if he has not at the time of conviction taken out a licence, pay where the licence is one that can be obtained for the whole of the financial year, the sum required by the said Ordinance to be paid for the licence for the whole year and on payment of the penalty as aforesaid, with all costs, if the licence is one that can be granted for a whole year and there is any portion of the financial year for which the licence was required then unexpired at the time of the conviction a licence shall be issued to the person convicted for that unexpired portion.”

P.G.D. acted as a house agent once, namely, on the 3rd July, 1936.

Held (1) that a person can be convicted of acting as a house agent even if acts only once;

(2) that it is not necessary, in a prosecution for acting as a house agent without a licence, to establish that the defendant held himself out as a house agent;

(3) that on a conviction of acting as a house agent without a licence the magistrate is bound to order the payment of the amount of the annual licence of a house agent, and that the provisions of sub-section (3) of section 10 of cap. 108 only come into force on payment of the penalty prescribed by subsection (1) of section 10, they being merely directions to the tax-collector to issue the licence for the unexpired portion of the year on payment of the prescribed penalty.

Appeal by the defendant from a conviction by Mr. A. V. Crane, Senior Stipendiary Magistrate, East Coast Judicial District, on a charge of acting on the 3rd July, 1936, as a house agent without a licence. The defendant was ordered to pay a sum of \$10, also \$50 the amount of the annual licence of a house agent, and \$3.60 costs.

J. A. Luckhoo, K.C., for appellant.

S. E. Gomes, Assistant Attorney-General, for respondent.

Cur. adv. vult.

P. G. DOOBAY v. R. THOMSON.

The following judgment of the Court was read by the Chief Justice:—

The appellant was convicted of acting as a house agent without taking out a licence therefor contrary to section 10 of the Miscellaneous Licences Ordinance, chapter 108, and section 25 of the Tax Ordinance, chapter 37.

For this offence he was ordered to pay \$10, also \$50, the amount of the annual licence of a house agent, and \$3.60 costs. In default of payment he was to be imprisoned for 60 days with hard labour.

From this conviction the appellant now appeals, and the grounds given are (1) that the decision was erroneous in point of law, (2) the decision was one which the magistrate viewing the evidence reasonably could not make, and (3) the magistrate exceeded his jurisdiction.

From the evidence given before the learned magistrate, it appears that the appellant negotiated the sale of a piece of land and a house for one Eva Ng-Yow and brought an action for \$100, the amount of his commission on that sale. Judgment was given in his favour, and the record of that case was produced in the magistrate's court as proof of the acting as a house agent by the accused.

It is argued on behalf of the appellant that a person cannot be convicted of acting as a house agent unless it is proved that he has acted as such on several occasions, or at least on more than one occasion. And, alternatively, it is submitted by Mr. Luckhoo that the section under which the appellant was convicted contemplates a holding out by the person charged, and that as there was no evidence of the appellant holding himself out as a house agent, the conviction cannot stand.

In reply to this argument, Mr. Gomes refers us to the wording of the section which says that anyone, who acts as, or carries on the business of a house agent, shall take out an annual licence. He submits the words are clear and unambiguous, and from them it is apparent that one transaction such as the appellant carried through in this case, would constitute "acting" within the meaning of the section.

This argument appears to us to be quite sound and to our minds the section clearly means that a person can be convicted under this section even if he acts only once, as a house agent without a licence.

We think this view of the meaning of section 25 is borne out by the wording of the following sections, 26 and 27, which refer exclusively to the carrying on of a business and omit any reference to acting as a pawnbroker or a huckster. Under these two sections, an isolated transaction as a pawnbroker or a huckster would not appear to be such a contravention as would render a person liable to a penalty.

As to the alternative argument, that this section 25, contemplates that there must be a holding out by the person before he is convicted, we can only say that we find it impossible to read into the section anything which could be taken as having any reference to holding out. But, even if it could be so taken, there was evidence that the appellant was holding himself out as a house agent.

The case of the *Apothecaries Company v. Jones* (1893) 1 Q.B. 89 is cited as an authority in favour of the appellant's first argument, but that case, to our minds, is clearly distinguishable from this. There, the defendant was charged with acting or practising as an apothecary. There were three different actions brought against him to recover penalties for attending, prescribing and supplying medicines to three different persons. Judgment was given against him in one, and in the other two, judgment was given in his favour. The reasons for this decision are given, and, in substance, we think the Court of Appeal came to the conclusion that as the defendant committed three acts contravening the section, he was in reality practising and therefore should not have been fined for the three contraventions which constituted the practising as an apothecary. As he was charged with practising, it took the other two acts to constitute the practising and naturally for those other two acts he could not again be penalised.

The other case cited in support of the appeal is *Scott v. North*, (1867) L.R., 2 C.P. 270, but on examining this case we cannot see that it is an authority in favour of the appellant. It appears to us decidedly against the appellant, for in that case the defendant was evidently charged with acting as broker without being duly licensed. It was held that he did act on four different occasions and the jury found a verdict for the plaintiff for four penalties of £100 each.

To deal with the last ground for appeal which is, that the magistrate exceeded his jurisdiction in ordering the full amount of the annual licence to be paid, it is necessary to refer to section 10 of the Miscellaneous Licences Ordinance, chapter 108.

In support of this ground, it is argued that as the appellant acted as a house agent on the 3rd July, 1936, for the first and only time, he was only liable for the proportion of the annual licence from that date till the end of the year. As to this submission, we are referred to subsection (3) of the above section 10.

On reference to this section 10, it appears to us to be quite clear that anyone who has been found guilty under it, can be ordered to pay for each offence a sum of not less than \$2, and not more than \$48 with all costs. And in addition, if he has not at the time of conviction taken out a licence he must pay, where the licence is one that can be obtained for the whole of the

P. G. DOOBAY v. R. THOMSON.

financial year, the sum required by the Ordinance to be paid for the licence for the whole year.

That order as to the payment of the licence for the whole year was made in this case. But it is argued that on the wording of subsection (3), only a portion of the annual licence is required to be paid.

The subsection reads as follows:—"On payment of the penalty aforesaid with all costs if the licence is one that can be granted for a whole year and there is any portion of the financial year for which the licence was required then unexpired at the time of the conviction a licence shall be issued to the person convicted for that unexpired portion."

It is said by the appellant that by virtue of this subsection (3) he is absolved from paying the whole amount of the annual licence of a house agent and should have been ordered to pay only for six months or half of it. With this argument we are unable to agree, because, in our opinion, the wording of subsection (3) clearly indicates that it is only a direction to the tax collector to issue the licence for the unexpired portion of the year on payment of the prescribed penalty.

The appeal is dismissed with costs of \$20.

Appeal dismissed.

S. SINGH v. J. L. DASILVA.

SUNDERBASI SINGH v. J. L. DASILVA.

[1936. No. 118.—DEMERARA.]

BEFORE VERITY, J. 1937. MAY 10. 31.

Practice—Taxation—Costs—Apportionment—General costs of action—Costs of issue—Interpretation.

Where judgment is given in favour of the plaintiff against the defendant for the general costs of an action, and in favour of the defendant against the plaintiff for the costs of an issue, the only items taxable by the defendant against the plaintiff are the solicitor's fees in connection with the issue on which the defendant succeeded and the remuneration of the witnesses (if any) who deposed solely to that issue.

Where in such a case the costs of the plaintiff are taxable on the lower scale, the costs of the defendant are also taxable on the lower scale.

Summons by the plaintiff for review of the certificate of taxation of the defendant's bill of costs.

J. A. Luckhoo, K.C., for plaintiff.

C. R. Browne, for defendant.

Cur. adv. vult.

VERITY, J.: This is a summons to review the Registrar's certificate of taxation of the defendant's bill of costs on the grounds (a) that the only taxable items are the solicitor's fees in connection with getting up the evidence on the issue on which the defendant succeeded, and (b) that the bill should be taxed on the lower scale, Scale II.

It was objected by counsel for the defendant that the first ground should not be argued, it not having been set out in the written objection. I was of the opinion that the reasons given in the written notice are wide enough to cover the present ground of review, and that the purpose of such notice has been substantially obtained in that ample opportunity was afforded for their argument before the Registrar who heard such argument and made his decision thereon. This ground is moreover almost inseparable from the other in point of the principle involved and I therefore allowed the point to be argued.

In the action the plaintiff pleaded by paragraph 4 of his statement of claim the publication of a slander on the 5th May, 1936, a date antecedent to the issue of the writ, and by paragraph 6 the publication of a further slander on the 25th of May, 1936, three days after the issue of the writ. By paragraph 3 the plaintiff pleaded that in consequence of the words set out in paragraphs 4 and 6 she had been greatly injured in her character and reputation. By the statement of claim she claimed \$5,000 damages, five times as great as those claimed by the writ.

At the trial the judge ordered judgment to be entered for the plaintiff for \$200 and ordered that the plaintiff recover against

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the defendant that sum “and the general costs of the action,” but having found in favour of the defendant with regard to the issue raised by paragraph 6 ordered “that the defendant recover against the plaintiff the costs occasioned by the said issue as to the use of the words set forth in the said paragraph 6 of the statement of claim.”

On this order the defendant brought in a bill of costs which included items which can only be described as items taxable on an apportionment of the costs of the action. To these items the plaintiff took exception on the hearing of the written objection, and the Registrar overruled the objection and confirmed the taxation. The Registrar further allowed the taxation of these items on the higher scale (Scale I) whereas the costs of the plaintiff were allowed on the lower scale (Scale II) only.

The decision of the learned Registrar is based largely, it would appear, upon his view that the second act of slander “was no ordinary act of aggravation as in itself it was the foundation of a separate cause of action for slander,” and he further states “assuming that in law the second act of slander could only be considered as an adjunct to and an aggravation of the first act of slander, the following factors must not be overlooked (a) the plaintiff did indeed plead the second act of slander as a second cause of action, (b) the action proceeded on the footing that there were two separate causes of action, (c) the judgment appears to have proceeded on a similar footing. The trial judge ordered the plaintiff to pay the defendant the costs of the issue in which the defendant won and he the plaintiff lost. It was an ordinary judgment for costs and the Registrar must interpret it in the same manner as he would interpret any other judgment for costs.”

With the learned Registrar’s view that the plaintiff pleaded the second act of slander as a separate cause of action I am disposed to agree, but the real effect of this manner of pleading requires consideration which may throw light on the Registrar’s conclusion as to the nature of the further proceedings, and the meaning of the order for costs.

The test as to whether or not the action and judgment proceeded on the footing that two separate causes of action were for determination is, in my view, whether the trial judge would have been right if, had he believed the plaintiff as to paragraph 6, he had assessed separate damages in respect of each act of slander. I am of the opinion that such an assessment would have been wrong, for while it is open to a plaintiff to plead an act performed after the issue of the writ in aggravation of damages it is not open to him to lead a fresh cause of action arising after the issue of writ. This question was discussed in *Eshelby v. The Federated European Bank, Ltd.* (1932) 1 K.B. 254. In that case an official referee allowed an amendment of the claim to include an amount falling due by way of instalment after the issue of the writ, and

it was held that such an amendment was not justified inasmuch as it admitted a new cause of action which did not exist at the date of the issue of the writ. Swift, J., said "I can find nothing in the rules which justifies such an amendment. To bring in such a cause of action does not seem to me to be amending the proceedings at all; it admits a new cause of action and one which could not have been sued upon at the time the writ was issued." He proceeded further "The Court has amended the statement of claim which is endorsed upon the writ but it has not amended the writ itself; as indeed it could not have done so because in order to make this action on the second instalment one which would come within the writ the date of the writ would have had to be altered. I do not think the Court could possibly alter the writ in that way."

It appears to me that what the Court could not do in that case the plaintiff in the present case could not do by virtue of inclusion of a second cause of action in his statement of claim. It might well have been the subject of an application to strike out. No such application was made, however, and the defendant now submits that he is entitled to such advantage as might accrue to him by reason of waiver on his part of an irregularity in the plaintiff's pleading. The attempt by the plaintiff to set up a fresh cause of action in these circumstances, however, is not a mere irregularity in manner of proceeding but is a nullity. It is altogether unwarranted by the prescribed practice of the Court and cannot be waived.

Paragraph 6 cannot therefore be held, even in conjunction with paragraph 8 to have constituted in law a second cause of action and any judgment based upon such an assumption would have been erroneous. Any attempt to interpret the terms of the judgment upon that assumption would be equally at fault unless such terms clearly expressed that view.

The real issue is, therefore, the meaning of the words of the order. The question of costs is a matter within the Judge's discretion and the words used in the order must be taken to mean what they say. It must be determined whether the trial Judge used a form of words which would effect an apportionment of the general costs of the action. It does not appear to me that he did so.

In the case of *In re Pollard; Pollard v. Pollard* (1902) Weekly Notes, p. 49, Kekewich, J., expressed the view that "The coats of an issue or costs increased by a particular claim do not connote by themselves any general costs of the action." In the present case the words of the order express no more, and relate to nothing further than costs occasioned by a specific issue of fact.

The most recent interpretation placed upon such an order was drawn to my notice by counsel for the plaintiff and would appear to dispose of all doubt. In *Adamson v. Birkenhead Corporation*,

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(1937) 1 Ch. 279 the trial judge ordered that the defendant corporation was to get the costs, except such costs, as were incurred by the plaintiff in proving a specific issue of fact. The plaintiff objected to the registrar's order on taxation on the ground that he had not apportioned any of the general costs of the action. Bennett, J., in holding that the registrar was right referred to the variance which had at one time existed between the practice of the Common Law Masters and those in Chancery and to the present practice of the Masters of the Supreme Court Taxing Office who never apportioned where an order or judgment gave a party the costs of an action except so far as they related to a particular issue and to the other party the costs of that issue. The order in that case is not identical with the order in the present case, but the principle is equally applicable, is that which formed the basis of the Common Law practice, and is that which in my view should be followed in this Court.

I am of opinion therefore that the learned Registrar erred in his conclusion that the order in this case connoted an apportionment of the general costs of the action, as would appear by reference to many items allowed by him on taxation. He appears to have been misled largely by his conclusion that there were two causes of action upon one of which the defendant succeeded, but it is by the words of the order rather than by the nature of the pleadings that the taxing officer is to be bound, and the order in this case refers solely to the costs occasioned by a specific issue. The defendant's bill of costs must therefore be sent back to the Registrar with the direction that the only taxable items are those occasioned by the issue as to the use of the words set out in paragraph 6 of the statement of claim, that is to say, the solicitor's fees in connection with getting up the evidence on the issue of fact on which the defendant succeeded and the remuneration of witnesses (if any) who deposed solely to this issue.

As to ground (b) I am of the opinion that the defendant's bill of costs should be taxed on the same scale as the plaintiff's. The defendant has not recovered a judgment in the action but has merely secured an order in regard to certain specific costs in an action in which judgment has been given in favour of the plaintiff. The judgment has fixed the scale upon which the general costs of the action are to be allowed and in my view the unsuccessful defendant should not be placed in any better position in regard to the scale of costs than is the successful plaintiff.

The direction to the Registrar on this ground will be, therefore, that the defendant's bill of costs be taxed on the lower scale (Scale II).

The plaintiff is entitled to the costs of this summons.

Solicitors: *R. G. Sharples*, for applicant (plaintiff).

W. D. Dinally, for respondent (defendant).

In re THE NEW DAILY CHRONICLE PTG., CO., LTD.

IN RE THE NEW DAILY CHRONICLE PRINTING
COMPANY, LIMITED, (In LIQUIDATION).

Ex parte C. R. JACOB.

[COMPANIES' WINDING UP. 1936.—No. 2.]

BEFORE VERITY, J. 1937. MARCH 15; APRIL 5; JUNE 11.

Company—Winding up by the Court—Leave to commence or continue proceedings—When granted—Mortgaged property—Execution against—Leave to mortgagee to proceed in—Not granted—Insolvency Ordinance, cap, 180, ss. 11, 38, 39, 44 and Second Schedule—Companies (Consolidation) Ordinance, Cap. 178, ss. 132, 202.

Section 132 of the Companies (Consolidation) Ordinance, chapter 178, provides that “when a winding up order has been made, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to any terms imposed by the Court.”

Held, that leave cannot be granted under this section to a mortgagee to proceed in execution against mortgaged property, because (a) under the laws of this Colony the property in the thing mortgaged does not pass to the mortgagee but remains in the mortgagor, and, on insolvency, passes to the assignee of the insolvent estate; (b) the insolvency laws are aimed at placing in the hands of the assignee the collection and distribution of the whole estate of the insolvent, and the grant of such leave would strike at such fundamental principle, would confer on the mortgagee rights which are not conferred upon him by the Insolvency Ordinance, chapter 180, and the Companies (Consolidation) Ordinance, and would disregard the statutory rights vested in the Official Receiver or liquidator by the said Ordinances, and the statutory priorities in the distribution of the assets of the company.

In re Demerara Turf Club, Limited, (1915) L.R.B.G. 191, Major, C.J., not followed.

Dictum of Full Court (Major, C.J., and Dalton, J.) in *In re Demerara Turf Club, Limited*, (1917) L.R.B.G. 51, not approved.

Semble, that where there are debts and liabilities which can only be established or determined by the trial of an action the Court will, in a proper case grant leave for the commencement or continuance of proceedings, but not to proceed in execution, against a company in liquidation, or an insolvent estate, as the case may be.

per Verity, J.: I am not of the opinion that section 44 of the Insolvency Ordinance, chapter 180 is not applicable to a case in which leave to proceed in execution has been granted by the Court subsequent to a receiving order, for in no case would leave be granted in circumstances in which by statute it was immediately to be rendered of no effect.

Summons by Charles Ramkissoon Jacob for leave to commence an action, and prosecute the same to judgment and execution, against The New Daily Chronicle Printing Company, Limited, for foreclosure of a mortgage passed on the 14th April, 1936, notwithstanding an order of the Court dated 24th August, 1936, for the winding up of the company.

J. A. Luckhoo, K.C., for the applicant.

G. J. deFreitas, K.C., for M. L. Hendricks, a creditor of the company.

Cur. adv. vult.

In re THE NEW DAILY CHRONICLE PTG. CO., LTD.

VERITY, J.: This is a summons for leave to commence an action and prosecute the same to judgment and execution, against a company for foreclosure of a mortgage passed on 14th April, 1936, notwithstanding an order of the Court dated the 24th August, 1936, for the winding up of the Company.

The application is made by reason of section 132 of the Companies (Consolidation) Ordinance, Ch. 178, and is opposed by the creditor upon whose petition the winding up order was made and whose counsel informs me he is authorised also to express the view of the Official Receiver.

A first mortgage was passed by the Company in favour of the applicant charging assets of the Company to secure a loan of \$600. By the deed of mortgage the Company covenanted to pay interest and repay the loan by instalments the first of which fell due on the 14th of October, 1936, and has not been paid. The mortgage deed secures to the applicant, in the usual form, the right to foreclose the mortgage and bring the property mortgaged to sale at execution and to recover from the proceeds of sale the full amount due at the time of such sale.

It is submitted on behalf of the applicant that on the authority of *Lloyd v. David Lloyd & Co.*, (1877) 6 Ch. D. 339 and of *In re Demerara Turf Club, Ltd.*, (*in Liquidation*), *B.G. Mutual Fire Insurance Co., Ltd.*, v. *Demerara Turf Club, Ltd.*, B.G.L.R. 1915, p. 191, leave will be granted, generally speaking, as a matter of course to a mortgagee to commence proceedings against a company in compulsory liquidation for realization of the mortgage security.

On the other hand it is submitted that in view of the distinctions between the laws of this Colony and the law of England relating both to mortgages and insolvency, the decision in *Lloyd's* case is not applicable and that the case of the *Demerara Turf Club* was wrongly decided. In support of this contention counsel for the petitioning creditor referred to further proceedings in the case of the *Demerara Turf Club* and more particularly to the judgment of Hill, J., reported at p. 132, B.G.L.R. 1916, dissenting from the view held by Sir Charles Major, C. J., in the earlier proceedings. Although the matter came before the Full Court on appeal from the judgment of Mr. Justice Hill, (B.G.L.R. 1917, p. 51) it cannot be said that the judgment of the Full Court solved this difference of view. While respect is due to the opinions of both judges there does not appear to be any authority by which this Court is now finally bound on this particular point. Rather is it a question to which fresh consideration must be given. In the first place it is desirable that due regard should be paid not only to the differences which exist between the laws of England and the laws of this Colony in relation to the nature and effect of mortgages but also to the effect of the statute law relating to bankruptcy or insolvency.

The distinctive nature of a conventional mortgage under the Roman Dutch system still operative in this Colony by virtue of proviso (*b*) of section 3 of the Civil Law Ordinance, Ch. 7, as compared with the nature of a mortgage in English law was recognised both by Sir Charles Major and Mr. Justice Hill, and need not be laboured but it is important that the effect of this distinction upon our statute laws should be understood, for recognition of this effect is essential to the due interpretation of those statutes and a full understanding of their intent.

The incidence of the respective rights of mortgagor and mortgagee and their respective interests in the property mortgaged as compared with such rights and interests in English law is reflected in the insolvency laws of this Colony, and the differences between the Insolvency Ordinance, Ch. 180 and the English Bankruptcy Acts cannot be ignored when attempt is made to apply or follow decisions in the English Courts based on statutes which in this regard vary not only in detail but in a fundamental principle.

In case of bankruptcy the immediate effect of the nature of an English mortgage is the vesting in the trustee of the equity of redemption only, the property remaining vested in the mortgagee. This effect is recognised by the Bankruptcy Acts which are aimed at securing to the mortgagee the right to realize his security in the event of bankruptcy. Section 7 (2) of the Bankruptcy Act, 1914, therefore especially declares that the making of a receiving order and the statutory consequences thereof "shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it" but for the receiving order. The Second Schedule to the same Act recognises throughout this right of the secured creditor to realize his security, while section 33 of the Act in prescribing the ranking for payment of debts makes no reference to mortgages or other secured debts. The principles which lies behind these enactments is clearly based upon the English conception of the nature of a mortgage, the transfer to the mortgagee of the legal ownership of the property mortgaged. It is this same principle so recognised by the Bankruptcy Acts which is the root of the judgment in *Lloyd's* case, the intent of which was to enable the secured creditor to exercise his right of realizing the security of the property in which he was the legal owner and in which the sole interest of the insolvent company was an equity of redemption. This lesser interest is by statute secured to the company not by any right in the liquidator to take possession of and sell the mortgaged property but by his right to redeem in compliance with the appropriate statutory requirements. Under the laws of this Colony, however, owing to the nature of a conventional mortgage the property in the thing mortgaged

In re THE NEW DAILY CHRONICLE PTG., CO., LTD.

does not pass to the mortgagee but remains in the mortgagor, and on insolvency passes to the trustee of the insolvent estate. This effect is recognised in our Insolvency Ordinance, Ch. 180, which is aimed at placing in the hands of the trustee the collection and distribution of the whole estate of the insolvent. Thus by the proviso to section 11 of the Ordinance (which corresponds to section 7 (2) of the Bankruptcy Act, 1914) there is no general saving of the right of a secured creditor to realize his security, but such saving affects only the rights of a creditor secured on any ship, vessel or share therein. The Second Schedule to the Ordinance (which corresponds to the same Schedule to the Bankruptcy Act) does not contemplate realization by the creditor of his security, but provides for realization by the assignee and prescribes the method by which a secured creditor may require such realization. Section 39 of the Ordinance (which corresponds to section 33 of the Act) in prescribing the ranking of debts for payment places legal and special conventional mortgages fifth and general conventional mortgages seventh in order of priority. Section 38 of the Ordinance prescribes the conditions under which, with the assent of the assignee, and approval of the Officer Receiver, a secured creditor may be allowed to realize his security. It is significant that there is no counterpart of this section in the English Act which recognizes and gives effect to the general right of the secured creditor to realize his security.

I have reviewed at some length the material differences between the English Bankruptcy Acts and our Insolvency Ordinance because these differences are not fortuitous but are the result of a distinctive recognition by the statute of the nature of a mortgage varying with the conception thereof held under the two systems of law. In both systems the same provisions relating to the rights of secured creditors and of the ranking and payment of debts are to be observed in the case of the winding up of a company as are in force under the laws of bankruptcy and insolvency and the same distinctive principles are thus preserved.

Recognition of this distinction both in principle and in detail discloses at once its importance not only in determining the issue raised by the summons but also in considering the application to this issue of the decisions arrived at in English cases.

In effect the present applicant seeks leave to realize his security, for foreclosure, sale at execution and payment from the proceeds of the full amount of his debt and costs do secure to him the fruits of such realization. In *Lloyd's* case relied upon by the applicant and followed by Sir Charles Major in the case of the *Demerara Turf Club*, it was the intent of the Court to secure to the creditor his right to realize his security. In the present case no such general right exists, and it is a question as to whether the Court should by leave to commence an action and

proceed to judgment and execution confer on the applicant rights which are not conferred on him by the Insolvency Ordinance.

It is true that in the judgment of the Full Court in the case of the *Demerara Turf Club, Ltd.*, in 1917 the learned Chief Justice expressed the view that it has been judicially settled that the Court may grant leave to proceed to execution in such cases, and that with this view Dalton, J., agreed. No reference is made in the judgment to the cases in which this judicial decision is to be found, but if, as I may hazard, they are those cited by counsel for the respondent company in that case, then they are decisions in England founded on principles entirely at variance with those of the laws of this Colony in that regard, and are no more applicable than, in my view, is *Lloyd's* case. It is with great respect for the views of the Full Court that I find myself impelled to dissent from the application to such circumstances as these of a view which, not being essential to the judgment of the Court, would not appear to be of binding authority.

I am not of the opinion that section 44 of Chapter 180 is applicable to a case in which leave to proceed to execution has been granted by the Court subsequent to a receiving order, for in no case would leave be granted in circumstances in which by statute it was immediately to be rendered of no effect, but I am of the opinion that the Court should not grant leave to proceed to execution where, as in the present case, the granting of such leave would strike at the fundamental principle underlying the insolvency laws of this Colony and without consideration for the statutory rights vested in the assignee, Official Receiver or liquidator by the Insolvency and Companies (Consolidation) Ordinances, or for the statutory priorities in the distribution of the assets of the insolvent estate or company.

While therefore there will undoubtedly arise cases in which the Court will properly exercise its powers to grant leave for the commencement or continuance of proceedings against a company in liquidation or an insolvent estate, for there may well be debts or liabilities which can only be established or determined by the trial of an action, yet it does not follow that an action should proceed to execution when such proceeding would be in defeat of the objects of the insolvency laws.

In the present case it does not appear to me that any useful purpose would be served by the institution of proceedings by the applicant and prosecution to judgment only. They are unnecessary to establish his mortgage which has already been established in the prescribed manner as is required by section 39 (5) of the Insolvency Ordinance, Chapter 180. It does not appear that the breach thereof is a matter in dispute. The applicant would therefore be in no better position did he bring suit and proceed to judgment, and unless leave was granted also to proceed to execution he would still be faced with that which he desires to

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avoid: the realization of the security by the Official Receiver and the statutory consequences thereof.

As, for the reasons I have given, I am of the opinion that it would defeat the intentions and, provisions of the insolvency laws of this Colony if leave was granted to proceed to execution I must refuse such leave.

It is open to the applicant to exercise such rights as are conferred on him by the Insolvency Ordinance and the Second Schedule thereto in order to secure realization of the security or its redemption, and he will then receive, in my opinion, all that he is legally entitled to receive.

If I am right in this view then the present application comes within so much of the ruling in *Lloyd's* case as I am prepared to adopt as consonant with the Laws of this Colony; that where without bringing an action a creditor is offered all that he is entitled to receive there is good ground for refusing leave to commence proceedings.

This application must for the foregoing reasons be dismissed with costs. I certify for counsel. Costs fixed by consent at \$75.

Application refused.

Solicitors: *W. D. Dinally*, for the applicant.
G. R. Reid, for the respondent.

IN THE MATTER OF EST. OF E. FRASER, DECD.

IN THE MATTER OF THE ESTATE OF EDWARD FRASER,
DECEASED.

AND

IN THE MATTER OF THE LEGITIMACY ORDINANCE, 1932.

THE PUBLIC TRUSTEE, PLAINTIFF,

v

ELIZABETH ST. CLAIR, DEFENDANT.

[1937.—No. 9. DEMERARA.]

BEFORE CREAN, C.J. 1937. FEBRUARY 3, 22; JUNE 18.

Intestacy—Illegitimate person—Succession to—No children—No brothers or sisters—Mother predeceasing—Whether uterine sister of mother entitled—Legitimacy Ordinance, 1932, (No. 14), s. 11 (2).

Where an illegitimate person, the only child of his mother, dies intestate leaving no children and no mother him surviving, but is survived by a uterine sister of his mother, such aunt is not entitled to any portion of the estate of the said illegitimate person.

Section 11 (2) of the Legitimacy Ordinance, 1932 (No. 14) provides that “where, after the commencement of this Ordinance, an illegitimate child, not being a legitimated person, dies intestate . . ., his mother, if surviving shall be entitled to take any interest therein to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent and if his mother does not survive him then such legitimate and illegitimate children of his mother as survive him *and the persons entitled to succeed them on intestacy* shall be entitled to take any interest therein to which they would have been entitled if all such children and the child had been born legitimate.”

E. F. was illegitimate and was the only child of his mother. He was never married. He died intestate. His mother, I.L., predeceased him. I. L., was illegitimate, and her mother had two children, E. S. C. and herself. E. S. C. survived E. F.

Held, that section 11 (2) of the Legitimacy Ordinance, 1932, made no provision for the sister of the mother of an illegitimate person succeeding to such person on intestacy.

S. J. Van Sertima, K.C., for plaintiff.

K. S. Stoby, for the defendant.

Cur. adv. vult.

CREAN, C.J.: This summons is issued, on the application of the Public Trustee, for a ruling by the Court as to whether or not Elizabeth St. Clair is entitled to any portion of the estate of Edward Fraser, deceased, who died intestate at Plantation Rose Hall, Canje, Berbice.

Edward Fraser was illegitimate and the only child of his mother Ida Lancaster now deceased. Elizabeth St. Clair, the present defendant and claimant herein, is a sister of Ida Lancaster, both being illegitimate daughters of Maria Lancaster, deceased.

The deceased person Edward Fraser whose estate the Public Trustee is presently administering died on the 24th June, 1935. He was never married; but he is survived by an illegitimate

IN THE MATTER OF EST. OF E. FRASER, DECD.

daughter named Ivy Fraser in addition to Elizabeth St. Clair his aunt, and the defendant in this summons.

Elizabeth St. Clair claims that she has rights, in and to the estate of the deceased Edward Fraser, by virtue of the provisions of subsection (2) of section 11 of the Legitimacy Ordinance of 1932.

This subsection (2) reads:—"Where after the commencement of this Ordinance, an illegitimate child, not being a legitimated person, dies intestate in respect of all or any of his property, his mother if surviving shall be entitled to take any interest therein to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent, and if his mother does not survive him, then such legitimate and illegitimate children of his mother as survive him and the persons entitled to succeed them on intestacy shall be entitled to take any interest therein to which they would have been entitled if all such children and the child had been born legitimate."

Counsel for Elizabeth St. Clair argues she is entitled to succeed to the estate of the deceased on the wording of this subsection. Further arguments have been adduced in favour of his contention which he has put in writing and which are quite ingenious and appear quite plausible. Amongst them is the submission that words should be imported into the section which are not there. If the words he suggests were included in the subsection undoubtedly there would have been a great deal more weight in his argument.

I do not propose to set out these arguments in detail as they are in writing and will form part of this record. But I think the main argument of the defendant is that the meaning of the words "and the persons entitled to succeed them" occurring in section 11(2) of the Ordinance is ambiguous, and, therefore, the history and scope of the enactment must be considered, and if considered it may be held that his client is entitled to succeed to the estate of the deceased herein.

It is suggested by counsel that there should be read into the above subsection (2) the words "and if they are dead the persons entitled to succeed them" as if these words followed immediately the words "and the persons entitled to succeed them." If the subsection had been worded thus it might have been possible to consider Elizabeth St. Clair as a claimant to the estate.

It seems to me however, that it would be extending the purpose of the Ordinance unreasonably—as it is now worded—to consider the claim of Elizabeth St. Clair as possibly coming within its scope and meaning. The Ordinance makes specific provision for the mother of her illegitimate child succeeding to his estate if he dies intestate. And if the mother does not survive him provision is then made for such legitimate and illegitimate children of his mother as survive him succeeding to his estate and the persons entitled to succeed them on intestacy.

This section was in my opinion passed primarily for the purpose of establishing the right of the illegitimate child and the mother of an illegitimate child to succeed on intestacy of the other. There is nothing in the section which would lead one to think that the Legislature contemplated defining in this Ordinance what the rights of a sister of the mother would be in the event of her nephew dying intestate.

The Ordinance was passed to amend the Law relating to children born out of wedlock and amongst other things it provides that on the death of an illegitimate child its mother shall succeed to his estate. And in the event of his mother not surviving him, then, if he dies intestate all the children of his mother and those entitled to succeed them shall succeed to his estate, which means that even if the children of his mother were only half brothers and sisters they are entitled to succeed him.

And I take it, that what was meant by the words “and those entitled to succeed them” was, the issue of those brothers and sisters or half brothers and sisters as the case may be. The Ordinance stopped there—it made no provision for the sister of such mother—and in my interpretation of it I am unable to see how the claim of Elizabeth St. Clair to this estate under section 11 of it can be entertained.

E. HEYLIGER v. A. W. BURGESS.

E. HEYLIGER, EXECUTOR UNDER THE WILL OF CHARLES
McCALMONT BURGESS, DECEASED, Plaintiff,

v.

A. W. BURGESS, Defendant.

[1937. No. 8.—DEMERARA.]

BEFORE CREAN, C.J. 1937. JUNE 15, 16, 18.

Costs—Probate action—Successful party—Costs of—Out of estate—By other party—When payable—Unsuccessful party—Costs of—Out of estate—When payable—When borne by himself.

Where the testator, or those interested in the residue, have been the cause of the litigation, the costs of unsuccessfully opposing probate may be ordered to be paid out of the estate.

If the circumstances led reasonably to an investigation in regard to a pro-pounded document, the costs may be left to be borne by those who respectively incurred them.

If, however, there were no grounds whatever for the investigation, then the Court has power to order the whole costs of the action to be borne by the person, who was responsible for the institution of the action.

Action for probate of a will in solemn form of law against the defendant who had entered a caveat to the grant of probate in common form.

S. L. van B. Stafford, for the plaintiff.

S. I. Cyrus, for the defendant.

Cur. adv. vult.

CREAN, C.J.: This action is brought by the plaintiff who is the executor of Charles McCalmont Burgess, deceased, for an order that probate of the will of deceased of the 13th January, 1936, be decreed in solemn form of law.

It was necessary for the plaintiff to bring the action on account of a caveat being lodged by the defendant, a brother of deceased. This caveat prevented the issue of any grant of probate; consequently, the bringing of this action was the only course open to the plaintiff.

The grounds given by the defence why a grant of probate should not be issued to the plaintiff, were undue influence, negligence and other grounds; also, that the above will was not executed in accordance with the Wills Ordinance, chapter 148.

Mr. Cyrus for the defendant has withdrawn all these allegations of undue influence and fraud as he evidently realised he had no evidence to support them, and that course adopted by him is, I think, to be commended. The only remaining point, therefore, for decision is that raised in the defence which alleges that the will was not executed according to law.

This defence was evidently taken because of a statement made by one of the witnesses to the solicitor for the defendant and signed by him. From this statement one could possibly come

to the conclusion that all the requisites necessary for the proper execution of the will were not present at the time it was signed by the deceased. The wording of the statement is not quite clear, because one might think from reading it, that Agard was not present when deceased and Wallbridge signed.

However, after hearing the evidence of Wallbridge and Agard I am satisfied that the will was executed in accordance with the law of the Colony, and, therefore, the last ground of defence fails. There remains only the question of costs, which is an important one in this type of case.

It has been argued by Mr. Stafford that the general rule that costs follow the event should be adhered to in this case and therefore his costs should be ordered to be paid by the defendant. In support of this argument I am referred to the case of *Spiers v. English*, (1907) Probate, 122. One principle this case lays down is that where the testator, or those interested in the residue, have been the cause of the litigation, the costs of unsuccessfully opposing probate may be ordered to be paid out of the estate.

In this case it has not been shown that the testator or the executor—the plaintiff herein—have been the cause of this litigation: therefore, there is no reason why the defendant's costs should be paid out of the estate.

Another principle laid down by the above case is, that if the circumstances led reasonably to an investigation in regard to a propounded document the costs may be left to be borne by those who respectively incurred them. If however, there were no grounds whatever for the investigation, then the Court has power to order the whole costs of the action to be borne by the person who was responsible for the institution of the action.

The fact that a statement was made by the witness Wallbridge, from which it might have been inferred that one of the subscribing witnesses to the will was not really present when it was signed by the deceased is, in my opinion, such a circumstance as might reasonably be considered as a ground for investigation. Therefore this case seems to me to be one in which the defendant should only bear the costs incurred by him, and not be ordered to pay the plaintiff's costs.

The order of the Court is that probate of the will be granted as prayed for by the plaintiff. His costs of the action to be paid out of the estate and the defendant to bear his own costs.

Judgment for plaintiff.

Solicitors: *Carlos Gomes; R. S. Persaud.*

GONDCHI v. HURRILL.

GONDCHI v. HURRILL.

[1937.—No. 4 BERBICE.]

BEFORE VERITY, J. 1937. JUNE 18, 21, 22.

Land—Title—Transport—Change of owner—Judicial sale—Adverse possession—Effect of—Recovery of possession—Action for—Limitation—Civil Law of British Guiana Ordinance, cap. 7. s. 4 (2)—Estoppel.

In 1921, when R. was the owner of a piece of land H. entered into adverse possession of it.

The land was sold at execution, and in 1929, S. obtained a judicial sale transport therefor.

In 1933, H. was in adverse possession for 12 years.

S. then transported the land to J., who, in turn, transported it to G.

G. brought an action against H. to recover possession.

Section 4 (2) of the Civil Law of British Guiana Ordinance, chapter 7, provides that “no person shall bring an action or suit to recover any immovable property, but within twelve years next after the time at which the right to bring or recover the same has accrued to him or to some person through whom he claims.”

Held, (1) that a transport does not confer on the holder thereof the right to enforce possession by way of an action which is barred under section 4 (2) of the Civil Law of British Guiana Ordinance, chapter 7;

(2) that G. claimed through R., and had no greater right to eject H., than R. had or would now have, had he remained the lawful owner;

(3) that as more than 12 years had elapsed since H. had entered into possession, the right of G. to recover possession from H. was statute barred.

Semble, that where by reason of his conduct in failing to oppose an intended sale of which he had actual notice, the person claiming by prescription or limitation has induced the purchaser to assume that no such adverse right exists, he will not be allowed to assert his rights under section 4 (2) of the Civil Law of British Guiana Ordinance, chapter 7, as that would be contrary to equity and fair dealing.

Action to recover possession of a piece of land. The facts and arguments appear in the judgment.

Mungal Singh, for plaintiff.

P. M. Benson, for defendant.

Cur. adv. vult.

VERITY, J.: This is a case in which the plaintiff claims possession to a parcel of land of which he is the owner by transport dated October 17th, 1935, an order for the defendant to remove a building therefrom, and damages for wrongful occupation thereof by the defendant.

The defendant avers that he has been in possession of the land from which the plaintiff seeks to eject him for nineteen years, and that the plaintiff is debarred by section 4 (2) of the Civil Law Ordinance, chapter 7, from bringing action to recover the said parcel of land. This defence is inartistically pleaded; but I am not prepared to hold that the statement of defence as amended does not disclose the substance of this defence.

There is little conflict of evidence; and I am satisfied on the evidence that the defendant occupied the disputed piece of land by leave of Roopchand, his grandfather from 1918 to 1921, in which year Roopchand agreed to sell the land to him, and he entered into possession in pursuance of such agreement, paying

then a portion of the purchase money and completing payment in December, 1925. No transport was passed by Roopchand in favour of the defendant; but upon title passing to the defendant's uncle, Sookram, by judicial sale Sookram undertook in writing dated 3rd August, 1929, to transport to the defendant the said piece of land in possession of which the defendant continued. In default of compliance with this undertaking, however, Sookram proceeded to transport a parcel of land, of which the piece in the defendant's possession formed a part, to Jugroo.

The defendant, on the 12th August, 1933, entered opposition to this transport, but in November, 1933, he withdrew his opposition upon an undertaking by Jugroo to secure the defendant's rights. Jugroo in his turn, however, failed to honour this undertaking, and, without notice to the defendant other than the statutory advertisement, passed transport of the whole parcel of land to the plaintiff who now seeks to recover possession from the defendant of that part which has been in his occupation since 1918. I am satisfied that, not only was the plaintiff aware of the defendant's occupation some fourteen years ago, but that he was present when Jugroo gave to the defendant the undertaking to which I have referred.

It appears, therefore, that the defendant has been in occupation of the land in question since 1918, and that this occupation has been adverse to that of the legal owners since 1921 when he entered into possession, not by leave of Roopchand, but in furtherance of the agreement for sale then entered into. He has been in possession adverse to that of the legal owners therefore for a period of some fifteen or sixteen years prior to the issue of the writ in this case.

The right in the legal owner to recover possession, if any such right can be said to have existed, or now to exist, accrued immediately upon his entry into possession in 1921; and by section 4 (2) of the Civil Law Ordinance, ch. 7, it is provided that "no person shall bring an action to recover any immovable property but within twelve years next after the time at which the right to bring the case has accrued to him or to some person through whom he claims." The plaintiff claims through Roopchand, and has no greater right to eject the defendant than Roopchand had, or would now have, had he remained the legal owner, unless any additional right or title is conferred on him by reason of the transport of the land to Sookram, Jugroo and himself, respectively.

In the case of *Abdool Rohoman Khan v. Boodhan Maraj* (1930) L.R.B.G. p. 9. Mr. Justice Savary in the course of an exhaustive and learned judgment, held that section 20 of the Deeds Registry Ordinance, 1919, does not override the effects of the limitation sections of the Civil Law Ordinance for, while it may confer title upon the holder of a transport thereunder, it does not confer upon him the right to enforce possession by way

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of action barred by the Civil Law Ordinance. The mere passing of the transport to Sookram, Jugroo and the plaintiff in turn does not affect the application to the present case of the provisions of section 4 (2) of chapter 7, the defendant having throughout the material period remained in actual undisturbed possession adverse to that of the transport holders.

It is submitted on behalf of the plaintiff, however, that the defendant had notice of the intended sale to Sookram and to Jugroo, and that he is not therefore entitled to set up his right under section 4 (2) of chapter 7. Counsel for the plaintiff cited the cases of the *South African Association v. Van Staden* (1892) 9 S.C., (Juta) 95 and *Oosthuizen v. Human* (1911) E.D.L. 273, in support of this contention. I have not had the opportunity of referring to the Reports of these cases, nor would it appear had learned counsel; but it is made clear, both from a reference thereto to *Dalton's* Civil Law of British Guiana, and from a reference to the former case in the judgment of Mr. Justice Savary to which I have referred, that the principle upon which those cases were decided is akin to that of estoppel. To invoke the aid of such a principle it must be shown that by reason of his conduct in failing to oppose such an intended sale of which he had had actual notice, the defendant or person claiming by prescription or limitation has induced the purchaser to assume that no such adverse right exists. Having led the purchaser into this position, he will not be allowed thereafter to assert his rights, for this would be contrary to equity and fair dealing.

It cannot be said that in the present case, equity is on the side of the plaintiff or his predecessors in title, or that any conduct or silence on the part of the defendant has led them into a position of difficulty. It is true that the defendant entered no formal opposition to the transport to Sookram and withdrew his opposition to the transport to Jugroo, but in neither case did he leave the intending purchaser in any doubt as to the nature of his claim. On the contrary, he made known his claim, and in each case abandoned his right to opposition only on solemn undertakings given by the intending purchasers that his right would be secured to him by them.

It is equally clear that of the transport to the plaintiff, the defendant had no such actual notice as would now deprive him of the right to set up limitation, but that, on the other hand, plaintiff had knowledge of the defendant's claim.

I am satisfied, therefore, that the defendant is entitled to plead section 4 (2) of the Civil Law Ordinance, and that thereunder the plaintiff is barred from bringing an action to recover possession of the land now in the possession of the defendant.

This action therefore fails, and judgment must be entered for the defendant with costs.

Judgment for defendant.

PLN. SPRINGLANDS, LTD. v. S. S. M. INSANALLY.

PLANTATION SPRINGLANDS, LIMITED, Plaintiff,

v.

S. S. M. INSANALLY, Defendant.

[1930. No. 275.]

BEFORE SAVARY. J.

1931. APRIL 16; MAY 6, 7, 8, 12, 13, 15, 27, 28; AUGUST 10.

Partition—District Lands Partition and Re-Allotment Ordinance, 1926 (No. 16), now cap. 169—Application to Court under—Prima facie title or interest in land in dispute—To be established by plaintiff—Practice—Pleadings—Issues raised in Judge bound by—Not entitled to raise others—Amendment.

Where the plaintiff brought an action against a partition officer appointed under the District Lands Partition and Re-Allotment Ordinance 1926, (now chapter 169), in which he claimed that the appointment of the defendant as partition officer as illegal and void, the Court ordered that the Attorney General be joined as a defendant.

Where a plaintiff is seeking to have the decision of a partition officer set aside by the Court he must first establish some *prima facie* title or interest in the land in dispute as, without that basis, he has no *locus standi*, and his claim fails.

Cases must be decided on the issues on the record, and if it is desired to raise other issues they must be placed on the record by amendment. A judge is not entitled to decide a case on an issue raised by himself without amending the pleadings.

Duties of partition officers explained.

Action for a declaration that the appointment of the defendant as a partition officer was illegal and void, and that all proceedings consequent on such appointment were also illegal and void.

P. N. Browne, K.C., for plaintiff.

S. J. Van Sertima, K.C., for defendant.

Cur. adv. vult.

SAVARY, J.: The plaintiff company allege that they are the owners by transport No. 176 dated the 13th of December, 1916, of "all that parcel of Plantation Number 78 (seventy-eight) bounded on the east by the Corentyne River on the west by the public road running through the said plantation on the south by the northern boundary of Plantation Number 79 (seventy-nine) and extending in a northerly direction for approximately 133½ Rhymland rods, the said parcel of land being now known as section A." This is part of Plantation Eliza and Mary, also known as Lot No 78, situate on the west bank of the Corentyne River, and is the land in dispute and the plaintiffs claim certain relief in respect of a partition of this land carried out by the defendant.

In the statement of claim originally filed the plaintiffs claimed (a) a declaration that the appointment by the Governor in Council of the defendant as partition officer was illegal and void; (b) a declaration that the parcel of land which was partitioned was their property and not that of the persons who presented the petition to the Governor in Council; (c) a declaration that the defendant acted

ultra vires of the provisions of the District Lands Partition and Re-Allotment Ordinance, 1926; (d) an injunction to prevent the defendant entering the said lands; (e) \$500 damages.

Objection was taken by Mr. Van Sertima, defendant's counsel, at the commencement of the trial to the want of proper parties in the action and he submitted that as the petitioners who claimed in their petition to be owners of the same piece of land as the plaintiff company, were not before the Court the trial should not proceed. This was strenuously opposed by Mr. P. N. Browne, counsel for the plaintiff company. In consequence of the points raised in this discussion counsel for the plaintiff, company asked for, and was granted, leave to amend the statement of claim, which he did accordingly.

In view of the fact that the order of the Governor in Council was attacked the Court thought it proper to order the Attorney General to be joined as a defendant and this was accordingly done. The Attorney General also raised the question of proper parties, *i.e.*, the petitioners, not being before the Court. On consideration and in view of the want of the proper materials before me, I decided that it did not appear that I was in a position to order the petitioners to be joined as defendants at that stage. I may mention that the plaintiff's counsel again resisted this invitation to have these parties before the Court, and contended that the petitioners were not necessary parties as the relief asked for in the amended statement of claim would not affect their rights, and secondly, that it would involve great expense and inconvenience to add them as parties.

Although I do not attach much weight to this latter contention, it has become unnecessary to further discuss the question of parties in view of the opinion which I have formed of this case.

By their amended statement of claim the plaintiffs claim (a) that the defendant's appointment by the Governor in Council was illegal and void; (b) a declaration that the partition was not made under lawful authority, the Order in Council appointing the defendant being *ultra vires*; (c) a declaration that the defendant acted *ultra vires* of the provisions of the District Lands Partition and Re-Allotment Ordinance in partitioning the said lands after discovering that the petitioners had not undivided shares or interests in and over the land to be partitioned; (d) an injunction; (e) \$500 damages for trespass.

At first sight it would appear that, as a result of the amendment, the plaintiff company limit their case to attacking the appointment of the partition officer, and raising the question of his right to partition after discovering that the interests of the petitioners in the lands in question were not joint but several, and are no longer seeking to obtain a declaration of ownership as against the petitioners, in other words, the plaintiff company abandon any claim to a judgment *in rem*.

But the defendant contends that before the plaintiffs can hope

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to have the question of their right to any relief investigated they must establish some *prima facie* title or interest in the land in dispute, as without that basis, they have no *locus standi* and their claim fails. In my opinion this contention is sound and I have, therefore, to enquire whether the plaintiffs have discharged that onus.

The plaintiff's claim is based on a transport passed on the 13th of December, 1916, numbered 176, whereby they allege the land in dispute was transported to them. The transport passed the ownership of Plantation Eliza and Mary which included Plantation Lots Numbers 75, 76, 77 and 78 all situate on the west bank of the Corentyne River.

From Plantation No. 78 were excepted (1) lot number 20, (2) lots numbers 0 to 19, and what I have to decide is the extent of these lots. The plaintiffs allege that according to the diagram referred to in their transport, these excepted lots are bounded on the east by the public road which appears on the diagram to pass through Plantation No. 78 whilst the defendant's case is that these lots extend across and beyond the said public road up to or near to the Corentyne River. Lot 20 is first excepted in the transport wherein it is stated that it is laid down and defined on a diagram of part of lot 78 by William Chalmers, dated 5th February, 1870, and deposited in the Registrar's Office on the 15th of May, 1888. In the transport the boundaries of lot 20 are not given, but it is alleged by plaintiff's counsel that they are indirectly referred to in reference to a strip of land which is also excepted in the transport.

Lots 0 to 19 are next excepted without any description save by reference to the last mentioned diagram.

It is common ground that the lands partitioned by the defendant comprise the excepted lots 0 to 20, but the complaint of the plaintiff company is that defendant regarded these lots as extending beyond the public road.

Some difficulty might have been caused by the diagram by Chalmers, Ex. H.O.D.7, referred to in the transport being considerably defaced, but for the fact that a copy was produced from the Lands and Mines Department, where it had been deposited sometime before 1892. It bears a number given to it in the Department, No. 541, and was admitted in evidence without objection, being exhibit E.S.E.P.2.

Dealing first of all with lots 0 to 19, it must be borne in mind that no boundaries are given in the transport, and the only description is by reference to Chalmers' diagram, Ex. H.O.D.7. I am satisfied from an inspection of Ex. H.O.D.7. and E.S.E.P.2. and from the evidence of the defendant's expert witnesses that the lines dividing these lots 0 to 19 are prolonged to the east of the public road and that the only reasonable inference to be drawn from this fact is that the lots do not end at the public

road but extend beyond and to the east of it. The Corentyne River is to the east of the public road as appears from H.O.D.6 and would be a natural boundary, and I accept the defendant's experts' view that the lots extend to or near to the river. No evidence has been adduced, or argument submitted, to show the impossibility or impracticability of this view, and, in fact, there was really no cross-examination on this part of their evidence, which is not surprising, as the plaintiffs' case is and has always been that the whole of the lands to the east of the public road belong to them.

It is true that Mr. Durham, the expert witness called by the plaintiffs, does not agree with this view and expresses the opinion that the prolongation of the lines to the east of the road is meaningless to him as the lines are not closed, and advances that as the principal reason for his opinion. But Ex. H.O.D 14, a plan by Bowhill, described by Mr. Durham, as a most competent surveyor, seems to me to show that the non-closing of lines in surveys was not so very unusual at one time and does not necessarily justify a conclusion that they are meaningless.

I prefer to accept the opinions of Mr. Parker, Mr. Nightingale and Mr. Mullin, the defendant's expert witnesses, because the reasons which they give for the contrary opinion appear to me sound and well founded, and their views do not do violence to what the eye sees on the diagram. It is unnecessary for me discuss their evidence in detail as I do not think any useful purpose would be served thereby. Moreover, I think their view is strengthened by the external circumstances, gathered from the documents themselves, connected with the deposit of exhibit H.O.D.7 in the Registry.

Exhibits H.O.D.7 and H.O.D.9 show that Chalmers prepared two diagrams of Plantation Lot 78 at the request of N. Winter (presumably the owner) after dividing a part of Plantation Lot 78 into 21 lots, H.O.D.9 not showing any prolongation of the lines dividing the lots to the east of the public road, from which it would appear that the lots ended at the public road; the other, H.O.D.7 showing the lines dividing the lots prolonged beyond and to the east of the public road but not closed. H.O.D.9 shows the depth of the lots as 75 roods whilst H.O.D.7 shows it as 60. Both diagrams purport to be dated the 5th of February, 1870, and H.O.D.9 was deposited in the Registrar's Office on the 21st of December, 1870, whilst H.O.D.7 was deposited on the 15th of May, 1888, one month before lot 20 was transported to the Lord Bishop of Guiana according to the date of that transport in a recital in the transport to the plaintiffs. I may here mention that the transport to the Lord Bishop of Guiana was not put in evidence.

Whether the prolongation of the lines was made after the date of the diagram or not is not apparent, but one is constrained to

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ask why did the owner deposit this second diagram Ex. H.O.D.7, 17 years after the deposit of Ex. H.O.D.9 if it was never intended that the lots should be extended beyond the public road. An Act of Deposit costs money and H.O.D.9 was already in the Registry. To my mind, it is reasonable to infer that the deposit of the second diagram, H.O.D.7, was made to show the correct dimensions of the lots just before one of them was about to be transported. Whether Chalmers did not carry out the original instructions, or the owner altered his mind is not apparent as there is no evidence on the point, but it seems to me that in the absence of any explanation. I must assume that the second deposit was done with some object in view, *i.e.*, to show the correct dimensions of the lots about the time when one of them was to be transported. If my assumption is correct, then it appears to me that the opinion of the defendant's witnesses is considerably strengthened.

It was urged on me that the transport to the plaintiffs. Ex. H.O.D.1, shows that the eastern boundary of lot 20 by an indirect reference was intended to be the public road, and that I should come to the conclusion that the other lots 0 to 19 also end at the public road, but for reasons already given, in my opinion, lots 0 to 19 extend across the road. Is the position of lot 20 different?

As previously mentioned the plaintiff's have not put in evidence the transport of lot 20 to the Lord Bishop of Guiana and I have to fall back on such material as I have before me to delimit lot 20.

In my opinion it is not correct to say, as counsel for the plaintiff's suggests, that the southern and eastern boundaries of lot 20 are given in transport, Ex. H.O.D.1. Lot 20 excepted in that transport is described as laid out and defined in Ex. H.O.D.7 and there is also excepted from lot 20 a strip of land "three rods wide along the side-line and public road trenches on the southern and eastern boundaries of the said lot number 20, the same being reserved for draining purposes." It seems to me that at most it might be said that the southern and eastern boundaries of lot 20 are inferentially given in reference to this strip of land that was excepted and this would be in the nature of hearsay evidence. But can I rely on this when it appears from Exhibit H.O.D.7 that lot 20, even though triangular in shape on the western side of the public road, extended across the public road in the same manner as lots 0 to 19 do, and when I bear in mind that diagram H.O.D.7 which, according to the transport defines lot 20, was deposited in the Registrar's Office one month before the transport of lot 20. If lot 20 ended at the public road, then diagram H.O.D.9 was sufficient for the purpose of transporting it, as all the lots in Ex. H.O.D.9 ended at the public road.

Mr. Parker gave it as his opinion that lot 20 did extend across the public road and I presume based his opinion partly on what he saw on H.O.D.7 and also on the fact that the exception of

three roods on the southern and eastern boundaries of lot 20, if I accepted plaintiff's contention, would have the effect, on the southern side of taking in the side-line trench and one-half of the dam between Plantations 78 and 79, and on the eastern side, of taking in the one rood which appears as reserved on H.O.D.7, the trench, and one rood of the public road. I agree with Mr. Parker's view as it seems to me there must be some error in the description of the three roods excepted, and it is not unreasonable for me to say that I do not feel justified in defining the eastern boundary of lot 20 on a description of this character when it appears to be in conflict with the diagram H.O.D.7, which according to the transport, exhibit H.O.D.1, is intended to be the only document delimiting lot 20.

Even if I were to take the view most favourable to the plaintiff's as regards lot 20, I would still have to say that they have left me in a position of doubt, and as the onus of satisfying me that they appear to have a *prima facie* title to the land east of the public road in prolongation of lot 20 is on the plaintiff's, I would have to come to the conclusion that their claim, even if based solely on this, also fails.

But even if I could take the plaintiff's view of the limits of lot 20, I would be faced with a serious difficulty as to the question of relief to be granted. At a comparatively early stage of the proceedings counsel for the defendant frankly mentioned the possibility of his case as to the extent of lot 20 failing, but no leave to amend the pleadings to meet this situation by an alternative plea was asked for, and the plaintiff's claim remains based on ownership of the whole of the lands to the east of the public road.

Plaintiff's counsel has not addressed any argument to me as to the kind of relief to be granted if it should turn out that their claim rested on apparent ownership by title of this very small portion of the lands partitioned, and not on the whole of the lands to the east of the public road. It seems to me that, even if the plaintiffs had succeeded in making me accept this limited view of their case, which they have not, I would have had to consider seriously whether it would follow as a result of this position that the whole of this partition would have had to be set aside and rendered useless; rather it seems to me that the parties who were in occupation of this small portion of the lands would have had to be before the Court when the appropriate relief could have been claimed, so that there would have been an adjudication on what appears to me to be a case different to the one now presented.

In any event, it would not have been open to me to frame a case for the plaintiff's, and I would have had to decide on the issues raised by the pleadings. As Lord Justice Scrutton said in *Blay v. Pollard and Morris* (1930) 1 K.B. at p. 634, "cases must be decided on the issues on the record; and if it is desired to

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raise other issues they must be placed on the record by amendment. In the present case the issue on which the Judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course.”

That disposes of the various points arising on the question of the apparent ownership of the lands in dispute by the plaintiffs.

It follows from my previously expressed opinion that it is unnecessary to discuss the further relief claimed by the plaintiffs by way of injunction or for trespass, but I think it is right to point out that no evidence whatever was led to show that the plaintiffs ever were in possession of the land in dispute. Trespass presupposes possession as distinguished from ownership and is a disturbance of possession.

In view of the reasons which I have given for my decision I am not called upon to state my views as to the effect of certain provisions of the District Lands Partition and Re-allotment Ordinance, but it would appear that those who prepare petitions to the Governor in Council under the Ordinance do not pay a sufficiently strict regard to its provisions, especially section 3.

The duties of partition officers are set out in the Ordinance and it would be well for them to bear in mind that these are statutory duties, and that it is not left to them to decide whether they are to be carried out or not. I call particular attention to the provisions of subsection (5) of section 6, which impose an obligation on partition officers to receive claims *in writing*. The investigation of claims and the ascertainment of the rights of petitioners are left to the partition officers, and it is a matter of importance, in view of a possible appeal or of subsequent litigation, that this provision should be strictly adhered to.

Certain alleged defects of the Ordinance were pointed out during the hearing, and without expressing any opinion, I venture to suggest for consideration the question whether the best procedure has been devised to deal with a matter affecting rights of property, and whether the Ordinance in its present form adequately meets the condition of affairs which it was apparently intended to deal with.

Before closing I cannot help expressing my view that a good deal of unnecessary discussion took place on account of the absence of proper parties in the proceedings and on consequential amendments which could have been avoided if the proper persons had been joined from the beginning, either individually or otherwise under the Rules of Court, so that what appears to me to be the real dispute could have been decided.

Mr. Jones's letter dated the 29th August, 1928, to the Local Government Board, Ex. W.S.J.2 and further correspondence Ex. W.S.J.4 and Ex. W.S.J.7 show clearly that the dispute is between the plaintiffs who claim to be entitled to ownership by transport of the whole of the lands to the east of the public road, and the

petitioners who claim to be entitled to occupy them or to have acquired rights over them.

In my opinion even if the plaintiffs had succeeded in getting the Court to make the declarations asked for in their amended statement of claim, I fail to see how their position would have been advanced any further, since it was admitted by their counsel that such a judgment could not adversely affect any rights of the petitioners, if they had acquired any; and, therefore, the plaintiffs would not in my opinion have been in any better legal position after a judgment in their favour in this action. In other words, after such a judgment the respective legal positions of the plaintiff and the petitioners would have been exactly the same as before the action was filed, and the petitioners would have continued in occupation of the lands they had previously occupied, save that the partition would not be carried out.

It seems to follow from this that, if the plaintiffs really did want to establish their position as owners entitled to the possession of these lands, as against the petitioners, they would still have had to file another suit against them to have this matter decided. This is contrary to the spirit and letter of the Supreme Court of Judicature Ordinance, Chapter 10, and the rules made thereunder, which are intended to avoid multiplicity of suits.

For the reasons which I have given, the claim of the plaintiffs fail and the action is dismissed with costs.

Judgment for defendant.

Solicitors: *A. V. Crane; W. D. Dinally.*

NOTE:—On appeal to the West Indian Court of Appeal the order of the Supreme Court was set aside by consent.

F. JOSEPH v. A. JOSEPH.

FRANCISCA JOSEPH, Appellant (Complainant),

v.

ALBERT JOSEPH, Respondent (Defendant).

[1937. No. 75.—DEMERARA.]

BEFORE FULL COURT: CREAN, C. J., VERITY AND LANGLEY, JJ.

1937. JUNE 30; JULY 2.

Husband and wife—Maintenance of wife—Persistent cruelty—Cruelty—Condonation—Fresh act—Revival of previous acts—What constitutes—Reasonable apprehension of bodily harm—Summary Jurisdiction (Magistrates) Ordinance, Cap. 9, s. 41 (1) (d).

A. and B. were married in 1921. Up to 1931 they lived in harmony with each other. Between 1931 and 1935 there were several acts of cruelty committed by the husband on the wife. She continued to live with her husband and therefore those acts were condoned. Between March, 1935, and August 20, 1936, there was a complete absence of cruelty

On August 20, 1936, there was a quarrel between A. and B. The husband did not use violence to his wife, he didn't abuse her and he didn't make use of threats to her. The wife left the matrimonial home on August 23, 1936, but she continued to cook and wash for her husband, and she did not detach herself completely from his household.

The wife brought a complaint against the husband for maintenance in which she alleged (i) that he had deserted her, and (ii) that he had been guilty of persistent cruelty to her, the last act being on August 20, 1936, and that by the cruelty he had caused her to leave him and live separately and apart from him.

The magistrate dismissed the complaint, and the wife appealed to the Full Court.

Held, by Crean, C.J., and Verity, J. (Langley, J., *dissentiente*) that the quarrel of the 20th, August, 1936, did not disclose such conduct on the part of the husband as should have led the magistrate to find that the wife reasonably apprehended that the husband would commit violence on her.

per Langley, J.: The clear proof of previous acts of cruelty of a ferocious brutality causes me to consider that any quarrel, which is defined as meaning an angry dispute, would create apprehension in the woman's mind.

Appeal by the complainant from an order of Mr. A. C. Brazao, acting Stipendiary Magistrate, Georgetown Judicial District, dismissing a complaint by a wife against her husband for maintenance. The complaint was brought on the grounds of persistent cruelty and desertion.

L. A. Hopkinson, for appellant,

S. L. van Batenburg Stafford, for respondent.

Cur. adv. vult.

LANGLEY, J.: Briefly the facts to which I attach importance in this appeal are as follows:—

The parties were married in 1921 and lived amicably, apparently, for 10 years. Then quarrels broke out between them and continued intermittently during the period 1931 to March, 1935; they were no ordinary matrimonial disagreements, but

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physical struggles in which the appellant was violently beaten, wounded and, in one instance, had her finger broken. A period of peace continued from March, 1935, until the 20th or 21st August, 1936. The appellant swore that on the 21st August, 1936, the respondent struck her, abused her and threatened to kick her but the learned Magistrate—who has had the benefit of hearing the story verbally—did not accept her evidence as to violence, abuse or threats. He finds, however, as a fact, that a quarrel did take place between them on the 20th August, 1936. The case for the appellant rests on whether this quarrel created apprehension of bodily harm in the mind of the appellant to provide sufficient grounds to justify her leaving the matrimonial home.

Counsel for the appellant has cited the following cases:—*Curtis v. Curtis*, (1858) 164 E.R. 688, 168; *Moss v. Moss*, (1916) P. 155, *Thomas v. Thomas* (1924) P. 194.

It has been argued that the appellant, having returned to live with respondent after March, 1935, the previous acts of brutality were thereby condoned.

The principles laid down in *Moss v. Moss* provide that such condonation may be displaced, and the cruelty revived by further acts of cruelty not in themselves sufficient to justify separation, if the Court considers that the new acts, taken together with those condoned, cause the wife reasonable apprehension of bodily harm. Although the learned Magistrate has found that there was a quarrel, he has not given any indication in his reasons for decision as to what he decided did occur. Those reasons, however, include the finding in respect of non-acceptance of the appellant's story in such a way as to create, in my opinion, an irresistible interference that he was looking for acts of violence on the 20th August, 1936, to revive the previous acts of cruelty.

Counsel has informed this Court that the legal principles laid down in the above cited cases, were not cited to the learned magistrate.

In the complete absence of any reference to them and with the strong inference created which I have already mentioned, I am of opinion that the learned magistrate misdirected himself in that matter.

Had these legal aspects been fully argued in the lower Court, I should probably have accepted the learned magistrate's finding, whichever way it went; but I am satisfied on the above grounds, that the legal aspect requiring a lower degree of cruelty was neither argued nor given consideration by the learned magistrate.

In these circumstances, I am of opinion that it is the duty of this Court to arrive at its own conclusions from the record on this point.

Having regard to the gross brutality of the respondent towards his wife, disclosed on the record, I am quite satisfied that the appellant could do nothing else than be most apprehensive of

bodily harm in any quarrel which might arise between them. There can be no question that as the quarrel, which took place on the 20th August, 1936, did in fact result in her leaving the matrimonial home, it would be serious enough to create such apprehension.

It has been suggested that as the wife returned to wash, cook and sell fish for the respondent, there was no justification for her to remain away.

In my opinion, those circumstances provide two additional aspects in justification of the appellant's conduct.

Firstly, it shows that while she was prepared to help the respondent in a reasonable manner, she was afraid to be cooped up with him altogether.

Secondly, the fact that the respondent agreed to those terms, is evidence that he was quite content for her to be away from him—until she tried to have the separation placed on a regular basis, involving definite payments of money, which would be legally enforceable—to provide for her maintenance.

I am of the opinion that the appellant formed the intention of leaving her husband on the occasion of the quarrel in August and the fact that it took her three days to carry out that intention in no way derogates from its value.

So that there can be no misunderstanding of the grounds of my judgment, I will repeat that it is only the clear proof of previous acts of cruelty of a ferocious brutality which causes me to consider that any quarrel—which is defined as meaning an angry dispute—would create apprehension in this woman's mind.

In these circumstances, I am of opinion that the appellant should succeed and that the Court should order:—

- (1) That the magistrate's order of dismissal should be quashed.
- (2) That the learned magistrate be directed to grant a separation order including such financial provision for the maintenance of the appellant, as he shall deem fit.
- (3) That the appellant receive costs in this Court and the Court below.

CREAN, C.J., delivered the following judgment in which Verity, J., concurred:

The parties in this case were married in 1921. Between that year and the year 1931, there was no incident and they appeared to have lived in harmony. Between 1931 and 1935 there is evidence that there were several acts of cruelty, but it is admitted that between March, 1935, and the 20th August, 1936, there was a complete absence of cruelty.

Some subsequent act of cruelty would be necessary to revive the former acts of cruelty which were condoned by the wife's continuing to live with him and thus give grounds for proceedings on persistent cruelty. Certain acts of cruelty were alleged by her to

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have occurred on the 21st August, 1936, and that, as a consequence of those acts, she left his house on the 23rd August, 1936. These allegations of the appellant the magistrate did not accept. He found on the evidence of the defendant (respondent) that there was a quarrel on the 20th August, 1936, but that there was no act of cruelty.

While conduct which would reasonably lead the appellant to apprehend violence would constitute such legal cruelty as would revive the previous acts, we should presume that the learned magistrate directed himself in this sense, unless the record and his reasons clearly indicate that he did not do so.

The reasons for his decision, in our opinion, give no such indication: nor does the evidence accepted by the learned magistrate disclose such conduct on the part of the respondent as should have led him to find that there was reasonable ground for such apprehension. On the contrary, the evidence, in our view, shows that as a fact, there was no such apprehension in her mind; for it appears therefrom that she never ceased to do the respondent's cooking and washing, or detached herself completely from his household up to the date of the trial. In our opinion, therefore, there was evidence to justify the learned magistrate's finding of facts and to those facts we are satisfied that he correctly applied the law. And, consequently, we consider that the appeal should be dismissed with costs. Therefore, the order will be: This appeal is dismissed with costs, \$2.40.

Appeal dismissed.

E. T. A. LACON v. T. MATTHEWS.

EDWARD THEOPHILUS AUGUSTUS LACON, Plaintiff,

v

TRIFENA MATTHEWS, Defendant.

[1936. No. 35.—BERBICE.]

BEFORE VERITY, J. 1937. FEBRUARY 26; MAY 11; SEPTEMBER 7.

Land—Survey—Notice of—True Copy—Original—Sufficiency—Land Surveyors Ordinance, Cap. 167, s. 16 (1)—Non-compliance with—Plan—Admissibility of—Oral evidence of surveyor—Illustration of.

Section 16 (1) of the Land Surveyors Ordinance, Chapter 167, provides that “when a land surveyor intends to resurvey land in dispute, or to define boundaries, he shall give . . . notice in writing . . . and the notice shall be served . . . by sending . . . a *true copy thereof certified*, by the surveyor.”

Held, that service of an original notice is substantial compliance with the requirements of the subsection.

At common law maps and plans made by a surveyor are admissible in evidence if produced by the surveyor and proved by him to be correct.

Production of such a plan by the person who prepared it merely illustrates his oral evidence and carries no more weight than does such evidence.

Non-compliance with the statutory provisions of the Land Surveyors Ordinance, Chapter 167, as to the duty of a surveyor in the course of making such a plan has no bearing whatever on its admissibility. Such non-compliance does not affect the powers of observation of the surveyor nor his competency to make correctly an illustration of what he saw or did, nor can it preclude him from making proof thereof in accordance with the accepted principle of the common law.

If a surveyor does not comply with the Land Surveyors Ordinance, Chapter 167, he may lay himself open to action in trespass and to penalties, and may have deprived himself of the protection afforded him by section 33 of the said Ordinance, but the admissibility or validity of his testimony is in no way affected.

Action for an injunction restraining the defendant from trespassing on the plaintiff’s premises. The facts appear from the judgment.

Mungal Singh, for plaintiff.

A. T. Peters, for defendant.

Cur. adv. vult.

VERITY, J.: In this case the plaintiff claims a declaration that certain land is his property, that a boundary line defined by certain sworn land surveyors is correct and also an injunction, damages and costs.

With regard to the first declaration claimed it appears to me from perusal of the pleadings in this case and in other cases that there exists a practice of including such a claim in many actions for damages in trespass to land, even where the title of the plaintiff to the land described in the transport is not in issue. The claim is for a declaration of the ownership of land the legal title to which is vested in the plaintiff by transport and prays a declaration in the very terms of the transport, the validity and effect of which are not disputed. No such declaration is necessary in such circumstances. It will not be made and I would express

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the view that a declaration under such circumstances should not be claimed.

The real issues in this case are not whether the plaintiff is the owner of land as described in his transport, but what is the correct boundary of the lands so described and whether the defendant has trespassed on such land.

The plaintiff avers that at the time he purchased the land in question he was put into possession by the vendor who pointed out to him the western boundary of that part of the northern back quarter of lot 19 New Amsterdam which he had purchased. He states that a certain cocoanut tree was growing within this boundary, and that in 1929 he erected a fence to the west of the cocoanut tree. On the 3rd of February, 1933, Robert Benn, an agent of the defendant, cut down this tree and broke down the fence, claiming that the tree was within the boundary of land purchased by the defendant from the same vendor and adjoining the plaintiff's land. In respect of this act the plaintiff claims damages in trespass. The defendant while admitting the act avers that the cocoanut tree is within the boundary of her land upon which the plaintiff wrongly erected his fence.

The plaintiff before action sought the aid of Mr. Moses, a sworn land surveyor, who made certain investigations but completed no survey and made no plan. At a later date the plaintiff secured the services of Mr. Durham, also a sworn land surveyor, who surveyed the plaintiff's land and made a diagram which he produced in the course of his evidence in Court.

The admission in evidence of this plan was opposed by counsel for the defendant on the ground that the surveyor had not complied with certain provisions of the Land Surveyors Ordinance, Ch. 167, more particularly in regard to the requirement of section 16 (1) that notice of intention to survey should be given in writing to the owner or occupier of adjacent lands by service on him of a true copy of the notice, certified by the surveyor.

In the present case the surveyor served upon the defendant, the owner of the adjacent land, not a certified copy but an original notice, and served no notice upon the owner or occupier of land adjoining the defendant's land to the west, but not adjoining at any point the plaintiff's land which he intended to survey.

It was submitted that service of an original notice is not compliance with section 16 (1), and that inasmuch as it was necessary to determine the boundary between the defendant and her western neighbour in order that the land to the east thereof might be equally divided between the plaintiff and the defendant, notice should have been served also upon that neighbour. I am satisfied that service of an original notice is substantial compliance with the statutory requirement and that notice to the owner of land adjoining the defendant on the west was unnecessary.

Counsel's submission however raises a matter of wider import-

ance than the consideration of whether or not in any particular case the surveyor has complied with the terms of the statute, and in view of certain decisions of the Supreme Court in this Colony it is in my view desirable that the matter should receive further consideration. It was submitted by counsel that failure to comply with the statute rendered inadmissible in evidence any plan or diagram which the surveyor should make and seek to produce in Court as part of his evidence. In support of his submission counsel cited the cases of *Bhoodunsingh v. Persaul Dass*, L.J. 8.11.07; *Jones v. Wills*, L.J. 13.12.11 and *Comacho v. Pimento & anor.* (1916) L.R.B.G. 107. In this last case reference is also made to the case of *Bisnauth v. Earle*, L.J. 30.5. 1906. *Bisnauth v. Earle* is hardly a case in point but is of interest in that it follows the case of *D'Aguiar v. Phillips*, G.J., 29th March, 1904 to which I shall make further reference.

In *Bhoodunsingh v. Persaul Dass*, Hewick J. in the course of his judgment said in reference to a chart admitted in evidence by him "The notice "to the owners. . . of the adjacent lands is not clearly proved and the Chart "though admitted as a chart proves nothing." After reviewing the evidence as to the notice he proceeds: "It is clear. . . that the provisions of Ordinance "20 of 1891 were not complied with, and the chart is of no value, so far as "this case is concerned, for it must be proved in the manner prescribed by "the Ordinance that all interested parties had an opportunity of objecting to "the survey, and were duly served with notices."

The learned judge does not set out the reasons which led him to the conclusion expressed in this latter extract from his judgment and I am not clear as to the precise interpretation which should be placed upon the words "the chart though admitted as a chart proves nothing." His decision was however followed and perhaps extended by Hill, acting J. in *Jones v. Wills*, who said in the course of his judgment: "Mr. Seymour, a sworn land "surveyor, made a survey of the lot at the instigation of the plaintiff but as "he had entirely failed to comply with the requirements of section 15 of "Ordinance 20 of 1891 his evidence was not available nor was the plan "referred to in the pleadings admissible." In this case also there are not made available in the report of the judgment the reasons which impelled the learned judge to reject the evidence as inadmissible on the ground of non-compliance with the statute.

In *Camacho v. Pimento & anor.*, the admission of a plan was objected to by counsel on the ground of non-compliance and the foregoing cases were cited. Berkeley, J., ruled that the chart was inadmissible, but in the report of this case again no reasons for the ruling are to be found.

Research has not revealed any other cases directly in point but the judgment of Sir Henry Bovell, C.J. and Hewick J. in *D'Aguiar*

v. *Phillips* G;J. 29.3.04, is of interest in that it throws some light upon the relation between the purposes of the Land Surveyors Ordinance and the admissibility in evidence of plans made thereunder. In that case a diagram made by a sworn land surveyor in compliance with the terms of the Ordinance was admitted at the trial by Lucie Smith, J., without such diagram being sworn to by the surveyor who made it. Upon appeal, the first reason for which was the illegal admission of this diagram, the decision of the trial judge was affirmed on grounds irrelevant to the present matter, but in the course of the judgment of the appeal Court it is said: "As the question of "the admissibility of such diagrams or copies thereof without the surveyor "who made them being called is one of much importance we think it right "to express an opinion thereon. It is clear that apart from the Ordinance 20 "of 1891, there is no rule of law which would make them so admissible, "and that the Ordinance contains no provision which expressly declares "them evidence and dispenses with the production of the surveyor who "made them No reason is apparent for extending the effect of those "provisions beyond their natural effect in preventing surveyors incurring "liability in trespass."

In considering therefore the question as to the admissibility of a plan made otherwise than in accord with the provisions of the Ordinance it is necessary in the first place to consider the ground for its admission in any circumstances. The case of *D'Aguiar v. Phillips* decides that such admission is not secured by the Land Surveyors Ordinance. The evidence Ordinance, Chapter 25, makes no such provision nor can I find in the law of this colony any enactment affecting the admissibility of maps, plans or diagrams relating to matters of private concern. Section 5 of the Evidence Ordinance provides, however, that subject to the provisions of the Ordinance the rules and principles of the Common Law of England relating to evidence shall so far as they are applicable to the circumstances of the colony be in force therein. It is difficult to find case law in the English Courts applicable to this point although there are such cases as *R. v. Mitchell* (1852) 6 Cox C.C. 82, which acknowledge the admissibility with certain restrictions of plans prepared for the purposes of a trial if produced by the person who prepared them. The learned authors of *Powell on Evidence*, 10th edition at page 330 state: "Models, maps and plans are constantly produced in "Court and proved to be correct by the persons who made them. They are "then secondary real evidence."

In this last sentence lies, I think, the common law principle under which all such plans as those made by the surveyor in this case are admissible in evidence if produced by the surveyor and proved by him to be correct.

Some confusion of thought may arise in this matter from lack

of true appreciation of the effect of such plans as distinguished from their admissibility. No such plan so admitted is evidence of right or title. It is not evidence of true boundary. Production of such a plan by the person who prepared it merely illustrates his oral evidence and carries no more weight than does such evidence. The witness having made certain observations and done certain acts illustrates those observations and acts by means of a drawing or diagram which he produces and the correctness of which he proves by his oral testimony. Lines drawn are not evidence of title or boundary but are evidence of what the witness has seen or done in relation to the land. It still remains for the Court to determine whether or not those lines are in accord with the rights or interests of the party on whose behalf they were laid down; as in the present case, for instance, whether the line drawn by the surveyor does in fact indicate the true boundary between the plaintiff and the defendant. That is what by the statement of claim the Court, is asked to do. The diagram tendered illustrates with precision the plaintiff's claim. It does not and is not intended to prove the plaintiff's rights.

Once it is appreciated that such a diagram is not evidence of boundary or of title; that it lies in an entirely different category to that of ancient maps which have from time to time been admitted as evidence of reputation as to boundary or right of way; that it is not evidence *per se* but merely a part of the witness's evidence and supplementary thereto, it appears to be quite clear that non-compliance with statutory provisions as to the duty of a surveyor in the course of making such a plan has no bearing whatever on its admissibility. Such non-compliance does not affect the powers of observation of the surveyor nor his competence to make correctly an illustration of what he saw or did, nor can it preclude him from making proof thereof in accordance with the accepted principle of common law, unless clearly by the statute it is so laid down. To adapt the words of the judgment in *Phillips v D'Aguiar* it would be extending the effect of the provisions of the Ordinance beyond their natural effect to hold that they laid down any such restriction upon the rules of evidence.

It is for the foregoing reasons that I feel reluctantly impelled to differ in view from the learned judges who have rejected such evidence in the cases to which I have been referred. It appears to me that whether or not the surveyor in the present case complied with the statute as to notice his diagram is still admissible in evidence for the purpose and with the effect I have made clear. If he did not comply with the statute he may have laid himself open to action in trespass and to penalties and may have deprived himself of the protection afforded him by section 33 of the Ordinance but the admissibility or validity of his testimony is in no way affected.

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The plan drawn by Mr. Durham being admissible and having been admitted I must consider its effect as part of his evidence and in relation to all the other evidence in the case. If I am satisfied that the survey proceeded on correct principles, that the line he laid down on earth is the true boundary line and that his diagram correctly delineates that line, then, for convenience of reference, I should be prepared to make a declaration that the line so laid down and so delineated on the diagram is the boundary between the holdings of the defendant and the plaintiff. If such a declaration were made the plan then, as part of an order of the Court, would acquire authority, as evidence between these parties as to their boundary.

I am not prepared in the present case, however, to make any such order, for while I accept the plan as an accurate delineation of the surveyor's observations I am not satisfied that he proceeded upon correct principles in determining the western boundary of the plaintiff's holding. The surveyor states that he started to measure the plaintiff's property from a point 2 feet from the edge of the back dam trench, that he cannot say that there is any law requiring it but that it is usual for practical reasons; that he took off that two feet before making the division between defendant and the plaintiff and without enquiring whether that two feet reserve was included in what the plaintiff bought; that the plaintiff only bears on his division one foot of this reserve and that he did not take that into consideration. As to the usual practice the surveyor states that no lot is defined nearer to a trench than two feet and in many cases as far as twelve feet.

There is no law or by-law requiring such reservation whether of two feet or more or less in New Amsterdam, I was referred to no authority for any such reservation nor is there any evidence in this case which goes to show that such reservation was at any time made or required, nor for that matter what line marks the eastern boundary of the land purchased by the plaintiff. In these circumstances I can find no authority for the surveyor in this case to lay down the eastern boundary as two feet from the trench and thereupon proceed to determine the area of the eastern half by mathematical division into two parts of the area lying between such eastern boundary and the western boundary of the defendant's holding. I am unable on the evidence before me to hold that the line laid down by Mr. Durham is the correct boundary between the defendant and the plaintiff.

I am therefore thrown back upon the other evidence in the case as to whether or not the cocoanut tree in question lies upon the plaintiff's land and whether or not the defendants trespassed when they cut down both tree and fence.

The plaintiff's evidence is in conflict with that of the defendant and of Thomas Brown, their common predecessor in title in this regard.

The plaintiff states that both tree and fence were to the east of the boundary, but is uncertain as to the location of his fence in relation to the line subsequently laid down by Mr. Durham and which he now claims to be the true boundary. The defendant and her witness Brown both aver that the cocoanut tree lay to the west of the plaintiffs boundary and the latter says that the fence originally erected by the plaintiff lay two or three feet to the east of the cocoanut tree. The defendant states that when she cut down the tree the wire of the fence ran round to the west of and in contact with the tree.

Mr. Durham's evidence is of but little assistance to the plaintiff on this point. He has recollection of a wire fence without paling, he states, but cannot say on which side of that fence his paal fell. He states that a cocoanut tree was pointed out to him; that it was on the area paaled off by him for the plaintiff a foot or two from the boundary. It is to be observed, however, that Mr. Durham made no note in regard thereto, that he did not include the location of the tree on his diagram and that his recollection is itself so faulty that he states that the tree had not been cut down in 1934, although it is admitted that the tree was in fact cut on 3rd February, 1933. It is true that Mr. Moses states that the tree stump was on the east half of the land but there is no means of knowing upon what principle he determined this location.

I am not prepared to accept the unimpressive testimony of the plaintiff in the absence of more satisfactory corroboration than that afforded by Mr. Durham's uncertain recollections and in the face of the testimony of the defendant and Brown even though this may in itself be hardly more impressive.

The declaration prayed for in paragraph 6 (a) of the statement of claim is unnecessary and would not determine or affect the issue; I am not satisfied as to the correctness of Mr. Durham's boundary line; nor as to the trespass by the defendant in respect of which the plaintiff claims an injunction and damages. The plaintiff therefore fails in all parts of his claim and there must be judgment for the defendant with costs.

Judgment for defendant.

C. T COLTRESS v. C. E. M. COLTRESS.

CHARLES THEOPHILUS COLTRESS, Plaintiff,

v.

CLEMENTINA ELETHA MIRIAM COLTRESS, Defendant.

[1935.—No. 106. DEMERARA.]

BEFORE VERITY, J.

1937. MARCH 23, 24, 31; APRIL 1, 2, 13, 14; SEPTEMBER 7.

Trust—Nature of—Husband and wife—Gifts inter vivos between—Roman Dutch law—Illegal—No presumption of illegality—Property purchased by husband in name of wife—Affidavit—Oath not authorised by law—Admission in writing.

An affidavit was made in a matter not authorised by law.

Held, that it was admissible in evidence as an admission in writing by the deponent.

Under the Roman Dutch law a gift by a husband to a wife was illegal; and so, where a husband purchased property in the name of his wife, there could be no presumption of a gift in favour of the wife.

Where a relationship equivalent to that of trustee and *cestui que trust* is created, even though such terms may have been unknown to Roman Dutch law yet the trustee, although vested with the legal ownership holds the property solely for the benefit of the *cestui que trust*. This is a principle applicable not only to trustees created by testamentary disposition, but equally applicable to all forms of relationship which would in English law constitute the existence of a trust.

The plaintiff purchased property for himself. For reasons of convenience agreeable to the defendant, who was his wife, he caused transport to be passed in her name. He retained real control of the property, he made disbursements from his own purse and received rents on his own account. The defendant at no time paid for the purchase or repair of the property from her own moneys and at no time received rents therefrom as her own property. The plaintiff at no time intended to make her a gift of the purchase money or any part thereof or of the property itself.

Held, (1) that under both English and Roman Dutch law the position created by the foregoing facts gives rise to a trust of which the law takes cognizance and to which the Courts will give effect; and

(2) that the defendant is trustee for the plaintiff of the property in question and cannot retain the same to her own use.

Action by the plaintiff against his wife for a declaration of trust in respect of immovable property. The defendant counter-claimed for a declaration in respect of certain money. The facts and arguments appear from the judgment.

H. C. Humphrys, for plaintiff.

S. L. van B. Stafford, for defendant.

Cur. adv. vult.

VERITY, J.: In this case the plaintiff claims a declaration that the defendant, his wife, is trustee for him of certain land and buildings in Georgetown. He further claims an order that the defendant do transport to him the said property and an account of rent and profits.

The defendant denies that she is trustee, averring that she is the beneficial owner. She counterclaims for an account of rents and issues, and further claims a declaration that she is joint owner with the plaintiff of a certain sum standing at deposit in

the plaintiff's name in the British Bank of South America, Limited, and an injunction restraining the plaintiff from drawing on such account beyond the extent of one-half thereof.

Apart from questions of law which may arise there is a great conflict of evidence as to the facts and it is necessary that in the first instance this conflict be resolved. I propose to deal firstly with the plaintiff's claim. His case rests upon evidence that he purchased the property in question with his own money and for his own benefit but that for purposes of convenience, owing to his impending absence from the colony he caused transport to be passed in his wife's name with her consent.

The defendant on the other hand avers that the property was purchased for her benefit with funds consisting in part of her own money and in part money a gift from her husband for this purpose.

A great deal of evidence was adduced not only bearing directly upon this issue but also regarding the personal relations of the parties between 1922 and the present time and in regard to the plaintiff's method of dealing with purchases both of movable and immovable property and transfers of the same from one person to another. I have taken all this evidence into careful consideration.

It is clear that from time to time during the past 15 years the parties have had disagreements resulting in a separation of the ending of which there appears little hope. It is equally clear that these disagreements affected the attitude of the parties in relation to the property in question. It is nevertheless obvious that their attitude subsequent to these differences is of less importance in determining the issue of fact than is their attitude when the transaction first took place and in the immediately succeeding years.

In the first place the plaintiff states that he purchased this property for the sum of \$1,100 by means of a cash payment of \$600 and a mortgage to a building society for the balance. He states that \$200 cash consisted of part proceeds of a bill for \$79 brought by him from Brazil and that \$400 were drawn by him from his account at the Government Savings Bank. He produces a memorandum to that effect signed by the defendant, Exhibit 4, together with a similar memorandum unsigned which he states was in the defendant's possession for many years and which appears on the back of a page from an account book upon which the defendant admittedly made certain entries (Exhibit 5).

The defendant on the other hand states that about \$250 of the purchase money consisted of her personal savings handed by her to the plaintiff to invest in this property on her behalf and that the balance of the purchase money was a gift to her from the plaintiff in consideration of financial aid given by her to him in the past.

In determining this initial conflict I find the memorandum (Exhibit 4), of great significance. The defendant admits that the signature thereto is her own. Both Exhibit 4 and Exhibit 5 bear every mark of original memoranda. They give no support

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to the defendant's version of the transaction. No reference is made therein to the suggestion that any part of the money was the property of the defendant. On the contrary reference is made to "a bill . . . in favour of my husband" and "cash drawn from his account." The signing of the memorandum, Exhibit 4, by the defendant implies rather an obligation to the plaintiff than the reverse. The most reasonable interpretation of both its terms and its intent would appear to be an acknowledgment by the defendant that the purchase money was the property of the plaintiff. The defendant does not attempt to explain its terms in any other sense. She explains its existence by saying that the plaintiff asked her to sign it and she did so, most likely without reading it. Nevertheless, it is to be remembered that it had its counterpart in a book which remained in her hands and in close proximity to entries made by herself. The defendant gives no specific explanation of the intent of these memoranda but indirectly suggests that they were an inaccurate representation of the facts to which her signature was secured for some such future purpose as that for which they are now produced. The parties were then on excellent terms. It is hard to believe that under such circumstances the plaintiff would trick his wife into signing so misleading a document for future fraud in the event of a falling out. On the other hand, it might be argued that granted the parties were on good terms there was neither necessity nor likelihood of such an acknowledgment between husband and wife. Perusal of documents and books admitted in evidence however reveals that the plaintiff is a person devoted to the making of memoranda whether as to the discipline of his children, the course of family disputes or the nature of financial dealings. Bearing this in mind the securing of such a note as Exhibit 4 becomes not only reasonable but almost inevitable.

Another contemporary document is produced by the defendant, an affidavit sworn by her in order to obtain transport of the property. By this affidavit the defendant deposed that the purchase money was her own property and not a gift either direct or indirect from her husband.

It is an untruthful document whatever account of the facts I am disposed to accept but it is argued that the plaintiff having assented thereto is bound thereby. No question of estoppel as submitted arises. There is no representation made therein by the plaintiff whereon the defendant has acted to her own detriment. If any false representation was made it was made to the Registrar of Deeds and it has not operated to the detriment of the defendant but rather the reverse. The false statements made in this affidavit are equally consistent with the plaintiff's story, for some such statements were a necessary part of an agreed plan by means of which title to the property was to be passed in the defendant's name.

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The plaintiff further states that in 1920 the defendant accounted to him for rents received by her during his absence, that from 1920 to 1927 he had attorneys in this colony who received rents collected by one Alleyne and accounted to him, that from 1927 to 1929 rents collected by Alleyne were handed to his son-in-law Jordan who accounted to him at the end of 1929 and handed him \$106 odd. The defendant denies that she accounted to the plaintiff or that rents were collected on his behalf by Alleyne or that the attorneys accounted to him. She states that from 1915 to 1920 she collected all rents on her own behalf: that she jointly with the plaintiff appointed attorneys and opened in her own name a bank account to which the attorneys were to deposit moneys accruing from the property. She further states that in 1922 Mr. Franker, one of the attorneys, accounted to her and paid over moneys then in his hands and that thereafter Alleyne rendered accounts to her. She states that from 1927 to 1929, Jordan, at the plaintiff's request, checked Alleyne's accounts and in 1929 the plaintiff paid to her the balance of \$106 received by him and continued thereafter to account to her till August, 1930.

The attorneys and rent collector support the plaintiff in his version of their dealings and deny either paying moneys to the defendant, accounting to her for the same or making lodgment in her behalf in any bank. Although Mr. Franker admits that his memory as to the details of this business is now incomplete he is very definite as to the person to whom he was under obligation to account and his evidence is that of a witness in whose integrity I place confidence. Alleyne whose memory appears clear on the point and who struck me as a witness of truth is firm in his denials of payment to the defendant or of accounting at any time to her. Mr. de Souza did not handle rents as attorney but in so far as his knowledge carries him his evidence definitely supports that of the plaintiff, of Mr. Franker and of Alleyne.

The defendant called Jordan as a witness and further produced certain copies of her bank accounts. A book kept by Jordan was also admitted in evidence. I have carefully examined every material entry in this book and compared the same with the bank accounts.

The book covers a period May, 1927, to December, 1929. The defendant was in the colony from January, 1928, to August, 1929. From May, 1927, to November, 1928, there is shown in the account book a monthly balance brought down from month to month "in favour of the property." Between March and October, 1928, the book shows payments made to Mrs. Coltress amounting in all to \$72. During September, 1928, Mrs. Coltress appears as having paid in the sum of \$82. During this period the entries of balances in favour of property continued but between December, 1928, and July, 1929, no such balances are

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shown and all balances appear to have been paid to Mrs. Coltress. Between March and October, 1928, in addition to payments to Mrs. Coltress and balances brought down in favour of the property there are shown deposits in the bank amounting to \$150.80. No corresponding entries appear in the defendant's bank accounts, the total deposits in which during that period amount to \$92 only, in sums and on dates differing in every instance from those appearing in Jordan's book.

From August to December, 1929, the entries of balances "in favour of property" are resumed and a balance of \$106.90 is brought down when the keeping of this book by Jordan terminated in December, 1929.

No explanation of the entries in this book can be furnished either by defendant or Jordan. The former professes ignorance of its contents and Jordan states that he merely copied Alleyne's accounts. Alleyne states he made no deposits in the bank. The defendant states she made deposits herself and may have told Jordan when she did so.

In the absence of any proper or complete set of accounts and in the absence of any intelligible evidence regarding such accounts as were kept by Jordan it is impossible to arrive at a satisfactory conclusion as to what all these entries mean, but if any reliance is to be placed upon them at all they do indicate, it is true, that between December, 1928, and July, 1929, the defendant received the rents but also that between January and December, 1928, the defendant repaid or more than repaid any sums she then received, that concurrently with payments made to her during that period sums were lodged to the credit of some bank account other than her own and sums were brought down "in favour of the property" as distinct from sums paid to her.

While the defendant states that the plaintiff accounted to her for rents received between March and August, 1930, no record thereof appears in the book kept by the plaintiff during that period. My attention was drawn to entries of the payment to the plaintiff of "commission" on rents received. This may be of some significance. It is explained by the plaintiff as a system of book entries used to indicate the real profit of the premises and it is to be observed that such entries continue for three months after the defendant admits the plaintiff ceased to account to her.

The plaintiff alleges and the defendant admits that he paid off the balance due on the mortgage, the cost of repairs to the buildings and the purchase price of a certain building on the premises by remittances from Brazil. The plaintiff states he did so as owner of the property; the defendant alleges that these payments were in furtherance of his desire to make to her a gift.

There is also evidence as to various attempts made by the plaintiff subsequent to a quarrel in 1922 to induce the defendant to transport the property to him or to acknowledge him as the

owner thereof. These attempts were unsuccessful and in October, 1930, the plaintiff commenced an action similar to the present case. This action was abandoned and on August 25, 1931, the defendant signed a document purporting to be an affidavit sworn before Mr. Campbell, a Commissioner of Oaths. While this document is in contravention of sec. 2 of the Statutory Declarations Ordinance, Cap. 255, and does not fall within the provisions of the Evidence Ordinance, Cap. 25. Part IV., nor the Deeds Registry Ordinance, Cap. 177., nor sec. 7 of Cap. 255, it is admissible in evidence as an admission in writing. Its purport is an admission of the plaintiff's present claim that the defendant is trustee for the plaintiff, the beneficial owner of the property, and that the defendant has no beneficial interest therein.

The defendant explains its existence by stating that Mr. Campbell overpersuaded her in spite of her telling him that the statements in the document were false, and that owing to her poor condition of health at the time she would have been prepared to sign anything—"even a death warrant." I have given careful consideration to her evidence and that of Mr. Campbell. I am satisfied that while displaying some initial reluctance to abandon her claim, the defendant was not persuaded by the exercise of any improper influence or misrepresentation by Mr. Campbell, but signed the document voluntarily. The defendant is an intelligent woman and by no means a weakling, and, in my view, she was well aware of the nature and effect of this document and signed it with her eyes open. For legal reasons it has not the effect or sanction of an oath but I cannot doubt that the defendant believed it to have that solemnity when she signed it.

After careful consideration I have come to the conclusion that the weight of the evidence is beyond doubt in favour of the plaintiff's claim. The significance of the original memoranda, the independent evidence of the attorneys and Alleyne, the general conclusion to be drawn from such books as were produced, and the defendant's solemn admission in 1931 all lead me to the view that the plaintiff in fact purchased the property for himself; that for reasons of convenience agreeable to the defendant he caused transport to be passed in her name; that he retained real control of the property; made disbursements from his own purse and received rents on his own account; that the defendant at no time paid for the purchase or repair of the property from her own moneys and at no time received rents therefrom as her own property; and that the plaintiff at no time intended to make her a gift of the purchase money or any part thereof, or of the property itself.

On these facts what are the respective positions in law of these two parties?

It is submitted on behalf of the defendant that there arises a presumption in favour of the wife where a husband purchases

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property in her name. Generally, this submission may be well founded but the presumption is not irrebuttable, and in the present case there is ample evidence in rebuttal. A prior consideration arises. At the time of the purchase of this property the common law of this colony was the Roman Dutch system under which no such presumption would arise, for thereunder in such circumstances as these a gift of this nature would have been illegal and there can be in law no presumption of illegality.

There being no gift in fact or by legal presumption, the position of the defendant as the holder by agreement of the legal title to the property of another remains to be considered.

Although there may no doubt be significant differences between the Roman-Dutch Law in force in 1915 and the Law of England relating to trusts, yet it appears to be clear that there is an underlying principle common to both systems in this regard. In the case of *Est. Kemp & Ors. v. McDonalds Trustee*, (1915) A.D., at page 499, the learned Chief Justice says "The English law of trusts forms, of course, no portion of our jurisprudence . . . but it does not follow that testamentary dispositions couched in the form of trusts cannot be given full effect to in terms of our law. The trustees to whom the estate is directly bequeathed are vested with the legal ownership in the assets. That is clear, but it is also clear that the testator never intended that they should have any beneficial interest . . . This designation in its English meaning denotes persons entrusted (as owners or otherwise) with the control of property with which they are bound to deal for the benefit of others." Solomon, J. A., in the same case says: "The constitution of trusts and the appointment of trustees are matters of common occurrence in South Africa at the present day. Thus it is a recognised practice to convey property to trustees under antenuptial contracts; trustees are appointed by deed of gift or by will . . . ; the property of limited companies and other corporate bodies is vested in trustees and the term is used in a variety of other cases . . . The underlying conception in these and other cases is that while the legal *dominium* of property is vested in the trustees they have no beneficial interest in it but are bound to hold it for the benefit of some person or persons or for the accomplishment of some special purpose."

The principle is clearly admitted therefore that where a relationship equivalent to that of trustee and *cestui que trust* is created even though such terms may have been unknown to Roman Dutch law yet the trustee, although vested with the legal ownership holds the property solely for the benefit of the *cestui que trust*. This is a principle applicable not only to trustees created by testamentary disposition but equally applicable to all forms of relationships which would in English law constitute the existence of a trust.

I have no doubt whatever that under either system of law the position created by the facts as I have found them give rise to a trust of which the law takes cognisance and to which the Courts will give effect. I hold therefore that the defendant is trustee for the plaintiff of the property in question and cannot retain the same to her own use. There will therefore be a declaration to that effect and the usual order that the defendant do transport the property to the plaintiff within thirty days and in default that the Registrar do transport the said property to the plaintiff at the plaintiff's expense.

In regard to the plaintiff's claim for an account Mr. Humphrys stated in reply to the Court that the plaintiff is not pressing therefor. In this I think he is wise for in view of the fragmentary accounts that have been kept and the small income derivable from the property taking the accounts would be a burdensome and unprofitable undertaking. There will be no order for an account.

There remains for consideration the defendant's counterclaim in respect of moneys on deposit in the British Bank of South America Limited at Pernambuco, Brazil. This claim rests upon an alleged gift by the plaintiff to the defendant of half of the sum standing to his credit in that bank. It appears that on November 6, 1929, the plaintiff transferred his account from his own name to the joint names of himself and his wife and gave his wife full powers to draw thereon reserving the same rights to himself. The defendant alleges the plaintiff pursued this course in furtherance of an expressed intention to make to her a gift of half the moneys then on deposit in the bank. The plaintiff denies this intention and explains this action on the ground of a serious illness which led him to secure that his wife would be able to withdraw these moneys without difficulty in the event of his death. On November 5, 1930, he withdrew all moneys from the joint account and re-deposited them in his own name.

I am disposed to accept the plaintiff's version in this matter even as I have done so in regard to the former issue in this case and on such a finding of fact the counterclaim fails. Even were the defendant's version true, however, her claim would still fail for the plaintiff did not by his action on November 6, 1929, give effect to any intention to make a gift to the defendant of half the moneys in the bank. Such rights as were conferred on the defendant were patently revocable at any moment by the mere act of withdrawal on the part of the plaintiff and were in fact extinguished when he withdrew the deposit on November 5, 1930. The counter-claim therefore fails.

The plaintiff having succeeded on all parts of his claim save that for an account to which he would have been entitled but for which he has not pressed and the defendant having failed in her defence and in both parts of her counterclaim, there will be in

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addition to the declaration and order for transport, an order that the defendant pay the plaintiff's costs of the action.

Judgment for plaintiff.

Solicitors: *J. Edward de Freitas; Carlos Gomes.*

A. C. GOMES, Appellant (Defendant),
 v.
 MAYOR AND TOWN COUNCIL OF GEORGETOWN,
 Respondent, (Complainant).
 [1937. No. 195.—DEMERARA.]
 BEFORE FULL COURT: CREAN, C.J., VERITY AND LANGLEY, JJ.
 1937. AUGUST 24, 25; OCTOBER 5.

Evidence—Rules—Publication in Gazette—Proof of—Whether necessary.

Public Health—Owner—Best rent—Rack rent—Local Government Ordinance, cap. 84, s. 2—Tenement yard—Scavenging and cleaning—Occupiers and owners—Liability of—Primary and secondary—Names of occupiers—Refusal by owner to give—Difficulty in ascertaining—Scavenging and Cleansing By-laws (Georgetown), 1916, rules 1, 5, 8, 10.

There was no more reason for formal proof of publication of Rules in the *Gazette* than there was for formal proof of publication of an Ordinance. As there is no necessity for formal proof of the passing of an Ordinance, so there is none for the making of Rules when proceedings are instituted by virtue of Rules.

Section 2 of the Local Government Ordinance, Chapter 84, provides that “owners” means the person for the time receiving the rack rent of the lands or premises in connection with which the word is used, whether on his own account, or as agent or representative for any other person, or who would so receive it if those lands or premises were let at a rack rent, and “rack-rent” means rent which is not less than two-thirds of the rent at which the property might reasonably be expected to let.

The appellant was the rent collector of certain premises belonging to The Hand-in-Hand Mutual Guarantee Fire Insurance Company of British Guiana, Limited. Evidence was led before the Magistrate that the rents received were the most that could be got for the premises in their present condition.

Held, that the rent received was rack rent, and that the appellant was the “owner” of the premises under section 2 of chapter 84.

By-law 5 of the Scavenging and Cleansing By-laws, 1917, provides that “in all cases where two or more persons occupy the same premises . . . where there is a common yard . . . the owner and all the occupiers thereof using such yard . . . shall be liable for their cleanliness . . . and shall also be liable for any offence against these by-laws.”

By-law 8 provides that “in all cases where by these by-laws the occupiers of premises are bound to perform any act, if . . . there is *difficulty* in ascertaining who is the occupier, the owner of such premises shall be liable.

By-law 10 provides that “where in these by-laws any duty is cast on the owner or occupier of any premises the occupier shall be deemed primarily liable”.

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Lot 5, Fort Street, Kingston, Georgetown, consisted of tenement buildings housing two or more tenants. The name of one of the tenants was known to the sanitary authorities, but they made no attempt to ascertain from the other tenants what their names were. They, however, asked the "owner" for the names of the tenants in order that they might be summoned in respect of the dirty state of the premises on which they lived. This information was refused by the "owner" who said that if he gave it his tenants might be annoyed with him. The magistrate found that there was difficulty on the part of the Chief Sanitary Inspector in ascertaining who were the occupiers of the premises.

Held, by Crean, C.J., and Verity, J. (Langley, J. *dissentiente*) that although the By-laws say that the occupiers are to be primarily liable for any contravention of them, there was no specific direction therein that the occupiers should be first approached by the sanitary inspectors before they institute proceedings against the owner; that there was nothing to prevent the inspectors from electing to take such course as appeared to them the most likely one to ascertain the names of the occupiers; and that as there was evidence on which the magistrate could have found that there was a difficulty put in their way of ascertaining those names his finding of fact would not be disturbed.

Per Langley, J.: The true intention of By-law 8 is to govern circumstances where a genuine difficulty arises and is likely to prevent the Public Health Department taking essential action. It does not call for an insurmountable difficulty but for "something hard to be accomplished, something laborious or perplexing." The evidence has not disclosed such a state of affairs. There are insufficient grounds for saying that the "owner's" action in withholding the information sought for by the Public Health authorities created a genuine difficulty within the meaning of By-law 8. There being no difficulty in ascertaining the names of the occupiers who were primarily liable, the secondary liability of the owner did not arise.

Appeal from a decision of Mr. A. V. Crane, Senior Stipendiary Magistrate, Georgetown Judicial District, convicting the appellant for a breach of By-Law No. 1 of the Scavenging and Cleansing By-Laws, 1916. The facts and arguments appear from the judgments.

J. A. Luckhoo, K.C., for appellant.

G. J. deFreitas, K.C., for respondent.

Cur. adv. vult.

CREAN, C.J.: The appellant was charged with failing to have the yard of 5, Fort Street, Georgetown, swept and cleaned before the hour of 8 on the morning of February 18 last, contrary to By-Law 1 of the Scavenging and Cleansing By-Laws of 1916. He was convicted and fined 810 and costs and from that conviction he now appeals.

The conviction was mainly founded on the evidence of Mr. Good, the Chief Sanitary Inspector, who in evidence said that he found this yard unswept, and littered with paper, vegetables, fruit skins and old tins on the morning of February 18 last at 8.30. The surface drains were found by him to be foul and offensive.

This was the second visit of the Chief Sanitary Inspector to this yard. He first visited it on February 9, 1937, and, as a consequence of that visit, he wrote to the appellant and asked him for the names of the occupiers of the lot so that proceedings might be taken against them. This information was refused by

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the appellant, and the appellant said he refused to give the information lest the tenants might be annoyed with him.

Later the same day the appellant said he had sent the names of the tenants but the magistrate found, as a fact, that he had declined to do so.

There was evidence also that the premises were occupied by more than two persons and the learned magistrate found on the evidence that both the owner and the occupiers were liable for an offence such as this, under rule 5 of the By-Laws. And, on the evidence of Griffith and Headley, it was held that the appellant collected the rack rent of these premises for the Hand-in-Hand Mutual Guarantee Fire Insurance Company and was considered by the magistrate as the owner of the premises. The Local Government Ordinance, chapter 84, enacts that "owner" includes the person for the time receiving the rack rent of the premises as agent or representative of any other person.

It seems to us that the evidence given as to the occupation of these premises justified the learned magistrate in finding that there was a common yard and therefore by rule 5, both the owner and the occupiers were liable for any offence against the By-Laws. But, by the subsequent rule 10, there appears to be a modification of rule 5, because it is laid down that when an owner or occupier is liable to perform a duty, the occupier is to be considered primarily liable.

Rule 8 makes it clear that where there is a difficulty in ascertaining who is the occupier, the owner of the premises is to be considered as liable for any breach of the By-Laws.

It is argued by Mr. Luckhoo, for the appellant, that as there was no evidence that the respondents asked the occupiers for their names, it was not open to the respondents to bring these proceedings against the appellant. That inquiry, it is submitted, was essential before bringing proceedings, because until that was done the respondents should not have been heard to say that there was a difficulty in ascertaining the names of the occupiers.

It is perfectly true, as submitted by counsel for the appellant, that there is no evidence recorded that the occupiers were asked for their names prior to the institution of the proceedings. In the absence of that particular piece of evidence, can it be said that there was any evidence on which the learned magistrate could have reasonably found that there was difficulty in ascertaining who were the occupiers of the premises? The occupiers are admittedly liable for any contraventions of the By-Laws in regard to their premises, and before the owner can be attached there must be evidence which shows there was difficulty in ascertaining the occupiers.

For the respondents, Mr. G. J. de Freitas submits that they took the step which was most likely to provide them with the names of the occupiers. When they requested the appellant to

give them a list of the occupiers of the premises, it must have appeared to them that such a method of procedure gave them the most reasonable hope of getting a full and reliable list of the names of the occupiers. And, as this information was refused by the appellant, they naturally argue there was difficulty in ascertaining the names of the occupiers and, as a result of such difficulty, they were authorised by By-law 8 to bring this prosecution against the appellant.

It is submitted that there was no hardship on the appellant in the institution of these proceedings against him as he could have avoided them by complying with the request for a list of the occupiers. Instead of giving the list when he was asked for it, he refused and so put difficulty in the way of the respondents.

Although the By-laws say that the occupiers are to be primarily liable for any contravention of them, there is no specific direction therein that the occupiers should be first approached by the Sanitary Inspectors before they institute proceedings against the owner. So far as we can see. there is nothing to prevent the Inspectors from electing to take such course as appears to them the most likely one to ascertain the names of the occupiers and, as there was evidence on which the learned magistrate could have found that there was a difficulty put in their way of ascertaining these names we are unable to see any sound reason for interfering with his decision on that point.

We have already indicated that in our opinion there was ample authority for the findings of the magistrate that the appellant could be considered as the owner of the premises for purposes of this prosecution and, therefore, the only matter for the consideration is the objection to the learned magistrate taking judicial notice of the By-Laws and failing to call for formal proof of their publication in the *Official Gazette*.

This contention was fully met by the remark of Mr. Justice Verity during the hearing of the appeal, when he said there was no more reason for this formal proof as to Rules than there was, for formal proof of publication of the ordinary laws of the Colony. As there is no necessity for formal proof of the passing of an Ordinance, so there is none for the making of Rules when proceedings are instituted by virtue of Rules.

For the reasons given we think that the learned magistrate's decision should be upheld and that this appeal should be dismissed with costs.

VERITY, J. With the decision given by the learned Chief Justice, I am in complete concurrence.

LANGLEY, J.: The appellant, Mr. A. C. Gomes, is appealing

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against a conviction by the Stipendiary Magistrate on the 31st May, 1937, of the offence of failing to have the premises at 5, Fort Street, Georgetown, property swept on the 18th February 1937, contrary to By-Law 1 of the Scavenging and Cleansing By-Laws made by the Mayor and Town Council of Georgetown on the 24th July, 1916, under the authority of sections 175 and 197 of the Local Government Ordinance, No. 13 of 1907. That Ordinance appears in the latest consolidation of the laws of this country as the Local Government Ordinance, Chapter 84, and the relevant power to make By-laws is provided by section 202 of the latter Ordinance. These provisions were repealed by the effect of the Fourth Schedule to the Public Health Ordinance 1934 (No. 15 of 1934) but the earlier relevant by-laws—not having been repealed—still have effect, by virtue of the provisions of section 162 (2) of the last mentioned Ordinance.

Very briefly, the facts appear to be that the appellant was, during the relevant period, employed by the Hand-in-Hand Fire Insurance Company on a commission basis to collect rents from the tenants of the property now in question. The Company had become owners of the property which consisted of a lot of land on which were tenement buildings housing some half dozen tenants.

The state of cleanliness of this property was unsatisfactory and in consequence of the reports from subordinate inspectors, on the 9th February, 1937, Mr. Good the Chief Sanitary Inspector of the Georgetown Town Council visited these premises. He directed Charles W. Griffiths, a Sanitary Inspector, to ascertain from the agent, the appellant, the names of the tenants. Apparently a conversation took place between an official of the Department and the appellant between the 9th and the 12th February, 1937, in which the names of the tenants were asked for, in order that they might be summoned in respect of the dirty state of the premises on which they lived.

It is alleged that the appellant refused to supply this information. Anyone, with practical experience of the management of small properties will realise the difficulty of the appellant's position. The rent collector is not always a welcome visitor. If it became known to the tenants, as doubtless it would be, that he had supplied information as to their names, for the purpose of having them summoned, he would be less welcome still. Moreover, quite possibly the money paid in fines would have been paid in rent and on the rent the appellant's livelihood depends.

On the 12th February, 1937, Mr. Good wrote to the appellant complaining of the dirty condition of the premises in question. He pointed out that the information as to names had been asked for and withheld. He reminded him that this omission was an offence under the Tenement Room By-laws. Finally, he

warned him that “owners” as well as “occupiers” were liable for the cleanliness of their premises.

For the appellant, Talbot Headley, an employee, gave evidence that he obtained the names of the tenants and went to the Public Health Department on the 15th and 16th February with this list. Failing to find Mr. Good, on both occasions, he gave his list to a “khaki clad” person in front of that Department presumably with instructions to give it to Mr. Good. The list did not reach its proper destination apparently, and had it done so, it would have been useless as it contained the names of tenants on the property in question and also those on an adjoining property without any indication as to which property the persons named were residing upon. The list was not addressed to any person.

It seems clear from these facts that the appellant failed to supply the information of the names which it was his duty to supply.

He is not charged with that offence, however, and the question arises as to whether this omission created a difficulty within the meaning of By-law 8. I will deal with the latter aspect later.

To return to the facts of this case. On the 17th February, 1937, Mr. Good addressed a final notice “to the secretary of the Hand-in-Hand Insurance Company” stating that a notice had been served on them on the 3rd February, 1937, by a Sanitary Inspector requiring them within 7 days to—

Firstly, remove the bush and weeds growing on the lot; and

Secondly, clean the drain of the obstruction of being choked with weeds.

This notice stated that the writer was satisfied these requirements had not been carried out and finally it threatened that legal proceedings would be taken, if the defects were not remedied within fourteen days of that notice, without further notice.

The latter period terminated on the 2nd March, 1937.

In spite of allowance of this period for the matter to be remedied, Mr. Good laid a complaint against Mr. Gomes on the 25th February, 1937, alleging the offence on the 18th February, 1937, to which reference has already been made.

The notice alleges two offences. Firstly, failure to weed, (contrary to By-law 1), and secondly, cleaning drains, (contrary to By-law 6).

In my opinion, it is unfortunate that Mr. Good having given the Company until the 2nd March, 1937, to remedy the defects, should have laid a complaint against the Company’s agent for practically the same offence before the expiration of that period. Such actions do not tend to create that spirit of co-operation between the public and the Public Health Department which is so necessary, if the work of that department is to be made effective.

I am inclined to think, however, that the situation was created

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by confusion of thought in Mr. Good's mind and that the complaint was laid against Mr. Gomes personally because he had failed to supply the names of the tenants. In other words, that the complaint was laid under the wrong By-law. That inference is strengthened by the fact that the complaint was laid on the day after the date of the notice, and, therefore possibly before the notice had been received, through the post, by the Company.

I will now deal with the minor points of law raised by Counsel for the appellant.

He has pleaded: (g) that there was no proof that the By-laws in question were published in the *Gazette*. I am satisfied that as such By-laws are by statute matters of which the Court may take cognizance that the duty of seeing that they are in force is one for the Court to perform without the formal production of the relevant *Gazette* as evidence at the trial unless the matter is in issue: (f) and (c) can be dealt with together—the question as to whether there was evidence that the appellant came within the definition of the word “owner” contained in section 2 of the Local Government Ordinance, Chapter 84.

In my opinion, the evidence of Talbot Headley showing “the rents we are now getting is the most we can get for the tenements in their present condition” clearly brings the rent received within the definition of the words “rack rent”—also defined in that section—as being “two-thirds of the rent at which the property might reasonably be expected to let.” If the appellant received the rack rent that is sufficient to do so.

That leaves for consideration the two major issues contained in the several remaining paragraphs shewn as grounds for this appeal.

They are—

Firstly, was there a “difficulty” in ascertaining the names of the tenants, within the provisions of By-law 8; and

Secondly, do the provisions of By-law 10, which make occupiers primarily liable, invalidate the proceedings—in the absence of any justifying difficulty—when the person incurring the secondary liability is prosecuted to conviction before action has been taken against persons made primarily liable under the provisions of the By-law.

To answer those two questions, it is necessary to review the legal position created by these By-laws.

The offence was laid under By-law 1, which creates offences which may be committed by two classes of persons in the case of properties, other than those on which tenement buildings stand. They are not both liable at the same time. When the property is occupied, the occupier is liable. Where the property is not occupied, the owner is liable.

That legal position does not control the circumstances of this

case as the property in question was in the joint occupation of some six tenement tenants.

For that reason, the provisions of By-law 1 are partially affected by those of By-law 5 which substitutes for the alternative liability of the occupier and owner a concurrent joint liability. That is to say, that where an offence has been committed; either occupier or owner or both occupier and owner may be prosecuted for the same offence under the provisions of that By-law, if the By-law is read separately.

Unfortunately, it must not be read separately as its provisions are qualified by those of By-law 10. The latter provides that where any duty is cast on the "owner or occupier" and is not performed the occupier shall be deemed primarily liable for an offence.

No other By-law than By-law 5 makes "owner or occupier" jointly liable so that the provisions of By-law 10 refer exclusively to By-law 5.

Counsel for both parties accept this interpretation of necessity, because, not only do the words admit of no other interpretation, but the principle upon which these provisions are based is obvious, practical and sound.

It means that the persons who make or permit the state of affairs which is injurious to the health of the community to arise, and who are by proximity in the best position to remedy the evils, shall be the first persons to be held responsible and prosecuted.

Counsel for the respondents being forced to accept this interpretation, have sought to save the legal position by raising the issue of "difficulty" contained in By-law 8 and referred to in my second question.

By-law 8 governs all the other relevant by-laws creating offences and it has been submitted that it governs the circumstances of this case because the appellant created the necessary "difficulty" by failing to supply the names of tenement occupiers.

This submission, in so far as Mrs. d'Andrade is concerned, cannot possibly be maintained as the witness C. W. Griffiths admitted in examination in chief that he knew her name as an occupier of the tenement property before proceedings were commenced against the appellant. Therefore in that instance the respondents have no defence whatever for contravening the provisions of By-law 10.

The respondents have admitted that no attempt was made to take the obvious action of ascertaining the names of the tenement occupiers when the premises were visited.

In my opinion, the true intention of By-law 8 is to govern circumstances where a genuine difficulty arises and is likely to prevent the Public Health Department taking essential action.

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It does not call for an insurmountable difficulty, but,—to cite the dictionary definition of the word “difficulty”—“something hard to be accomplished, something laborious or perplexing.”

The evidence has not disclosed such a state of affairs. On the other hand, that evidence indicates that the appellant may have made himself liable for an offence against By-Law 4 (2) of the Tenement Rooms By-Laws. This Court is not interested in that aspect however, as he was not so charged.

Having reviewed the legal position what are the answers to the two questions to be?

As regards the first, no difficulty arose at all in connection with Mrs. d’Andrade and, in my opinion, there are insufficient grounds for saying that the appellant’s action in withholding the information sought for by the Public Health Authorities in the cases of the other five tenant occupiers created a genuine difficulty within the meaning of By-law 8. Therefore the answer to the first question is in the negative.

I am unable to cite a supporting authority, but it seems logical to hold that the intention of the authority making the by-laws—providing it is within their powers and the scope of the legislation in question, and that is not doubted in this case—should be the deciding factor and any action taken in contravention of a clearly expressed intention should be held invalid.

In this case it is not questioned, seriously, that an offence has been committed for which both owner and occupier are liable.

It is submitted that because of the irregularity in what I may describe as the administrative aspect, created by By-law 10, no secondary liability can accrue until the primary liability of the occupier has been dealt with by legal proceedings.

In my opinion, that submission is well-grounded. There can be no question, to my mind, that was the clear intention, and By-law 10 can only be so interpreted.

It has been submitted by counsel for the appellant that the rent collectors of Georgetown will be following this appeal as a test case, so it may help if I express an opinion on the policy underlying the By-laws concerned. In my opinion, to interpret them is an easy matter, as although the draftsman has made the task less simple by separating into isolated by-laws provisions which would have been clearer if they had been made subparagraphs of the same by-law, the general policy or intention of this subsidiary legislation is clearly expressed. The duties placed on all parties are indicated and the whole position is based on close co-operation of all concerned to attain the obvious purpose of safeguarding the Public Health Owners, agents, rent collectors are all given the specific duty of co-operating with the Public Authorities on all occasions and failure to do so is an offence. If tenement properties are involved such persons in control of the properties are bound to

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supply all information as to occupiers necessary for the Public Authority to enforce the law. That is their legal duty. If such persons are not sufficiently altruistic and imbued with a proper sense of civic responsibility as to want to co-operate readily with the Public Health Authorities, perhaps a more selfish argument will cause them to adopt their proper course of action. I would remind them that the more healthy the tenants are, the more likely are the rent collectors to receive the rents from which they deduct their commissions. Sickness usually robs the poor man of the wherewithal to pay for even such an important necessity as a roof over his head. Such co-operation, however, must be mutual. The action taken in this case of fixing a period to remedy the trouble and then instituting legal proceedings almost before it had commenced was calculated to endanger any spirit of co-operation already existing for a considerable period. I trust, however, in the interests of the community that this whole unfortunate incident will sink into a kindly oblivion quickly.

Under all the circumstances and for the reasons I set out earlier in my judgment I am of opinion that this appeal should be allowed with costs.

CREAN, C.J.: The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

Solicitor for respondent: *Francis Dias. O.B.E.*

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TAI-CY-YOUNG, Appellant, (Defendant)

v

S. C. JONES, Respondent, (Complainant).

[1937. No. 207.—DEMERARA.]

BEFORE FULL COURT; CREAN, C.J., VERITY AND LANGLEY, JJ.

1937. AUGUST 25, 26; OCTOBER 5.

Sale of Food and Drugs—Nature, substance and quality demanded—Purchase through an agent—Purchase by principal—Prejudice—Statutory standard—Actual notice to purchaser—Label—Notice on—“Weak vinegar”—Naming of—Diluted—History of vinegar—Sale of Food and Drugs (Consolidation) Ordinance, cap. 102, ss. 6 (1), 8, First Schedule, item 13.

Criminal law—Statutory defence—Not raised or adequately represented—To be considered by Court.

Appeals—Reasons of decision—Magistrate’s—Finding of fact—To be short and precise.

Section 6 (1) of the Sale of Food and Drugs (Consolidation) Ordinance, chapter 102, provides that “no one shall sell, to the prejudice of the purchaser, any article of food or drugs not of the nature, substance and quality demanded by the purchaser. Provided that an offence shall not be deemed to be committed under this section where the standard of purity does not fall below that of the cases set forth in the first schedule hereto.” The standard of purity contained in item 13 of the first Schedule relating to vinegar is as follows: “where vinegar has a total acid value of four per centum calculated as acetic acid, and does not contain any free mineral acid or other ingredient not normally present in the particular variety of vinegar which it purports to be, and does not contain any colouring matter or other substance which makes it appear or tends to make it appear of a different kind or variety from what it really is.”

Section 8 of chapter 102 provides that “no one shall be guilty of any contravention aforesaid in respect of the sale of an article of food or of a drug mixed with any ingredient or material not injurious to health and not intended fraudulently to increase its bulk, weight or measure, or to conceal its inferior quality, if, at the time of delivering that article or drug, he supplies to the person receiving it a notice, by a label distinctly and legibly written, printed or stamped on or with it, to the effect that it is mixed.”

The appellant was charged with unlawfully selling to the complainant to his prejudice a certain quantity of vinegar, such vinegar not being of the nature substance and quality demanded by the complainant. The complainant, a Sanitary Inspector, sent M. to buy a bottle of vinegar from the appellant. M. called for a bottle of vinegar which was supplied to him by the appellant, and for which he paid 5 cents. Nothing was said about the quality of the vinegar, but the bottle bore a label plainly marked “weak vinegar.” On the place from which the bottle was taken M. saw other bottles marked “strong vinegar” and “weak vinegar.” The vinegar was purchased for the purpose of analysis. The appellant was so informed, and when he heard the purpose for which it was bought he asked for its return and snatched at the bottle. Upon analysis of the contents of the bottle sold to M. it was found by the Government Analyst to be 55 per cent, vinegar containing 4 per cent, acetic acid, and 45 per cent, extraneous water, having a total acid value calculated as acetic acid of only 2.2 per cent. The appellant was convicted, and he appealed. The record of appeal did not disclose that section 8 of the Sale of Food and Drugs Ordinance, chapter 102 was referred to by counsel for the appellant in the proceedings before the magistrate, and this section was not referred to in the grounds of appeal, the only section mentioned being section 6.

Held, (1) that M. was acting on behalf of the complainant who was in fact

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the purchaser within the meaning of the Sale of Food and Drugs Ordinance, chapter 102;

(2) (CREAN, C.J., *dissentiente*), that there was no evidence on which the magistrate could have found that there was fraudulent intent within the meaning of section 8 of chapter 102;

(3) that as the label was in no way concealed from the purchaser who could easily have seen it had he wished and did in fact see similar labels on other bottles in the shop, the appellant had complied with the requirements of section 8 in that he had supplied a notice to the purchaser;

(4) that inasmuch as the notice stated that the vinegar was weak, that is to say, diluted, it indicated that the vinegar was mixed, and was thus in itself sufficient compliance with the statute.

per CREAN, C.J.: The seller does not protect himself unless his label specifies the actual extent of the dilution.

per VERITY, J.: Where the facts of a case in themselves raise a defence secured by a penal statute effect must be given thereto, whether or not the defendant himself or by counsel raises or adequately represents the same.

per LANGLEY, J.: Customer should be notified:—(a) when vinegar sold is a preparation by a process other than fermentation that it is artificial vinegar;

(b) when article sold contains less than 4% acetic acid content, that it is weak vinegar or artificial vinegar, as the case may be.

History of vinegar reviewed by LANGLEY, J.

The reasons of decision given by a magistrate should state shortly his precise findings of fact. A statement that "I accept the evidence" of this side or that is not enough.

Appeal from a decision of Mr. J. H. S. McCowan, Stipendiary Magistrate, Georgetown Judicial District, convicting the appellant for selling to the complainant to his prejudice one half pint of vinegar such vinegar not being of the nature, substance and quality demanded by the complainant, contrary to section 6 of the Sale of Food and Drugs (Consolidation: Ordinance, Chapter 102.

E. G. Woolford, K.C., for the appellant.

G. J. deFreitas, K.C., for respondent.

Cur. adv. vult.

CREAN, C.J.: In this case the respondents agent Arthur Marshall entered the shop of the appellant and ordered a bottle of vinegar and some mustard. He got the bottle of vinegar and paid 5 cents for it. There was a label on the bottle which read "weak vinegar." There were other bottles displayed in the shop some of which were labelled "strong vinegar" and some "weak vinegar" but this witness before the magistrate says that he simply asked for vinegar.

The bottle was bought for the Sanitary Inspector for the purpose of analysis. The appellant was so informed and when he heard the purpose for which it was bought he asked for its return and snatched at the bottle.

The usual procedure in a purchase such as this was carried out and a third part of the bottle of vinegar was left with the appellant. The vinegar sold was analysed and the analysis shewed that it contained only 2.2 per cent. of acetic acid instead of 4 per cent, required by the Ordinance and was adulterated by adding at least 45 per cent, of water.

On the evidence given in the magistrate's court the appellant

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was convicted under section 6 of the above Ordinance and ordered to pay a fine of 25 dollars and the costs of the prosecution.

From this conviction the appellant now appeals and in his notice he states several grounds why his appeal should be allowed.

The ground of appeal that there was no sale to the prejudice of the purchaser contrary to section 6 appears to be the important one.

In approaching a decision on this appeal it appears to me that it is important to bear in mind that there are always two defences to a prosecution under this section and the text books suggest that care should be taken not to confuse the two kinds of defence.

If the defence is, that the purchaser's attention was called to the true nature of the article sold by a notice either given verbally or displayed upon the premises, the seller's ground of defence is that the sale was not to the prejudice of the purchaser within the meaning of section 6.

If, on the other hand, the defence relies on the label supplied on, or with the article sold, this constitutes a defence under section 8.

On reading the record of proceedings before the learned magistrate there does not appear to be any reference by Mr. Woolford to section 8 of the Ordinance, and as the only case referred to by him is the case of *Sandys v. Small*, which relates to the defence that the sale was not to the prejudice of the purchaser, it must be assumed that the appellant was not seeking the aid of section 8 as a defence.

In the grounds of appeal there is also an absence of any reference to this particular section as a defence: But there is a specific allegation therein, that there was no sale to the prejudice of the purchaser. Therefore, up to the time of coming into this Court no indication was given that the protection of section 8 would be sought as a defence by the appellant.

In the argument of this appeal most stress was laid on the fact that as the vinegar was actually purchased by Marshall there could be no sale to his prejudice because he was supplied by the Inspectors with the money to make the purchase. And as the case of *Sandys v. Small* was again relied upon in support of the appeal it must be taken that the submissions did not amount to a defence under section 8.

The case of *Sandys v. Small* is reported in 3 Queen's Bench Division at page 449 and was decided in 1878. In that case there had been a sale of whisky mixed with water and it was proved that notices had been posted in a conspicuous place in the bar and in every other room of the house. The notice read "All spirits sold here are mixed." The seller was not convicted, but it is thought that the foundation for that decision was that the purchaser was fully aware of the nature of the article that was being supplied to him.

In his judgment in that case Chief Justice Cockburn said that when an article is altered, it must be considered to have been done to the prejudice of the purchaser, unless it is fully and sufficiently brought to his knowledge.

From the reasons for decision given by the learned magistrate it appears that he mainly relied on the case of *Rodbourne v. Hudson* as his authority. This case appears in the Times Law Reports 1924 Vol. XLI, p. 132. The report of this case shews that rum was sold by the appellant, and in his bar there was a notice which read "all spirits sold at this establishment are of the same superior quality as heretofore, but to meet the requirements of the Food and Drugs Acts they are now sold as diluted spirits; no alcoholic strength guaranteed."

In the decision given by Lord Hewart all the decided cases on the point are reviewed and it would appear to be his opinion that there emerges from these decisions a principle which is contained in, or resolves itself into, two vital questions which the Court must ask itself before coming to a decision in a case of this sort.

The first question is:—What is the substance of the information which must be given to the purchaser? The second question is:—Were the steps taken sufficient, in all the circumstances, to convey this information to an average customer?

Mr. Justice Avory expressed doubt whether this decision of Lord Hewart could be reconciled with the old case of *Gage v. Elsey* and dissented from what he took to be the effect of the Scottish judgments on the point. However, he did agree that there was evidence on which the justices could have found that the sale was to the prejudice of the purchaser, and so agreed in the dismissal of the appeal.

There is no doubt that the cases on this point are conflicting and of very little assistance as authority. But if an opinion might be ventured I would say that this decision of Lord Hewart does at least formulate some principle which is clear and easy to follow.

As to the first question suggested in the above decision the purchaser must be told in substance that the thing he is getting is not the thing he asked for. And as to the second question the point for consideration is whether the notice is in such terms as would bring the required information to the mind of an average customer. The actual sufficiency of the notice is a question for the magistrate.

To discover what notice was given to the purchaser one must look at the evidence as to what occurred at the time of sale. The evidence of the complainant appears to be the only evidence which can be considered, as evidently that alone was accepted by the learned magistrate.

From that evidence the learned magistrate found that the label on the bottle did not convey to the purchaser the nature of the

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article which was being sold to him. What occurred between the seller and the purchaser immediately after the sale is not referred to by him, probably because he thought that the happenings at the precise moment of the sale were the only ones for consideration in a case of this sort, and I think he had authority for thinking what was said or done after the sale was not relevant to the issue.

It appears from the decision of the magistrate that he came to the conclusion that this label did not amount to informing the complainant that he was not getting the thing he asked for, and as the purchaser (the complainant) was not notified by the appellant that the bottle was adulterated by adding 45 per cent. of water and only contained 2.2 per cent. of acetic acid instead of 4 per cent. the statutory minimum of that ingredient, he found that the sale was to the prejudice of the purchaser. Although the decision of the magistrate is not very revealing, I think it would be safe to assume that in so finding, he realised that if the method of selling adopted by the seller in this case, were not looked upon as a contravention of the Ordinance, a very wide avenue would be opened up, which would enable a seller to obtain excessive or fraudulent profits. He could sell a mixture with 99 per cent. of water in it and 1 per cent. of the article asked for by the purchaser, instead of the pure article, and safeguard himself by labelling it as "weak." I take the view that the seller does not protect himself unless his label specifies the actual extent of the dilution. For instance in this case if the seller's label on the bottle specified that it contained only 2.2 per cent. of acetic acid instead of 4 per cent., the statutory minimum, then the seller would be protected as he has then taken steps which should convey the fact of dilution to an average customer.

Even if the seller had sought the protection of section 8 as a defence, there was in my opinion sufficient evidence before the learned magistrate on which he could have found that the mixture was intended for a fraudulent purpose and so I think this appeal should be dismissed.

VERITY, J.: This is an appeal from a conviction by the Stipendiary Magistrate for the Georgetown Judicial District for an offence under the Sale of Food and Drugs (Consolidation) Ordinance, Ch. 102, sec. 6.

The appellant was charged with unlawfully selling to the complainant to his prejudice a certain quantity of vinegar, such vinegar not being of the nature, substance and quality of the article demanded by the complainant. The facts accepted by the magistrate appear to be that the complainant, a Sanitary Inspector, sent one Marshall to buy a bottle of vinegar from the appellant. Marshall called for a bottle of vinegar which was supplied to him by the appellant and for which he paid 5 cents.

Nothing was said about the quality of the vinegar but the bottle bore a label plainly marked "weak vinegar." On the place from which this bottle was taken Marshall saw other bottles marked "strong vinegar" and "weak vinegar." Upon analysis of the contents of the bottle sold to Marshall it was found by the Government Analyst to be 55 per cent. vinegar containing 4 per cent. acetic acid and 45 per cent. extraneous water having a total acid value calculated as acetic acid of only 2.2 per cent. The magistrate convicted the appellant and inflicted a penalty of \$25 with \$2 costs, in default imprisonment for one month with hard labour.

There are two main grounds of appeal. Firstly, that the complainant was not the purchaser and that the sale was not therefore to his prejudice. Secondly, that the sale was not to the prejudice of the purchaser in that by reason of the notice contained on the label affixed to the bottle the purchaser was made aware of the nature, substance and quality of the article supplied to him.

As regards the first ground it was intimated by the Court during the hearing of the appeal that the evidence disclosed that Marshall was acting on behalf of the complainant who was in fact the purchaser within the meaning of the Ordinance and in my view this ground of appeal fails.

In regard to the second ground it is necessary to consider the terms of section 6 (1) of the Ordinance which are as follows:

"No one shall sell to the prejudice of the purchaser any article of food "or drug not of the nature, substance and quality demanded by the purchaser: provided that an offence shall not be deemed to be committed under this section where the standard of purity does not fall below that of the "cases set forth in the first schedule hereto."

The schedule sets forth the standard of purity of vinegar, in so far as material to this case, as having "a total acid value of four per centum calculated as acetic acid." Admittedly the vinegar in the present case fell short of the standard and the proviso to section 6 (1) does not therefore arise. It nevertheless appears from the analyst's certificate that genuine vinegar has a total acid value of at least 4%, the standard laid down by the schedule.

In my view therefore the purchaser who demands vinegar does not receive an article of the nature, substance and quality demanded if he receives vinegar of a lower acid value than 4%. The further question remains, however, as to whether the sale in the circumstances of this case was to the prejudice of the purchaser.

By section 8 of the Ordinance it is provided that no one shall "be guilty of any contravention aforesaid in respect of the sale of an article of food or of a drug mixed with any ingredient or

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“material not injurious to health and not intended fraudulently to increase its bulk . . . or conceal its inferior quality if at the time of delivering that article or drug he supplies to the person receiving it a notice, by a label distinctly and legibly written, printed or stamped on or with it, to the effect that it is mixed.” It has been held, however that the delivering of a label in accordance with the requirements of section 3 is not the only means available of giving the purchaser notice of what he is purchasing. In *Sandys v. Small* 3 Q.B.D. 446 Cockburn, C. J. said “I do not think the statute means that the affixing of the labels is to be the only mode of bringing knowledge home to the purchaser.”

There are therefore two possible defences open to the appellant on the facts of this case: firstly, the statutory defence that although the vinegar was mixed with water he supplied to the purchaser a notice by label to the effect that it was mixed, and secondly, that he did in fact give to the purchaser actual notice of what he was purchasing.

If the appellant relies on the statutory notice it must appear that the ingredient or material with which the vinegar was mixed is not injurious to health and also that it was not intended fraudulently to increase its bulk or conceal its inferior quality. He must then establish that he supplied to the purchaser a notice by label distinctly and legibly written printed or stamped on or with the article, to the effect that it is mixed.

No question of injurious ingredients arises in the present case but it was argued on behalf of the respondent that dilution of vinegar to the extent existing in this case was intended fraudulently to increase its bulk and that the appellant cannot therefore avail himself of the protection of section 8. There is no finding of fraud by the magistrate nor in my view is there evidence in this case on which the magistrate could rightly have found that there was fraudulent intent. This is a question of fact for the magistrate to determine in each case and only if it is so determined does the protection of the section fail: *Jones v. Jones* (1894) 58 J.P. 253.

In regard to the final question affecting the statutory protection of the vendor there is no doubt as to the fact that he did supply to the purchaser a notice by label distinctly and legibly printed. There is some conflict in decisions under the analogous English Act as to whether or not such notice has been given where although a label is affixed to the article it does not come to his attention or is even concealed from him at the time of delivery. The cases of *Jones v. Jones* (supra) and *Clifford v. Battley* (1915) 1 K.B. 531, confirm to the former view even though in those cases the article and label were concealed by wrapping in opaque paper before delivery to the customer who had no opportunity of seeing the label. In *Batchelor v. Gee*

(1914) 3 K.B. 242 it was held that notice was not given although the article was labelled when the purchaser did not and could not see the label and his attention was not drawn to it. The divisional court in *Clifford v. Battley* held that *Batchelor v. Gee* was wrongly decided and *Jones v. Jones* rightly decided, though Avory J. whose judgment in *Batchelor v. Gee* was not followed dissented from the judgment of the majority.

The present case is less extreme, in that the label was in no way concealed from the purchaser who could easily have seen it had he wished and did in fact see similar labels on other bottles in the shop. In my view the appellant complied with the requirements of section 8 in that he supplied a notice to the purchaser and the only question remaining is whether the notice was in itself sufficient compliance with the statute. Was it to the effect that the article was mixed.

The statute does not require that the notice shall state with what or to what extent the article is mixed: *Jones v. Jones*, supra, and *Pope v. Tearle* (1874) L.R. 9 C.P. 499, in which latter case it was held that under a similar enactment it was not necessary to declare the nature or quantities of the materials admixed.

The sole requirement of the enactment is that the notice shall be to the effect that the article is mixed. The words used on the label in this case are the words "Weak Vinegar." The evidence shows that the bottle contained genuine vinegar with which extraneous water had been mixed. The word "weak" as defined in the Shorter Oxford Dictionary means in this relation "having less than the full or proper amount of a specific ingredient; of an infusion; over diluted," and this appears to me to be the meaning which the average person would attach to the word "weak" in such a connection. Had the label borne the words "Diluted vinegar" it appears to me that there could have been no doubt that these words were to the effect that the vinegar was mixed, and in the ordinary sense mixed with water. I have little doubt in coming to the conclusion than the use of the word "weak" has in its true and in its ordinarily accepted meaning the same effect.

In my view therefore the appellant had complied with the requirements of section 8 of the Ordinance and brought himself within its protection. The defence of actual notice of the nature, substance and quality of the article supplied does not arise. The appeal should in my opinion be allowed and the conviction be quashed.

I would add that it appears to me that some confusion existed both at the hearing before the magistrate and the hearing of the appeal as to the application of cases decided in regard to these two possible defences. Although the attention of the magistrate was drawn to the provisions of section 8, and although argument

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was heard by the Full Court which involved consideration thereof, but little distinction, if any, was drawn between the effect of cases decided under section 6 without consideration of section 8 and those decided on the meaning and effect of the latter section. Perusal of the numerous cases cited in the course of argument has led me to the conclusion that such a distinction is essential and had it been necessary to decide this case under section 6 alone my conclusion might not have been that at which I have now arrived, for it may well be more difficult for a vendor to satisfy the Court on the question of actual notice as to the nature of the article than it is for him to avail himself of the additional protection afforded by section 8.

Comment was made in the course of argument upon the reasons given by the magistrate for his decision and it is true that the reasons given by him in writing would appear to indicate that he misdirected himself on more than one point. It is not an offence "to sell vinegar below the standard set out in the Sale of Food and Drugs Ordinance" as the learned magistrate states, and it is not the law that "if it falls below the standard the purchaser must be prejudiced." At the same time in fairness to the magistrate it must be pointed out that the argument addressed to him does not appear to have been calculated to place before him the real contentions of the appellant in their clearest form, unless indeed such argument was very much clearer than that addressed to the Full Court, which certainly does not appear from the record. Nevertheless, in my view where the facts of a case in themselves raise a defence secured by a penal statute effect must be given thereto, whether on not the defendant himself or by counsel raises or adequately represents the same. In this case the facts in my view are those of circumstances in which the statute provides that "no one shall be guilty of any contravention" of the preceding sections, and the defendant should not therefore on those facts have been convicted.

At the risk of undesirable prolixity or vain repetition I would further add a desire felt, I believe, by all members of the Court and expressed on more than one previous occasion that magistrates should, in giving their reasons for judgment, state shortly their precise findings of fact. A statement "I accept the evidence" of this side or that is not enough. In the present case had the question of actual notice arisen, I should for my part have found it necessary to refer that matter back to the magistrate for a more precise statement of the findings on this specific question of fact.

LANGLEY, J.: The prosecution in this case was brought in respect of a retail sale of vinegar, contrary to the provisions of section 6 of the Sale of Food and Drugs (Consolidation) Ordinance, Chapter 102 of the Laws of British Guiana.

The offence is alleged to have been committed in Georgetown on the 7th May, 1936. The hearing took place before the Magistrate on the 28th May, 1936, and judgment was given on the 8th June, 1936. Cases of this nature are of importance, involving as they do public policy protecting the general health of the community. It is deplorable, in my opinion, that a delay of 15 months should have occurred before this appeal was heard on the 25th August, 1937.

Shortly, the material facts are that on the 7th May, 1936, Marshall (hereinafter called the purchaser) who was an employee of the Georgetown Town Council, acting on the instructions of Sanitary Inspector Jones (hereinafter called the Inspector) another employee of the last named Council, entered the shop of the appellant thereafter called the shopkeeper) to purchase a bottle of vinegar and 4 cents worth of mustard. He was charged 9 cents; 5 cents for the vinegar. He received the vinegar in a bottle to which was affixed a printed label clearly marked "WEAK VINEGAR" in lettering nearly half an inch high. Another employee of the Council named Lindore was in the shop at the time this transaction took place. He alleges that when the purchaser told the shopkeeper that the vinegar was for the Sanitary Inspector, the shopkeeper "made a snatch" at the bottle, saying it was weak vinegar and asking for its return. The Inspector entered the shop at this time and he alleges that Lindore told him of this attempt to take back the vinegar. The Inspector found the articles in the possession of Lindore. The purchaser says that the shopkeeper did not ask him whether he wanted strong or weak vinegar. Very fairly, however, the purchaser says that he saw other bottles on the shelf marked "strong" and "weak" vinegar respectively "for all to see" and that the shopkeeper took the bottle supplied to him from that shelf. That is an admission of "notice" by the purchaser. The shopkeeper's story is rather different, and, in my opinion, is the more likely to be true, having regard to the circumstances. The record indicates that the shopkeeper has an imperfect knowledge of the English language and also has some difficulty in expressing himself therein. That aspect is of importance, because the degree of understanding which was created between the purchaser and the seller at the time of the purchase is the crux of this whole matter. The shopkeeper states that the purchaser asked for mustard first, and was given 4 cents worth of that condiment. The shopkeeper says that the purchaser then asked for vinegar and he—the shopkeeper—told him that "strong" was ten cents, and "weak" five cents. On being shown five cents by the purchaser he gave him a bottle of the vinegar marked "weak." The shopkeeper admitted that he did not know that the law required a 4% minimum content of acetic acid and he also said that he tested the vinegar by taste; presumably the strength.

There can be no question that it was the shopkeeper's special duty to know the law governing the trade in which he was engaged, and he should have been more exact in his measurement of the dilution of the vinegar he received. I place more credence in the shopkeeper's story as it would seem that where he had two qualities, varying in price by 100%, it would be natural to expect him to enquire as to which strength his customer would require. Another important point in his evidence was that he "lowered" the vinegar he received by adding 4 gallons of water to a demijohn containing 8½ gallons of vinegar. That means that he added a quantity of water equal to 31.25% of the whole mixture prepared for sale. I will deal with the significance of those proportions later. The regular statutory procedure governing the taking of such test samples was complied with correctly by the Inspector.

I purpose dealing with certain aspects of this matter before that of the main issue.

The local legislation governing this prosecution is identical with the relevant English statute, so that the principles of the English cases are strictly applicable.

It must be remembered that this is a criminal offence, and, therefore, the onus of proof remains with the prosecution from first to last; further, that the benefit of any reasonable doubt arising on the facts must be given to the accused.

I wish to quote Mr. Justice Cockburn in an English relevant case, *Sandys v. Small*, (1878) 3 Q.B.D. 452, "The Courts should construe the words of the Act so as not to interfere with the due freedom of dealing between the seller and the purchaser, nor unfairly prejudice either party," and at another point in the same judgment, "The provisions of the Act were intended to apply to adulteration of a clandestine character which operates to the prejudice of the purchaser." This latter aspect is of great importance in the case now before the Court.

The principle of the law governing this sale of vinegar is that where the seller of the article brings to the notice of the purchaser the fact that the article sold to him is not of the nature, substance or quality of the article asked for by the purchaser, the sale is not to the prejudice of the purchaser. Therefore it is not an offence within the provisions of the Ordinance in question.

The difficulties of this Court in arriving at a decision have been very greatly increased by the fact that the reasons given by the magistrate for his decision disclose from first to last a lamentable misinterpretation of the law involved. These reasons open with the statement that it is an offence to sell vinegar of a strength below the statutory standard. That is not the case if the purchaser is made aware of the fact that the article sold is below the standard of acetic acid content before the purchase is completed and or that it is of artificial manufacture.

Further, there is disclosed in the reasons a complete failure to understand the principles which guided the Court in the English case of *Rodbourne v. Hudson*, (19251 1 K.B., p. 225. Further, the reference to the expectations of the Sanitary Inspector, mentioned in reasons, were of no moment.

The test required is not what standard a specialist may consider desirable, but, whether a normal purchaser was made fully aware that he was not receiving what he had asked for and might reasonably expect to be getting and was thereby prejudiced. Further, the suggestion that it was wrong for the vinegar to be adulterated with 45% of water, showed that the prosecution had failed to inform the Court, by expert evidence, that nearly all modern vinegar is composed of 95% water with the trivial balance made up of acetic acid, and other acids and substances. Finally, the statement that "it was immaterial whether vinegar was called 'weak' or 'strong,' as if it fell below the statutory standard the purchaser must be prejudiced" was wrong.

This record makes it quite clear that the magistrate had an erroneous view of the law he was administering, but, in this he was not alone, as the department concerned shared it with him.

This Court has to exercise its jurisdiction as a tribunal of appeal on matters of fact as well as matters of law. When the question at issue is the proper inference to be drawn from facts which are not in doubt, the Appellate Court is in as good a position to decide the question as the Judge in the lower Court, the latter, normally, is in a better position to form a conclusion upon which of the witnesses, whom he has seen and heard, trustworthiness may be placed.

In this case the magistrate's conception of the law was so much in error that he was not directing his attention to the relevant issues and his findings provide no assistance to this Court.

The record of the evidence is not as valuable as it might be, but it does provide sufficient material for this Court to draw its own inferences from the accepted evidence, or lack of it. Therefore, in my opinion, it will be unnecessary, and in the circumstances, undesirable, to send this matter back for further adjudication on proper lines in accordance with the law.

One of the most important items of evidence for the prosecution was the Analyst's certificate, and this case provides a striking example of the dangers of allowing the formal production, by a person not an expert on the subject matter, of a document containing technical information, upon which a Court may require explanations. Presumably, it was produced under the authority of section 44 (1) of the Evidence Ordinance, Chapter 25. In my opinion, magistrates would be well advised to insist on the attendance of the Analyst, not in every instance but in any case where they are not quite sure that the document produced provides evidence which they fully understand. The document

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certifies that the sample examined was adulterated and that it contained the ingredients as under:—

Vinegar containing 4% acetic acid	... 55%
Extraneous water	... <u>45%</u>
	<u>100%</u>

I am not an Analyst, but the fallacy of this document which purports to be an analysis of vinegar is obvious to any person with an elementary knowledge of arithmetic. Apart from ascertaining the quantity of acetic acid in the sample to be 2.2 per cent., no attempt was made to analyse the liquid. The figures shewn in this document are merely an arithmetical calculation based on the acetic acid content of the liquid and the statutory standard. What was done was to arrive at the quantity which would bring the 2.2 per cent. of acetic acid found in the sample up to the statutory standard of 4 per cent. and call the balance of the liquid extraneous water. As I pointed out during the hearing of the appeal, this defective analysis throws this evidence completely out of perspective to the true facts. A serious aspect of this certificate is that, instead of ascertaining the true ingredients of the sample, with a view of finding out whether it contained pure vinegar, or substitutes which might be injurious to the health of the public, the analyst merely identified and measured the acetic acid content. What he calls 55 per cent. vinegar might have contained 54 per cent. of a deadly poison such as arsenic, if that did not happen to react to the acetic acid test; unless of course he tested it by tasting, as did the shopkeeper. To say the least of it, it was a lost opportunity. An almost comic aspect of this matter is that so obsessed were the magistrate and the analyst with the acetic acid content that neither took any trouble to be sure that the liquid was vinegar at all.

That brings me to the crux of this case. What is vinegar? I understand that this is regarded as a test case; I therefore ask indulgence to go into the history of vinegar in considerable detail. The definition of vinegar has been a vexed question and apparently one which even the Imperial Parliament has considered and set aside on more than one occasion. Very fortunately, however, for us the history of vinegar was fully reviewed, with the assistance of the greatest living experts on that subject, supported by the Vinegar Trade Association, in the case of the *Westminster City Council v. William Tame* in the Bow Street Police Court, London, on the 25th January, 1937. The accused was convicted and appealed. The appeal was dismissed by the London Quarter Sessions Appeal Committee on the 16th June, 1937. The hearings are fully reported in the *British Food Journals* for April and August, 1937. The decision may not be binding on this Court, but it is so obviously correct that it would be fatuous not to

accept the principles laid down. It seems that vinegar has been used in England since the 17th century, being imported from France and the wine making European countries. As its name implies, it began as a sour wine, and, after about a hundred years, it was produced in England from sour wine, and, later, from brewing. There was also a fermented vinegar; dictionary definitions usually refer to it as a fermented liquor. Towards the end of the last century the chemists produced an unpleasant synthetic vinegar, which has been greatly improved. To-day a great deal of vinegar sold is composed of 95 per cent. water, caramel for colouring, and the balance acetic acid. This liquid is not fermented in manufacture. Medical experts say it is not injurious to health, in fact some say that synthetic vinegar is better for sick persons than the fermented vinegar. On the other hand, some evidence supported the theory that fermented vinegar has a greater digestive value. The real question, however, is not whether vinegar may be innocuous or unadulterated but whether it can properly be sold as vinegar. Both vinegar which is the product of fermentation and synthetic vinegar are composed of acetic acid diluted with water in very much the same proportions, but the acetic acid in the former is produced in a different way from that in which the latter is produced. The former is produced by fermentation, and, not only does it give the article a better aroma and flavour, but it also creates other products of fermentation not present in the synthetic compound. The point in issue in the English case cited above was whether a shopkeeper selling a purchaser for vinegar an article marked "Table Vinegar" was giving that person sufficient notice that he was receiving synthetic vinegar and not fermented vinegar. It was upheld, on appeal, that an article sold as vinegar, or table vinegar, without any qualification or explanation as to its origin being given by the seller to the purchaser, implies that the substance sold is derived from a process of fermentation. The result of that decision is that any shopkeeper who sells vinegar which has not been produced by fermentation, must warn his customer that he is not getting vinegar but artificial vinegar.

In my opinion, having regard to all the difficulties which have surrounded this subject in the past, such a course is the only satisfactory one to adopt. The synthetic vinegar should be clearly marked artificial vinegar to show its true character.

Unfortunately, this decision, though it gives help towards the formation of a future policy, does not remove the primary difficulties of the traders in this Colony. Their difficulty is how can customer and trader be safeguarded in connection with the statutory standard of 4 per cent. acetic acid content? It is clear that the rough and ready methods of the appellant are not sufficient, because the standard of the wholesale product—which has to be broken down by the retailer—may not be constant.

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There is no precise evidence on this point disclosed on the record but counsel on either side have bandied about trade terms of "Strong" and "Weak" vinegar, and suggested that the former contained a 10 per cent. acetic acid content.

Accepting these figures as basis of argument illustrating the process adopted by the appellant; but of course in no way allowing them to influence my judgment as evidence, it will be seen that if the appellant did add 4 gallons to the 8½ gallons of vinegar received by him from the wholesaler, those quantities would reduce the 10 per cent. acetic acid content to approximately 6.8 per cent; a figure very far away from the 2.2 per cent. alleged in the evidence.

One can see, however, from this illustration that the retailer is completely at the mercy of the wholesaler for providing accurate figures of the original acetic acid content of the vinegar supplied prior to breaking down.

Possibly the appropriate authority may consider reviewing this legislation in relation to the position of the unfortunate retail shopkeeper. He may receive an article called vinegar which may contain anything from 8 per cent. to 14 per cent. or more acetic acid content. Unless he is sure of the precise percentage he will always be in danger of reducing the percentage below the statutory standard. The quantities dealt with by the small trader would seldom justify the expenditure on analysis fees. His position would always be precarious unless he was selling a highly priced fermented vinegar, bought in containers ready for sale, when such a test would not be necessary. He is therefore forced into the position of giving his customers notice that the article sold to them is below the statutory standard and an artificial product—a course which may be prejudicial to his trade.

Having outlined the history of vinegar, so opportunely provided by the English case this year, let me apply, what I must confess is completely new knowledge to me, to the facts of this case.

The issues before the Court are simple, and raise two questions. Firstly, was the liquid sold vinegar at all? Secondly, was the label on the bottle sufficient notice to a normal purchaser that the article sold to him was not vinegar of the full statutory strength?

In my opinion, the prosecution failed to provide any material evidence of what the liquid consisted, or how it was produced. There is little doubt in my mind that in fact it was an artificial vinegar and should have been so labelled and/or the purchaser should have been warned of its true character. It was, however, for the prosecution to prove that fact and they made no attempt to do so. With regard to the second question. As I have said, Marshall, the purchaser, very fairly told the magistrate that all could see the bottles on the shelf and that he saw that there were two descriptions on them, "Strong Vinegar" and "Weak Vinegar." In other words he had notice of the weak vinegar.

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In addition, I place credence in the evidence of the shopkeeper to the effect that he asked the purchaser whether he wanted strong or weak. There appears to have been some confusion of thought in the minds of Counsel representing the parties in this appeal as to the relative connection between the trade terms "Strong Vinegar" and "Weak Vinegar" on the one hand and the statutory standard, on the other hand. There should be no doubt in any one's mind, in so far as the statutory definition of vinegar is concerned, that there is but one standard of strength. It therefore follows that, from that aspect, (that is excepting the aspect of fermentation) any sample of vinegar containing precisely 4 per cent. of acetic acid content or more is a statutory standard vinegar. In my opinion, when a purchaser asks for vinegar and receives an article with due notice that it is weak vinegar, the word 'weak' can have only one meaning, and that is that the vinegar is below the statutory strength. Further, the provisions of section 8 of the first abovementioned Ordinance protect the seller where the adulteration is not intended fraudulently to increase the bulk of the article sold. The prosecution having failed to prove that the liquid was not vinegar or that there was any intent fraudulently to increase the bulk of the vinegar and the purchaser having admitted what in my opinion was sufficient notice of the strength of the article I hold that the appeal should be allowed with costs.

Appeal allowed.

M. DEMENDONCA & CO., LTD., v. J. L. GRIFFITH.

M. DEMENDONCA & CO., LTD., Plaintiffs.

v.

J. L. GRIFFITH, J. E. TOBIAS AND REGINA ORDERSON, as administratrix with Will annexed of ELIZABETH CLUE, Deceased, and MARIE LOUISE HENDRICKS, Defendants.

[1937. No. 100.—DEMERARA.]

BEFORE LANGLEY, J. 1937. JUNE 17; SEPTEMBER 1, 15, 18;
OCTOBER 16.

Partnership—Publication of newspaper—Purchase of printing plant—Lease of premises—Implied authority of partners—Agency of necessity—Partnership Ordinance, cap. 83, ss. 7, 16 (1), 16 (2).

The three defendants formed the intention to run a newspaper, and, as a preliminary step in furthering that end, they purchased certain printing plant of which they became co-owners. The first named defendant showed the plaintiff the agreement between the defendants to purchase the printing plant. The plaintiff thereupon let to the first named defendant, purporting to act not only on his own behalf but on behalf of the other defendants, certain premises for the purpose of housing the plant and carrying on a newspaper.

Owing to certain type not being available the newspaper was not started when delivery of the printing plant was effected. An attempt was, however, made to run it later.

Held, (1) that the first named defendant had an implied authority to lease the premises for housing the printing plant this being incidental to the proper conduct of the business of running a newspaper;

(2) that the second and third named defendants were not only jointly concerned in the purchase of the printing plant, but after delivery, were jointly concerned in the use thereof;

(3) that they were therefore liable as partners for the rent of the premises accruing due after delivery of the plant.

The plaintiff sued all three defendants in the magistrate's court for arrears of rent. The second named defendant received notice that he was sued as a co-tenant along with the two other defendants, but he did not inform the plaintiff that he was not a tenant.

Held, that the second defendant was liable for rent accruing due thereafter.

Semble, that the first named defendant was an agent of necessity of the two other defendants as the delivery of the printing machinery rendered his action in leasing premises the only reasonable course open to him.

Action on a specially indorsed writ for rent. The defendant Griffith consented to judgment; while the defendants Tobias and Orderson denied liability. The defendant Hendricks was joined as a defendant by Order of Court dated 17th June, 1937.

J. A. Luckhoo, K.C., for plaintiffs.

S. L. van B. Stafford, for defendant Tobias.

E. G. Woolford, K.C., for defendant Orderson.

G. J. deFreitas, K.C., for defendant Hendricks.

Cur. adv. vult.

LANGLEY, J.: This action is a claim for \$140 in respect of premises situated at 11, High Street, Georgetown (hereinafter

called "the premises") made by deMendonca & Co., Ltd., against three defendants—J. L. Griffith, J. E. Tobias and R. Orderson acting in her capacity as administratrix of the estate of Elizabeth Clue, deceased, (hereinafter called "Orderson"). The debt itself is not in question, the issue being whether the liability should fall on the shoulders of all the defendants jointly, or on one or more of them. Griffith filed a consent to judgment, Tobias and Orderson applied for leave to defend, denying all liability. Various applications for adjournments were made on the grounds that a settlement was possible, and, at a later stage, application was made on behalf of Marie Louise Hendricks and the Independent, Ltd.,—an incorporated Company—to be made defendants in the action as being essential parties to such settlement, in order that any terms agreed upon might be made enforceable. That application was granted, but, from facts that emerged during the hearing, I am not satisfied that that company had authorised the application made to this Court. I therefore amend my order of the 17th June, 1937, by deleting all words, after "Hendricks," from lines 4, 5, 6 & 7 (*i.e.*, from the word "and" down to the word "action,") and substituting therefor the words "as defendant in this action."

Briefly, it appears from the evidence that at a meeting of a Miners Association, held some time in 1935, those present suggested that the ownership of a newspaper might assist in bringing their grievances before the public, and it was decided to take steps towards that end. Later, Tobias, acting on information from Griffith, Secretary of the Association, together with Mansfield (acting for Clue), Griffith and one Dodds signed an agreement, made with Mrs. Hendricks, for the purchase of certain printing plant and machinery, etc.,—hereinafter called the "plant"—for the sum of \$3,500. The terms called for delivery on or after the 31st December, 1935, payment down \$1.00 (*i.e.*, 28th November, 1935,) and a second payment of \$900 on delivery of plant, together with a mortgage on the plant for \$2,500, repayable in five years at 6% on the outstanding balance. This plant was situated at the premises prior to delivery, but was in possession of a now defunct company. Delivery took place early in May, 1936, by which time Dodds had dropped out of the firm.

Under the terms of this agreement the three defendants were the co-owners of the plant which was housed in the premises leased by the previous tenants until the day of delivery. Prior to this day, however, Griffith had approached the plaintiff and applied for a lease of the premises; an offer which was definitely refused on account of a previous unsatisfactory transaction between them. Later, Griffith returned to the plaintiff with a senior clerk in Messrs. Cameron and Shepherd's office named Carrington. The last named firm were acting on behalf of Mrs.

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Hendricks, and Carrington was able to show the plaintiff the abovementioned agreement.

The plaintiff alleges that Carrington definitely informed him that Griffith was acting for Tobias and Clue. There is no evidence that Carrington had any authority, either express or implied, to bind either Tobias or Clue.

The plaintiff, however, accepted this representation and asserts that from first to last he understood that he was dealing with all three defendants. I need not go in detail into the various circumstances which resulted from this tenancy; it is sufficient to say that all receipts for rent were given in the names of the three defendants; and later, on two occasions the plaintiff sued them all in the Magistrate's Court for arrears of rent, and finally also in this Court. The aspect as to notice of the summonses I will deal with later.

The defence raised by Tobias is that he never personally, or through any agent, agreed to rent the premises, nor did he take possession of them. Orderson avers that, after making fullest enquiry, no agreement written or otherwise, was ever made by the late Mrs. Clue with the plaintiff to rent the premises.

The issue to be decided is, had Griffith lawful authority to bind the other two defendants when he leased the premises from the plaintiff?

As regards the plant, the evidence shows clearly that all three defendants had made payments towards the purchase price of the plant and were shown in the agreement to be co-owners thereof. Whether co-owners are also partners depends on the evidence in each case.

It is admitted that there was an intention to run a newspaper, and, as a preliminary step in furthering that end, these three defendants purchased that plant. The plant had to be housed when delivered. To quote Tobias "the machinery could not be kept in the street."

Owing to litigation, the delivery of the main plant was delayed. After that was handed over, other type essential to the production of a newspaper was withheld by the Official Receiver until further litigation released it for delivery.

The witness Richard Holland confirmed the story of Tobias as to the intention to run a paper when he said "They wanted to run a newspaper but the balance of the type was with the Official Receiver." Further, Tobias admitted that the defendants were to be paid in shares when his alleged company was formed.

The position seems to be that the defendants took a preliminary step toward running their newspaper and the only reason the paper was not produced was that certain type was not available. Possibly, there may have been a desire to hand over the undertaking as a running concern to a company ultimately,

but that stage had not yet arrived, and it is one with which we are not concerned.

Can it be said that where co-owners go so far in a commercial undertaking as to purchase the machinery necessary for their purpose, but, because difficulties arise preventing the completion of their purpose, delay occurs which changes the relationship between the co-owners, although the purpose remains unchanged?

It seems clear that the parties to the agreement of the 28th November, 1935, were not only jointly concerned in the purchase of the plant, but, after delivery, were jointly concerned in the use thereof. Some by employment, others by notoriety, and all by the final sale to the Company if one was formed.

There can be no question that the leasing of the premises by Griffith to house the plant was incidental to the proper conduct of the business. Tobias, by implication, admits this. That would bind his firm as, generally speaking, partners are the agents of each other (sec. 7 of Partnership Ordinance, cap. 83).

As regards Tobias, the matter can be carried further, as although, if we accept his story that he was deceived by Griffith in connection with the first summons; unquestionably, he received notice that he was sued as a cotenant, with the other two defendants and took no steps to bring what he now represents was the true position to the notice of the plaintiff. He allowed that representation to continue. There can be no question that originally it was upon that representation that the plaintiff accepted Griffith as a tenant with the other two defendants. That brings the case within the provisions of subsection (1) of section 16 of chapter 83.

The failure of Tobias to safeguard his interests in the Magistrate's Court was reckless for it must be remembered that the first summons was issued on the 21st July, 1936. Tobias had told Mrs. Hendricks as far back as the previous March that he was going to "pull out." The very questionable guaranteed promissory note which he extorted from Griffith was dated the 29th July, 1936, seven days after the service of the first summons and the day before the hearing of that summons. I am quite satisfied that if that promissory note could be regarded as having any lawful effect at all, a Court could set it aside as calculated to defraud the creditors of the firm, as on the admissions made in Court by Tobias the only purpose was a clumsy attempt to place financial obligations of the firm on the shoulders of Griffith, a man of straw, as worthless financially, as he is in most other respects.

The position of the late Mrs. Clue is rather different. She died on the 15th November, 1936, that is, prior to the period for which this rent is claimed, but after the date of the lease to which she was clearly a party. It seems to me that at the date of her death she was co-owner of this partnership plant; entitled to

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that benefit and liable to any expense involved in connection therewith. Under the agreement of the 28th November, 1935, the partners contracted to bind themselves for five years. As a partner in the firm, the estate of the deceased would be bound by the acts of the other partners until her interest had been lawfully terminated. Death in itself does not necessarily terminate a partnership: see section 16 (2) of chapter 83. Again referring to her case, any notice to a partner acting in the partnership business respecting partnership affairs is notice to the firm: see section 18 of chapter 83.

A distinction which may be drawn between the positions of Tobias and Clue is that whereas the former, after express notice of the tenancy through the first summons, by implication, ratified the action of Griffith by failing to notify the plaintiff of what he now alleges were the true facts (*i.e.*, that he was in no way responsible for the tenancy), with regard to the latter (apart from the evidence of Griffith, in which no reliance can be placed) there is no direct evidence that she had any notice of the tenancy. The obligation created in her case rests entirely on the effect of her co-partner's action as her agent carrying on in the usual way of business: see section 7 of chapter 83. No evidence on the restriction of the powers of the partners has been adduced.

Had the administratrix terminated the partnership by dealing with the deceased's interest in the partnership the estate might not have been liable in respect of the claim now made.

Taking the evidence as a whole, I am satisfied that the purpose proposed at the Miners' Meeting in 1935, was carried partially into effect by the defendants on their account. It is not surprising that the venture failed seeing that it appears to have been left entirely to Griffith to carry out. He accepted delivery on behalf of himself and the other two parties to the agreement of November, 1935. The plant having been purchased the question of housing it was one which Griffith had of necessity to deal with in the usual way of carrying on the business.

The evidence shows that Tobias knew it was so housed, and that he was summoned personally as a tenant by the plaintiff without making any attempt to correct in the mind of the plaintiff what he now alleges was untrue. The mere payment of the judgment debt did not affect that position. There is the evidence that Tobias recognised the financial dangers of being linked with Griffith early in this matter and tried to save the situation by forcing Griffith to execute a promissory note guaranteed by one Croal (of whom we know nothing and who may be worth no more than Griffith) for the purpose of evading the liabilities of the firm. It would seem more than obvious—if he is now speaking the truth—that instead he should have gone to the plaintiff, and told him he was not his tenant.

There is sufficient evidence to prove that the late Mrs. Clue—

through her attorney—was definitely involved in this business of attempting to run a newspaper, although the evidence fails to show that she had the actual notice of the tenancy which Tobias admits receiving.

It may be some consolation to Mr. Woolford to know that had I not been satisfied that an attempt to run the newspaper was in fact commenced, on the facts disclosed I should have found that the defendant Griffith was agent of necessity of the other two defendants, as the delivery of the machinery rendered his action the only reasonable course open to him.

I give judgment in favour of the plaintiff for the sum of \$140 and costs against the three defendants Griffith. Tobias and Orderson, the last named in her capacity as administratrix of the estate of the late Elizabeth Clue, deceased.

I make no order in respect of costs of Mrs. Hendricks or the Independent, Ltd.

Judgment for plaintiff.

Solicitors: *Vivian C. Dias*, for plaintiff;
R. G. Sharples, for defendant Tobias;
G. R. Reid, for defendant Hendricks.

REX v. H. B. SADLER.

REX v. HENRY BRONKHURST SADLER.

[INDICTMENT NO. 12,312.—DEMERARA.]

BEFORE VERITY, J. 1937. OCTOBER 21.

Criminal law—Defamatory libel—Indictment—Special pleas—Criminal Law (Procedure) Ordinance, Cap. 18, ss. 103 (1), 107—Criminal Law (Offences) Ordinance, Cap. 17, ss. 109, 112—Defences under s. 109 of cap. 17—Not special pleas—Raised under plea of not guilty.

The only special plea permissible as a defence to an indictment for defamatory libel is the one contained in section 112 of the Criminal Law (Offences) Ordinance, Chapter 17, which provides that “it shall be a defence to an indictment for a defamatory libel that the publishing of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published and that the matter itself was true.”

The defences allowable under section 109 of the Criminal Law (Offences) Ordinance, Chapter 17 to an indictment for defamatory libel may be raised on a plea of the general issue, that is to say, of not guilty, and they do not fall within the category of defences which may be specially pleaded under section 103 of the Criminal Law (Procedure) Ordinance, Chapter 18.

Where a special plea was defective the Court acting under the provisions of sections 93 and 108 of the Criminal Law (Procedure) Ordinance, Chapter 18, gave leave to amend.

Indictment for defamatory libel under section 113 (a) of the Criminal Law (Offences) Ordinance, Chapter 17. A special plea was filed and objection was taken to its validity. The facts and arguments appear sufficiently from the judgment.

J. H. B. Nihill, K.C., Attorney-General, for the Crown.

S. L. van B. Stafford, for the accused.

VERITY, J.: The defendant is indicted under section 113 (a) of Chapter 17 for the publication of a defamatory libel. Upon arraignment he has pleaded that he is not guilty and within the time prescribed by section 103 of Chapter 18 he has filed a document purporting to be a special plea in justification under the provisions of section 112 of Chapter 17 and sections 103 and 107 of Chapter 18.

The Attorney General by replication has submitted that this document cannot be entertained under section 112 of Chapter 17 in that it is not pleaded in the manner provided for in the Criminal Law (Procedure) Ordinance, Chapter 18.

Section 112 of Chapter 17 provides that it shall be a defence to an indictment for a defamatory libel that the publishing of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published and that the matter itself was true.

By paragraph (a) of the defendant’s plea to the first count of the indictment it is alleged that “all the defamatory matters alleged in the indictment are true” and by paragraph (b) it is alleged (*inter alia*) that “the said matters were relevant to a

subject of public interest . . . and that the public discussion of the said matters, was for the public benefit.”

Paragraph (a) further contains an allegation of absence of ill will and of the existence of honest belief on reasonable grounds that the matters are true. This alternative appears to have reference to the proviso to the last paragraph of section 109 of Chapter 17.

Paragraph (b) includes an allegation that the defendant honestly and on reasonable grounds believed all the defamatory matter to be true and the whole paragraph appears to have reference to section 109 (e) of Chapter 17.

It is submitted on behalf of the defendant that these two paragraphs read together constitute a sufficient plea under section 112 of Chapter 17 and in accordance with the provisions of section 107 of Chapter 18.

I am not of that opinion. They contain no allegation that the publication of the defamatory matter “in the manner in which it was published at the time when it was published” was for the public benefit. Such an allegation by way of plea is required both by section 112 of Chapter 17 and section 107 of Chapter 18.

There is therefore in the document filed no plea in justification under the provisions of section 112 of Chapter 17 and in accordance with the Criminal Law (Procedure) Ordinance. It is further submitted on behalf of the Crown that the particulars set out in paragraph (a) of the document filed by the defendant as a special plea do not conform to the requirements of section 107 (2) of Chapter 18 in that they do not set forth the particular fact or facts by reason of which it was for the public good that the matters should be so published.

The particulars set out contain statements which it is alleged are facts upon which apparently the defamatory matter was based, but they do not in any instance set out facts by reason of which it was for the public good that such matters should be published.

The Attorney General further submits that the latter alternative of paragraph (a), paragraph (b) read as a whole, paragraphs (c) and (d) each pleads matters of defence which may be raised on the plea of not guilty but are not matters which may be specially pleaded under the provisions of section 103 of Chapter 18.

The latter alternative of paragraph (a) pleads in part the defence allowable under section 109 (j) of Chapter 17; paragraph (b) pleads a defence allowable under section 109 (e); paragraph (c) that under section 109 (h) and paragraph (d) that under section 109 (j).

All these matters are good defences such as may be raised on a plea of the general issue but do not fall within the category of defences which may be specially pleaded under section 103 of

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Chapter 18 which provides that certain specified special pleas and no others may be pleaded in accordance with provisions thereafter set out. These paragraphs cannot therefore be entertained and can form no part of a special plea.

On behalf of the defendant application has been made for leave to amend the plea by deleting the latter alternative of paragraph (a), the first sentence of paragraph (b) and the whole of paragraphs (c) and (d) with the necessary consequential amendments to the plea to the second count of the indictment. By section 108 of Chapter 18 the provisions of section 93 are applied to any plea, replication or other criminal pleading, as well as to indictments to which the section is specifically applicable. Under this latter section when it appears that an indictment is defective the Court shall make any order for amendment the Court thinks necessary unless the required amendments cannot be made without injustice.

In the present case in my view the plea filed by the defendant is defective. There appears no ground for concluding that the amendments necessary to remedy these defects cannot be made without injustice, and I therefore order that the plea be amended

(i) by the deletion of the words,

“or alternatively was made without ill will to the person defamed and in the honest belief on reasonable grounds that they are true “
from paragraph (a) thereof;

(ii) by the inclusion in the particulars following paragraph (a) thereof of a statement of the particular fact or facts by reason of which it was for the public good that the matters should be so published.

(iii) by the deletion of paragraphs (b), (c) and (d) thereof and the substitution therefor of a pleading that it was for the public benefit that the matters charged should be published in the manner in which and at the time when they were published.

(iv) by deleting from the plea for justification on the second count the words.

“or alternatively were made without ill will to the person defamed and in the honest belief on reasonable grounds that they are true.”

(v) by such consequential amendments to the remainder of the plea as are rendered necessary by the amendment to the plea to the first count of the indictment.

For the sake of greater convenience such amendments may be sufficiently effected by the withdrawal of the present pleas and a substitution therefor of pleas embodying so much of the present plea as is unaffected by such amendments together with the amendments required by this order.

Solicitors: *P. W. King*, Crown Solicitor; *R. G. Sharples*.

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REX v. HENRY BRONKHURST SADLER.

[INDICTMENT NO. 12,312.—DEMERARA.]

BEFORE VERITY, J. 1937. OCTOBER 28.

Criminal Procedure—Indictable offence—Preliminary investigation—Accused person—Deposition of—Admissibility in evidence—On behalf of Crown—Criminal Law (Procedure) Ordinance, Cap. 18, s. 62—Evidence Ordinance, Cap. 25, ss. 52, 57, 89—Criminal Justice Ordinance, 1932, (No.21), s. 18.

The deposition of an accused person taken before the magistrate at the preliminary investigation may be given in evidence by the Crown at his trial in the Supreme Court.

J. H. B. Nihill, K.C., Attorney-General, for Crown.

S. L. van B. Stafford, for accused.

VERITY, J.: Application by the Attorney-General to give in evidence at this trial the deposition made by the accused at the preliminary examination before the magistrate was opposed by Mr. Stafford on behalf of the accused on the ground that the deposition does not come within the provision of section 57 of the Evidence Ordinance, Chapter 25, and could only be admitted in compliance with the provisions of section 89 of Chapter 25 as amended by section 24 of Ordinance 21 of 1932.

The provisions of this latter section are obviously inapplicable to the depositions of accused persons, but it was submitted by the Attorney-General that the admission of such depositions is authorized by the combined effect of section 62 of the Criminal Law (Procedure) Ordinance, Chapter 18 and sections 52 and 57 of the Evidence Ordinance, Chapter 25.

By section 62 of Chapter 18 as amended by section 18 of Ordinance 21 of 1932, the magistrate is required after the examination of the witnesses called by the prosecutor to ask the accused person if he wishes to say anything and to warn him that whatever he says will be taken down in writing and may be given in evidence upon his trial. Section 52 of Chapter 25 makes an accused person a competent witness at any stage of the proceedings, and section 57 provides that any statement purporting to have been made by an accused person under the provisions of section 62 of the Criminal Law (Procedure) Ordinance may be given in evidence against him without further proof.

In the present case the accused in answer to the question and caution duly administered by the magistrate stated "I will give evidence and call witnesses." He thereupon was sworn and proceeded to make a statement on oath which was taken down in writing in the form of a deposition.

It appears clear to me that the deposition is admissible in evidence at the trial as a statement made under the provisions of section 62 of Chapter 18.

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It would be unreasonable to conclude that the effect of the relevant enactments enabled the accused person to avail himself of the opportunity of making a statement before the magistrate while evading the consequences of the statutory warning by the simple expedient of making that statement on oath.

I am fortified in my view that this is not the effect of the enactments by reference to the decisions of English Courts founded on legislation which in principle and effect I am unable to distinguish from the local statutes. The admissibility of the depositions of accused persons in these circumstances has been recognised in such cases as *Reg. v. Adams* (50 J.P. 136) decided so long ago as 1886, and *Reg. v. Bird*, *R. v. Boyle* and *R. v. Chapman* (reported in vols. 15, 20 and 29 T.L.R. respectively) the last case having been decided in 1912.

The deposition of the accused being therefore a statement purporting to have been made in accordance with the provisions of section 62 of the Criminal Law (Procedure) Ordinance may be given in evidence at this trial without further proof unless it is proved that the magistrate purporting to sign the statement did not in fact sign it. There being no such suggestion in the present case, the statement and deposition may be given in evidence.

E. RAMCHARRAN v. RAMSALUK.

EDWARD RAMCHARRAN Applicant,

v.

RAMSALUK, Respondent.

[1937.—No. 296. DEMERARA.]

BEFORE FULL COURT: CREAN, C.J., AND VERITY, J.

1937. NOVEMBER 15.

Appeal—Magistrate's Court—Leave to appeal—Unavoidably prevented—Ignorance of procedure—Summary Jurisdiction (Appeals) Ordinance, Cap. 16. ss. 8 (2), 8 (3), 14.

A person proposing to appeal from the decision of a magistrate did not lodge a notice of the grounds of appeal within 14 days of the receipt of a notification to him under subsection (2) of section 8 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, from the clerk of the magistrate's court that the copy of proceedings was ready. On an application for leave to appeal in which he alleged that he thought that a similar notice had been sent to his counsel, and so he didn't forward it to him.

Held, that he was not unavoidably prevented from appealing within the meaning of section 14 of Chapter 16.

Motion by the defendant for leave to appeal from a decision of Mr. F. O. Low, Stipendiary Magistrate, Essequibo Judicial District.

E. G. Woolford, K.C., for applicant.

C. R. Browne, for respondent (plaintiff).

The following judgment of the Court was delivered by the Chief Justice:—

The conduct of the applicant and the circumstances surrounding his contemplation of this appeal do not lead us to think that he was unavoidably prevented from filing his appeal within time. If this application were to succeed it would mean that an applicant in a case like this could come into Court and say he was ignorant and be entitled to an extension of time; we do not apprehend such a ground was contemplated by the Ordinance.

This application is therefore refused with costs fixed in the sum of \$10.

Application refused.

E. SANDIFORD v. F. G. FRANCE.

ELOISE SANDIFORD, Plaintiff,

v.

F. G. FRANCE, Defendant.

[1937. No. 77.—DEMERARA.]

BEFORE VERITY, J. 1937. NOVEMBER 1, 30.

Practice—Writ—Irregularity in—Leave to amend—Terms of Order of Court—Not complied with—Amendment made—Not in accordance with rules or order of Court—Writ set aside.

E. S. sued in person on a specially indorsed writ. She did not comply with O. 17 r. 6 (2) in that the statement of claim was not signed by her but by her counsel. On the 12th April, 1937, the Court ordered that the writ be amended accordingly and that a copy of such amended writ be served on the defendant.

The amendment allowed by the order of the Court was not carried into effect, and no amendment was made within the time prescribed by the Rules of Court.

Held, (1) that the plaintiff not having complied either with the order of the Court or with the Rules, the amendment made was void;

(2) that the writ having been irregularly issued in the first place and the plaintiff having failed to avail herself of the opportunity afforded for curing this irregularity, the writ must now be wholly set aside.

H. W. de Freitas, solicitor, for plaintiff.

J. L. Wills, for defendant.

Cur. adv. vult.

VERITY, J.: In this case by an order dated April 12, 1937, and entered on April 23, 1937, it was ordered that the Writ be amended to comply with Order XVII., Rule 6, sub-rule 2, of the Rules of Court, 1900, as amended by the Rules of Court, 1932.

An amended Writ was served on the defendant on October 7, 1937. The amendment does not comply with the terms of the Order. The date of the amendment is not endorsed upon the amended Writ as prescribed by Order XXVI., Rule 9 and it is not contended that the amendment was made within the time prescribed by Order XXVI., Rule 7.

Under the circumstances Mr. Wills for the defendant moves that the writ be struck out.

Mr. H. de Freitas on behalf of the plaintiff submits that the writ as amended complies with Order XVII., Rule 6 even though the amendment goes further than contemplated by the Order of April 12, 1937, and that Order XXVI., Rules 7 and 9 do not apply to this case, amendment having been allowed under Rule 12 of the same Order.

It is clear that the amendment is not that allowed by the Order of the Court and is therefore made without leave after service of the writ and is irregular.

It appears to me to be equally clear that the provisions of Rules 7 and 9 apply to all amendments covered by Order XXVI.,

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except such amendments under Rule 12 as may be made by the Court during the hearing to which obviously the provisions of Rule 7 might not apply.

The plaintiff in the present case not having complied either with the Order of the Court or with the Rules, the amendment is void. The writ having been irregularly issued in the first place and the plaintiff having failed to avail herself of the opportunity afforded for curing this irregularity, the writ will now be wholly set aside under Order LI., Rule 1. The plaintiff to pay the defendant's costs.

Writ set aside.

BACHAN PRASAD PANDAY, Plaintiff

v.

JOHN LONDON, Defendant.

[1937. No. 17.—BERBICE.]

BEFORE LANGLEY, J. 1937, DECEMBER 6.

Immovable property—Sale of—No title in vendor—District Lands Partition and Re-Allotment Ordinance, Chapter 169—Partition under—Necessary to give vendor title—Specific performance—Refused to purchaser.

Where a vendor could only give title to a purchaser if he, the vendor, obtained title through the medium of a partition under the District Lands Partition and Re-allotment Ordinance, Chapter 169, a decree for specific performance was refused to the purchaser.

Action by the plaintiff for specific performance of a contract relating to land. The defendant counter-claimed for rectification of the contract. The facts and arguments appear from the judgment.

L. M. G. F. Cabral, for plaintiff.

E. G. Woolford, K.C., for defendant.

Cur. adv. vult.

LANGLEY, J.: This action was brought in respect of a claim for possession of certain lands at Hampshire, Berbice, with a rice mill situated thereon, under the terms of a written agreement dated the 30th April, 1937, made between the parties to this action; together with a claim for damages for each day the plaintiff was kept out of possession. Alternatively, the plaintiff claims damages for breach of the said agreement, and in either case his costs of this action.

The defendant claims to have the said written agreement rectified so as to embody the true terms and conditions—and some extra safeguards—as the defendant believed them to have been agreed upon in the first instance. In his defence the defendant alleges that the said agreement should be set aside by this Court

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because he was entitled to enjoy separate and independent legal advice; also, because the agreement was executed by him as the result of mistake and undue influence whereby the real terms upon which the defendant agreed to sell his interest in the property in question were not properly set out in the agreement he executed.

The first duty of the Court in this action is to try and establish the true facts; the evidence being in direct conflict. I propose giving the two versions somewhat fully because it is necessary that the record should show clearly the great divergences which arose. The plaintiff said that he saw the defendant on the 19th April, 1937, and, after some bargaining, they agreed mutually that the plaintiff should buy the property for \$4,000—\$1,000 cash and \$3,000 payable later. The final details of the sale were to be discussed later. This first verbal agreement was never effective, being incomplete, and it being mutually agreed that the terms of it were altered in a material degree at a later stage. Both parties agree on this part of the story. On the 26th April, 1937, the plaintiff saw the defendant and told him he was ready to complete the bargain. They agreed that they should meet in New Amsterdam on the 30th April, 1937, and did so.

The plaintiff and the defendant said that Mr. Luckhoo and Mr. Woolford respectively were their usual legal advisers. As the issue of independent legal advice has been raised it should be noted that the parties were engaging a legal adviser to whom neither was tied by previous associations apparently. Owing to Mr. Luckhoo being absent from the Colony and Mr. Woolford being engaged in the Magistrate's Court on that day, acting on the advice of a Mr. Ramdial, the defendant suggested to the plaintiff that they should ask Mungal Singh, Esq., Barrister-at-law, to draw up the agreement for them: thus, by mutual consent, they engaged the service of that gentleman. The plaintiff said that he had brought two cheques to pay the \$1,000—one for \$400 and the other for \$600. Before the interview with Mr. Singh took place the defendant told the plaintiff that his wife said that he should have asked for \$2,000 cash down. To this very material change in the terms the plaintiff agreed, subject to his condition which I will deal with later.

It is clear that at this stage the previous verbal agreement had been superseded.

A most important issue in this action is the date upon which the possession of this property was to pass, and I attach considerable weight to this evidence of the alteration of the amount of the first payment. It seems to me, looking at this matter from a commercial aspect, that it would be unlikely for the plaintiff to agree to pay 25% of the purchase price without getting possession, but more unlikely still that he would be willing to pay 50% of the purchase price without achieving that end. The parties went to Mr. Singh about noon on the 30th April, 1937. He

was alone in his Chambers. It is from this point that the two stories diverge and I propose to compare them as they progress.

The plaintiff said that the defendant told Mr. Singh that the terms were \$2,000 cash first and \$2,000 by instalments. When asked by Mr. Singh the amounts of the instalments and the periods of the repayments, the defendant asked the plaintiff what terms he wanted, and accepted his suggestion for repayments extending over 5 years. These terms for repayment are not in issue. Although the plaintiff had cheques to the value of \$1,000 with him, he only agreed to give the smaller (\$400), which he said was to bind the deal.

The plaintiff said that he told the defendant that if he had kept to the \$1,000 for the first payment he would pay him that sum, but if he insisted on \$2,000 he would only pay him \$400 down. That he did. The defendant offered no other explanation of this change of the initial payment and I accept the plaintiff's version of that transaction. The first material difference in the two stories arises now. Whilst the defendant said that Mr. Singh took down all the terms on the back of an envelope and later told Mr. Burch-Smith to type them into an agreement; the plaintiff and Mr. Singh deny the notation on the envelope. They said that Mr. Singh, after hearing from the plaintiff the details of the consideration for the sale, sat down and commenced typing in triplicate the document which was used as the original agreement. When Mr. Singh had completed the first paragraph, Mr. Burch-Smith arrived, and Mr. Singh asked him to get the terms from the parties and continue with the document which Mr. Singh had commenced. Mr. Singh said that he only typed the title of the agreement, which formed the first seven lines of the agreement produced, (Ex. A). Mr. Burch-Smith was at that time awaiting the result of his final examination as a solicitor and has since qualified in that capacity. I take that as evidence that he was capable of understanding the words of the document he was typing, of putting into English the terms that the plaintiff and the defendant told him and of explaining them to these parties. The whole question of responsibility for legal advice, however, always rested with Mr. Singh. It is agreed that soon after Mr. Burch-Smith arrived, Mr. Singh left his Chambers. Mr. Burch-Smith confirms this evidence in so far as it was within his knowledge.

The plaintiff and Mr. Burch-Smith both said that the latter typed the agreement paragraph by paragraph as the defendant and plaintiff settled the terms, having discussed fully and agreed upon each point. The defendant denies this, and says that Mr. Burch-Smith typed the agreement from the envelope Mr. Singh had used for his notes. Further, that Mr. Burch-Smith "did not talk anything to us" until he arrived at the paragraph dealing with the price for bags. The defendant repeated this by

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saying definitely that “he did not get anything from me and Panday mouth, only the bag” and “we only talk about bag and insurance.”

It is agreed that Mr. Singh returned to his chambers whilst the parties were discussing the final paragraph on insurance. That paragraph was settled and the agreement completed, copies being given to each of the parties, whilst Mr. Singh read from the third copy. When this had been done—a correction being made and initialled—three copies were signed by the parties and their signatures regularly witnessed by Mr. Burch-Smith and another man. The defendant stated that he had to wear glasses for reading and was slightly deaf. I was unable to form an opinion of the state of his eyesight but I definitely formed the opinion that he was slightly deaf, from several incidents in the Court when I had him under observation. The plaintiff paid his \$400 and also \$6 to Mr. Singh for his services. For some reason the receipt for the latter amount was made out in the name of the defendant but, by mutual arrangement, the defendant repaid half this fee to the plaintiff. The defendant said that he took home his copy of the agreement. On reading it he found that it was wrongly worded, and that several important terms agreed between the parties were omitted. He said he returned to Mr. Singh’s chambers on Monday (the 3rd May, 1937) and “objected to deliver the mill before the 31st August, 1937.” It is significant that the defendant alleges that he made this objection on the 3rd May, 1937, but told the Court that the plaintiff had told him that “he couldn’t get the money before the end of July.” The urgency of this objection of his would appear not to have arisen early in May. The defendant also said he raised, with Mr. Singh, the issues relating to title, and insurance and that Mr. Singh said he was going to write to the plaintiff. He then said he suggested an address of the plaintiff to Mr. Singh where he would receive the letter earlier.

In my opinion, in gauging the value of the defendant’s statement that he knew the agreement was wrong on the 1st May, 1937, it is important to remember that he took no further action to remedy what are alleged to be very serious grievances until he received, Mr. Luckhoo’s letter dated the 12th June, 1937. Mr. Singh denies the interview of the 3rd May, ever took place. He said the defendant came to him about two weeks later and wanted to alter the part about bags; nothing else. Mr. Singh told him he could not change it. Apart from the visit of the defendant which Mr. Singh alleges took place about the middle of May, the next step taken by the parties was the visit of the plaintiff and his engineer K. Kort to the property and subsequently to the plaintiff at his house on the 6th June, 1937, (Sunday). Both the plaintiff and Kort say that the plaintiff told the defendant that he was coming to complete the payment that week. Further, that

the plaintiff refused to allow the defendant another two weeks to clear the stock of paddy in the mill. The defendant denies that that conversation ever took place. He said they came to inspect the mill and only talked about the ownership on a block and tackle.

Again these two stories are in direct conflict. The subsequent action of the plaintiff supported by the evidence of Mr. Singh and the defendant himself, who does not deny that the plaintiff brought the money that week—confirms the evidence of the plaintiff and his witnesses in my opinion. By accepting this evidence, the position is that on the 6th June the plaintiff was begging for time to clear the paddy in the factory; this completely contradicts his evidence that it had been mutually agreed that possession of the factory was to be given on the 31st August, 1937.

After a brief interview between the parties, near an omnibus, on the 8th June, 1937, (Tuesday) the plaintiff arranged with Mr. Singh to accompany him to the defendant's house the next day—which was a Public Holiday—and they did so. The plaintiff said he took \$1,600 cash with him on that occasion, but the defendant refused the cash because he could not give a good receipt on a public holiday. Mr. Singh advised him that such a receipt would be good in law. The defendant said, however, that he would go to Mr. Singh's chambers on Friday and receive the money there and give possession.

Mr. Singh confirms that story in detail. The plaintiff said he went to Mr. Singh's chambers on Friday the 11th June, 1937, but the defendant did not arrive. Counsel for the plaintiff stresses the point that Mr. Luckhoo's first letter was dated the 12th June, 1937, next day, and that point has significance. Again the defendant denies the evidence of the plaintiff and Mr. Singh as to what took place at that interview. The defendant says he did not tell Mr. Singh that he could not give a receipt on a public holiday; that he refused the balance of the cash because he would not take it before the 31st August; that he did not promise to go to Mr. Singh's chambers on the 11th June.

The subsequent correspondence between the parties is immaterial. The plaintiff issued the writ on the 23rd June, 1937.

In my opinion the review of the evidence shows that the parties arrived at a verbal agreement on certain conditions of sale on the 19th April, 1937. but that, prior to arriving at Mr. Singh's chambers on the 29th April, that agreement was nullified by mutual consent. I am satisfied that the evidence given by the plaintiff, Mr. Singh and Mr. Burch-Smith provides the true account of what occurred at Mr. Singh's chambers on the 30th April, when the written agreement was made. The "envelope writing" mentioned by the defendant was a creation of his mind having a legal significance which I was surprised to find within the knowledge of a rumshop keeper.

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It was claimed that the defendant, in the circumstances, was entitled to have and enjoy separate and independent legal advice. I am unable to find any indication in the evidence of this case that the plaintiff was in a dominant relationship to the defendant. The choice of the legal adviser was made by the defendant. There has been no indication in the evidence of fraud, misrepresentation, undue influence nor mistake on the part of either party. The very ingenious suggestion that Mr. Singh, as agent of the plaintiff, could misrepresent or mistake the facts to himself as agent of defendant requires no comment from me.

There is every indication that the agreement properly represented the terms agreed upon between the parties and was accepted by the defendant in its entirety on the day it was executed. It is significant that until he received the letter of the 12th June, the defendant neither sought separate advice nor raised any material objection to the terms of the agreement. I am unable to accept his version of what took place between the parties earlier in June. Having seen the demeanour of the defendant in Court and taken into consideration that he has successfully run a licensed premises for over twenty years I have formed the opinion that the defendant is a man with an aggressive personality, used to holding his own in every way, quite able mentally to know what his rights are, and accustomed to assert them. His evidence that he had forgotten his glasses and evident deafness raise the issue as to whether he understood what Mr. Singh was reading. I am satisfied that, firstly, he thoroughly understood the agreement paragraph by paragraph as Mr. Burch-Smith took down their instruction, secondly, he knew of the only alteration which was made after the document was typed, thirdly, he accepted those terms without demur from the 1st May, 1937, until the interview with the plaintiff on the 6th June, 1937, and then only sought to put off the date of giving possession in order to make a little more profit on the deal, fourthly, at no time did he take any action, on his own initiative, to dispute the terms before the receipt of Mr. Luckhoo's letter of the 12th June, apart from the trivial objection about the price of the bags.

With reference to the counterclaim, having regard to the findings of fact by the Court it is clear that there are no grounds for rectification of the agreement, as it sets out the true terms to which the parties agreed.

The plaintiff claims possession. The title of the defendant to the property in question is imperfect and the parties were mutually aware from the commencement, that it would be necessary for the defendant to take action under the provisions of the District Lands Partition and Re-allotment Ordinance, Chapter 169. This action would entail a petition by the owners of not less than 51 per cent. in extent or value of the area to which such petition might relate. This Court, even if it was

satisfied that the plaintiff could not be compensated by monetary damages should not make any other charging parties other than those on record before the Court to deal with their property in a manner in which they were in no way obligated to do. Not only would that objectionable course be necessary to give the plaintiff the relief he is seeking, but the adverse position would be made worse as it would mean that, by enforcing specific performance, this Court would be assuming the power to direct the Governor in Council to exercise the discretion given to them by the provisions of section 4 of the last mentioned Ordinance in favour of the defendant, without having reviewed the facts upon which such discretion should be exercised. Under these circumstances I cannot seriously think of exercising the equitable discretion of the Court by ordering the defendant to take action under the partition procedure with a view of giving the plaintiff possession and subsequently good title.

Had the circumstances of this case warranted an application to the Court to grant relief by way of specific performance I am of opinion that the plaintiff should have made his election between claiming the performance of the contract or damages for the breach of its terms. As the former relief is a matter beyond the jurisdiction of the Court—in the circumstances of this case of partition procedure—the Court will consider that which should have been done to have been done, and will limit the issue to the question of damages for breach of the contract.

The question of whether there was a breach of this contract depends on the wording of the third paragraph (Commencing “Purchase price”). The wording of this paragraph, when compared with the next, if taken literally, shows a direct conflict of terms. The first says that the “\$1,600 is to be paid on the 31st August, 1937,” and the second makes a definite provision for the giving of possession of the property in the event of an earlier payment. The intention of these paragraphs, in my opinion, however, is clear. The first provides solely for the payment of the balance, or second payment, on the fixed day. The second provides that possession shall be given to the purchaser when a fixed event took place, that is to say, when the \$1,600 was paid. It is clear therefore that the agreement calls upon the defendant to give possession on the payment of that \$1,600. The question of possession is a separate matter and express provision is made for the event upon which it depends to take place at an earlier date than fixed primarily for the second part of the consideration to be paid. If those paragraphs were discussed and settled separately there can be no question that the issues were quite clearly within the understanding of the parties. The evidence which I have accepted shows that the defendant refused to accept the \$1,600 on the 9th June, because he realised that he would have had to give possession if he did so, I presume that

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if the plaintiff had come and offered the money then, without asking for possession, that the defendant would not have been so reluctant to accept it.

In my opinion that was a definite breach of the terms of the agreement. I have therefore to try and arrive at a sum in damages which will put the injured plaintiff in the same position as he would have been if the terms of the agreement had been faithfully observed by the defendant.

This is not a case where the plaintiff can buy a similar property elsewhere and thus provide a comparative value for the purpose of assessing the amount of the damage he has sustained as might have been given if this contract referred to the ordinary sale of goods. The value of the mill depends upon the situation of the mill having regard to the supply of paddy available to keep it running. The statement of claim shows the damages claimed to be \$9 for every day over an extended period. That claim would mean that the plaintiff anticipated making a nett annual profit of approximately \$3,300 on his investment of \$4,000. In his evidence the plaintiff doubled the total of that estimate. The other portion of his claim is even more ridiculous. He assessed his loss of profit on the remainder of the property—that is apart from the mill—at \$6 per day, or \$2,200 per annum. In his evidence he told the Court that he would get \$12 a year rent from this extra land. His damages cannot be assessed on hypothetical profits he might have made, in any case. I mention these figures because I think that counsel would be well advised to go into these calculations when settling the pleadings, with far more care than is apparent in this case. It is apparent that the plaintiff has lost the first payment of \$400. In the absence of any evidence of proximate and material damage I am of opinion that \$100 is ample compensation for the loss on this transaction through inconvenience and trouble to which he has been put through the very dishonourable conduct of the defendant in breaking the terms of his contract. A great deal of criticism of the terms of the agreement has been submitted by Counsel for the defendant—some of which may be well grounded—but in my opinion, in no case would such defects or omissions afford sufficient grounds for either setting aside the contract, or revising it. As no mistakes have occurred no question of rectification can arise as I have already said.

The Court therefore orders that the defendant shall pay to the plaintiff \$500 damages and the taxed costs of the plaintiff (claim and counter-claim). This action is certified as fit for counsel.

Judgment for plaintiff.

Solicitors: *E. A. Luckhoo, O.B.E.; V. D. P. Woolford.*

Re NELSON CANNON, Insolvent; *ex parte* PERCY C. WIGHT.

[1937. No. 348.—DEMERARA.]

BEFORE LANGLEY, J. 1937. DECEMBER 20.

Auctioneer—Licence—Period of—Calendar year—Annual payment—In advance—Two months' grace—Licence determined if annual payment not made in advance—Subsequent payment—Does not revive licence—No debt created if payment not made in advance—Payment of no effect—Recovery of money so paid—Prosecution for trading without a licence—Insolvency Ordinance, Cap. 180, ss. 39 (1), 80 (3) (c)—Interpretation Ordinance, Cap. 5, s. 25—Auctioneers Ordinance, Cap. 82, ss. 3, 5—Tax Ordinance, Cap. 37, ss. 24 (1), 53, 54, 65—Tax Ordinance, 1931 (No. 29), ss. 21, 22—Miscellaneous Licences Ordinance, Cap. 108, s. 10—Miscellaneous Licences (Amendment) Ordinance 1931 (No. 28), s. 2.

An auctioneer's licence is automatically determined under section 3 of the Auctioneers Ordinance, Chapter 82, if the annual sum payable in respect thereof is not paid in advance. The licence cannot be revived if such payment is subsequently made.

Where a person whose auctioneer's licence has been determined seeks to trade again as an Auctioneer he must start afresh to obtain a licence under section 3 of the Auctioneers Ordinance, Chapter 82.

The annual sum payable in respect of the continuation of an auctioneer's licence was not paid in advance. The auctioneer continued to trade as such. He was adjudged insolvent. More than a year after such annual sum was payable in advance, the assignee in insolvency paid to the Chief Commissary the said sum as a preferent debt. On the accounts of the assignee being filed, a creditor objected to the payment.

Held, that the licence having been determined for failure to pay in advance the annual sum payable in respect of its continuation, no debt for auctioneer's licence duty was due by the auctioneer to the Government; that, after such determination, the ex-licencee was not empowered or entitled to trade again as an auctioneer without taking steps to obtain a new licence, failing which he was liable to the penalties created by section 5 of the Auctioneers Ordinance; that the payment was not lawful; and that it should be recovered by the assignee and disposed of in accordance with the provisions of the Insolvency Ordinance.

Semble, that the annual payment to be made in respect of the continuance of an auctioneer's licence is for the period beginning on the 1st of January and ending on the 31st of December, and that, although the said payment is due on the 1st of January, a period of two months' grace is allowed for making it.

Determination of an objection lodged by Percy Claude Wight, O.B.E., to the payment on the 28th August 1935, by the *Official Receiver* (the assignee in insolvency of Nelson Cannon) to the Chief Commissary of the sum of \$100 as a preferent claim for licence duty as an auctioneer due by the said insolvent Nelson Cannon for the year ending 28th April, 1935. The insolvent carried on 5 auction sales subsequent to the 28th April, 1934, namely, on the 19th July, 1934, 20th September, 1934, and 17th December, 1934. The accounts of the assignee were being examined by the Registrar who reported the facts and circumstances to the court.

C. V. Wight, for Percy C. Wight, a creditor.

Official Receiver, (P. W. King) in person.

Re N. CANNON, INSOLVENT.

LANGLEY, J: Having heard the arguments of counsel for the objecting creditor and the Official Receiver and considered the excellent report submitted by the Registrar, Mr. Duke, I am of opinion that this objection should be sustained.

The facts recorded show that the insolvent entered into an auctioneer's bond on the 13th April, 1910. It has been assumed that the original auctioneer's licence was issued to him on the 28th April, 1910, under the provisions of section 3 of the Auctioneers Ordinance, 1888, (No. 6), now Chapter 82 of the Laws of British Guiana.

Apparently, from that time onwards, the insolvent carried on the trade of auctioneer up to the date upon which the Receiving Order was made (15th February, 1935). He is alleged to have held at least 5 public auctions between the 19th July, 1934, and the 17th December, 1934.

On the 28th August, 1935, the acting Official Receiver, assignee of the insolvent's estate, paid \$100 to the Chief Commissary as a preferent claim for auctioneer's licence duty for the year ending 28th April, 1935: see s. 39 (1) of the Insolvency Ordinance, Chapter 180.

An objection made by a creditor of the Insolvent's estate (see s. 80 (3) (c) of the Insolvency Ordinance) was filed against this payment on the grounds that it should not have been paid when no licence was issued by the Chief Commissary and that such payment was against the law. It is not stated whether in fact a licence was issued when this payment was made.

The first question is, what period should the annual licence fee cover. The wording of s. 3 (3) of Chapter 82 provides for the payment "of the sum from time to time required by any Tax Ordinance for the time being in force, or if no licence duty is imposed by that Ordinance the sum of \$100."

As I understand that subsection an annual licence was created for an auctioneer, costing \$100, payable in advance, but specific provision was made for the control and variation of the amount to be paid for that licence by any Tax Ordinance for the time being in force.

By the provisions of s. 24 (1) of the Tax Ordinance, Chapter 37, subsequently this power—by reference—was exercised by creating another licence to trade as auctioneer within a restricted area and leaving the amount to trade as auctioneer in the whole Colony at \$100.

Further, s. 3 (3) of Chapter 82 created that annual licence for a period of 12 months from date of issue of licence.

It should be noted that the provisions of s. 3 (3) of Chapter 82 only provided for the variation of the amount of this tax and not to other aspects of the licence.

This position was altered by section 53 of Chapter 37, which varied the periods of duration of many licences to a common

period of 12 months commencing from the 1st January, 1929 and each subsequent 1st January but, at first, that section excluded the licences mentioned in s. 24 (1) of that Ordinance.

Section 53 of Chapter 37 was repealed and re-enacted by section 21 of the Tax Ordinance, 1931 (No. 29) which, whilst leaving certain exceptions, omitted the previously excepted section 24 (1) of Chapter 37: therefore the substituted section 53 of Chapter 37—which came into force on the 30th December, 1931—necessitated an adjustment of the period of the insolvent's auctioneer's licence. It terminated on the 31st December, 1931.

It should be noted that the words hereinbefore enumerated in the original section 53 of Chapter 37 would have included the licences set out in s. 24 (1) of that Ordinance had not the draftsman excluded that subsection specifically, presumably in accordance with the intention of the Legislature. The subsequent removal of that exclusion can have but one meaning.

The answer to the first question therefore, in my opinion, is that the last-mentioned amendment had the effect of varying the provisions of s. 3 (3) of Chapter 82 and creating an annual licence commencing on the 1st January in each subsequent year.

There should be evidence of the issue of the previous licences, but as it does not affect the legality of the payment I do not propose to direct the production of the relevant documents and books.

Neither does the amendment made by section 22 of the Tax Ordinance, 1931, to section 54 of Chapter 37 affect the position in this case. It would have done so had this payment been made in respect of a licence for 1935 instead of 1934. The period of grace being then extended until after the date the receiving order was made (15th February, 1935), making the amount a debt accrued due but not in default. That is of course in the absence that the licensee had gone out of that trade or of evidence that he had so traded in January or February of that year.

The second question is, whether licence issued to the insolvent was determined by the failure to pay the annual fee on or before the expiration of the previous period of the licence?

In my opinion, this licence was created by section 3 of Chapter 82, but the original position was altered in law by the amendments made subsequently to sections 53 and 54 of Chapter 37. The former changed the period of the life of the licence: the latter adds provision for two months' grace for the payment of the renewal fee before the determination of the licence takes place, but determination does take place then.

The final effect of this amending legislation is that although the licence would appear still to be continuous from date of original issue—and not a new licence each year—it would be automatically determined by failure of payment for renewal by the end of February in each year.

Whether his last lawful licence purported to expire on the 31st December, 1933, or 28th April, 1934, or was automatically determined by failure of payment for renewal by the end of February, 1934, there can be no question from the facts appearing on the record that he had no licence for 1934.

I am therefore of opinion that, even if the previous licence was lawful—which is open to very grave doubt—it had been determined.

That raises the third question as to when the previous licence expired or was determined? In the absence of all evidence as to the facts it is impossible to fix the date upon which the last lawful licence issued to the insolvent expired. If lawful at all, presumably the 1933 licence should have expired at the 31st December, 1933, but failure to recognise the effect of the amendments in 1931 may have invalidated several previous licences.

The fourth or main question is, whether such a payment was a lawful debt due from the estate of the insolvent to the Colony at the date the receiving order was made on the 15th February, 1935.

In my opinion, if a previous licence had expired it could not be revived. It would be necessary to start afresh under the procedure provided in section 3 of Chapter 82.

It should be noted that section 3 of the Miscellaneous Licences Ordinance, Chapter 108, does not exclude Chapter 82 from the provision of that first-mentioned Ordinance.

When a licence expires automatically the ex-licensee would only become liable when he commenced trading as an auctioneer. When he did that, without properly obtaining a licence, he might become liable to the penalties created by section 5 of Chapter 82, or section 10 of Chapter 108, as amended by section 2 of the Miscellaneous Licences (Amendment) Ordinance, 1931 (No 28). Section 25 of the Interpretation Ordinance, Chapter 5, would prevent prosecution under both Ordinances for the same offence. By inference, however, it is clear that even if action was taken under the provisions of the Miscellaneous Licences Ordinance—as finally amended—the Chief Commissary would have no power to adjudicate in such a case as this as the amount exceeds \$10.

The payment now in issue was made on the 28th August, 1935, in respect of a period wrongly described as ending on the 28th April, 1935. Had the licence previous to that been issued in a proper manner it should have expired on the 31st December, 1934. Whichever date is taken the payment was made after the actual period for that licence had expired under circumstances in which the insolvent was not entitled to a renewal of his licence at all, and no steps were taken to have a new one issued.

The Official Receiver, Mr. King, has submitted that Under the provisions of section 65 of the Tax Ordinance, Chapter 37, this

licence fee could be recovered by the Colonial Treasurer by parate execution.

I am of opinion that the provisions of that section are excluded from application in this case because the licence fee cannot be said to have been “due” at any time after the failure to pay before the end of February, 1934. By the effect of s. 3 (3) of Chapter 82, the licence was determined on that date—even if a licence had been lawfully issued the previous year.

In my opinion, as the previous licence has been so determined and legislation makes payment in advance essential the procedure for the issue of a new licence should have been adopted before any sum due on that licence could become due.

The questions suggested as to the effect of the penalty clauses do not arise as no action was taken under them and no amount could have become due.

Therefore I find that this payment was not lawful and I direct that it should be recovered by the Official Receiver and disposed of in accordance with the provisions of the Insolvency Ordinance.

Order for costs of Counsel for the objecting creditor fixed at \$10.

WEST INDIAN COURT OF APPEAL

REPORTS OF DECISIONS

OF

THE COURT

1931-1937.

JUDGES

OF THE

WEST INDIAN COURT OF APPEAL, 1931-1937.

Sir CHARLES F. BELCHER, C.J., Trinidad and Tobago President.

Sir JAMES S. RAE, C.J., Leeward Islands.

Sir ROBERT H. FURNESS, C.J., Barbados.

Sir ANTHONY DeFREITAS, C.J., British Guiana.

T. W. S. GARRAWAY, C.J., St, Lucia.

R. S. DeVERE, C.J., Grenada.

Sir BERNARD ARTHUR CREAN, C.J., British Guiana.

C. M. MURRAY-AYNSLEY, C.J., Grenada.

* WILLIAM SAVARY, C J., (Acting), British Guiana.

ERNEST ALLAN COLLYMORE, C.J., Barbados.

*WILLIAM JAMES GILCHRIST, C.J., (Acting), Trinidad & Tobago.

CHARLES CYRIL GERAHTY, C.J., Trinidad and Tobago, President.

GEORGE EDWARD FUGL RICHARDS, C.J., St. Lucia.

WILFRED M. WIGLEY, C.J., Leeward Islands.

* Temporary member of the Court.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF THE LEEWARD ISLANDS, DOMINICA CIRCUIT.

GEORGE BERNARD DUPIGNY as Executor of the Estate of CAMILLA LEONORA DUPIGNY, Deceased, LILIAN MARIE DUPIGNY, GEORGE BERNARD DUPIGNY and BEATRICE ALEXANDRINA BERTHA SUTHERLAND (nee DUPIGNY) as Beneficiaries under the Will of WILSON DUPIGNY, Deceased, Appellants (Plaintiffs).

v.

LUCY ANNE DUPIGNY, as Administratrix of Estate WILSON PATRICK LEONARD DUPIGNY, Deceased, and one of the Beneficiaries under the Will of WILSON DUPIGNY, Deceased, Respondent (Defendant).

Before Sir CHARLES F. BELCHER, Chief Justice of Trinidad and Tobago, *President*; Sir ROBERT H. FURNESS, Chief Justice of Barbados; and Mr. T. W. S. GARRAWAY, Chief Justice of St. Lucia.

1932. APRIL 30.

Appeal—Rehearing—West Indian Court of Appeal—Viva voce evidence heard in—Appeal papers—Extension of time to lodge—Application for—Unreasonably opposed—Refusal by trial judge—Appeal from—Application granted—Costs of appeal—To be borne by respondent.

On an appeal to the West Indian Court of Appeal evidence was taken before the Court.

Where an application to the trial judge for an extension of time to lodge the appeal papers had been unreasonably opposed, and was refused by the judge, an appeal to the West Indian Court of Appeal against such refusal was allowed with costs against the respondent.

The Chief Justice of Trinidad, Sir Charles Belcher, delivered the judgment of the Court as follows:—

Two appeals are before us, one by the original plaintiffs against judgment in the action and the other also by the plaintiffs against a refusal of the trial judge to extend the time for lodging the appeal papers. Dealing with the latter first, we considered that as no reasons for his decision had been given by the trial judge, and the defendant admitted she was not prejudiced by the extension while the substantive judgment was on the face of it not sustainable as to amount, the justice of the case required us to grant the extension and hear the appeal, and as this might have

been arranged between the parties but the defendant opposed the extension and thus it was contested, the ordinary rule must apply and the appellants must have their costs.

As to the substantive case, it is an appeal from a judgment of the Supreme Court of the Leeward Islands, Dominica Circuit, whereby the plaintiffs claim for £302. 4. 1 for moneys had and received, and for use and occupation of premises, was dismissed with costs; and the defendant's counterclaim for £577.16. 1½ was allowed with costs. The course apparently followed was that the Court ordered accounts to be taken before an agreed referee, upon the basis previously found as matter of fact that the defendant was plaintiff's agent. The defendant brought in her accounts but the plaintiffs while neither surcharging or falsifying these before the referee in the ordinary way objected to the adoption of the accounts, as a whole, by the Court. The accounts as finally filed showed a balance due to the defendant of £105. 12 6 only.

There were several grounds of appeal, but those substantially argued before us referred to details of the accounts. We thought it right to allow the accounts to be gone into before us. This has been done and we have taken evidence and heard arguments on disputed items.

Dealing first with the plaintiff's claim, we agree with the finding of the learned judge that the relationship between the parties was one of agency, which in its nature excludes any claim for use and occupation unless founded on agreement forming part of the agency contract, expressed or implied. No such agreement was in evidence before the Court below, while there was evidence of agency created by conduct. Looking at the accounts in that light we find that they are substantially accurate, except that we disallow item No. 87, the last in account B (disbursement side) because we think the evidence shows that the commission which it represents belonged to the joint business out of which the agency arose. Certain objections were taken to the disbursement account of which the principal is that items 1, 2, 3, 4 and 6 were not paid by the defendant to the creditors at all but by one of the plaintiffs who had to borrow to do so and who with the other parties to this action has been sued to judgment by the lender. We are satisfied on the evidence given before us that the defendant did discharge these items and that the plaintiffs have had the benefit of this discharge and are freed from liability in respect thereof and that she ought to be allowed the payments. Another serious objection was that item 51 (£85. 8. 0) which defendant paid herself as representative of her husband's estate on the balance of a particular account in the business books was merely a fragment in more general accounts which ought to have, but had not, been taken between her husband and the business he managed for the family, and that it should not be allowed standing by itself. We find that these estate accounts have been kept

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separately and in detail, and that unless it were shown, which it was not, that the balance on taking over was wiped out by other transactions, payment of it should be allowed. We expressly refrain from concerning ourselves with any transactions between the parties which transactions are not specifically before us in this case.

The judgment of the Court below will be varied in that while that part of it dismissing the plaintiffs' claim is affirmed with costs, the judgment for defendant on the counterclaim should be for £91. 9. 7 only with costs, which sum is arrived at as follows: reduce the balance on general account to £2490. 16. 5 which added to £53. 6. 5 the correct balance of rent account, gives gross disbursements £2544. 2. 10. Deduct defendant's 7/40 of this—£445. 4. 6 and it leaves £2098. 18. 4, from which is to be deducted the aggregate on the other side £2007. 8. 9 leaving balance as stated £91. 9. 7.

As to costs of the main appeal, although defendant's own accounts filed in the action showed that at most she could claim £105. 12. 6 as against £577. 16. 1½ for which judgment was given her, and that she did not abandon the unsustainable difference even when she received the notice of appeal, (though she did so at the beginning of the hearing of the appeal itself) the course the case has taken satisfies us that even had the difference been abandoned earlier, that would not have influenced appellants' attitude, since the four days occupied before us were taken up with other grounds which appellants clearly meant to go on with in any case. The respondent ought therefore to have the costs of the substantive appeal, the costs of the interlocutory appeal to be set off against them.

A. A. CAMACHO v. R. S. CAMACHO, &c.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF THE LEEWARD
ISLANDS ANTIGUA CIRCUIT.

(PROBATE).

In the estate of MARY CHRISTINA CAMACHO, deceased.

Between ALEXANDER ALOYSIUS CAMACHO, Defendant-Appellant.

AND

RAYMOND SYLVESTER CAMACHO, LEO POLYCARPO CAMACHO, MARY CHRISTINA WESTCOTT, married woman, the wife of LEE HARRIS WESTCOTT, WILFRED THEODORE CAMACHO and EMANUEL OLIVER CAMACHO, Plaintiffs-Respondents.

Before SIR CHARLES F. BELCHER, Kt., Chief Justice of Trinidad and Tobago, President; SIR ROBERT H. FURNESS, Kt., Chief Justice of Barbados, and Mr. T. W. S. GARRAWAY, Chief Justice of St. Lucia.

1932. MAY 11.

Will—Undue influence—Not to be presumed—Onus of proof—On party alleging.

Costs—Probate action—Contents of will—Want of knowledge—No grounds for suggestion—Undue influence—No ground for suspicion—Parties attacking will—To pay costs personally.

The onus of proving undue influence is always on those who allege it, and such undue influence is never presumed.

The plaintiffs claimed to have a grant of letters of administration with the will annexed made to the defendant, revoked on the ground of undue influence of the defendant upon the testatrix, and that the testatrix did not know or approve the contents of the will when it was executed by her. The testatrix herself gave the instructions to the solicitor with no intervention from the defendant who was present, and the will was read to and approved by her later when she signed it. There was nothing whatever to support the suggestion that she either did not hear everything or did not understand everything in the will, and there was no suspicion of undue influence.

Held, that the costs of defending the action must be paid personally by the parties attacking the will.

The judgment of the Court was delivered by the President as follows:—

In the action from the judgment wherein this appeal is brought the plaintiffs claimed as next of kin of Mrs. M. C. Camacho to have a grant of letters of administration with the will annexed made to the defendant, her eldest son, revoked, on the ground of undue influence of the defendant upon his mother, the testatrix, and that

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the testatrix did not know or approve the contents of the will when it was executed as alleged by her. At the hearing, due execution in the technical sense, and testamentary capacity, were not seriously contested, but the learned judge, taking into consideration the examination upon scripts of the solicitor who prepared the will, the defendant and a Bank Manager who held it in custody, and also the evidence given at the trial itself on the part of the defendant (on whom admittedly the normal onus lay as propounder), his witnesses being the solicitor, a doctor, and the attesting witnesses, and an accountant, held that the result of the evidence so before the court and the fact that defendant himself did not give evidence was of a kind to bring the case within that class where there is imposed upon the propounder the further burden of removing suspicions that the will is not the true will of the testator, and he held further that this onus had not been discharged and pronounced against the will without allowing the case to go to the jury.

It is well established law that the onus of proving undue influence is always on those who allege it, and that such influence is never presumed. The rule applicable in cases such as the learned judge found this to be—they may shortly be referred to as cases of the type of *Paske v. Ollat* (1815) 2 Phill. Ecc. 323; 161 E.R. 1158—a type capable of infinite variation as the latter cases show, is also well established. Now if these cases are looked at, it will be seen that in every one there was something else, other than the suspicion of undue influence, which affected the mind and conscience of the Court, something attendant on the surroundings of the execution of the alleged will, which the propounder had to clear up. This must follow from the nature of things, for were it otherwise, that is to say, had the propounder to remove from the Court's mind every trace of suspicion of undue influence as well as all other suspicions before the case could go to the jury at all, then the rule as to onus in undue influence cases would be completely reversed: for it would follow that the jury could never pronounce on the fact, undue influence or not, till the Court was satisfied there was no evidence of undue influence to go before the jury. So the cases to be considered as falling within the rule in *Paske v. Ollat* must be cases where the suspicion is of some other or additional kind: at least where the tribunal is one composed of judge and jury, as it is here.

It is obviously necessary where the probate tribunal consists of judge and jury, that the wider issue, does the will express the testator's intentions which is purely a question of fact as are due execution and testamentary capacity should go, like those, to the jury when there is any evidence at all that the will propounded does express such intention even though the contrary has been suggested and the judge himself may entertain doubts, and we are prepared to say that that principle is fairly to be deduced

from the English cases (e.g. *Fulton v. Andrew* (1875) 44 L.J. P. & M. 17. But even were this not so we do not think there can be found, in the evidence before the learned judge in this case, reasonable foundation for suspicion that this was not the testator's true will, and that quite apart from Mr. Mendes' admission that the suspicions upon which he relied as having affected the learned judge's mind were suspicions of undue influence alone. Examining the items of evidence involved, from both points of view, the most that can be said to be proved or properly inferrable is that defendant was on bad terms with most of his brothers and sisters, that he stood first in his mother's confidence, that he was busy about the preparation of this will and of a former will and codicil, and that he was preferred in the will itself to all of his brothers and sister and that too to a considerable extent, and that the will is unequal and unexpected as regards the provision made for some of the family and does not contain a clause relating to jewellery which might have been expected to be in it.

On the other hand there is ample proof that the testatrix herself gave the instructions to the solicitor with no intervention from the defendant who was present and that it was read to and approved by her later when she signed it, and nothing whatever to support the suggestion that she either did not hear everything or did not understand everything in this very simple drawn document.

The testatrix gave reasons for excluding some of her family altogether, and reducing the benefits of another to a minimum, which seem cogent: as to the furniture which the daughter had in her possession and which was left away from her, it is significant that it is never suggested that there was any gift *inter vivos* of this to the daughter: all must have recognised that testatrix thus retained the right to will it away from its possessor or original bailee. As to the jewellery the facts are doubtful, but if the defendant were really in a position to use, and intended to exert, undue influence it is remarkable that he did not make his mother tell the solicitor that she would in the future give her jewellery to her daughter personally, which, supposing the question of the solicitor to have been anticipated would tally with the facts as defendant knew they would be found to exist after death and not contradict them. While as to the not putting defendant in the box, this is usually bad tactics and probably was so here as it always suggests something to hide, but on the other hand in the circumstances of hatred and suspicion in which the admitted letters clearly show the parties to have stood to each other, his not testifying is equally consistent with a desire not to be pilloried at length and in public on family matters.

Looking at all these points as a whole we find nothing sufficiently substantial, nothing not equally explainable by suppositions favourable to the defendant (that is to say consistent with the

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will being expressive of the true testamentary desires of the testatrix) to warrant the judge, supposing him to have the legal power to do so, in taking the very grave step of saying that the defendant had failed to discharge the onus on him, grave we say, because it prevented the whole of the facts coming before the proper judges of fact, that is the jury.

In our opinion whatever suspicions the judge felt can only have been suspicions of undue influence, a matter always for the jury. There was nothing in the first place to justify the finding that the case fell under the rule in *Paske v. Ollat* and even if it might have fallen under that rule in the absence of clear evidence covering the instructions for and execution of the will, and surrounding circumstances, the latter as testified to ought effectually to have disposed of any suspicions of a relevant nature theretofore engendered in the judge's mind. We ought perhaps to add that we see no valid grounds even for suspecting undue influence in the legal sense.

We therefore allow the appeal, and set aside the learned judge's order with costs against the respondents personally, jointly and severally, both here and below.

Appeal allowed.

L. AUTH., B'W'TING & TRIUMPH v. ROOPNARINE.
 LOCAL AUTHORITY OF THE VILLAGE DISTRICT OF BET-
 TERVERWAGTING AND TRIUMPH, Appellant, (Defendant),
 v.
 ROOPNARINE, Respondent (Plaintiff),
 [1931. No. 183.]
 BEFORE FULL COURT: DE FREITAS, C.J., AND SAVARY, J.
 1931. JULY 24, 29; AUGUST 21.

Appeal—From decision, not reasons for decision—Fact—Finding as to—Evidence as to—Finding not disturbed.

Nuisance—Landlord and tenant—Lands reserved by landlord—Escape of water from—Tenants' lands—Damage to—Rule in Rylands v. Fletcher—Absolute liability of landlord—Natural user of his lands—Negligence—Volenti non fit injuria.

An appeal is from a decision, and not from the reasons for that decision. A Court of Appeal may look behind the judgment and the reasons for the judgment to ascertain what are the grounds of the decision.

A Court of Appeal cannot disturb decisions on questions of fact where there is evidence upon which the findings of fact can reasonably be based.

An occupier of land has an absolute right not to have his land invaded by injurious matter, coming from the land of a neighbour, such as large quantities of water kept upon the land of the neighbour and under his control. But that general rule of absolute duty is qualified by the following exceptions: (1) where a person is using his land in the ordinary way and damage happens to adjoining land, without any negligence on his part, no liability attaches to him; and (2) if the person claiming to be compensated has consented to the accumulation of water being kept on the defendant's land he cannot recover in the absence of negligence on the part of the defendant.

The plaintiff claimed damages from the Local Authority of the Village District of Betterverwagting and Triumph for injury to his growing crops on the land occupied by him in the Empolder as a tenant, which injury was alleged to have been caused by the Authority having negligently permitted the plaintiff's land to be flooded, without taking due and reasonable care.

Under the control and management of the Local Authority there is a large tract of land containing the Triumph middle walk canal (drinking water) and certain water trenches which abut on a portion of land in the south eastern corner of that tract called McKenzie Empolder, or three sides of the Empolder. The Empolder at its fourth side, the south, abuts on the East Demerara Conservancy Canal.

The plaintiff and others occupy "beds" of agricultural land in that Empolder as tenants of the defendant, and the plaintiff entered into such occupation as a tenant at a time when the trenches and canals were in the same position and were being used for the same purposes as at material times thereafter.

Two days before the flooding occurred the Authority began to use its canal and trenches in the ordinary way by allowing water to come in from the Conservancy Canal, through an intake koker, for the purpose of increasing the quantity of water so as to float laden punts and enable them to transport sugar canes from the lands of tenants in the Empolder.

The magistrate found (1) that the Authority was negligent in continuing to allow too much water to come in, after it had received notice in good time of the impending danger of the inflow of water causing the tenant's lands to be flooded, and (2) that the Authority failed to use the means it had of avoiding a flooding of the plaintiff's land.

The defendant appealed.

Held, (1) that the plaintiff having taken possession of his land abutting on the canal and trenches then existing, he must be taken to have consented

L. AUTH., B'W'TING & TRIUMPH v. ROOPNARINE.

to the accumulation of water being kept by the Authority and to have occupied his land subject to the ordinary risks arising from such accumulated water, and consequently he cannot recover against the Authority without proof of negligence;

(2) that it was implicit in the case that the accumulation of water was for the common benefit of the Authority and of its tenants for the accumulation provided drinking water for the tenants and villagers and also the means of transport and drainage. Therefore, notwithstanding the risk of danger from such accumulation of water in artificial water courses the plaintiff must be held to have consented to take the ordinary risks of escaping water; and the Authority will not be liable without negligence;

(3) that a duty is imposed by law on the Village Authority to use reasonable care to prevent damage to the crops of the plaintiff on his land in McKenzie Empolder by an overflow from accumulated water kept by the Authority on land under its control and management;

(4) that there was evidence on which the magistrate's finding as to negligence could reasonably be based.

Appeal by the defendants from a decision of Mr. J. H. S. McCowan, Stipendiary Magistrate, East Demerara Judicial District, in an action in which he gave judgment for the plaintiff for the sum of \$18.56 and costs. The facts and arguments appear from the judgment.

A. V. Crane, Solicitor, for appellant.

J. A. Luckhoo, K.C., for respondent.

Cur. adv. vult.

The judgment of the Full Court was delivered by Sir Anthony De Freitas, Chief Justice, as follows:—

In the present case a solicitor for the first time has appeared before the Full Court as the advocate for an appellant. This was done under the authority of section three of Ordinance 15 of 1931. Mr. Crane was the solicitor for the Village Authority before the Magistrate at Sparendam and, by virtue of that section, he argued the Authority's appeal before this Court. Mr. J. A. Luckhoo, K.C., was Counsel for the plaintiff, Roopnarine, in the Court below and in this Court. The opposition in advocacy in the Full Court of a King's Counsel and a Solicitor is so unusual that it is worthy of being noted.

2. It was common ground at the trial before the Magistrate that under the control and management of the Village Authority there is a large tract of land containing the Triumph Middlewalk Canal (drinking water) and certain water-trenches which abut on a portion of land in the south-eastern corner of that tract called McKenzie Empolder, on three sides of the Empolder; that the Empolder at its fourth side, to the south, abuts on the East Demerara Conservancy Canal; that the plaintiff-respondent and others occupy beds of agricultural land in that Empolder as tenants of the Authority; and that the plaintiff-respondent entered into such occupation as a tenant at a time when the trenches and canals were in the same position and were being used for the same purposes as at all material times thereafter.

3. Before the Magistrate the plaintiff claimed damages from the

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Village Authority for injury to his growing crops in the land occupied by him in the Empolder as a tenant, which injury was alleged to have been caused by the Authority having negligently permitted the plaintiff's land to be flooded, without taking due and reasonable care. The substance of the defence fell under three heads: (1) that there was no duty on the Authority, as Landlord or Village Authority, to take any care to prevent the empolder being flooded. (2) that the plaintiff did not suffer any damage at all, and (3) that the flooding, if any, was caused by the misfeasance and negligence of the plaintiff. The Magistrate gave judgment for the plaintiff, whereupon the Authority appealed.

4. The appeal papers sent up to us show that the trial by the Magistrate on several days between the 28th of March, 1930, and the 11th of July, 1930, resulted in a jumbled case upon which the Magistrate gave his decision on the 26th of September, 1930. The Magistrate's "Reasons for Decision" sent up to us are not easy to understand. However, that the basis of his decision is negligence, in not performing a duty to take reasonable care appears to us to be indicated by the following extracts from the 'Reasons': "It is admitted by both parties to this action that it is one between landlord and tenant and is based on negligence": "The law applicable to landlord and tenant is that defendants as landlord of the plaintiff *are regarded in law in the same light as individual owners* and should be dealt with accordingly; that against landlords actions for negligence may be maintained": "Defendants could regulate flow of water": "They had means to prevent mischief which occurred:" "I therefore find that there was a flooding of the plaintiffs beds causing damage, through the overflow of water due entirely to the defendants . . . omitting to do what they should have done, as already mentioned, especially after abundant notice being given to them: they had the means to prevent the mischief that occurred. Both on the law and the facts they are liable." Notwithstanding a jumbled case and difficult "Reasons," it must be borne in mind that an appeal is from a decision and not from the reasons for that decision (*Sanders v. Sanders* (1881) 19 Ch.D., 373, C.A., per Jessel. M.R.) and that a Court of Appeal may look behind the judgment and the reasons for the judgment to ascertain what are the grounds of the decision. (*Debenhams v. Perkins* (1925) 133 L.T., 252, per Bankes, L.J.).

Mr. Crane strenuously contested the correctness of the Magistrate's findings of fact. It is sufficient for us to say that a Court of Appeal cannot disturb decisions on questions of fact where there is, as there is in this case, evidence upon which the findings of fact can reasonably be based. It may have been the misfortune of the Authority (or, perhaps, its fault) that its Chairman, Mr. James Straughn, in his evidence emphatically expressed

his 'belief' that the plaintiff's case, of a flooding of his land and consequential injury to his crops, was merely a 'concoction.' He was irregularly allowed to say in his examination-in-chief: "My belief is that the whole story is a concoction. The people have been told to tell lies for a purpose." The Magistrate's belief, however, was that the plaintiff's story was not a concoction but was true; and he, therefore, ignored the Chairman's belief and decided against the Authority. The Chairman's belief was not founded on any knowledge derived from his own observation. It may have been the misfortune of the Authority (or, perhaps, its fault) that it called as its second witness, next after the Chairman, Mr. Robert L. Thomson, "Assistant Inspector of Districts, in charge of East Coast, Demerara," who was allowed by the Magistrate to give inadmissible and entirely worthless evidence, when he was permitted to say (as noted by the Magistrate): "I relied on the information of the Chairman and Rangers and I knew it was not possible for it to flood. They made up the story." A witness who is a mere conduit pipe for partisan hearsay should never be permitted to give his futile decision on the very question that the tribunal has to decide. However, the Magistrate reversed Mr. Thomson's decision and entered judgment for the plaintiff.

6. After reading the Magistrate's reference to the liability of 'individual owners,' when we approach the substantial question before us it appears that the *prima facie* common law rule governing this case is to be gathered from *Rylands v. Fletcher* (1868, L.R., 3 H.L., 330) and the maxim *sic utere tuo ut alienum non laedas* and is, that an occupier of land (such as the plaintiff), has an absolute right not to have his land invaded by injurious matter coming from the land of a neighbour (the Authority), such as large quantities of water kept upon the land of the neighbour and under his control. But that general rule of absolute duty is qualified by the exception that where a person is using his land in the ordinary way and damage happens to adjoining land, without any negligence on his part, no liability attaches to him. It is qualified by another exception, that if the person claiming to be compensated has consented to the accumulation of water being kept on the defendant's land he cannot recover in the absence of negligence on the part of the defendant. In this case the Village Authority might come under either, or both, of these exceptions. It is common ground that two days before the flooding occurred the Authority began to use its canal and trenches in the ordinary way by allowing water to come in from the Conservancy Canal, through an intake koker, for the purpose of increasing the quantity of water so as to float laden punts and enable them to transport sugar canes from the lands of tenants in the Empolder. The Authority therefore, would not be liable in the absence of negligence. But the Magistrate has found

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that the Authority was negligent in continuing to allow too much water to come in, after it had received notice in good time of the impending danger of the inflow of water causing the tenants' lands to be flooded: and he has found that the Authority negligently failed to use the means it had of avoiding a flooding of the plaintiff's land. The plaintiff having taken possession of his land abutting on the canal and trenches then existing, he must be taken to have consented to the accumulation of water being kept by the Authority and to have occupied his land subject to the ordinary risks arising from such accumulated water, and consequently he cannot recover against the Authority without proof of negligence. But the Magistrate has found that negligence was proved. Further, although there is no evidence of the terms of the tenancy, it is implicit in the case that the accumulation of water was for the common benefit of the Authority and of its tenants, for the accumulation appears to provide drinking water for the tenants and villagers and also the means of transport and drainage. Therefore, notwithstanding the risk of danger from such accumulation of water in artificial watercourses the plaintiff must be held to have consented to take the ordinary risk of escaping water; and the Authority will not be liable without negligence. But the Magistrate has found negligence. While we do not think that the Authority is liable under the rule of absolute duty in *Rylands v. Fletcher*, we think the Authority has a duty to take reasonable care and is liable for negligence.

7. We do not agree with Mr. Crane's strenuous contention that decisions, referred to from the Bench, in cases between land lords and tenants occupying different floors in the same house can have no bearing on the question before us, because (as he laid down) such decisions are affected by express or implied covenants to repair and because they do not relate to separate and detached houses. From *Carstairs v. Taylor* (1871: L.R., 6 Ex. 217) it will be seen that a landlord who accumulates water in a house has a duty to use reasonable care to prevent the water escaping and injuring his tenant's goods in another part of the house. It will also be seen that the consideration of the question in that case did not proceed upon the footing of the relationship of landlord and tenant or of liability to repair or of the escape of water having been from one floor to another floor in the same house and not from detached house to detached house. In that case Bramwell, B., said: "The defendant has here conducted the water to the place from which it poured on to the plaintiff's premises, and he may therefore be said to have poured it on to them. So far the case resembles *Rylands v. Fletcher*; and I am satisfied that it makes *no matter that the defendant is the plaintiff's landlord*, but that *the case must be argued as if there had been a severance of the freehold*. But I am clearly of opinion

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that there is a material difference between the cases. In *Rylands v. Fletcher* the defendant for his own purposes conducted the water to the place from which it got into the plaintiff's premises. Here the conducting of the water was no more for the benefit of the defendant than of the plaintiff. . . Here the plaintiffs must be taken to have consented to this collection of the water, which was for their own benefit, and the defendant can only be liable if he was guilty of negligence."

In *Salmond on Torts* (1928 edition), with reference to the qualification of the rule in *Rylands v. Fletcher* by the exception as to the plaintiff's consent, we find at page 355: "In such cases the defendant is not liable except for negligence (*A.G. v. Cory Bros.* (1921) 1 A.C. 521, 539). This principle finds its chief application in those cases in which the different storeys of a building are in the occupation of different persons, and the occupant of a lower story complains of the damage done by the escape of water from an upper storey. Whether the water is rainwater collected from the roof, or water supplied *ab extra* in pipes, it is settled law that there is no liability for any such escape in the absence of proved negligence. (*Carstairs v. Taylor*) Except in so far as this exception extends, *the rule in Rylands v. Fletcher is just as applicable between upper and lower occupiers as between adjacent occupiers.*"

In *Cockburn v Smith* (1924: 2 K.B. 119, C.A.) the owner of a block of flats let one of the top flats to a tenant, but kept the roof of the building and the guttering appurtenant thereto *in his own possession and control*. The guttering became defective and rainwater which should have been carried away escaped and flowed upon the wall of the tenant's flat and made the flat so damp that the tenant suffered injury to her health and sustained damage. *The landlord had notice of the defect but was dilatory and negligent in remedying it.* The Court of Appeal held that the defendant was under an obligation to take reasonable care to remedy defects in the roof and guttering of which he had notice and which were a source of damage to the plaintiff. It is to be observed that the decision in that case was in no way affected by covenant to repair; and Lord Justice Bankes said: "I want to make it plain at the outset that this is not a letting of the whole house where, without an express covenant or a statutory obligation to repair, the landlords would clearly be under no liability to repair any part of the demised premises," and "the question is what duty the landlord owed to the tenant, in relation to this defective guttering. It cannot now be suggested that there was any agreement, express or implied, which can accurately be described as any agreement to repair the roof or the guttering." And Lord Justice Scrutton said: "In my opinion there is enough here to impose a liability upon the respondents (the landlords) at common law. If this had

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happened between *two adjoining houses* and water had escaped to one of them owing to defect in an artificial construction upon the other it is admitted that the case would have fallen within the principle of *Rylands v. Fletcher*. But there are exceptions which modify the rule in *Rylands v. Fletcher* and reduce the duty of insuring against damage to an obligation to take reasonable care that damage does not occur." In that case the Court of Appeal approved of the decision in *Hargroves v. Hartopp* (1905: 1 K.B. 472), the authority of which had been recognised by the House of Lords in two cases. In the *Hargroves* case the plaintiffs were tenants of a floor in a building of which the defendants were landlords. A rainwater gutter in the roof, the *possession and control* of which had been retained by the defendants, became stopped up. Notice of the stoppage was given by the plaintiffs to the defendants, but the defendants neglected to have the gutter cleared out till after the lapse of four or five days from the receipt of the notice, and in the meantime the plaintiff suffered damage by reason of rainwater having found its way into their premises in consequence of the stoppage. *It was held that the fact of the gutter being under the control of the defendants imposed upon them a duty to take care that it was not in such a condition as to cause damage to the plaintiffs, and that as they had notice of its being stopped and neglected to clear it out within a reasonable time after the receipt of the notice, they were guilty of a want of due care and were consequently responsible for the damage done.* This was a judgment of a Divisional Court affirming the judgment of the City of London Court holding the defendant liable on the ground of negligence on a claim for damages for (1) breach of the contract of tenancy and also for (2) negligence in failing to clean the gutter out after due notice.

8. We have reached the conclusion that the Magistrate's decision is correct, that the Village Authority is liable on the ground of negligence. In our view of the circumstances of this case and of the admitted facts and of the Magistrate's findings of fact, a duty is imposed by law on the Village Authority to use reasonable care to prevent damage to the crops of the plaintiff on his land in McKenzie Empolder by an overflow from accumulated water kept by the Authority on land under its control and management; and we think the Magistrate was right in holding the Authority liable for a breach of that duty by negligently delaying to use the means in its power, after sufficient notice, to prevent the overflowing.

9. No question has arisen for our consideration as to negligence in the performance of acts authorised by statute, nor any question as to the greater effect of the authority of a statute than the authority of the common law in excluding liability for the consequences of acts so authorised.

10. We have again to call attention to the lax manner in which a clerk of a magistrate's court has performed his duty in relation to an appeal to the Supreme Court. In accordance with section 8 (2) of Chapter 16 (s. 8 (2) of Ordinance 6 of 1929) the Magistrate lodged with the clerk on the 26th of September, 1930, a statement of his reasons for the decision appealed against, in the case now before us. The same subsection imposes upon the clerk the absolute duty of preparing a copy of the proceedings (including the reasons) forthwith upon the receipt of the reasons "and, at latest within twenty-one days of the receipt thereof," and it also imposes upon the clerk the absolute duty of notifying the appellant when the copy is ready. Notwithstanding that the statute peremptorily requires the clerk to prepare the copy "at latest within twenty-one days," the negligent clerk in the present case has expanded that maximum limit of three weeks to a dilatory period of eight months and nine days, for it was not until the 4th of June, 1931, that the making of the copy was completed and a letter was written by the clerk notifying the appellant. The appellant had previously written three letters to the Magistrate calling for the copy.

11. In this case there was an instance of the extraordinary inactivity of an officer of the Local Government Board, when normal activity might have achieved an amicable settlement and prevented expensive litigation of pretentious importance. It appears from some of the Magistrate's 'notes of evidence' that in the morning of Saturday, the 30th of November, 1929, a complaint as to the flooding and damaging of crops on the Empolder on Friday, the preceding day, was made at the Head Office of the Local Government Board to the Secretary of the Board, which was in effect a complaint against the Chairman of the Village Authority, Mr. James Straughn, and his servants or agents. The flooding then complained of is the subject of this case. The Secretary then informed the complainants that Mr. Robert L. Thomson would be sent to "look after the matter." Other notes by the Magistrate show that Mr. Robert L. Thomson told the Court: "I am assistant Inspector of Districts, in charge of East Coast, Demerara. As such I superintend the actions of all Local Authorities in this District . . . I had on (Saturday) the 30th of November, 1929, orders from the Secretary, Mr. Christiani. I went to Beterverwagting on the Saturday, I did not go aback as it was too late. Between this and January I did not return. On 8th January, 1930, I went to McKenzie Polder, east-half. On the Saturday I went, I met the Chairman, two Rangers and the Overseer. I did not go aback, or on any day the following week. I relied on the information of the Chairman and Rangers and I knew it was not possible for it to flood. They made up the story." Mr. Thomson was sent to "look after the matter" of the flooding of the Empolder on the Friday, For the purpose of his inquiry he did not think it necessary to seek information from independent and impartial persons nor to

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inspect on the Saturday or a day or two later the scene of the alleged flooding, when his inspection might have enabled him to find material upon which to base a settlement between the contending parties. He thought it sufficient to listen to and accept the self-serving statements of the parties against whom the complaint was made, into which complaint he was sent to inquire. His inquiry was a travesty of an inquiry, yet he reached the conclusion that the complainants "made up the story" of a flooding having occurred on the Friday; and expensive litigation followed and will probably frequently recur if officers of the Local Government Board continue to be so remiss.

12. The appeal is dismissed with costs, including twenty-five dollars for counsel's fee.

Appeal dismissed.

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IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

URIAS ISAAC, Appellant (Plaintiff),

v.

LAURENCINE MORENO, Respondent (Defendant).

Before SIR ROBERT H. FURNESS, Chief Justice of Barbados; Sir ANTHONY DE FREITAS, Chief Justice of British Guiana; and MR. T.W.S. GARRAWAY, Chief Justice of St. Lucia.

1933. MAY 3.

Principal and agent—Fraudulent misrepresentation—Of agent—Liability of principal—Counterclaim—Nature of—Action dismissed—Counterclaim proceeded with.

An intending vendor who knew the boundaries of her lands sent an agent who had knowledge of them to point out two particular pieces to an intending purchaser. In addition to these two pieces, the agent pointed out a parcel of land containing 1,100 bearing cocoa trees; this parcel did not belong to the vendor as the agent well knew. The purchase price agreed upon for the lands pointed out by the agent was \$1,300. Conveyance was thereafter executed in favour of the purchaser. After conveyance, the purchaser entered into possession of the lands pointed out to him by the agent, but he was subsequently evicted from the parcel of land containing the 1,100 cocoa trees: this parcel of land was valued at \$390.

The purchaser brought an action against the vendor for damages for the misrepresentation of the agent.

Held, that the vendor was liable for the fraudulent misrepresentation of her agent, and that the purchaser was entitled to recover from her the sum of \$390 suffered by him as damages by reason of such fraudulent misrepresentation.

If there is a counterclaim and the plaintiff's action is dismissed, the counterclaim may then be proceeded with.

The Judgment of the Court was delivered by Sir Anthony De Freitas as follows:—

In this action a claim by Urias Isaac, the Plaintiff (now Appellant), was for an order setting aside a Memorandum of Transfer and a Memorandum of Mortgage under the Real Property Ordinance, No. 160. By the first Memorandum land was transferred to him by Laurencine Moreno, the defendant (now respondent), for the purchase price of \$1,300, and by the second Memorandum he mortgaged the same land to the defendant as security for the payment of \$550. In the alternative, the plaintiff claimed damages. Both claims were based on allegations that the defendant had induced him to buy the land for that price by fraudulently representing to him through her agent, Donald Moreno, in the treaty for the sale, that a portion of land containing eleven hundred bearing cocoa trees was a part of the land she was offering to sell to him, which part was not included in the parcels stated in the Transfer and from which he was evicted

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after the date of the Transfer. The plaintiff also claimed to recover twenty-five shillings from the defendant, being the sum he paid for taxes due in respect of the transferred land before the date of the Transfer.

2. In her Defence, the defendant denied any misrepresentation in relation to the land; denied that Donald Moreno was her agent; and she pleaded that if Moreno is held to have been her agent, then he showed the plaintiff the correct boundaries, which were clearly marked and defined; and she also pleaded payment of 25/- into Court in satisfaction of the plaintiff's claim; and she set up a counterclaim in relation to capital and interest secured by the mortgage of the transferred land by the plaintiff to her.

3. The entered judgment, against which this appeal is brought, declares that the Court ordered that the action be dismissed, with costs to the defendant. The trial judge does not mention the claim for 25/-, but it may be taken to be included with all the plaintiff's claims in the general dismissal of "the action." There is nothing to show that the judge dealt in any way with the counterclaim. He does not mention it. He has given no decision upon it.

4. The following facts appear in the case. The defendant having offered to sell to the plaintiff two pieces of land at Guaico, she sent her agent, her grandson Donald Moreno, to show him the land. The agent misrepresented the identity of one of the pieces of land (the smaller of the two) by showing it to the plaintiff as including a portion of land having 1,100 bearing cocoa trees on it, which it did not include in fact. The plaintiff and Donald thereupon went to the defendant; and the result of the treaty for sale was that the plaintiff then orally agreed to pay the defendant \$1,300 for the two pieces of land Donald had shown to him. In pursuance of their agreement the plaintiff paid \$750 to the defendant and he accepted a conveyance to him of two pieces of land described in the defendant's Certificate of Title registered under Ordinance No. 160 and, as it turned out, not including the portion of land with 1,100 cocoa trees on it. This conveyance was effected by a Memorandum of Transfer, No. 26 of the 13th of June 1929, indorsed on the Certificate of Title. In accordance with their agreement the plaintiff thereupon, on the 13th of June, 1929, by Memorandum of Mortgage No. 27 indorsed on the Certificate of Title mortgaged the two pieces of land so transferred to secure payment of \$550, being the balance of the purchase-price. The plaintiff then entered into possession of the two pieces of land identified to him by Donald, in the belief that they had been conveyed to him by the Memorandum of Transfer. These two pieces were not contiguous. There was a piece of land between them, which had been bought from the defendant by her son-in-law Tang Kai, sometime before the sale to the plaintiff. When the plaintiff had been in possession for

a month or two Tang Kai claimed to be the owner of the portion of land with 1,100 bearing cocoa trees on it, of which the plaintiff was then in possession. A survey was made, whereby Tang Kai's claim was proved to be well founded; and the plaintiff was evicted. In his findings of fact the trial judge says that when Tang Kai first made his claim "Plaintiff at once complained to his vendor, Mrs. Moreno who came up to Guaico, was shown where the interference was, and said that Tang Kai had no right to the part he claimed;" that he had no right to the 1,100 bearing cocoa trees. The survey was subsequently made, with the result already mentioned. The defendant's agents and the plaintiffs caused a valuation to be made of the portion of land with the 1,100 trees and the value was assessed at \$390, which the trial judge finds to be the value.

6. It was also proved at the trial that the plaintiff informed the defendant that the survey had resulted in favour of Tang Kai and that she thereupon "still maintained it was not Tang Kai's land." At the trial, however, it was common ground that the land with 1,100 trees belonged to Tang Kai. The plaintiff has built a house on the larger of the two pieces of land. He is left with 350 cocoa trees only, out of the 1,450 shown to him by Donald as being offered for sale. The trial judge does not say that he disbelieved the plaintiff when he said (what must be believed): "Had I not been shown the portion of land which turns out to be Tang Kai's, I would not have paid \$1,300 for it. I would not have bought the place at all." If a misrepresentation is calculated to mislead and a course is pursued in accordance with it, it is *prima facie* evidence that the plaintiff was misled by it; and it is clear that in this case the plaintiff was misled. And the plaintiff said: "I would be satisfied to keep what I have and take something by way of damages"; so he preferred to have judgment on his alternative claim for damages.

6. Briefly put, the trial judge held (1) that there was no fraud, that the agent, Donald Moreno, made an innocent misrepresentation as to the identity of the land, and that there is nothing involving fraud by her agent to affect the defendant; and (2) that the oral contract having been completed by a conveyance, the plaintiff has no remedy.

7. In his written reasons for his decision the trial Judge says: "I find no evidence whatever of fraud," and he goes on to say." "A principal is liable in damages for the false representations made by his agent acting with his authority. But nothing involving fraud is so brought home here to the defendant's grandson as to affect the defendant. This grandson lived near the land, it is true, but it may well be that since this family had once owned all the land and the boundary with Tang Kai was a very recent one and apparently not defined on the ground, he did not know where it fell." In the Defence it is pleaded that the

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boundaries were clearly marked and defined and that Donald showed the plaintiff the correct boundaries.

8. On the question of fraudulent representation by the agent, the judge's surmises that the agent may not have known the boundaries and that they were apparently not defined on the ground, are not in accordance with the evidence. It should be borne in mind that a particular entity was pointed out to the plaintiff by the agent, that is, a piece of land with bearing cocoa trees on it. From the evidence of the plaintiff the judge has found as a fact that when the plaintiff showed the defendant the land with 1100 trees as the land which Tang Kai was claiming to be his property, she "said that Tang Kai had no right to the part he claimed." This shows that the defendant, even after a dispute had arisen, was maintaining the position of one having knowledge of the boundaries. It appears that the judge overlooked the evidence of the defendant, the sole witness for the defence, when she swore: "I sent Donald to point out the land. Not he, but Isaac, moved the boundaries, because he wanted more than he bought. The surveyor saw where the boundary was that was removed." The case proved by the plaintiff was that the authorised agent represented to him that the particular entity with 1,100 trees formed part of the land for sale and that he was thereby induced to become the purchaser and that he was evicted from the same entity. The only answer the defendant could give was to tell the obvious untruth that the plaintiff had himself "moved the boundaries." The judge does not believe that the plaintiff moved any boundary mark, nor can any other reasonable person believe it. He has found as a fact that the agent misrepresented the identity of the land to the plaintiff. The defendant further said in her evidence: "I sent Donald to point out the land before Isaac bought. Donald was living on the very place, overseeing the place. The grandson overlooks the place for me." It is not sufficient merely to say that Donald was "living near the land," for he "was living on the very place, overseeing the place." The defendant pleaded that the boundaries were clearly marked and defined, and she made it clear in her evidence that boundary marks existed and that she knew them, and that because Donald knew the boundaries she sent him as her agent for the special purpose of showing to the plaintiff the land she was offering for sale. In the result an intending vendor who knew the boundaries sent an agent who had knowledge of them to point out two particular pieces of land to the intending purchaser. To constitute fraud the person making the representation must either know it to be untrue, or make it without belief in its truth, or make it recklessly, careless whether it be true or false. "A person making any statement which he intends another to act upon must be taken to warrant his belief in its truth. Any person making such a statement must always be

aware that the person to whom it is made will understand, if not that he who makes it knows, yet at least that he believes it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false or did not believe to be true" (*per* Lord Herschell in *Derry v. Peek*). It would be a reasonable inference from the whole of the evidence that Donald did not merely make a mistake and that he could not possibly have had any belief that the land of which he was overseer included the 1,100 trees.

9. An illustration of fraudulent representation by an agent and of his principal's responsibility for such a misrepresentation is to be found in *Pearson v. Dublin Corporation* (1907) A. C. 351 H. L. In that case the Corporation furnished the plaintiff with plans made by their agents for the purpose of showing him the particulars of works required to be done and of inviting him to tender for a contract to execute the works. In the plans misrepresentations were made as to the existence and position of a wall to a depth of nine feet below *ordinance datum*. In consequence of the non-existence of this wall the plaintiff executed more costly works than would otherwise have been required and he then brought an action for deceit against the Corporation claiming damages for false representation as to the nature of the works to be executed. The Lord Chancellor held that there was evidence to prove that the plaintiff was induced to execute the works by misrepresentations made on behalf of the Corporation; and he said: "The principal and the agent are one and it does not signify which of them made the incriminating statements or which of them possessed the guilty knowledge." Having observed that the statement as to the wall was inaccurate in fact and that the tender was for a less sum than the plaintiff would otherwise have offered to accept if he had known the truth, Lord Halsbury said: "I desire to associate myself with the observations which have been made by the Lord Chancellor, that it matters not in respect of principal and agent (who represent but one person) which of them possesses the guilty knowledge or which of them makes the incriminating statement. If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the misrepresentation or which is the person who has the guilty knowledge." Lord James of Hereford said: "It was said that the plans were furnished by the engineers to the defendants, who are innocent of personal deceit. They passed the plans on, and so innocently made the misrepresentation not knowing of its untruth. The engineers, who knew of the nature of the misrepresentations, made no communication to the tenderer. I cannot admit the soundness of this argument. The engineers were employed by the Corporation as their agents to make the plans for the purpose of being communicated to the plaintiff and others.

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In the course of this agency the alleged deceit was committed. Of course, the defendants did not personally test the accuracy of the plans, but when they passed them on they surely must bear the burden of their agents' conduct and cannot repudiate the wrongful representations upon which they to a certain extent invited the tenderers to rely. In the Courts below this argument on behalf of the defendants was not accepted, and I concur in thinking it cannot be maintained." Lord Atkinson said: "It was the province of the jury to determine with what intent the representation was made. They would, from the fact that the representation was false, have been entitled to draw the inference that the persons who made it intended that it should be acted upon. To use Lord Bramwell's words in *Smith v. Chadwick* (1884: 9 App. Cas. 187 at p. 203) "An untrue statement as to the truth or falsity of which the man who makes it has no belief is fraudulent, for, in making it, he affirms he believes it, which is false." Mr. Ronan was obliged to admit that if the defendants had authorised their engineers to communicate directly to the contractor the plans, and therefore the representations appearing on the face of them, his clients would, within the authority of *Barwick v English Joint Stock Bank* (1867: L.R. 2 Ex: 250) and the cases following it, have been responsible for the fraud of the engineers thus made their agents." In Barwick's case it was held that the false representation of the agent of the defendants was properly described in the declaration as that of the defendants.

10. In the case of an executed contract where property has been conveyed, as in the case now before us, it is settled that a misrepresentation is not a ground for setting aside the transaction, unless the misrepresentation would be not only sufficient to afford ground in Equity for the rescission of an executory contract, but also is deceitful in contemplation of law, that is to say, unless there is fraud or misrepresentation amounting to fraud. A purchaser may have a conveyance set aside on the ground of fraud; or, after conveyance, he may bring an action for damages on the ground of fraudulent representation. It is clear that Donald Moreno acting as the defendant's agent under her direct authority, fraudulently represented to the plaintiff that the 1,100 bearing cocoa trees were included in the land offered for sale, and that the plaintiff was thereby induced to buy and to accept the conveyance. The agent knew well the land to be sold. He was the overseer of it. His principal, the defendant, also knew the land well; but when she was shown the portion of land with the 1,100 trees on it and was told that Tang Kai claimed it as his property she said he had no right to it. She adopted her agent's false representation and took the benefit of it. She cannot approbate and reprobate.

11. In his written reasons for his decision the trial judge says;

“The fact of the misrepresentation having been made by the agent of the vendor is, as mentioned above, established. The sole question is as to the legal effect in the particular circumstances of the case, of a verbal contract for the sale of freehold land merging later in conveyance,” and “There was in fact completion by acceptance of transfer and registration of the purchaser, and the effect of that must be considered. The plaintiff, had he used ordinary prudence and checked the boundaries either by stepping them out (as from the rectangular shape of the land and its having Crown traces on two sides, he could very easily have done), or by the simplest form of professional survey, would have found out the mistake at once,” and “Plaintiff had fair opportunity to test the truth of the representation as to extent, and he failed to make use of it.” The plaintiff was not lacking in prudence. He was careful to inspect the land in 1929 before he agreed to buy it. He was shown a particular entity containing 1,100 bearing cocoa trees as a part of the land offered for sale. The defendant and Donald knew well, for it is common knowledge, that the number of cocoa trees is important material for an intending purchaser’s estimation of the price he will agree to pay for the land with the trees. The plaintiff fixed his price accordingly. His real complaint is that the defendant has failed to give him the land with the 1,100 trees which they had bargained for and which he paid her for. He was in possession of those trees for a month or two, when Tang Kai’s claim gave him reason, for the first time, to think it would be prudent to have a survey made: and a survey was made, when the defendant’s assertion that Tang Kai was wrong failed to prevail—when a fraudulent representation is in operation such a question of prudence cannot arise.

12. *In Dobell v Stevens* (1825: 3B. & C. 623), in the treaty for sale, the vendor of a public-house made deceitful representations respecting the amount of business done in the house and respecting the rent received from a part of the premises, whereby the plaintiff was induced to purchase the premises at the price demanded, and it was held that the plaintiff could maintain an action for damages for the deceitful representations although they were not noticed in the conveyance of the premises or in a written memorandum of the bargain which was drawn up after the representations were made. The fact that the plaintiff had the means of discovering before the execution of the conveyance, an error amounting in law to fraudulent misrepresentation did not take away his right to compensation in damages, the Court being satisfied that the error was not in fact discovered until after the completion of the purchase. The decision in that case was adopted by Lord Chelmsford in *Venezuela Ry. Co. v. Kisch* (1867) L.R. 2 H.L. 99, at p. 120. *In Nash v. Wooderson* (1884: 52 L.T. 49) the plaintiff entered into an agreement to buy certain leasehold houses, The agreement contained a statement that the

property was then held for a further term of twenty-four years and it stated a condition that the title should commence with two underleases and that the purchaser should make no requisition or objection in respect of the prior title or the right to grant the underleases. Four years afterwards the purchaser brought an action to set aside the conveyance, having discovered the underleases to be invalid. The Court held that the lessor of the underleases had not sufficient interest to support them and that the assignment to the purchaser only gave him the property for a term of 9½ years. And it was held that the purchaser had a right to rely on the statement that the property was held for a term of 24 years and that the condition could not prevail against it, that the purchaser was entitled to have the conveyance set aside, but parties agreed that damages should be paid him instead. The trial judge, North J., referred with approval to what was said by Williams J. in *Joliffe v. Baker* (1883, 11 Q.B.D. 255) as to what amounts to a sufficient misrepresentation to give ground for an action of deceit: "Perhaps it is scarcely necessary to add that there can be no doubt that, if a man affirms something as a positive fact concerning which he has no knowledge whatever, knowing neither whether it is a fact or not, and does so intending to induce another person to act upon it as a fact, and for his own benefit, regardless of whether the fact is so or not, then that is the strongest possible evidence of fraud in the plain meaning of the word, because by the hypothesis he could not have known that to be true as a fact which he pretended to know, and which he represented that he knew to be a fact."

13. On the question of inquiry by a purchaser reference might be made to the case of *Venezuela Ry. Co. v. Kisch* (1867) L.R. 2 H.L. 99. The bead note there says: "Where there has been fraudulent misrepresentation, or wilful concealment of facts, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it, that he might have known the truth by proper inquiry." In the case now before us there was nothing to put the plaintiff upon inquiry, after Donald Moreno had shown him the particular entity with 1,100 cocoa trees on it; his inquiry was then completed. In the *Venezuela* case, the Lord Chancellor, Lord Chelmsford, said: "This case differs in this respect from that of *Ex parte Briggs* (L. R. 1 Eq: 483) which was mainly relied upon in support of the objection of delay, for there Mr. Briggs, after he discovered that the representations in a prospectus, on the faith of which he was induced to take shares, was false, dealt with the shares as owner by instructing his broker to sell them. The respondent therefore has not precluded himself by laches from his right to have the contract for the purchase of shares in the company rescinded, provided he has clearly and distinctly alleged in his bill the fraudulent representations (or any of them) upon

which he relies and has established them by satisfactory evidence. But it appears to me that when once it is established that there has been any fraudulent misrepresentation (or wilful concealment) by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector. "You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty." I quite agree with the opinion of Lord Lyndhurst in the case of *Small v. Atwood* (6 Cl. & F. 395) that "where representations are made with respect to the nature and character of property which is to become the subject of purchase, affecting the value of that property, and those representations afterwards turn out to be incorrect and false to the knowledge of the party making them, a foundation is laid for maintaining an action in a Court of common law to recover damages for the deceit so practised; and in a Court of equity a foundation is laid for setting aside the contract which was founded upon that basis." And in the case of *Dobell v. Stevens* (1825) 3B. & C. 623, to which Lord Lyndhurst refers as an authority in support of the proposition, which was an action for deceit in falsely representing the amount of the business done in a public house, the purchaser was held to be entitled to recover damages, although the books were in the house and he might have access to them if he thought proper." In *Dobell v. Stevens* the action was brought after conveyance.

14. A counterclaim must be of such a nature that the court would have jurisdiction to entertain it as a separate action. It is not merely a defence to the plaintiff's claim. It is substantially a cross action. The issues of fact raised by a claim and a counterclaim should generally be tried together, and that is a defendant's object in pleading a counterclaim. If there is a counterclaim and the plaintiff's action is dismissed, the counterclaim may then be proceeded with. In the case now before us the trial judge has dismissed the action, but he has not dealt in any way with the counterclaim. He has left it for adjudication hereafter in the court below (see English R.S.C., O. 21, r.16; Trinidad O.22, r.16; *Roberts v. Booth* (1893) 1 Ch. 52).

15. It is clear that the defendant (now respondent) is responsible for her agent's fraudulent representation which deceived the plaintiff and induced him to buy the land and accept the conveyance, and which caused him to suffer damage to the amount of \$390 (£81. 5.), being the sum assessed by the trial judge as the value of the land from which the plaintiff was evicted. Judgment therefore should have been given in the Court below for the plaintiff for £81 5. 0. damages and for £1. 5. 0. for money paid by the plaintiff for and to the use of the defendant, and for

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costs. It follows that this appeal should be allowed with costs; and that the counterclaim in relation to the mortgage should remain for adjudication hereafter in the court below, as the trial judge has left it. There is evidence that some interest has been paid in respect to the mortgage debt.

16. But Mr. Wooding, counsel for the appellant, with a view to putting an end to the litigation between the parties, has made a generous suggestion, with which the respondent (who appears in person before us) expresses her agreement, that the mortgage debt shall be taken to have been \$160.00 (\$550 less \$390) on that date of the mortgage, and that the costs here and in the course below to be paid by the respondent to the appellant, and the sum of £1. 5. 0. shall be set off as an equivalent against the sum due for mortgage debt and interest, although those costs when taxed (and the £1. 5. 0.) will certainly amount to a much larger sum than the sum due for mortgage debt and interest.

This being accepted by the respondent, it is ordered, with the consent of the parties, that the judgment appealed from be set aside and that judgment be entered in the court below for the plaintiff with one shilling damages without costs and that the counterclaim be dismissed without costs and it is ordered, by consent, that the Memorandum of Mortgage, No. 27 of the 13th of June, 1929, be rescinded and that the indorsement of it on the respondent's Certificate of Title under Ordinance No. 160 be cancelled.

Appeal allowed.

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IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

ANDRE PAUL TERENCE AMBARD, Appellant (Defendant),

v.

GAULT MACGOWAN, Respondent (Plaintiff).

Before SIR ROBERT H. FURNESS, Chief Justice of Barbados; SIR ANTHONY DE FREITAS, Chief Justice of British Guiana; and MR. T. W. S. GARRAWAY, Chief Justice of St. Lucia.

1933. MAY 3.

Libel—Defamatory words—Deliberately aimed at plaintiff and no one else—Words true of another person—Reasonably understood to apply to such person—Whether a ground of defence.

Where a defendant in an action for libel deliberately aimed the words complained of at the plaintiff and had no one but the plaintiff in mind when he published them, it is no defence that the words complained of could also be reasonably understood to refer to another person of whom they were true.

Dictum of Farwell, L.J. in *Jones v. Hulton* (1909) 2 K.B. 444, at p. 480 explained.

The following Judgment of the Court was read by Sir Robert H. Furness, Chief Justice of Barbados:

This is an appeal from the judgment of the Chief Justice of Trinidad in an action for libel brought by the respondent against the appellant in respect of parts of a report, published in the "Port-of-Spain Gazette" dated February 27, 1932, and in the "Port-of-Spain Gazette Weekly" Edition dated February 29, 1932, of a meeting of the Trinidad Chamber of Commerce held on February 26, 1932.

The action was tried without a Jury and the Chief Justice of Trinidad found that the words complained of referred to the respondent and were defamatory of the respondent, that they were not published on a privileged occasion and that, even if the occasion had been privileged, publication was attended with express malice on the part of the appellant.

Damages were assessed by the Chief Justice of Trinidad at £300. Except that it is not denied that the words complained of, if they refer to the respondent, were defamatory, the appellant complains of all these findings and further says that the damages awarded the respondent were excessive.

It is to be gathered from the evidence that H.M.S. York and other ships of the Atlantic Fleet visited Trinidad in January 1932, and that, while there one member of the crew of H.M.S. York went down with cerebro-spinal meningitis on January 24, and was brought ashore but died in hospital six days later.

On January 29, the Royal Mail Steamship Company telegraphed their Trinidad Agent as follows:

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“Can you deny rumour which is current in London stating that certain cruising steamers will omit call owing to sickness in the Islands.”

On the receipt of the foregoing telegram it would seem that Mr. Smith, the Company's agent in Trinidad, communicated with Mr. Forbes, the President of the Trinidad Chamber of Commerce and Mr. Huggins the President of the Associated Chambers of Commerce of the West Indies and that Mr. Forbes and Mr. Huggins immediately despatched the following telegram to the West India Committee:

“Please deny rumour regarding sickness in West Indies. Quite unfounded. One case meningitis H.M.S. York isolated. Understand cruises being abandoned for this reason.”

The West India Committee has offices in London and is incorporated by Royal Charter; its object is to promote the industries, trade and welfare of the British West Indies, British Guiana and British Honduras. On February 3, the Committee's Secretary Sir Algernon Aspinnall, wrote to the Trinidad Chamber of Commerce as follows:

“Dear Sir,—I thank you for the following cablegram, signed on behalf of your Chamber and of the Associated West Indian Chambers of Commerce, which reached me on January 30, reading as follows:

Please deny rumour regarding sickness in West Indies. Quite unfounded. One case meningitis H.M.S. York isolated. Understand cruises being abandoned for this reason.

On receipt of this message we at once sent a communique to the Press with the object of contradicting the rumours which had appeared in certain newspapers to the effect that cruising steamers were being diverted from Trinidad owing to an outbreak of meningitis.

These rumours originated in a telegram from Trinidad regarding a case of meningitis on board H.M.S. York. Directly currency was given to them we communicated with the companies whose cruising steamers were on their way to the West Indies and told them that we felt sure that we should have heard from you if there had been any serious epidemic and advising them not to omit their calls at Trinidad.

Your message arrived opportunely as it enabled us to confirm the view we had expressed and I was glad to be able to cable to you on February 1 as follows:

‘Yours thirtieth all cruising vessels visiting Trinidad.’

We sent a further communique to the Press which, as you will note from the enclosed cuttings, appeared in “The Times” and elsewhere. We have also informed the principal Tourist Agencies that the health of Trinidad is excellent.

It would perhaps avoid repetition of episodes of this kind if you could ask the representatives of the English Press and News

Agencies in Trinidad, if you are able to get into touch with them, to exercise discretion in sending news messages capable of misinterpretation. If the representative who sent the message about the case of illness on board H.M.S. York had added a note to the effect that it was an isolated case or that the general health of the community was excellent, it would have saved those interested in Trinidad a good deal of anxiety.

Actually a further message was received on Monday from a News Agency referring to the regrettable death of the seaman on board the "York" but without any mention of the fact that there was no epidemic!

Yours faithfully,
(Sgd.) ALGERNON ASPINALL,
Secretary."

The cuttings enclosed with the letter were as follows:

The "Evening News" of January 30, reported:

"The West India Committee have received a cable from the Trinidad Chamber of Commerce saying that the health of the island is excellent, any contrary reports are without foundation."

The "Times" of February 2, said:

"The West India Committee is authorised to contradict rumours (not published in "The Times") that Trinidad has been omitted from the itinerary of certain ships proceeding to the West Indies owing to an alleged epidemic at Port-of-Spain. One case of meningitis occurred in H.M.S. York and was isolated, but there is no reason to suppose that it originated in Trinidad, where the health of the community is excellent."

The "Morning Post" of February 1 reported:

"NAVAL STOKER'S DEATH.

Port-of-Spain,

January 30.

"Stoker Halliman, of H.M.S. York, died of cerebrospinal meningitis this morning. The funeral is taking place this afternoon with full naval honours—Reuter."

There is no evidence as to the precise date on which the foregoing letter was received in Trinidad but at a general meeting of the Trinidad Chamber of Commerce held on February 26, the letter was read by the Secretary after Mr. Forbes had referred to the telegram received from the Royal Mail Steamship Company and the subsequent action taken by himself and Mr. Huggins.

It is to the report of this meeting, including the headlines and the introductory matter which precedes the report proper, in the "Port-of-Spain Gazette" and in the Port-of-Spain Weekly Edition that the respondent takes exception.

The report was virtually identical in both papers. It began with the following headlines in large type:

TRINIDAD LIBELLED IN ENGLISH PRESS.
MISLEADING REPORTS FROM LOCAL REPRESENTATIVE.

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TOURIST TRADE NEARLY CHASED AWAY
W.I.C. ADVISES EXERCISE OF DISCRETION

MR. HUGGINS SUGGESTS ACTION BY TRINIDAD CHAMBER OF COMMERCE.

Then follows introductory matter, the first and third paragraphs being in heavy type:

“Misleading reports sent to leading newspapers in England recently by the representative of News Agencies and certain English newspapers in Trinidad, have resulted in tourist steamers avoiding this port, and the West Indies, but for prompt action by the West India Committee and the local Chamber of Commerce, it was disclosed at the meeting of the Trinidad Chamber of Commerce yesterday morning, when correspondence and newspaper clippings in connection with the matter were made public and given for full publication in the local Press.

The report of a case of cerebro spinal meningitis in Trinidad, appearing in the London Press as a contribution from their Trinidad correspondent, failed to state that it was an isolated instance confined to H.M.S. York, then visiting Trinidad, and that the health of the community was excellent, and consequently tourist agencies decided to cancel visits of tourist ships to the West Indies.

The West India Committee who took action before hearing from Trinidad as they expected that any epidemic would have been reported to them early, asked the Chamber to get the representative in question to exercise discretion in sending news messages capable of misrepresentations, and Mr. G. F. Huggins, President of the Associated Chamber of Commerce of the West Indies at the meeting yesterday expressed the hope that the representative here, will think well before making misleading statements of the kind.”

Then there further follows:

- (a) The following report, the accuracy of which is not in dispute, of the remarks made by Mr. Forbes: “‘We were advised from London,’ Mr. Forbes the President of the Chamber said, ‘that tourist steamers had decided not to call at this port on account of the prevalence of spinal meningitis.’”

“This matter came before Mr. Huggins, as President of the Associated Chambers and myself, and we immediately took joint action in the matter, got in touch with the Secretary of State for the Colonies, and I am pleased to state that within 48 hours we had the assurance of Sir Algernon Aspinall that all tourist steamers with the port of Trinidad on their schedule would call here. I think that it is a very striking illustration of the good that is likely to accrue to this island through having personal representation in London.’

“In this connection we are in receipt of a letter from the West

India Committee explaining the situation and I would like this letter to be read to the meeting and also published in full in the Press for general information.'

(b) A copy of Sir Algernon Aspinall's letter together with the cuttings referred to in the letter.

(c) A report, the accuracy of which is not in dispute, of the remarks made by Mr. Huggins and which concludes as follows:

"I really feel," he said, "that steps should be taken by this Chamber to see, so far as we can, that misrepresentations in regard to the health or anything else in this Colony should not be made to responsible papers like the "Times" and others through correspondents here, and I hope that ventilation of the question will make these representatives here think well before they make misleading statements of this kind."

The words complained of consist of the headlines to the report, the opening statement of the introductory matter and the passage quoted from the remarks made by Mr. Huggins.

It is convenient here to notice that though in his letter to the Chamber of Commerce Sir Algernon Aspinall says: "It would perhaps avoid repetition of episodes of this kind if you could ask the 'representatives' of the English Press and News Agencies in Trinidad, if you are able to get into touch with them, to exercise discretion in sending news messages capable of misrepresentation" and though Mr. Huggins is quoted as having referred to "correspondents" and "representatives," the introductory matter to the report of the meeting speaks all along of "representative" and "correspondent" in the singular and attributes to Mr. Huggins an expression of the hope that the "representative" here will think well before making misleading statements of this kind."

It is also convenient here to notice that while the report was published with great prominence on February 27, that is to say, the day after the Chamber of Commerce Meeting, the report of the rest of the proceedings of that meeting did not appear until February 28, though they related to a number of matters which would appear to be of considerable practical interest to the community, such as the local citrus fruit industry, Government contracts, the grading of Demerara rice, Customs overtime charges, the establishment of a Trade Commissioner Service in the United Kingdom and a scheme for the relief of the cocoa industry.

After, but only after, the meeting of the Chamber of Commerce and the publication of the reports, it came to light that a message which it has been assumed gave rise to the rumours in London had been sent by Reuter's agent in Trinidad—a Mr. Cuthbertson who is no way connected with this case. The message was sent on January 25 and was in the following terms:

"Flying Yellow Flag H.M.S. York of the Atlantic Fleet Squadron now visiting Trinidad moved five miles from Port-of-

Spain to quarantine station as result outbreak cerebro-spinal meningitis disease first suspected when Stoker Stanley Halliman of Northumberland was admitted local hospital with acute symptoms.”

This telegram was published almost verbatim, under prominent headlines, in the “Star” the day it was despatched and in the “Daily Telegraph,” “Morning Post,” and “News Chronicle” the following day.

The gist of it, without headlines, was also published in the “Times” on January 26. There is no evidence, however, that any of this information was in the possession of either the Chamber of Commerce or of the public up to the date of the publication of the alleged libel.

From what is now known it would also seem that the agent of the British United Press in St. Thomas (Virgin Islands)—not Trinidad—sent the following message to London on or about January 26.

“Serum for the treatment of spinal meningitis is being rushed to the aid of the sufferers from that disease on board the quarantined British cruiser, ‘York,’ now at Port-of-Spain, Trinidad. The United States Navy has lent assistance, and a naval seaplane refuelled here to-day on its way with the badly-wanted serum. Seven men are reported to be afflicted with spinal meningitis on ‘York.’

This message was published in the “Daily Telegraph” and the “Evening News” of January 27, and the latter paper, under the caption “Barbados is Lucky” adds:

“Several liners that left England last week with Londoners in search of sunshine in the West Indies were to have called at Trinidad during the next few days. It is likely that the call at Trinidad will be cancelled, I heard last night, owing to the outbreak of meningitis on board H.M.S. York and H.M.S. Dorsetshire, now in Port-of-Spain, Trinidad. Happily there are many other islands equally beautiful, such as Barbados, where these liners can make the first call of their cruise, and where Londoners may get their first experience of the West Indies.”

Beyond the above remarks in the “Evening News,” apparently written by a “gossip-writer,” there is no suggestion in any newspaper in evidence that the reported case of meningitis on H.M.S. York might lead to tourist or other vessels avoiding Trinidad as a place of call and the respondent says,—and he was not contradicted,—that the news value of Reuter’s message lay in the number of men in the Fleet.

The appellant was the editor, printer, publisher and one of the proprietors of the “Port-of-Spain Gazette” and the “Port-of-Spain Weekly Edition,”—papers admitted to have an extensive circulation throughout Trinidad and in the Committee Booms of the world, and more particularly of the West Indies, Canada and

Great Britain. The respondent was the Managing-Editor of the "Trinidad Guardian," having come from England to Trinidad to take up that position in May, 1929; and he was also the correspondent in Trinidad of the "Times" of London, the "New York Times," the "Toronto Star" and the correspondent or agent in Trinidad of the Canadian Press News Agency, the British United Press and the International News Service; according to the uncontradicted evidence of Mr. Frye, an advertising agent and journalist in Port-of-Spain, the respondent was the only representative in Trinidad of important newspapers.

Soon after the arrival of the respondent in Trinidad it was seen that the respondent and appellant began tilting at each other's papers and that, later on, reference of a personal character began to appear in each paper. In his evidence the respondent says: "It was a tight for circulation on our side, while on theirs it degenerated into personal attacks on me."

In an editorial which appeared under the caption of "Hoist with their own Petard" in the "Gazette" of October 4, 1931, it is stated: "It was not many months ago that Macgowan was permitted by his Directors to launch out in a campaign of down-right vilification against the Editor and proprietor of the "Gazette." In the "Gazette" of the previous day a reference had been made to the respondent by name below and in headlines in some respects strikingly alike the headlines in the appellant's papers of February 27 and 29, 1932. The headlines are as follows:—

SCAREMONGERING MACGOWAN LIBELS TRINIDAD IN TWO CONTINENTS
EXAGGERATED STORY PROVIDES CHEAP COPY
INCALCULABLE HARM TO TOURIST TRADE
ACTION DEPLORED BY CHAMBER OF COMMERCE

Then follows:—

"Opportunity was taken by the Hon'ble Fred Grant, Vice-President of the Chamber of Commerce at yesterday's meeting to denounce the action of the person who sent an exaggerated and libellous statement concerning Trinidad for publication in the London and New York "Times."

Gault Macgowan, Managing-Editor of the "Trinidad Guardian" has not admitted that he was the author of that story, but it is well known here that the exaggerated news of Trinidad that appears generally in those papers emanated from him."

After the foregoing statement in the appellant's paper and having regard to the bearing towards each other of the editors of the two papers to which allusion has been made it would not appear surprising if witnesses were found who, on reading the report in the appellant's papers of February 27 and 29, 1932, jumped to the conclusion that this constituted another attack by the appellant on the respondent.

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Two witnesses, Mr. Frye and Seepersad Naipaul, the Chaguanas Correspondent of the "Trinidad Guardian," did in fact refer in their evidence to the "Scaremongering Macgowan" article while all the witnesses called by the respondent—seven in number—spoke to their knowledge of the respondent as correspondent of the "Times," and four of them refer to their consequent association of him with the words complained of.

From the evidence of Mr. Rennie, the Secretary of the Chamber of Commerce, and a witness for the appellant, it would appear that even at the meeting of the Chamber of Commerce the respondent's name was mentioned in connection with the subject of Sir Algernon Aspinall's letter. He says: "No other name but Macgowan's was mentioned at the meeting as that of a correspondent."

This may throw light on the evidence of Mr. Bull, the Canadian Trade Commissioner, who says: "I understood the speech to refer to whoever had sent the reports. I thought so because of what people said about me. I can't say I knew he (Mr. Huggins) was talking about the plaintiff till I was told there."

What for convenience we will call the article containing the words complained of has been subjected to an extremely acute analysis by Mr. Wells. For example, as regards the expression "representative of News Agencies and certain English newspapers in Trinidad," Mr. Wells submitted that it did not fit the respondent because he was the correspondent of one English newspaper only and that if "English" can be read as applying to "News Agencies" it is a better description of Mr. Cuthbertson than the respondent seeing that Mr. Cuthbertson represented at least one English News Agency—Reuter's—whereas the respondent represented "outside" News Agencies only. Mr. Wells also submitted that there was no evidence that Mr. Cuthbertson was not the correspondent of one or more newspapers but having regard to Mr. Frye's evidence to which we have referred we think the proper inference is to the contrary.

Our attention was also particularly directed to the last word of the last cutting enclosed with Sir Algernon Aspinall's letter and to the fact that the word—"Reuter"—at the termination of the message clearly showed its origin, namely, that it had been sent not by a newspaper correspondent nor by an "outside" News Agency, but by an English News Agency: by Reuter's agent in fact who was not the respondent. It was submitted that anyone reading the article must infer that both messages came from the same source and, consequently, must infer that the first message came, not from a Newspaper correspondent but from Reuter's agent; it was further submitted that this inference would be fortified by the allegation that rumours had appeared in more papers than one, so pointing to their origin being a message from a

News Agency rather than from the correspondent of a single paper.

Again, Mr. Wells discussed in detail the references in the article to "The Times." "The Times," he pointed out, is only mentioned specifically three times and he submitted that the first two of these references do not point to the Trinidad correspondent of "The Times" as the person who sent the offending message and that if the same remark cannot be made of the third reference still, there was ample in the article, including Mr. Huggins' speech, to remove any suggestion to the contrary that might have been conveyed. As regards the second reference—"not published in "The Times,"—Mr. Wells submitted that though these words referred to the non-publication of the message that gave rise to them, still they would naturally tend to point away from "The Times" correspondent as the sender of the message.

In similar fashion Mr. Wells analysed and criticised the evidence of the witnesses for the respondent.

And with regard to the witnesses as a whole he strongly urged upon us that any belief, induced by the "Scaremongering Macgowan" article that the respondent was aimed at in the article complained of, would be unreasonable on the ground that there was no sort of reference in the latter article to it.

Further, for reasons already to some extent indicated, he urged upon us that if there was anything in the article capable of suggesting that the offending message had been sent by "The Times" correspondent here, there was ample other matter to dispel that suggestion.

In our view the "Scaremongering Macgowan" article and the openly hostile relations which had for a long time existed between the editors of the two papers were relevant surrounding circumstances which may naturally and reasonably have affected the mind of an ordinary newspaper reader; in other words it seems to us that the public mind may well have been in a condition when it could be ready to apply an article, such as the article complained of, appearing in the appellant's papers, to the respondent, and to the respondent alone.

The evidence also points to a general disposition to attribute anything connected with the outside newspaper world to the respondent who was a journalist from England; the appellant himself, in the "Scaremongering Macgowan" article already quoted from, said that it was well known that the respondent communicated with the London and New York "Times"; Mr. Frye, an advertising agent and journalist says: "I know of no one else (than the respondent) here who is a correspondent of newspapers abroad" and again, "I know that Macgowan was the only representative of important newspapers." Mr. Cutteridge, the Acting Director of Education, says: "He (respondent) is the only correspondent of newspapers I know of";

Mrs. Agostini says: "He (respondent) writes for papers away, in England and New York, I knew him to be correspondent of London "Times" and also a newspaper in New York, "Times" I think. "I know of no other person who writes for papers away."

The ordinary newspaper reader does not stop critically to analyse every word used and many are satisfied with the general drift of what they read.

Referring very briefly to some of Mr. Wells' criticisms, at least one witness—Mrs. Agostini—said she did not know the difference between a news agency and a newspaper correspondent; another witness—Naipaul—said he did not concern himself with the difference, though he knew it.

The word "Reuter," as Mr. Wells said, must at once convey to the alert and informed mind certain information but, on the other hand, it is probable that there are many newspaper readers who habitually pass the word unnoticed or to whom, as in Mrs. Agostini's case, it conveys no clear meaning.

Then, with regard to the three references to "The Times" which Mr. Wells dissected, it is to be remembered that the very first words of the article are: "Misleading reports sent to leading English newspapers" and these words would naturally be construed as including "The Times."

We have a further observation to make and it is this: in our view the inadequacy of reasons offered by a witness months after he had read a newspaper article for the conclusions at which he arrived upon reading that article must not be pressed too far.

It is not everyone who has the gift of clearly expounding his views however well founded they may be, especially in a witness-box, nor is it everyone who consciously reasons out the views he may hold.

The learned trial Judge describes all seven witnesses called by the respondent as persons of some local standing and they all satisfied him that they genuinely believed that the words complained of referred to the respondent.

We think there was ample ground for such belief on their part and we see no reason to differ from the general conclusions of the learned trial Judge that the belief was a reasonable one and was arrived at on reasonable grounds.

Mr. Wells, however, submits that this does not conclude the matter provided it can be proved that the words complained of could also be reasonably understood to refer to another person of whom they were true and he contends that they were true and of and could be reasonably understood to refer to Mr. Cuthbertson.

He pressed upon us that read as a whole, the article is obviously intended to refer to the sender of the offending message,

whoever he may be, and that, in fact, it has been proved that the sender was Mr. Cuthbertson.

For this proposition he relied on passages in the judgment of Farwell, L.J. in *Jones v. Hulton* (1909) 2 K.B. 444, *Shaw v. London Express Newspaper Ltd.* (1925) 41 T.L.R. 475 and *D. C. Thompson & Co. v. McNulty* (1927) 71 S.J. 744.

At page 480 in *Jones v. Hulton*, Farwell L.J. says: "But it is not enough for a plaintiff in libel to show that the defendant has made a libellous statement, and that the plaintiff's friends and acquaintances understand it to be written of him; he must also show that the defendant printed and published it of him: for if the defendant can prove that it was written truly of another person the plaintiff would fail." And again at page 481: "If the libel was true of another person and honestly aimed at and intended for him, and not for the plaintiff, the latter has no cause of action, although all his friends and acquaintances may fit the cap on him."

While the point did not fall to be decided in this case before him the words contained in the passages quoted are not to be lightly passed over as mere *obiter dicta*, given utterance to as they were in the course of a discussion by the learned Lord Justice of the elaborate dissenting judgment of Fletcher Moulton L.J., in which the latter Lord Justice laid down (at page 464) that a defendant is not guilty of libel unless he intended the defamatory words to refer to the plaintiff.

The question for decision in *Jones v. Hulton* was whether the fact that a writer had adopted "Artemus Jones" as a purely fictitious name in an article intended to be descriptive of a certain type of Englishman abroad, being unaware of the existence of any living person of that name, was a defence to an action for libel by the plaintiff whose name happened to be Artemus Jones.

The words of Farwell, L.J. are wide and sweeping but they must be read in connection with the circumstances he was discussing and it seems clear to us that he may well have meant no more than this—that had the defendant in *Jones v. Hulton* been unaware of the existence of Artemus Jones, the plaintiff, and had he been able to show that there was a living Artemus Jones of whom he was in fact writing, that would have been relevant evidence as to the natural meaning of the words used by the defendant.

At page 480 he says that, while in agreement with the proposition laid down by Fletcher Moulton, L.J., just referred to, he differs from him as to the meaning of the word "intended."

"In my opinion," he says, "the defendant intended the natural meaning of his own words in describing the plaintiff as much as in the innuendo, the inquiry is not what did the defendant mean in his own breast, but what did the words mean having regard to the relevant surrounding circumstances."

It is possible to imagine relevant surrounding circumstances so it seems to us, that in a given case would have to be weighed even against the proved intention in the breast of a defendant to write of another than the plaintiff.

For example, such, we think might have been the case, even though the defendant in *Jones v. Hulton* had been writing of an actual Artemus Jones, if the description of that Artemus Jones had closely fitted the plaintiff, had the defendant known the plaintiff, and on the one hand, had the plaintiff been extremely well known to the readers of the defendant's papers, while on the other hand, the Artemus Jones actually in the defendant's mind was unlikely to be known to those readers at all.

In *Shaw v. London Express Newspaper, Ltd.*, where the case was withdrawn from the jury on the ground that the article complained of was not defamatory of the plaintiff, there appears to have been nothing at all to connect the plaintiff with the article except coincidence of surname but not Christian names and of present address with an address, 17 years old.

In *D. C. Thompson & Co. v. Mc Nulty* the respondent brought a libel action against the appellant in respect of an article in their newspaper.

The only question at issue was whether the article referred to the respondent and the Court ordered that the issue be tried. The article purported to relate to Elizabeth Mc Nulty, a 23-year-old Anderston girl.

The respondent was another girl of same, name and same place and aged 21 but the facts are not fully stated and there is nothing to show whether the existence of both girls was known to the appellants.

According to the very brief report of the case, in giving judgment Lord Dunedin said the case might be torn to pieces at the trial because it might be shown that the article related to a person who was not the respondent and on that finding the appellant would escape.

Lord Sumner and Lord Atkinson concurred and it is to be inferred that the Court agreed with the broad proposition stated by Farwell, L.J.; the action, however, was not being tried and it seems to us that this case is not, any more than the dicta of Farwell L.J. in *Jones v. Hulton*, to be regarded as an authority for saying that proof that the matter complained of was truly and honestly written of another person is in all cases and under all circumstances conclusive as against a claim by a plaintiff to whom that matter has been reasonably applied. And, on the construction most favourable to the appellant the case before us is to be distinguished from *D. C. Thompson & Co. v. McNulty* and from the hypothetical cases suggested by Fletcher Moulton, L.J. and Farwell, L.J. in *Jones v. Hulton*.

In all those cases it is to be assumed that, on the one hand, the

defendant has done nothing to wrap up or leave in doubt the identity of his subject, but has openly named him, while, on the other hand, the plaintiff has sought to fasten upon an inadvertent coincidence of name which has led to his being identified as that subject by some of his acquaintances.

In the case before us the person of whom the appellant is writing is not named and, to put it at its lowest, is so described as to leave his identity in doubt.

So far as the evidence goes it was not even in doubt for all the witnesses called identified the respondent as the subject of the article.

The appellant has not said that he was writing of Mr. Cuthbertson or of whom he was writing; but the Court has been asked to infer that he was writing of the sender of the telegram, whoever that might be, and that, consequently he was writing of Mr. Cuthbertson as it turns out to be Mr. Cuthbertson who sent the telegram.

That, so it seems to us, is a very different thing from the appellant saying:

“At the time I wrote I had never heard of the respondent, I had Mr. Cuthbertson and no one else in mind, I was honestly writing of him, everything I have said of him is true and by some mischance for which I am not responsible some people think I was writing of the respondent.”

We are left in no doubt that this case cannot be brought within the spirit of the proposition stated by Farwell, L.J.

Even if it could the question whether the appellant was truly and honestly directing the article at another than the respondent would still be a question of fact for the jury and for reasons which we shall indicate when we come to discuss the question of malice we are satisfied that there was sufficient evidence to satisfy a jury that the appellant deliberately aimed the words complained of at the respondent and had no one but the respondent in mind when he published them.

In that he found the appellant was actuated by malice towards the respondent this is obviously the view of the facts taken by the learned trial Judge.

This, too, is to be added: the origin of the rumours in London is, even now, only a matter for surmise; Sir Algernon Aspinall, in his letter to the Chamber of Commerce, does indeed attribute their origin to a telegram from Trinidad but the British United Press message, sent from St. Thomas and published in at least two London papers on January 27, is couched in language more calculated to give rise to rumours than the message sent by Mr. Cuthbertson, and even in the Statement of Defence itself (paragraph 8 (b) the paragraphs in the English Press there set out are attributed to “certain information furnished through *inter alia*) Reuter’s Agency and/or the British United Press.”

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It has been further submitted that even if the words complained of were defamatory of the respondent, still they were published on a privileged occasion, that is to say on such an occasion as prevented the inference of malice ordinarily attaching to any defamatory statement.

The law with regard to qualified privilege was laid down in *Toogood v. Spyring*, (1884) 1 C., M. & R. 181, by Baron Parke in the following words (p. 193): "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society; and the law had not restricted the right to make them within any narrow limits."

In *Henwood v. Harrison*, (1872) L.R. 7 C. P. 606, Willes, J. says (p. 622.): "The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals."

He then quotes the law as stated by Baron Parke in *Toogood v. Spyring* and the following statement of the rule by Lord Campbell in *Harrison v. Bush*, 5 E. & B. 344:

"A communication made *bona fide* upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable."

Baron Parke's words in *Toogood v. Spyring* have been quoted over and over again and always with approval; nevertheless great difficulty and great divergence of opinion has arisen in applying the principles enunciated by him.

As Lindley, L.J., said in *Stuart v. Bell*, (1891) 2 Q.B. at page 346:

"The reason for holding any occasion privileged is common convenience and welfare of society, and it is obvious that no definite line can be so drawn so as to mark off with precision those

occasions which are privileged, and separate them from those that are not. *Coxhead v Richards*, 2 C.B. 569, in which four very eminent Judges are equally divided upon the question whether an occasion was privileged or not, is a striking illustration of the truth of this remark.”

The case of *Stuart v Bell* itself provided a further illustration, the Court being divided in that case also as to whether the occasion of the communication was privileged.

In a variety of circumstances it is now well recognised that it is to the public convenience to permit communications to be made, however defamatory they may be, provided they are made honestly.

To take a common example:—

The reply of an employer to inquiries by a person interested as to the character of an ex-employee is protected.

The protection arises out of the position of the parties and the question in this case may be put in this way:

Was there anything in the position of the parties to bring them within the *Toogood v. Spyring* rule?

It is not argued that the appellant comes within any of the well-defined classes where privilege is at once assumed, nor that any particular privilege attaches to journalists as a class, but that in the particular circumstances of the case the appellant's position as a journalist imposed upon him the duty to communicate the substance of the article to the public; that in those particular circumstances he had the same sort of duty *qua* journalist that an employer asked for the character of a servant has *qua* employer.

The learned trial Judge stated Mr. Wells' proposition, as he understood it, in this way: “If a meeting is held by a body in the position of the local Chamber of Commerce, and there is a discussion in the course of it upon a matter of public interest (in the sense that it may possibly affect each member of the public in his individual interests) then anyone who knows of what took place there is protected in any fair and non-malicious account of the proceedings he may choose to publish, though doing so may involve the repetition in print of untrue defamatory statements made about an individual at that meeting.

Whether that which is in the defendant be called a right, or called a duty, is immaterial for *ex hypothesi* it exists in every member of the community and not alone in journalists or in any other limited class: it must indeed be taken that the mere proof of the interest of the public is enough to create the corresponding quality in the person publishing the statement, subject at most to this, that the latter person must be retailing at first hand and not inventing.”

Mr. Wells says that his proposition was misunderstood by the learned trial Judge to this extent; that in this case, while claiming no special privilege for journalists, as a class, the fact that the appellant was a journalist and the fact that he was reporting a meeting of the Chamber of Commerce were most material, *i.e.*, most material in considering whether it was the appellant's duty "as a citizen" to publish; that the duties of citizens obviously vary with their respective circumstances and positions.

It consequently becomes necessary to examine the authorities from an angle different from that adopted by the learned trial Judge in order to see how far Mr. Wells' proposition, as put to us, can be supported.

Cox v. Feeney, (1863) 4 F. & F. 13, was an action for libel in respect of the publication in a newspaper of a report of an inspector of charities dealing with the alleged mismanagement of Queen's College, Birmingham.

The report contained a letter, written some years previously, on the plaintiff in his management of the College. In the course of the trial Cockburn C.J. referred with approval to the dictum of Lord Tenterden: "A man has a right to publish, for the purpose of giving the public information, that which it is proper for the public to know" and in the course of his summing up to the jury he said:

"I take it, that if that report had been published at the time, no man could say that it was beyond the province of a public journalist, whose business, aye, and I say whose duty, it is to bring before the public information which may be useful to them—it would be his duty to publish the report from beginning to end for the information of the general public and inhabitants of Birmingham, who are so deeply interested in this hospital and College, which are two of the principal institutions of the town."

He goes on to discuss the low state into which the College had fallen and continues: "Is it beyond the legitimate province of a journalist to bring before (the public) that information which may be of great value, and may throw light upon the causes from which this institution has become defective, instead of being the greatest good?"

Though left to the jury in *Cox v. Feeney*, the question whether or not a duty to publish exists is for the Judge to decide.

Cockburn, C.J. makes it clear that in his view there was a duty to publish on the part of the defendant in that case, his reason being that the information published might be of great value to the public in respect of a matter which deeply interested and concerned them.

In *Adam v. Ward*, (1915) 31 T.L.R. 299, at page 304 Buckley, L.J. expresses doubt as to whether the dictum of Lord Tenterden

which has been quoted contains an accurate statement of the circumstances in which a privileged occasion arises for the publication of matter interesting to the public and he states what he thinks is the true proposition in this way: "That if the matter is of public interest and the party who publishes it owes a duty to communicate it to the public, the publication is privileged, and in this sense duty means not a duty as matter of law, but, to quote Lord Justice Lindley's words in *Stuart v. Bell* (supra) 'a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal.'

If this proposition is applied to the case then before the learned Lord Justice it would seem to imply this—that to establish privilege in that case two ingredients were necessary, that is to say not only the interest of the public in the decision of the Army Council in General Scobell's case but also the duty on the part of the Army Council to communicate to the public what the learned Lord Justice calls "the antidote to the poison which Major Adam had administered."

The general inference to be drawn is that the fact that a matter is of public interest does not of itself give rise to a duty to publish—in other words there is no consequential duty to publish merely because the matter is of public interest.

There must, it would seem, be some further element—as in *Cox v. Feeney* where it may be inferred that a duty arose owing, in that particular case to the defendant's position as a journalist by virtue of which he was able to afford the public information on a matter of great importance to them, and by the publication of which they stood to profit and by the withholding of which they stood to lose. Buckley, L.J. says (*Adam v. Ward*, p. 303) the test whether a duty to publish exists may depend upon:

- "(1) The position of the person who makes use of the language;
- (2) The nature of the communication made; and
- (3) The interest of the person by whom and the person to whom the communication is made."

In *Chapman v. Ellesmere*, (1932) 2 K.B. 431, Lord Hanworth, M.R. (p. 456) expresses the view that when Buckley, L.J., used the words "matter is of public interest" in the passage just quoted he meant "has already become of public interest." "There is no authority," says Lord Hanworth, "which protects a statement in the newspaper, when it is made not in answer, but as a fresh item on which a general interest, as distinguished from a particular interest already aroused, prevails." And again "The duty cannot arise in respect of a matter not yet made public at all."

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In the result he came to the conclusion that while publication may be privileged in as case such a *Adam v. Ward* where the widest publicity has previously been given to the subject of the libel no like privilege could arise in a case such as that before him where there has been no previous publication relating to the subject of the libel.

Slessor, L.J. (p. 467) says: "I am unable to find in the authorities any reason to suppose that the law has protected a general publication in cases where there is only a sectional interest and a consequential duty to inform only a part of the public."

From these words it might be inferred that in the view of Slessor, L.J., a sectional interest did as of course give rise to a consequential duty to inform the section interested but he may have, and probably, meant no more than this: that if only a section of the public is interested then, at most there can only be a consequential duty to inform part of the public—not that a consequential duty of necessity arises.

Before that could be the tests laid down by Buckley, L.J., in *Adam v. Ward* (supra) would have to be applied.

Romer, L.J., (p. 474) says: "So far as regards the Times Publishing Company, it may in one sense be true to say that they owe a duty to their readers to publish any and every item of news that may interest them. But this is not such a duty as makes every communication in their paper relating to a matter of public interest a privileged one. If it were, the power of the Press to libel public men with impunity would in the absence of malice be almost unlimited."

It was on the three cases just examined that Mr. Wells particularly relied but many other cases were cited to us. It may be useful briefly to refer to some of them.

In *Allbutt v. General Council of Medical Education*, (1889) 23 Q.B.D. 400, Lopes, L.J., delivering the judgment of the Court (p. 408) says: "It is most material to bear in mind that it is admitted that the report is.....a report of facts which have been finally ascertained and adjudicated upon. To determine whether such a report is privileged, it is important to consider the position, powers, and duties of the Medical Council." He then discussed those powers and continues: "There is no appeal from their decision, and the influence of public opinion is no small safeguard against the abuse of the powers intrusted to them. This influence cannot be exercised if they keep secret the grounds on which they act. The public are clearly interested in knowing these grounds."

He then examines the provisions of the Act under which the Council had acted and continues:

"These provisions show how important it is, that not only the

profession, but the public should have accurate information as to the proceedings of the Council, should know who is on the register, who is entitled to sue for charges, who is exempted from serving on juries, who is entitled to hold those public appointments for which medical men are eligible, and who can sign valid certificates.”

It is clear that the Court applied the rules enunciated by Buckley, L.J., in *Adam v. Ward* 26 years later and that one of the deciding factors in the case was the practical interest the public had in knowing what the Council had done.

In *Mangena v. Wright*, (1909) 2. K.B. 958, on a point of law raised on the pleadings, J. E. Bankes, K.C., for the defendant submitted that an official in the position of the Agent-General for Natal was under a duty to the public, in the interests of Great Britain and Natal, to publish information in his possession as to the conduct and character of a person who was endeavouring to intervene in England between the Imperial and Colonial Governments.

Phillimore, J., allowed the matter to go on to trial saying (p. 978) that “where a communication is made by a public servant as to a matter within his province, it may be the subject of privilege.” Buckley, L.J., in *Adam v Ward*, 31 T.L.R. at page 304, says:

“I doubt whether in *Mangena v Wright* Mr. Justice Phillimore was right in saying, at page 978, that where a communication is made by a public servant as to a matter within his province, it may be the subject of privilege, if those words are intended to convey that those facts without more will create a privileged occasion,” and he then proceeded to state the proposition which has already been quoted.

Purcell v. Sowler, (1877) L.B. 2 C.P.D. 215, related to an *ex parte* charge made against the plaintiff at a meeting of a Board of Guardians and reported in the defendant’s newspaper. Cockburn, C.J., (p. 218) after expressing the opinion that the libel related to a matter of public interest, *i.e.*, the conduct of a medical officer of the Poor Law Union, continued: “The true question in the present case is whether, though the subject matter was of general interest, the occasion on which the words were uttered was privileged, so as to protect the *bona fide* publication of the report.”

He held that the occasion was not privileged on the ground that the proceedings were *ex parte* and were before a body of very limited jurisdiction in respect of which publicity was not essentially necessary or usual as in the case of proceedings in a Court of justice or before Parliament.

For our purpose the point of importance is that the mere fact that the libel related to a matter of public interest was held not to afford protection.

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Davis v Shepstone, (1886) 11 A.C. 187, related to a libel arising out of allegations against the conduct of a public officer. Lord Herschell, L.C (p. 191) says: "It was insisted by the counsel for the appellants that the publications were privileged, as being a fair and accurate report of the statements made by certain messengers from King Cetewayo upon a subject of public importance." The contention did not, however, prevail.

"In the case of *Purcell v Sowler*" (supra), Lord Herschell said "the Court of Appeal expressly refused to extend the privilege (attaching to reports of proceedings in Parliament and the Courts) even to the report of a meeting of Poor Law Guardians, at which accusations of misconduct were made against their medical officer. And in Their Lordships' opinion it is clear that it cannot be extended to a report of statements made to the Bishop of Natal, and by him transmitted to the appellants, or to statements made to a reporter in the employ of the appellants, who for the purposes of the newspaper, sought an interview with messengers on their way to lay a complaint before the Governor."

Here again, as in the last case, it is clear that the fact that the matter was of public interest and even of importance did not avail the defendants.

It may be remarked generally that the tendency of modern decision is to extend the limits of the moral duty which authorises the publication of defamatory matter in the general interest of society; the Courts, however, have been far from ready to imply such a duty merely on the ground of public interest and the cases we have examined show that, in the absence of a duty of another character—as the duty of the Army Council to General Scobell in *Adam v Ward* (supra)—the public must have an interest of a practical kind in a matter which not only interests but actually touches them before a duty on the ground of public interest will be created or implied.

The general interest of society does not suffer on that account for fair and full latitude of discussion upon any public matter is adequately safeguarded by the defence of fair comment—a defence confused with the defence of qualified privilege in some of the older cases, for example *Kenwood v. Harrison* (supra) and *Davis v. Duncan*, (1874) L.R. 9 C.P. 396.

Bearing in mind the tests stated by Buckley, L.J., it is now for us to consider whether a duty to publish the article complained of existed in this case and to do so it is convenient briefly to recapitulate some of the salient facts.

As already related, on January 29, 1932, the agents in Trinidad of the Royal Mail Steamship Company received a cablegram inquiring if they could "deny rumour which is current in London, stating that certain cruising steamers will omit call owing to sickness in the Islands."

On February 1, 1932, in reply to a telegram from the Trinidad Chamber of Commerce the West India Committee cabled the Chamber of Commerce:

“Yours thirtieth. All cruising vessels visiting Trinidad.”

On February 3, 1932, the West India Committee wrote confirming this cable and enclosed cuttings from London newspapers contradicting the rumours referred to in the Royal Mail Steamship Company’s cable.

The meeting of the Chamber of Commerce was held on February 26, 1932, the President expressed the wish that Sir Algernon Aspinall’s letter should be published in full in the newspaper press for general information and Mr. Huggins expressed the hope that the ventilation of the question (misrepresentation with regard to health or anything else in the Colony by newspaper correspondents) would make newspaper correspondents careful in the future.

Publication of the article complained of followed in the appellant’s papers on February 27 and 29, 1932.

Put shortly, it has been submitted on behalf of the appellant before us that a duty to publish the article arose on the grounds:

(1) That the article related to matters of public interest such as the health of the Colony, reports abroad as to the Colony’s health, the trade of the Colony, action taken by the Chamber of Commerce and the West India Committee with regard to matters which might prejudice the Colony or its trade, the transmission of news relating to the Colony to England and the views of the President of the Chamber of Commerce as to the value of having a representative of the Colony in England;

(2) that public interest had already been aroused on these matters as was shown by the exchange of telegrams and the discussion in the Chamber of Commerce;

(3) that the defendant was the editor of one of the two local daily papers, both of which made a practice of publishing the proceedings of the Chamber of Commerce;

(4) that publication of Sir Algernon Aspinall’s letter had been requested by the President of the Chamber of Commerce;

(5) that the publication of the article served to allay the uncertainty, confusion and fears which the Court is invited to infer naturally resulted from the rumours which had been set on foot, and that the appellant, as the editor of one of the leading newspapers in the Colony, was a proper person to supply the public with the actual facts.

Mr. Forbes did not expressly say why he desired Sir Algernon Aspinall’s letter to be published in the press but Mr. Huggins expressed the hope that ventilation of the matter would avoid the future publication of misleading statements.

While, however, the manner in which the local representatives

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of the English press and English News Agencies transmit for publication in England news concerning the Colony, on such a matter as the public health of the Colony, has been put forward by the appellant as one of the subjects of public interest on which he relies and while in his statement of defence (paragraph 8 (g) one of the objects advanced by the appellant for publishing the article was "that efforts should be made to prevent the spreading of such reports in the future," it is noteworthy that it has not been contended on behalf of the appellant before us that a duty lay on him to publish the article with a view to the prevention of future misleading reports, nor would such a contention have been well-founded.

If Trinidad had been in imminent danger of irreparable or great harm owing to the reckless dissemination of misleading information on the part of newspaper correspondents, and if the only practicable remedy was to bring the pressure of public opinion to bear on those correspondents, then there might be ground for saying that it was the duty of the appellant to ventilate the matter in the press.

But in the present case nothing would seem to have been more easy than to do exactly what Sir Algernon Aspinall suggested, namely, to get in touch with the representatives of the English press and News Agencies in Trinidad and ask them to exercise discretion in sending news messages capable of misrepresentation.

If, instead of adopting this very reasonable course to check an evil believed to exist, the guilty were pilloried before the public and, as a result, the wrong man was pilloried, those at fault would have to take the consequences.

Not to perform a social or moral duty is a matter for blame.

No one could have blamed the Chamber of Commerce had they acted on Sir Algernon Aspinall's suggestion and quietly brought their influence to bear on the respondent or any other, in their eyes, offending journalist, instead of launching a public accusation; consequently, no one can say that it was a duty to launch that accusation and if there was no duty there can be no privilege on the score of duty.

The only practical purpose which it is suggested would be served by the publication of the article is the allaying of the alleged uncertainty, confusion and fears already alluded to.

We have seen, however, that any rumours set on foot in London as a result of the telegram to Reuter's had been publicly denied in the London press nearly a month before the meeting of the Chamber of Commerce.

There was no urgent occasion to republish those denials in Trinidad for, in the absence of evidence to the contrary, it is reasonable to presume that readers of English papers in Trinidad

would be as likely to see the denials as the reports of the rumours.

Besides, in their case, they would know that the rumours as to sickness in Trinidad were unfounded.

So far as the evidence goes it would also seem that whatever direct harm had been done by the publication of the telegram to Reuter's was already known to be at an end nearly a month before the meeting of the Chamber of Commerce and that such harm never extended beyond the possibility of "certain cruising steamers"—and there is no reason to suppose they would be numerous—omitting Trinidad from their itinerary.

Nor is there anything in the evidence to suggest that this would be a matter of vital or grave importance to Trinidad as a whole or to any firm or individual in particular though naturally some would profit by the visits of large tourist steamer. It may be it is possible for such a state of national despondency and alarm to exist as to give rise to a moral or social duty on the part of any citizen, put by circumstance in a special position to do so, to communicate to the public information brought to his notice whereby that despondency and alarm may be dispelled.

We see nothing in the circumstances of the present case, however, to give rise to any such duty on the part of the appellant nor do we think a duty arose on any other ground.

The request of the President of the Chamber of Commerce for publication of Sir Algernon Aspinall's letter is a circumstance deserving of consideration.

But publication of this letter is not complained of; it is the appellant's own introductory matter and the report of part of Mr. Huggins's speech of which the plaintiff complains.

And if Sir Algernon Aspinall's letter had been defamatory of the respondent it would not have served the appellant to say that it was published at Mr. Forbes' request.

It has also been submitted that there was a right in the appellant to publish the article on the ground that being on a matter of potential public interest, in which public interest had already been aroused, it was therefore a matter of common interest between the appellant as Editor of the two newspapers and the public as readers of his newspapers.

It is not in dispute that the article dealt with matters of public interest and it may be conceded that it would interest the public to know what transpired at the meeting of the Chamber of Commerce and that a certain amount of public interest had already been aroused in the subject matter reported.

Something more, however, is required. The interest must be something different to the interest of the public at large in a work of art, a picture or a book, or in a question of politics or the conduct of a public man.

These are all matters of sufficient public interest to found a

defence of fair comment on a matter of public interest but, while the cases are not always easy to reconcile, a clear distinction has gradually evolved between the defence of fair comment on a matter of public interest and the defence of qualified privilege.

In the former case the defence fails unless the facts commented on are proved by the defendant to be true; in the latter case it is sufficient if the defendant believed what he stated to be true and, in the absence of proof to the contrary, this is assumed.

If the mere fact that a communication was upon a matter of public interest in which the interest of the public had already been aroused rendered the occasion of publication a privileged occasion, then the distinction just alluded to between the defence of fair comment and qualified privilege would, in those cases, disappear and the truth of the facts commented on would cease to be material.

But the defence of common interest has never been carried that length.

The "common interest" group of cases is collected in Spencer Bower on Actionable Defamation (2nd ed.) at page 117 and in Gatley on Libel and Slander (2nd ed.) at page 258 and it may be deduced from them that the "common interest" must be an interest in some sense personal both to the writer or speaker and the person or persons addressed.

There are cases where publication to the world at large has been held to be privileged, as in *Allbutt v. General Council of Medical Education* (supra) and *Adam v. Ward* (supra) in which common interest has existed but it was not on the ground of common interest that those cases were decided.

It is true, too, that in *Henwood v. Harrison*, (1872) L. R. 7 C.P. at page 627, *Mangena v. Wright* (1909) 2 K.B. at page 977 and in *Chapman v. Ellesmere* (1932) 2 K.B. at page 456, the proposition contended for has been considered with some degree of judicial favour, but in no case has the Court gone the length of holding that the mere interest which every one has in a matter of public interest, in which interest has been aroused, gives rise to any right or privilege other than that of fairly commenting on that matter, and in our view the facts gave rise to no other right or privilege in this case.

The article containing the words complained of was given great prominence, the headlines being in large type and the introductory matter being spread across two columns.

This prominence of display coupled with the wording of the headlines and the terms of the introductory matter are all consistent with a wish to injure the respondent: they are also consistent with an honest desire to give publicity to a matter of public interest, or at least merely to provide matter which, to borrow a phrase from the judgment of the learned trial judge, was calculated to "sell the paper."

Consequently, if the evidence stopped there it would be equal both ways, it would be as consistent with the absence as with the presence of malice and so insufficient to justify a jury in finding malice or to be left to a jury at all.

The question therefore arises: "Was there any evidence of malice fit to leave to a jury extrinsic the article?"

Put another way, looking at the case as a whole, was there evidence that the appellant published the article not merely to inform the public on a matter which was of interest to it but also with the ulterior object of injuring the respondent?

Was there evidence that the appellant used the occasion to gratify his personal anger or malice?

First, the haste to publish the article seems matter to be taken into account.

It has been indicated that though a number of questions of considerable importance to the trading and agricultural interests of the Colony, and to the Colony at large, were discussed at the meeting of the Chamber of Commerce on February 26, 1932, the only report of that meeting published by the appellant on the following day was the article complained of—which related solely to the matter which has given rise to these proceedings—while other, and to our minds much more important matters, were given second place and relegated to the next day's paper.

Next, when discussing the evidence as to the identity of the respondent with the person defamed we referred to the allegation by the respondent that a fight for circulation had degenerated, on the part of the Gazette, to personal attacks on the respondent and the allegation in the Gazette of October 4, 1931, that the respondent had launched out in a campaign of down-right vilification against the appellant.

There was ground therefore, for ill-will on both sides and sufficient reason to examine any evidence which may throw light on the appellant's attitude towards the respondent.

This is chiefly to be found in the copies of the Gazette which have been put in evidence and we will refer to some of them briefly, and in chronological order.

First, references to the respondent in issues of the Gazette prior to the publication of the words complained of.

SEPTEMBER 12, 1929.

Under the caption "First with the News?" the following appears in the course of an editorial note to a letter from a correspondent:

"The amateurishness of the Trinidad Guardian is, at present, such that its Editor (or Editors) is either ignorant of, or does not seem to appreciate, what has already been published time and again during years past in other papers of this Colony.

The "featuring craze" seems to be strong that this new

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spurious claim may be a new line which has dawned on the fertile brains of the Editor-in-Chief and some of his staff.”

SEPTEMBER 17, 1929.

Contains a cartoon entitled “Contempt” and portrays the appellant, in the shape of a well-conditioned mastiff smiling contemptuously at the respondent, in the shape of an emaciated cur, barking in front of a pile of ‘returned’ Trinidad Guardians,

NOVEMBER 5, 1930.

Under the caption “Harbour Scheme Falsehoods” a letter in the London Daily Express from its Trinidad correspondent is held up to ridicule.

There is ground for thinking that the article points to the respondent as being the correspondent in question and, in that way, accuses him of inventing a fairy tale of making a statement which he knows is emphatically untrue, and of slandering the lighter owners of the Colony.

Among other references to the author of the letter is the following:

“May we respectfully suggest a Christmas gift of a cheap atlas from the editor of the London “Daily Express” to his Trinidad correspondent—if, really anyone in Trinidad will have the temerity to plead guilty to holding that position?”

December 25, 1930, contains a cartoon headed “The Belmont Municipal School.”

This cartoon shows a blackboard with the election figures—Ambard 357—Jones 180; It also shows the respondent over the appellant’s knee, being caned by the appellant while the defeated candidate stands by.

Below the cartoon are the words: “The boy Jones: Please Sir. Don’t lick me; Mac told me to do it.”

October 3, 1931, contains the article headed “Scaremongering Macgowan” to which reference has already been made; also, in the same issue, the heading “Jekyll or Hyde?” is given to letter from the respondent, but signed not in his name, but “Managing Editor.”

As the cross-examination of the respondent on the “Scaremongering Macgowan” article was stopped by the learned trial judge it may be only fair to the appellant to assume that the epithet of “Scaremongering” was capable of being justified.

The manner, however, of its application to the respondent still remains a matter for consideration in considering the question of malice—especially in view of the appellant’s own attitude to the “Bats Disease” as disclosed by the leading article in the *Gazette* of October 9, 1931.

Similar remarks may be applied to any other matter cross-examination on which may not have been proceeded with on

account of the ruling as to cross-examination of the "Scaremongering Macgowan" article.

October 4, 1931, contains the article under the caption "Hoist with their own Petard" already alluded to. Apparently the 'petard' is the respondent and it is the directors and shareholders who have been 'hoisted'.

The article, which runs to a little over a column of the *Gazette*, is a personal attack on the respondent.

In the course of it, after stating that it became necessary to find an editor who would faithfully carry out the peculiar ideas of the business men of the city who had established the paper, it is said:

"A certain Gault Macgowan was discovered, who seems to have arrived here with brand new ideas of what Journalism should be."

Then, after leading up to the expression "Hoist with their own petard," and charging the respondent with launching out in a campaign of villification against the appellant, the *Gazette* accuses the respondent of sending a garbled message to the New York Times.

The article continues: "We treated the message with contempt. From the report of yesterday's meeting he appears to have discreetly absented himself, and perhaps wishes the public to believe that he is not the author of the cable referred to.

But another extract dated February 19, last and sent to both the New York Times and the Montreal *Gazette* (and acknowledged as coming from Gault Macgowan) will show that there is an abundance of reason for tracing authorship of all this scaremongering news to one source and one source only.

The brazen mendacity of the author of these misleading and sensational reports is disclosed in the letter published in yesterday's Port-of-Spain Gazette, addressed by the Managing-Editor of the Trinidad Guardian to the Secretary of the Chamber of Commerce.

True to character, he proceeds to bolster up his misleading statements by another of the same kind."

There is more of the same sort of thing, for example: "The brazen-faced sender of the cable had the audacity....." As regards the phrase "discreetly absented himself" in the preceding quotation, it is to be observed that this article appeared the day after the publication of the respondent's letter to which the caption 'Jekyll or Hyde' was given, and in the course of which the respondent actually complained that he had had no notice that anything concerning himself was to be discussed at the meeting.

The foregoing is the last reference to the respondent, to which our attention has been called, in any *Gazette* issue prior to the publication of the words complained of four and a half months later, namely on February 27 and 29, 1932.

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It is, however, convenient here to refer to two issues of the Trinidad Guardian which have been put in evidence.

December 21, 1930, An article under the heading "Dance, little puppet, dance."

Appellant is the little puppet.

The article which runs to a column of the Guardian is a personal attack on the appellant in which such phrases and passages appear as: "Have you no shame, Judas?"

"Councillor with a conscience" (ironically): No longer will you be able to escape behind the alleged errors of the composers you regularly abuse in your columns" Dance little puppet, dance. Henceforth you must jump to the strings and writhe to the lash of your master; and you would have betrayed your brothers of the newspaper press throughout the Empire."

December 23, 1930. What purport to be communications from the Guardian's political correspondent appear under the following headlines:—

ALLEGED SOCIALIST MOVE TO RULE THE CITY

NEWSPAPER FINANCE PLAN

PRECEDENCE PROBLEM AT NO. 5

SUBTLE PROPAGANDA BEGINS

The supposed communications, though obviously intended to be facetious, mainly consist of remarks and suggestions calculated to annoy the appellant and hold him up to ridicule.

To return to the Gazette the only issues after the publication of the words complained of to which our attention has been called and which throw light on the appellant's state of mind towards the respondent are: March 6, 1932. Reference is made to the filing of this action. The respondent is referred to three times, and each time as Macgowan or Gault Macgowan. The appellant on the other hand is referred to as Mr. Ambard or Mr. A. P. T. Ambard and Mr. Huggins is referred to as Mr. George Frederick Huggins, O.B.E.

March 8, 1932. A letter of explanation from Mr. Huggins is published under the caption "Gault Macgowan and Mr. Geo. F. Huggins." Reference is also made in this issue to an action for slander brought by the respondent against Mr. Huggins in respect of the speech made by the latter at the Chamber of Commerce meeting. In the course of the reference it is stated that Mr. George Frederick Huggins, O.B.E.....is the person sued; and the name of the plaintiff is Gault Macgowan *described on the writ as a Journalist* of No. 39 Doundonald Street, Port-of-Spain. The italics are ours.

March 10, 1932. Again, the respondent is referred to without any prefix to his name while the appellant and Mr. Huggins are referred to as Mr. Andre Paul Terrence Ambard and Mr. Geo. F. Huggins, O.B.E.

Reading the passage in the Gazette to which we have referred

in conjunction with what for convenience we have called “the article containing the words complained of, an overwhelming presumption, to our minds, arises that the article was deliberately aimed at the respondent.

We are satisfied too, that the passages in the two papers to which we have referred, and which were published prior to the article, afford ample evidence that subsequent to the respondent taking up the editorship of the Guardian, a feeling of hostility developed on the side of the appellant and was subsequently reciprocated by the respondent.

The feeling on both sides seems to have reached a high pitch when, on the one hand, the “Hoist with their own Petard” article appeared in the *Gazette* on October 4, 1931, and, on the other hand, the “Dance, little puppet, dance” article appeared in the Guardian on December 21, 1931.

Having regard to the appellant’s previous attitude towards the respondent it is not unreasonable to presume that he would be on the look out for his revenge for the latter article and that he regarded the subject of the article containing the words complained of as his opportunity.

The evidence of the appellant’s illwill towards the respondent does not cease with the publication of the article.

We have referred, for example to the invidious distinction drawn between the respondent and others concerned with this litigation—the respondent being persistently denied the usual courtesy prefix to his name.

Again, to refer to the respondent in connection with his slander action against Mr. Huggins as “Gault Macgowan described on the writ as a journalist” has the appearance of being a studied, if subtle, insult.

The learned trial judge, sitting without a jury, came to the conclusion that at the time the libel was published the appellant was imbued with great dislike of the respondent and that actual malice prompted the writing of the words complained of.

Without relying on all the reasons advanced by the learned trial Judge—for example, he appears to have fallen into a misapprehension as to the personal responsibility of the respondent for the articles complained of in the “Scaremongering Macgowan” article—in our view the learned trial Judge had ample grounds for the conclusion at which he arrived and we are fully in accord with it.

We are also satisfied that ample grounds existed for the award of substantial damages and that, having regard to all the circumstances of the case, it is impossible for a Court of Appeal to say the sum awarded was excessive.

The appeal must be dismissed with costs.

Appeal dismissed.

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IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE OF
SAINT VINCENT.

OLIVER WENDELL FORDE, Appellant (Plaintiff)

v.

HENRY WILSON, Respondent (Defendant),

Before SIR CHARLES F. BELCHER, Chief Justice of Trinidad and Tobago,
President; SIR JAMES STANLEY RAE, Chief Justice of the Leeward Is-
lands; and Mr. R. S. DE VERE, Chief Justice of Grenada.

1934. MARCH 7.

Appeal—Rehearing—Questions of fact—Functions of Court of Appeal.

An appeal is in nature a rehearing but the Appeal Court is not to usurp the province of a jury. It is to presume that the Judge's findings on questions of fact are right and to bear in mind that he is in a better position to appreciate those matters affecting credibility which appear plainly in Court but are not usually capable of reproduction in a note book. That is of course where there is a conflict of evidence; if it is but a matter of the drawing of inferences from admitted facts the Appellate Tribunal is in no worse position than the trial judge, and may draw its own, which may not be the same as his.

But where facts are in dispute to the extent that it can be said there is some evidence each way, it may still be the case that the evidence adduced on one side is so inherently inconsistent or so incredible when tested in the light of admissions or of probability that no tribunal ought to act upon it however plausibly it may have been presented. If in such a case the party adducing it has secured from the tribunal below a judgment in his favour it is the duty of the Court of Appeal to reverse it.

The following judgment of the Court was read by the President:—

Plaintiff Appellant appeals from a judgment in favour of defendant respondent in an action in the Supreme Court of Judicature of Saint Vincent for £66. 13. 4 being £62. 10. 0 for purchase money of a second-hand car and £4. 3. 4 for a new axle supplied for it separately and later.

The defence as pleaded was, as to each item, a bare denial of the contract.

As the matter stood at the close of the case for the plaintiff, there was without doubt evidence of a sale upon which the judge could properly have found for him, while on the other hand he had only been asked one question in cross-examination (and had answered that in the negative) which would suggest a possible defence by way of confession of the contract but with an overriding condition, and avoidance of the contract by failure of that condition. We do not say that the learned acting Chief Justice who tried the case could have come to no other conclusion, or that we should ourselves necessarily have arrived at the same one

but certainly there was a case to be answered. If an over-riding condition precedent were to be set up, as set up later it was, the onus lay upon the defendant to establish what at that stage he had hardly done more than suggest.

The defendant accordingly opened his case and gave evidence and at once proceeded to develop the defence referred to, by admitting the agreement to buy but saying that it was wholly subject to his being able to raise a loan from the bank: that this he could not do, so that the intended sale fell through.

The learned judge at the conclusion of the whole case found that there was a contract of the nature alleged by plaintiff but with the added condition alleged by defendant: that the stipulated event, the getting of the loan, had not materialised and that the contractual relationship was thereby dissolved. He accordingly gave judgment for the defendant, as he was bound to do if there was sufficient evidence in law to enable him to say that the defendant had made out an affirmative case.

The principles upon which we as an Appellate Tribunal must approach the matter have been laid down so often that it is not necessary to refer to them at length or to the relevant cases in detail.

An appeal is in nature a rehearing but the Appeal Court is not to usurp the province of a jury. It is to presume that the Judge's findings on questions of fact are right and to bear in mind that he is in a better position to appreciate those matters affecting credibility which appear plainly in Court but are not usually capable of reproduction in a note book. That is of course where there is a conflict of evidence; if it is but a matter of the drawing of inferences from admitted facts the Appellate Tribunal is in no worse position than the trial judge, and may draw its own, which may not be the same as his. But where facts are in dispute to the extent that it can be said there is some evidence each way, it may still be the case that the evidence adduced on one side is so inherently inconsistent or so incredible when tested in the light of admissions or of probability that no tribunal ought to act upon it, however plausibly it may have been presented. If in such a case the party adducing it has secured from the tribunal below a judgment in his favour it is the duty of the Court of Appeal to reverse it.

The principle last mentioned is referred to in express terms in *Khoo Sit Hoh vs. Lim Thean Tong* (1912) A.C. 325. The cases for its application are rare but unless the principle exists the words "rehearing" and "weight of evidence" would have no meaning in connection with appeals, which would then be limited solely to questions of law.

Examining now the evidence in the present case as a whole, we find first certain matters not in dispute or at least no longer at this stage capable of being disputed. It is common ground

that neither plaintiff nor defendant was in good financial state, and each knew of the other's plight. They were friendly, and defendant was under some moral obligation to plaintiff. Plaintiff was anxious that defendant should buy his car for \$300, and defendant, though reluctant, was thinking about it. Whatever negotiations took place were begun on the morning of March 22nd, and reference was made right at the beginning to defendant's paying for the car by means of a loan which he should obtain from the Bank. There was no talk of anything but a cash purchase. Plaintiff gave defendant the car to try and defendant did try it and not only tried it but allowed certain other persons to use it whose intervention was not agreeable to plaintiff. Plaintiff, on becoming aware of this, told defendant that he now looked upon him as having bought it, and defendant acquiesced, but without either recapitulating or otherwise referring to specific terms; so that it must be taken that these had been adequately set out before. This acquiescence was on the afternoon of the 22nd, and whatever the contract may have been it was now complete: this is what the learned judge must in our opinion be taken to have found.

The crux of the matter now emerges. The learned judge had to make up his mind whether the defendant had established to his satisfaction the existence of the condition for which he was contending. Such a condition, being a matter not to be performed by one of the parties but dependent on a third party's act, is comparable to the obtaining of an architect's certificate in connection with a building contract. Both parties admit their contract, but one cannot enforce it until the condition is fulfilled. Perhaps the parallel is not exact for in the present case non-materialisation of the condition would bring the whole matter to an end, but the analogy is useful. If the reference to the Bank was not an overriding term, it is not suggested that it was anything else than a mere discussion of a mode in which the defendant might enable himself to perform a contract already binding.

The judge took the former view, the one upon which defendant relied, and it is our business to say whether the evidence before him justified his decision. If there was enough for a jury reasonably to act upon it is quite immaterial that we might have taken another view. If however we find the evidence so slender and incredible, viewed from within and without, that no tribunal of fact ought reasonably to have acted upon it, our duty is to reverse the judgment. If, incidentally, inferences were drawn, we have to consider whether such were the proper ones.

Since both parties agree that the application to the Bank was a failure, we need not consider whether the condition happened or not, but only whether there was evidence that it was stipulated for. Defendant had the onus upon him of proving this. If the evidence he gave could reasonably justify a finding in his favour

the appellant here must fail. It is hopeless, where facts alone are in question, to attempt to upset a lower Court's finding by showing anything short of this, that the verdict of a jury to the same effect would have been perverse. We are not entitled to substitute for a reasonable finding another finding which to us may appear more reasonable.

At this stage it will be convenient to continue the narration of undisputed matters as from the time of the making of the contract whatever it was. The matters previously mentioned were anterior to its formation, or at the time thereof.

After plaintiff told him he must take the car and he had agreed, defendant kept the car, and it has been in his possession ever since. Next day (March 23rd) it broke down on the road. Defendant thereupon asked plaintiff to supply a new axle: nothing was apparently done by plaintiff in this respect for twenty days, at the end of which plaintiff, on April 12, bought on his own credit an axle which he handed defendant, and the car was brought into Kingstown by the latter. Meanwhile on March 27th, that is four days after the breakdown, plaintiff gave to the police a notice which we infer was a notice of change of ownership. At this time of the year licence fees were due in respect of cars and drivers, and the police were going about collecting the money. On April 7th (the car being still derelict) the police interviewed the defendant: the subject matter of this interview is disputed. About this time, or at all events before the car had been mended, both plaintiff and defendant went together to McDonald and tried to sell him the car as it lay. He refused to buy. At a later date which is uncertain but was probably after April 12th defendant, having fitted the new axle and brought the car in, interviewed the Bank Manager for the first and only time. He asked him to lend money either on the car or to enable it to be bought, and his application was refused. Supposing the condition defendant alleged was in existence it had now been put to the test. After this refusal, which was communicated by defendant to plaintiff, plaintiff asked defendant to pay for the car at thirty dollars monthly and to give him a Bill of Sale over it by way of security: this defendant refused to do. Meanwhile defendant had garaged the car at Mr. Fraser's cotton factory where it had been kept in McDonald's charge by plaintiff before the 22nd March. McDonald told him to take it away. Defendant reported this to the plaintiff. Plaintiff said he had nowhere to put it. Defendant at once took it away from Mr. Fraser and stored it somewhere else. About this time the dispute began and, without any letter before action being written, the writ was issued on May 8th.

We come now to disputed matters. Defendant says there was a condition, but that was for the judge to say, and the important thing is to see what words passing between the parties defendant relies upon. They were these "Forde suggested I should go to

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the Manager of the Bank and get \$200 and that he would endorse it. I replied if it can be done I will help you." That is all. Nothing else is suggested to have been said before the afternoon interview when the bargain was closed, and when the bargain was closed no more was said. We have a great difficulty in this case in perceiving just what reasons the judge had for his findings, for he gives none of them either on major or subsidiary points; but he must at least have believed that the conversation took place in the terms to which defendant swore, or he could not possibly have given him judgment. Was then the judge right in directing himself as he must have done that those words might mean that the whole matter was to go off if the Bank would not lend?. We think he was. The words are not precise but if they were used their natural meaning seems fairly clear. The next question for him was did they bear that apparent meaning in the particular circumstances, did they, that is to say, represent the intention of the parties? Such a matter was for the judge sitting as a jury, and to answer it he had to look at the parties' subsequent conduct.

Against Wilson is his accepting the car as his when pressed by Forde after the incident of the unwelcome passenger, without any further reference to the condition. Against him is the form of his pleading, denying as he does in his defence the very contract which it is the essence of his case later on to admit. Against him is the fact that Forde never pressed him to go and see the Bank: if the condition existed it was all in Forde's interest that it should be complied with at once, so that he would get his money. Against Wilson also is his own long delay in approaching the Bank. He leaves it for three weeks: something may hinge on the derelict state of the car during this interval, but both parties knew that it was Forde's personal backing rather than any value of the car which would influence the Bank, and Forde's position was not affected by the accident. Against Wilson also is the accusation of perjury which he makes against the police officers. His case being that he had bought the car subject to a condition, it would not be strange that he should tell the licensing authority he had taken it over, and so why deny it! And against him also are his acts of ownership done in connection with the car after he knew the Bank would not lend. And, it may finally be said, against him is the whole nature of the condition he alleges: cases must be extremely rare of anyone being able to get delivery of a car at an agreed price upon the condition that if at some unspecified time in the future he cannot find the money to pay for it, he may cry off his bargain.

On the other hand there are matters which do go to make his story credible. Both parties knew quite well that unless the defendant borrowed the money somewhere or other he could not pay cash at all. Both parties evidently believed, or at least thought

it likely, that the Bank would lend on plaintiff's signature. If plaintiff were willing to guarantee defendant to the Bank and so himself become responsible if defendant defaulted, (in which case plaintiff would have in effect to refund the purchase money plus interest to the Bank) he must indeed have been anxious to get rid of the car on any terms. Plaintiff himself admits that he let defendant have the car without a penny of deposit, a scrap of writing, or any security. Is it altogether out of the question that so anxious a vendor would agree that if the Bank would not lend the affair would be off and that he should then take his car back? That is surely no less reasonable than it was to let a penniless man have his property unconditionally so that if Forde were not paid he could never get the car back except by an expensive process of writ and execution. It is in favour also of the defendant and against Forde that Forde continued to take an active interest in the car after selling it, as he says, outright: and that Wilson should have told him in McDonald's presence that McDonald was "only faking him" *i.e.* Forde. How could McDonald affect in any way a man who had no longer any interest in the car? Next comes the incident of Forde supplying the axle, which was a curious thing to do for another man's car. Then there is the circumstance, after the Bank's refusal to lend, of Forde suggesting to Wilson that Wilson could "have the car" if he would give him a Bill of Sale and pay by instalment. If there was no condition precedent of the kind defendant alleges, one would have expected Forde, if he wanted security, to ask for it at the outset. But clearly the parties at first contemplated a sale for cash and not on terms, and where was the cash to come from? Finally, there is the fact that Wilson after the Bank incident first tried to store the car where Forde used to keep it, and then asked Forde what he should do, and that Forde at least expressed no surprise that Wilson should want him (Forde) to look after his (Wilson's) property.

Each of these incidents so far as it tells against a party may of course be susceptible of explanation by him, and there is manifestly room for a great deal of argument on probabilities, but all these things were matters for the judge as a jury, and when one considers the incidents in Wilson's favour outlined above and takes them in connection with the testimony he gives of the terms of the agreement, it is quite impossible to say that a judge believing his evidence as to the words used might not also find considerable corroboration for the meaning defendant attached to them in the subsequent conduct of both parties. Defendant's case is neither self contradictory nor wholly improbable. The judge found that it was a good case. We might not ourselves have so decided but that is not material. The appeal must be dismissed with costs.

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IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE COURT OF SUMMARY JURISDICTION OF
THE LEEWARD ISLANDS (ST. CHRISTOPHER CIRCUIT).

Between MAUD HART (Defendant) Appellant,
and
HORACE GREY (Plaintiff) Respondent.

Before Sir CHARLES F. BELCHER, Chief Justice of Trinidad and Tobago,
PRESIDENT; Sir JAMES S. RAE, Chief Justice of the Leeward Islands;
and Sir ROBERT H. FURNESS, Chief Justice of Barbados.

1934. MAY 9.

*Trespass—Land—Undivided interests—Brother and sister—Possession—
Not in brother—In sister—Whether on her own behalf.*

There is no presumption, from the mere relationship of brother and sister that the sister's sole and undisturbed possession of a parcel of land was exercised on her brother's behalf.

The judgment of the Court was as follows:—

This is an appeal by the defendant in an action for trespass in which judgment was given for the plaintiff for £6 damages with £4. 11. 0. costs. The plaintiff sued in his personal capacity, the evidence showing that he was devisee as well as executor of one James Williams who admittedly was in possession at the time of his death.

The defence was that defendant was, at the time of action brought, the owner of the premises upon a title obtained by adverse possession for 12 years (under Leeward Islands Acts Cap. 18 Sec. 10).

It was common ground that both plaintiff's testator and defendant (who were brother and sister) were interested in the premises apart from possession, but to what extent is neither clear, nor as we think, material.

It was also admitted that from a date in 1927 until he died on 10th August, 1933, the plaintiff's testator had undisturbed possession. Immediately upon his death the defendant, forestalling the plaintiff, stepped in, and in fact plaintiff has never taken possession.

As executor, this would not, upon the principle referred to in *re Pryse*, (1904) Probate 301, (*per* Stirling, L.J. at p. 305) have prevented plaintiff from succeeding. As devisee, it would (see case referred to in *Roscoe's Nisi Prius*, 18th Edition, Vol. 2. p. 931 top); but any such defect here has, we think, been cured by admission at the hearing; and in any case Counsel for appellant has stated (we think very fairly) that he would not have objected to an amendment.

The onus lay therefore upon the defendant to prove her title and that it existed when action was brought.

Upon this, the real issue in the case, the learned trial Judge had before him the evidence of the defendant herself and of two neighbours; and on the other side, there was the evidence of two persons named Eliza Cardin and Richard Hart. We may dispose of all the evidence except that of the defendant herself by saying that it is not in our opinion, in itself enough either to prove or disprove title, being vague as to dates and as to the facts of possession.

Taking defendant's evidence so far as it is not contradicted, it amounts to this:—from sometime anterior to 1906 till 1911, defendant lived with her grandmother on the premises. From a date in 1911 till a date in 1923 (but not necessarily for 12 years) defendant was in sole undisturbed possession. In 1923 plaintiff's testator lived on the premises for a short time, apparently with the defendant, and there is no indication that there was any dispute between them. In 1926 he returned and began to live there again with her; he made some repairs and alterations and assisted in ejecting a third party. At some time in 1927 the brother, not being able to get on with defendant's children, brought an action against her, concerning a house or it may be a room (not at all events the main dwelling) which had been erected by defendant's deceased husband on the premises. This action never came to trial, but—apparently by mutual consent—defendant moved the outside house (or room) to Franklands and left her brother in possession of the premises generally, and he retained that possession till he died, neither acknowledging any interest on her part in the premises nor on the other hand claiming any right in the building she had removed.

It is not altogether easy to see from the notes (taken down by Counsel but agreed upon) of the Judgment what the inferences were which the learned judge drew. We think he must be taken to have decided that the visit of James Williams in 1923 was an interruption of plaintiff's possession: otherwise indeed he could not have found it necessary to make the reference he did to the years before 1911 when defendant lived with her grandmother. We can see no justification upon the evidence for the view the learned Judge took of the 1923 visit considered by itself. Then he appears to have directed himself that from the mere fact of the relationship of brother and sister, the sister's possession, although otherwise undisturbed, ought to be presumed to have been exercised on the brother's behalf. No custom which could justify such a presumption has been proved, and it seems otherwise unsustainable.

We may say at this point that had we not supposed the notes of Judgment appearing at page 14 of the Appeal Book to be an extract from the Judge's note-book, we should have asked for a

M. HART v. H. GREY.

statement of his reasons; we are as it is without the advantage of having this before us.

While defendant's sworn statements as to the length of time she was in possession might be said to be equivalent to a discharge of the onus upon her to prove her title if it stood unquestioned, that is not the case: she herself discloses, by her account of what took place in 1927, facts from which inferences might be drawn adverse to the interpretation which she asks should be placed upon that possession, and the otherwise colourless events of 1923 may take on a definite complexion with probative effect when viewed in the light of those inferences.

The judge should have looked at the whole of the evidence and drawn all proper inferences; and then asked himself and answered the question whether upon a consideration of all the evidence the defendant had discharged the onus upon her.

As it is we must indeed take it that he found she had failed to discharge that onus, but that he reached that conclusion upon a partial consideration only of the evidence, and upon an erroneous presumption in relation to that part which he did take into consideration.

If there was only one inference which could possibly be drawn, upon the whole case properly considered, we should ourselves draw it; but that it is not so, and we think there must be a new trial, the cost of this appeal and of the former trial to abide the result of the new trial.

Appeal allowed, new trial ordered.

REX v. A. SATAR.

REX v. ABDOOL SATAR.

[INDICTMENT NO. 12,147—DEMERARA.]

WEST INDIAN COURT OF APPEAL NO. 2 OF 1934.

1934. AUGUST 8, 9.

BEFORE Sir C. F. BELCHER, Chief Justice of Trinidad and Tobago, President; SIR R. H. FURNESS, Chief Justice of Barbados, and Mr. B. A. CREAN, Chief Justice of British Guiana.

Indictment—Defect—Amendment—Criminal Law (Procedure) Ordinance, sections 93, 95 (1).

Prisoner was indicted on a charge of making false entries, with intent to defraud, in the book of account numbered S2435 kept by the Royal Bank of Canada wherein his account of money deposited in the savings department of the said bank was entered and kept. The said charge was laid under section 261 of the Criminal Law (Offences) Ordinance, chapter 17. At the trial it was proved that the prisoner made an alteration in the book which had the effect of making it appear that his account in the bank was in credit \$30 more than in fact was the case, and it was also proved that the alteration was made with fraudulent intent.

It was submitted on the prisoner's behalf that the pass book was not "kept by" the bank within the meaning of section 261, and that submission was upheld by the trial judge.

At the request of the Crown the trial judge granted an amendment of the indictment by substituting a charge under section 255 of the Criminal Law (Offences) Ordinance, chapter 17, of altering with intent to defraud an accountable receipt for the receipt of money by the Royal Bank of Canada.

Held, on the authority of *Martin v. Pridgeon* (1859) 28 L. J. M. C. 179, that the amendment could not be made under section 95 (1) of the Criminal Law (Procedure) Ordinance, chapter 18, which corresponds with section 1 of the Criminal Procedure Act, 1851 (14 and 15 Vict. c. 100).

Held, further, that there was a defect in the indictment, and that the amendment was sustainable under section 93 of the Criminal Law (Procedure) Ordinance, chapter 18, which corresponds with section 5 (1) of the Indictment Act, 1915.

A. C. Brazao, for the prisoner.

S. E. Gomes, acting Attorney-General, for the Crown.

Cur. adv. vult.

The judgment of the Court was delivered by the President.

The Court in this case has to answer a question of law reserved by the trial judge under section 174 of chapter 18.

The prisoner was indicted on a charge of making a false entry in a bank book of account under section 261 of chapter 17.

The particulars given made it clear that the book referred to was the prisoner's own savings bank pass book.

At the trial it was proved that the prisoner made an alteration in the book which had the effect of making it appear that his account with the bank was in credit \$30 more than in fact was the case: and it was also proved that the alteration was made with fraudulent intent.

REX v. A. SATAR.

It was submitted on the prisoner's behalf that the pass book was not "kept by" the bank within the meaning of the section in question; and that submission the learned trial judge upheld.

The Crown then asked for an amendment of the indictment so that upon the same facts as to the prisoner's act and intent, the charge would read as one of altering an accountable receipt under section 255 of chapter 17.

It may here be observed that the offences under each section are felonies, and the punishment for each the same.

The learned judge allowed the amendment asked for, relying as his authority upon section 95 subsection 1 of chapter 18 which is derived, *via* certain local amendments, from the Criminal Procedure Act of 1851 (14 and 15 Vict. c. 100 s. 1.) This is not however, the sole power to amend an indictment contained in chapter 18. In section 93 there is reproduced, almost verbatim, section 5 (1) of the Indictments Act, 1915, which permits the amendment of a defective indictment.

The jury found the prisoner guilty.

The question put to us is the general one whether there was power to amend as was done; if then we find such power either in section 95 or in section 93 it will suffice to enable us to answer in the affirmative: otherwise not.

If section 95 were the only authority, we are bound to say that we can see no essential difference between the effect of the words it uses "if there appears a variance between the proof and the charge. . . the Court may amend the indictment so as to make it conformable with the proof" and those of the English Act, 11 and 12 Vict. c. 43, section 1 "no objection shall be allowed for any variance between information and evidence." Wide as the latter words appear, they were held as long ago as 1859 in *Martin v. Pridgeon*, 28 L. J. M. C. 179 not to be wide enough to allow a conviction for drunkenness alone under one Act of Parliament, after amendment, where the original charge was one of drunkenness and riotous behaviour under another Act. Whatever the extent, in either direction, of the principle to be drawn from that case, it clearly shows that there are some amendments which are not permitted even when the offences, in original and amended indictments, are of the same general character.

But section 95, as we have seen, does not stand alone, and it need not be resorted to if the amendment can be sustained under section 93. We think it can. It is true that not even section 93 will justify any amendment whatsoever; so much appears from the few cases reported upon its model, the Indictments Act, 1915. In *R. v. Errington*, (1922) 16 Cr. App. R. 148 an amendment adding another false pretence (on a charge of one such) was held bad, the reasons given by the Court of Criminal Appeal being that the indictment was not defective, and that the appellant could not possibly upon the first charge have expected to

have to meet the second. But in *R. v. Fraser* (1923) 17 Cr. App. R. 182 the words “with intent to defraud” were left out of a false pretences indictment; an amendment was allowed, the Court of Criminal Appeal clearly viewing the indictment as defective only. Again, in *R. v. Hughes* (1927) 20 Cr. App. R. it was not permitted to substitute a charge of pretence of existing fact for a false promissory statement, which latter, of course would have been no false pretence at all for the purpose of constituting an ingredient in an offence. To do so, says the Lord Chief Justice, would not be correcting a defect in the indictment but altering its substance. In *R. v. Tuttle*, (1929) 21 Cr. App. R. 85, the indictment was supported by the evidence, but by an oversight the section of an Act was quoted which was not in force when the offence was committed, instead of a section identical in terms which had been repealed by the Act quoted. This was held to be a defect only, and amendment was allowed.

Now let us see what was done here, first by the indictment and then by the amendment of it. The prisoner was first charged with something for which, taking it as we must that the ruling of the learned trial judge upon what constitutes “keeping” a pass book was correct, (indeed it is admitted on both sides) he could never have been convicted, nor could anyone else, for the act upon which the indictment was founded was alleged to have been done in relation to a savings bank book, and such books are not “kept” by a bank according to the ruling.

But the essence of the allegation against the prisoner is the fraudulent alteration of a writing: that is surely plain, though originally the writing may have been misdescribed in regard to the custody of the book in which it was contained and an irrelevant section referred to. The act of the prisoner is one and the same in each case, *i.e.*, before and after amendment, and what that act is, is clearly brought to his knowledge: the evidence adduced is of that act, and the rest is mere misdescription and mis-reference. We think that whether or not that is a “variance” within the meaning of section 95—we do not decide this but refer to *Hiatt v. Ward*, 1894, 17 Cox p. 736—it is exactly such a matter as will constitute a “defect” within the meaning of section 93, and therefore that the amendment was both permissible and proper to the ends of justice.

It did not substitute one offence for another or charge the prisoner with any further or other act than what was alleged against him to begin with; it merely described that act in terms which showed it to constitute an offence instead of in terms ineffective to that end, and it related the act to a section making it punishable instead of to one which did not. It has never been suggested that the prisoner did not know what the act was which he was being called upon to answer, or that the amendment subjected him to the slightest embarrassment or prejudice. The question put is therefore answered in the affirmative.

J. F. NELSON, &c., v. A. J. PEREIRA.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

J. F. NELSON, T. FRANCIS, AND G. DAC. MOORE,
Appellants (Defendants),

v.

ANTONIO JOAO PEREIRA, Respondent (Plaintiff).

Before Sir CHARLES F. BELCHER, Chief Justice of Trinidad and Tobago,
President; Sir ROBERT H. FURNESS, Chief Justice of Barbados, and Mr.
B. A. CREAN, Chief Justice of British Guiana.

1934. AUGUST 17.

Appeal—Rehearing—Question of fact—Judge's decision varied.

Estoppel—By conduct—Execution sale—No claim by owner—Purchaser not prejudiced.

Damages—Execution sale—Knowledge by owner of goods—No interpleader—Whether damages should be awarded.

Decision of trial judge on questions of fact varied.

Where an owner of goods taken in execution was present at the sale and did not claim them, but it did not appear that there was anything to suggest that the purchasers for a moment attached any value to such goods or that they knew that they were included in the sale or that the price paid was affected by the owner's failure to claim them, it was *held* that he was not estopped from claiming them in an action brought by him for trespass to goods.

Where an owner of goods taken in execution knew of the execution but did not interplead, he was not awarded general damages in an action brought by him for trespass to goods.

The judgment of the Court was delivered by the President as follows:—

This appeal arises out of an execution levied against one Gwendolen Davis under a judgment against her for £21. 5. 4. recovered by one Tom Poy in the Port of Spain District Court. Execution was levied on goods at 32, Marine Square, Port of Spain by the appellant Moore, a bailiff on the staff of the District Court, on the 15th September, 1933, and the goods were sold to and taken possession of by the appellant Francis, acting, as was not seriously contested before us, as agent for the appellant Nelson, on the 26th September. The respondent alleged that he was the tenant of 32, Marine Square and that certain goods belonging to him, and which were enumerated in the Statement of Claim, were included in the levy. He brought this action for damages for trespass to his premises and trespass to and conversion of his goods. The learned trial Judge found that the goods claimed by the respondent were his, that he was the tenant of the premises and that entry was made by all the appellants without his leave

and licence; accordingly, he gave judgment against the appellants for £47. 11. 4 special damages, £25 general damages, and costs. The goods claimed by the respondent were valued by him at over £200 so, although in the reasons for his judgment the learned trial judge says he accepts in its entirety the evidence adduced on behalf of the respondent's case and rejects *in toto* the testimony of all three appellants, it is clear he did not accept the respondent's evidence in this particular matter of value. On the contrary, looking at the odd shillings and pence that he awarded it would seem probable that he accepted the valuation of Moore and added a round sum—about 50% below the respondent's valuation for the articles not valued by Moore. The learned trial judge did not however state the basis on which he arrived at his figures.

In the first place we propose to consider whether on the evidence of the respondent and his witnesses the learned trial judge was justified in coming to the conclusion that the respondent was the tenant of 32, Marine Square.

The respondent had had a chequered business career. He once lived with a woman named Addison, by whom he had children, and, while living with her, he carried on business sometimes on his own account, sometimes in the name of or as manager for Addison and sometimes on behalf of another woman—a cousin of Addison's—named Skinner. After the death of Addison in 1930, the respondent had intimate relations with and a child by Addison's adopted daughter, the said Gwendolen Davis. The respondent and Davis both lived at Tunapuna but in different houses and Davis looked after Addison's children. In July 1933 the respondent rented 32, Marine Square with the object, so he says, of opening a grocery. In fact it was fitted up and used as a drug store, the respondent moving into it the stock-in-trade of a drug store that Davis was then carrying on at George Street, Port of Spain. The respondent says he refused \$900.00 for the stock in the drug store and, after the execution sale, this stock was valued at between \$800.00 and \$900.00. Besides certain furniture, fixtures and fittings claimed by the respondent, in respect of which the learned trial judge seems to have accepted Moore's valuation of £25. 11. 4., there were no other goods on the premises with the exception of a cask of prune syrup and a cask of prune juice also claimed by the respondent and which, at the outside, the learned trial judge we think, cannot have valued at more than £12. The prune syrup and juice are said to have been brought for the proposed grocery business. They were left outside and there is no evidence that the premises were in fact used for any purpose except Davis' drug store. On the clear admission of the respondent the front part of the premises was entirely devoted to that purpose.

We have said the respondent fitted up 32, Marine Square as a drug store; we arrive at that conclusion because, besides fitting

it up with ordinary counters he fitted it up with a dispensing counter, which would have no place in a grocery. The respondent paid rent for the premises to one Charles from the 15th July, 1933, taking a receipt for the first month's rent \$20.00 in his own name. This receipt was numbered 13 and dated the 10th July; another receipt given by Charles to the respondent bears the same date and is numbered 14; it is for "fixtures, fittings, show cases &c &c, No. 32, Marine Square"; these are the fixtures and fittings alleged to have been wrongfully seized and sold. It is convenient here to add that, leaving out certain articles said by the respondent to be in his possession as executor of Addison, and leaving out the prune syrup and prune juice already referred to, the only other goods claimed by the respondent consisted of the dispensing counter, already referred to, and another counter both bought by the respondent from one Shaw in July, 1933.

Though, as has been stated, the respondent took the receipt for the rent in his own name, and though the respondent says he was the tenant of the premises, the respondent charged Davis with no rent in respect of the drug business though, he says, he got a salary of \$12.00 a week as manager of it. Under these circumstances, and having regard to the use to which the premises were put, in our view, the only reasonable conclusion to come to is that he took the premises, not, as he alleges, to open a grocery for himself, but as agent for Davis and for the purpose of their being used for her drug store business. It follows, in our view, that the renting of the premises and the purchase of the fixtures &c. from the landlord, being closely related as they have been shown to be, virtually formed part of one transaction, and that just as the premises were rented on behalf of Davis, so the fixtures, &c, were bought for her. Further, having regard to the date and the nature of the purchase from Shaw, in our view it is only reasonable to conclude that the goods purchased from Shaw were bought for Davis in the same way.

As regards the articles claimed by the respondent as being in his possession as executor of Addison, no objection was taken on the ground that these articles were not claimed by the respondent in his personal capacity but Mr. Wooding has shown us that the typewriter, chairs and coffee mill were not included in the particulars of Addison's estate filed by the respondent and that, as to the rest, the respondent himself says at p.49 of the Appeal Book that they were eventually sold and that he bought none of them. Consequently we have come to the conclusion that the respondent (having given an account which by his own admission was false) has not discharged the onus which was upon him to show that any of the goods seized and claimed were his, with the exception of the prune juice and prune syrup.

It is however urged that even if the casks of syrup and juice belong to the respondent he is estopped from claiming in respect

of them in that he first specifically referred to them in the writ, and further that, though present at the sale, he laid no claim to them there.

Before he could be estopped he must know his goods had been levied on. The learned trial judge found that at no time was the respondent aware that his goods were levied on, but that finding, in our view, cannot be sustained. At p. 46 of the Appeal Book the respondent himself says that Moore told him everything on the premises had been levied on and that Lai Fook. Tom Poy's solicitor, told him he could not sell or move anything that was on the premises. So far as Moore is concerned, however, we are satisfied that he was well aware that the respondent disputed the right to seize everything on the premises and, having regard to the slovenly way Moore went about his business, we think it impossible to say that Moore was misled by the respondent's failure to identify every item that he claimed to be his. So far as Nelson and Francis are concerned, without discussing whether, under any circumstances, it would have been the respondent's duty to announce his claim to the casks and their contents at the sale, we are satisfied that, in the circumstances of this case, his silence in no way influenced either Nelson or Francis. On their own admission it is abundantly clear that they went to the sale and bid, not on the strength of any inspection of the goods or any inventory or valuation of the goods but as the result of a "tip" received from an assistant of Davis named Lewis, and a bailiff of the District Court named Parkes, that the drug store was for sale and likely to be picked up as a bargain. What precise information was conveyed by Lewis and Parkes does not appear but there is nothing to suggest that Nelson or Francis for a moment attached any value to the prune juice or prune syrup or that they knew they were included in the sale or that the price paid was affected by the respondent's failure to claim these items. In our view the defence of estoppel fails.

We will now advert to the question of damages.

It is tolerably clear from the respondent's own evidence, that, as alleged by Moore, on the execution being levied, the respondent at first claimed that the whole place belonged to him; otherwise there would be little point in the reference to the telephone book, to see whose name was entered as a subscriber, to which the respondent deposes. It was Davis' name that was found to be entered, and the respondent thereupon produced the receipts given him by Charles to substantiate the claim, which we have found to be unjustified, that he was the sole tenant of the premises and the sole owner of the fixtures. Moore says he told the respondent that if he claimed anything he could interplead; the respondent denies this but (p. 43 of the Appeal Book) says he

knew there was such a thing as interpleader. Obviously the reasonable course for him to adopt was to file an interpleader claim and having regard to the amount of the judgment debt—£21. 5. 4.—and the value of the drugs as to which there was no dispute—in the neighbourhood of £200—, one can hardly doubt that the execution creditor would have immediately admitted the claim. We go further; having regard to the respondent's own evidence as to what took place on the 15th September between himself, Moore and Lai Fook's clerk, Knox, we think there can be little doubt that, had the respondent then claimed the two casks as his they would never have been seized at all. Under these circumstances and having regard generally to the respondent's conduct he is not, in our view, entitled to recover any damages whatever.

We have disregarded documents referred to in the Statement of Claim but not dealt with in the argument before us; if the learned trial judge put any value on them at all it would seem that he valued the two casks and the documents as being together worth £22.

It follows that there will be judgment for the plaintiff for £22 instead of £72. 11.4.

The appellants Nelson and Francis will be allowed one set of costs of the appeal; no costs to the appellant Moore and no costs to any party in respect of the proceedings in the Court below. Damages to be set off against costs.

G. V. DE GALE v. G. A. H. RENNIE.
 IN THE WEST INDIAN COURT OF APPEAL.
 ON APPEAL FROM THE SUPREME COURT OF GRENADA.

(NO. 2 OF 1934).

GEORGE VICTOR DE GALE. Appellant,
 v.
 G. A. H. RENNIE, Respondent.

Before SIR CHARLES F. BELCHER, C.J., Trinidad and Tobago, PRESIDENT:
 SIR JAMES S. RAE, C.J., Leeward-Islands; and MR. B. A. CREAM, C.J.,
 British Guiana.

1935. JANUARY 26.

Evidence—Written instrument—Construction of—No ambiguity—Explanation of instrument—Oral evidence not admissible.

W.T.M. leased plantation Telescope, excluding two parcels comprising 3 acres and 5 acres respectively, to A.R. who subsequently purchased, and had conveyed to him, so much as he had been a tenant of and no more. A.R., devised the said lands to G.A.H.R. After the conveyance to A.R. G.A.H.R. purchased from W.T.M. the said parcel of land containing 5 acres but did not get a conveyance thereof. G.A.H.R. executed a mortgage on "all those plantations or estates called and known by the names of Telescope and Paradise situate in the parish of Saint Andrew in the island of Grenada containing together by estimation 320 acres or thereabouts English Statute Measure, being the entire estates which were sold by W.T.M. to A.R., and which estates lands and hereditaments the said A.R. was in possession of up to the time of his death, and which since the death of the said A.R. have been and now are in the possession of the Borrower".

Held, that there being no sort of ambiguity in the language of the description, there was no ground for admitting evidence to explain it, such as that the borrower's conduct at the time of the mortgage showed that he meant to give security over everything he owned at Telescope, and not only on those lands sold by W.T.M. to A.R. and inherited by him from the latter.

The judgment of the Court was as follows:—

This is an Appeal from a judgment of the Supreme Court of Grenada in an action tried in its summary jurisdiction.

To the Plaintiff's (Respondent's) claim in trespass. Defendant (Appellant) raised the defence of title: and, there being ample evidence of Respondent's possession, this Court needs only to consider whether the learned Judge below was right, on the evidence, in holding that Defendant has failed to show a title, the onus in that regard plainly lying upon him.

It appeared that in 1901 one Mahon owned an estate called Telescope; and both sides admit that up to that time the disputed land formed part of that estate. In that year Mahon leased the bulk of Telescope, but not all of it, to the Plaintiff's father: the latter, later, bought from Mahon so much as he had been tenant of, but no more; and, dying in 1903, left it by will to his son the Plaintiff.

In 1916 the Plaintiff mortgaged at least the bulk, and as Defendant contends all, of the estate to the Grants; and in 1922 whatever was mortgaged to the Grants was sold in an action brought upon that mortgage to a Mrs. Smith; who in turn sold it to the Defendant, who still owns it. Before proceeding to deal with the devolution of that part of Telescope which was not included in Mahon's sale to Plaintiff's father, (which for convenience we may call the "excluded part" as distinguished from the "bulk") it is to be observed that, the root of title having been split by the division of the estate in 1901, Defendant must either show that the title to the whole estate as it was in 1901 (excluded part as well as bulk) had been at the time of the alleged trespass (1933) brought together again and become vested in him, or at least he must show that the particular part of the title which affects the disputed land was, in 1933, so vested. That is, we think, indisputable. Bearing in mind that, as above mentioned, Defendant has established his title to the bulk of the estate, the next observation is, that although the onus is entirely upon him to connect the disputed land with some title in himself, he has not tried to prove that that disputed land lay physically in the bulk of Telescope rather than in that part of it which was excluded from the Conveyance of 1901. To succeed therefore in his defence he must show that at the material date in 1933 the title to the whole of the excluded lands also was vested in him. We now proceed to consider what is in evidence concerning this part of the title. Defendant himself calls no evidence of it as it was up to 1916, nor any evidence to show that it came to him through any other person than the Plaintiff, or in any other way than by means of the mortgage from the latter to the Grants in 1916. Plaintiff on the other hand gives his own account of title to the "excluded" lands and of course it is open to Defendant to accept that so far as he may think it helps his case. What Plaintiff says is that the excluded lands comprised 8 acres in all; that Mahon himself sold three of these to outsiders, and that he, Plaintiff, brought the remaining five from Mahon soon after 1903, but took no conveyance of them. He goes on to testify to certain subsequent transactions of his own with those five acres which need not concern us here except in that he says that the land in dispute was part of the five acres and still vested in himself, having been neither mortgaged by him to the Grants in 1916 nor otherwise disposed of. We reach then the position that Defendant in order to succeed must rest entirely upon the mortgage to the Grants, and so must show, either by express words or necessary implication, that it included that part of the lands (excluded from the conveyance Mahon to Plaintiff's father) which Plaintiff brought from Mahon. Let us turn to its parcels as described in the first schedule to the mortgage. The words are "All those "plantations or estates called and known by the names of Telescope and

“Paradise situate in the parish of Saint Andrew in the island of Grenada “containing together by estimation 320 acres or thereabouts English Statute “Measure, being the entire estates which were sold by William Thomas “Mahon to Alfred Rennie, and which estates lands and hereditaments the “said Alfred Rennie, was in possession of up to the time of his death, and “which since the death of the said Alfred Rennie have been and now are in “the possession of the Borrower together with, etc.”

The Defendant must rely upon the words from the second “and which” to the end. He contends therefore that those words are not merely explanatory of, but add to, those which precede them, so that while the description so far as “up to the time of his death” refers only to what the elder Rennie had, the words “and which since the death of the said Alfred Rennie have “been and now are in the possession of the Borrower” are wide enough to include, and must be taken to include, other lands (namely those originally excluded) so far as these other lands formed part of Telescope Estate and were in Plaintiff’s possession when he mortgaged to the Grants. In support of this interpretation it is urged for Defendant that Plaintiff must have meant to mortgage all he had at Telescope. We do not see from the evidence why he should be taken so to intend; but in any case the words are quite manifestly relative to and descriptive of something preceding them, otherwise we should have had “and also those other lands which,” or something of that kind, instead of the simple relative actually used. Further, the description “and which since the death of the said Alfred Rennie have been “in the possession of the Borrower” could not possibly apply to land which the Plaintiff only came into possession of, according to his evidence, (and there was no other before the learned trial judge) at a date subsequent to his father’s death. There is no sort of ambiguity in the language of the description, and therefore no ground for admitting any evidence of outside facts to explain it, such for instance as that Plaintiff’s conduct at the time showed he meant to give security over everything he owned at Telescope: a contention on which much reliance has been placed. Of course had there been any evidence that the disputed land was part of the land which Plaintiff got from his father, *i.e.*, the bulk of the estate, it would have been relevant; but there was none such. The words of the Grants’ mortgage in their natural and ordinary meaning which must be given them, unless the context indicates otherwise, (which it does not) merely mean that Plaintiff has now what his father bought from Mahon.

The lands excluded from the 1901 conveyance were therefore not included, on a proper interpretation of it, in the Grants’ mortgage, and it becomes quite unnecessary to go into the history which Plaintiff gives of how he dealt with them, for he is in no event bound to prove his own title.

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Defendant therefore having failed to show that the disputed land was included in one branch of the title rather than in the other between 1901 and 1916, and having failed also to show that the mortgage of the latter year to the Grants, which admittedly forms his own sole root of title, reunited the divided branches has not discharged the onus of proving a title in himself to the land in dispute. Whatever the weakness of Plaintiff's own title as against third parties, it is irrelevant to the issue here, and Defendant cannot take advantage of it.

The learned judge below was in our opinion right and the Appeal must be dismissed with costs.

IN THE WEST INDIAN COURT OF APPEAL.
NELSON CANNON v. PERCY CLAUDE WIGHT.
[NO. 2 OF 1934—BRITISH GUIANA.]

Before Sir CHARLES F. BELCHER, C.J., Trinidad and Tobago, President; Sir ROBERT H. FURNESS, C.J., Barbados; and Mr. BERNARD A. CREAN, C.J., British Guiana.

1935. APRIL 15, 16, 17.

Contract—Construction—Surrounding circumstances—To be considered—Purchase—Meaning of.

The word “purchase” is an agreement interpreted in the light of the surrounding circumstances.

L. A. P. O'Reilly, K.C. (S. L. van B. Stafford with him) for the appellant Nelson Cannon.

E. G. Woolford, K.C., for the respondent Percy Claude Wight.

Cur. adv. vult.

The judgment of the Court, which was read by the President, was as follows:—

Appellant, plaintiff below, sued respondent for damages for breach of agreement. The learned judge held at the conclusion of plaintiff's case that there was no evidence of breach fit for a jury and gave judgment accordingly for defendant. The evidence given by plaintiff and his witnesses showed that prior to February, 1932, plaintiff owned an estate subject to a mortgage to Mrs. D'Abreu. Towards the end of February a mortgagee's sale was imminent, and appellant desirous of saving something from the wreck, made suggestions to defendant of which the tenor was that the latter should buy and allow him (appellant) to sell

as agent in lots. On February the 23rd the mortgagee herself bought the property in, and on the same day respondent bought it from her; the appellant put in the latter agreement but said that at material times he did not know its exact terms (although a witness to it), but that at the time it was entered into he was aware there was some discussion between vendor and purchaser as to rate of interest. In fact the agreement was for \$4,700 deposit immediate possession and balance \$42,300 in six months at 6 per cent, with right of earlier payment and transport on payment of balance, and a provision for forfeiture of deposit on default. Next day 24th February the agreement sued on was made in the form of a letter addressed by the appellant to respondent and approved by the latter. It begins "You will purchase from Mrs. D'Abreu Bel Air Park property for the sum of \$47,000," and then it proceeds to provide (summarising its terms in what appears to be their undisputed meaning) that the appellant is to have an opportunity for six months of selling enough of the property on an agreed subdivision to bring in by way of purchase money a sum equal at 23rd of August 1932, to \$47,000 plus interest from 23rd February, at 6 per cent and is to try to do so; such sum, if obtained, to be paid over to respondent and then the appellant was to have for his reward half the unsold lots; otherwise nothing, save for certain conditional rights which it is agreed, in the events which happened, did not materialise.

Appellant did not sell \$47,000 worth of lots or anything like that. After the lapse of the first six months the parties agreed to extend the terms to 6th November, 1932; it is enough to say that nothing was done under this extension.

The argument put forward by Mr. O'Reilly on behalf of the Appellant is that there was implied in clause (a) of the agreement a promise by respondent to obtain title forthwith after the 24th February, or at least soon enough thereafter to allow appellant a reasonable time in which to affect his sub-sales before the six months were up: it was not contemplated, it is argued, that any such should be effected till respondent obtained transport of the whole property. Admittedly, respondent did not get transport till several months after the six had expired, and appellant says that he was thereby prevented from doing his own part and earning his reward for it. This argument necessarily turns on the meaning of "purchase" in the first clause. Mr. O'Reilly says it must mean "purchase at once for cash and get transport at once," because as between a vendor and a purchaser that is what the law will import. But this is not an agreement for sale and purchase: it is so far as the respondent's obligations are concerned, an agreement whose main object is not to give appellant transport against cash but to place him in a position to effect sales to others, and unless more is said or implied that object

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would be satisfied by any original terms of purchase which would enable respondent to re-sell through the appellant. Something more is said, indeed, in clause (d), which may reasonably be interpreted to mean (it is not necessary, however, to decide this) that when the aggregate sub-purchasers have paid \$47,000 they will get their transports within a limit of six months. Subcontracts could be made on that footing, and if they were so made and to the requisite value, appellant would have earned what he bargained for. If, therefore, we regard clause (a) as embodying an executory promise on the part of the respondent, it does not necessarily imply any promise for the immediate obtaining of transport.

But when we look at the evidence adduced on appellant's behalf, to the effect that the respondent had already bought the property the day before the agreement of the 24th of February was signed, it becomes obvious that even if the language of clause (a) standing alone could be interpreted as importing an engagement to obtain transport forthwith, the words cannot possibly bear that meaning when taken with the circumstances attendant on the documents executed. In those circumstances, a meaning otherwise natural becomes sheer nonsense; for neither party, it is clear, contemplated a further purchase, or that respondent would pay his deposit twice over, as would be the case if the words are read as referring to an engagement not yet entered into. We must find some other meaning, and at once it appears, again by the plaintiff's evidence, that the reference is to the past, to a contract already entered into. It may be said that some element of futurity may still be implied, namely, a promise to observe outstanding obligations; but even if the word "purchase" is strained to mean "complete in the future an agreement to buy already made" the reference must still be to the executed contract since no other was ever in contemplation.

Clause (a) is, in effect, viewed in its proper surroundings, a recital of the terms of that contract so far as was necessary to set out the position of the respondent as owner of the land, in the usual business sense, and a setting out of the reason for the appellant having to sell lots to a particular aggregate value before he should become entitled to have half the remainder transported to him. The other terms, whatever they were, were quite immaterial to the present agreement.

The language is not particularly apt, in its use of the future tense instead of the past, but when we learn from appellant's witnesses that a (cancelled) agreement of the day before between himself and the respondent began in almost the same terms (then quite appropriate since the execution sale had not taken place) we can have no difficulty in concluding that it was that circumstance and the using of the old agreement as a draft or precedent which led to the retention of language no longer exactly fitting.

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The existence of that agreement, and its wording, are matters which may be looked at, not to alter anything in the new one, but to explain and give a meaning to words otherwise meaningless; and we find the words will bear that meaning when we look at the whole agreement in its complete setting of the surrounding facts.

We reach, then, the conclusion that on a proper interpretation of the contract the executory obligation of each party was intended to mature, if we may use the term, with that of the other: they were concurrent promises, and since appellant admittedly did not do his part he can in the circumstances not complain that there was any breach, by way of prevention, on the part of the respondent. We think the learned Judge below was right, and the appeal must be dismissed with costs.

Solicitors: For the appellant, *Carlos Gomes*;
for the respondent, *A. G. King*.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

ADELAIDE MARLAY, Appellant (Plaintiff).

v.

MARLAY & Co., LIMITED, Respondents. (Defendant).

Before Sir CHARLES F. BELCHER, Chief Justice of Trinidad and Tobago, President; Sir ROBERT H. FURNESS, Chief Justice, Barbados; and Mr. B. A. CREAM, Chief Justice, British Guiana.

1935. April 27.

Evidence—Sale of shares—Oral contract—Transfer of Shares—Instrument of—Construction of—Articles of company—Transferor entitled to dividends accrued due—Oral evidence not admissible to contradict.

On the 26th January, 1929, M. verbally agreed with S. to sell to him 40 shares along with, as the trial judge found, the right to dividends thereon for the year ended 30th September, 1928, for \$2,720. On the 25th February, 1929, a dividend of 5% was declared for the said period, but it was agreed by the shareholders that it should not be paid until the 31st December, 1929.

On the 28th February, 1929, a formal transfer of the shares was executed by M. in favour of S. to have and to hold “subject to the several conditions on which” M. “held the same immediately before the execution hereof.”

Article 43 of the Articles of association of the company provides that “the transferor shall be entitled to receive back from the purchasing member in due course a fair and just proportion of the dividend which shall be declared and paid by the company for the current year.”

Article 10 provides that the company shall not recognise any interest in the nature of trust.

Held (1) that under article 43 the transferor will be entitled to a proportion of the current year’s dividend up to date of settlement or at least of

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agreement of sale; *a fortiori* to the whole of any dividend declared in respect of a past year as in this case;

(2) Where parties choose or are obliged (as here) to embody their agreement in permanent form the law provides that an intention expressed or necessarily implied therein may not be varied by oral testimony directed to show that really something else was meant;

(3) that oral evidence was not admissible to show that the right to the dividend for the period ended 30th September, 1928, was sold by M. to S.

(4) that article 10 was absolutely fatal to the claims of the company to found a defence in equity.

The President delivered the following judgment of the Court:—

This is an appeal by plaintiff from the judgment of Manning J., for the defendant Company in a claim by the administratrix of a shareholder for an account in respect of dividends, and for the eventual payment of what should be found due.

The claim was originally in respect of two blocks or shares, 80 and 40 respectively; but the appellant has before us not disputed the correctness of the judgment as to the former. We are concerned therefore with the lot of 40 shares only.

On 26th January, 1929, the intestate (who died on 5th May of the same year) verbally agreed with one Marfoe, as Attorney for one Soutoi, to sell Soutoi the 40 shares for \$2,720.00 which is at the rate \$68 per share. No transfer was prepared at the time, but the whole purchase money was paid.

On 25th February, 1929, a dividend of 5% was declared by the Company in respect of a period then already past, namely, the year ending 30th September, 1928: but by consent of the shareholders (including the intestate who at that time held 20 other shares as well) the dividend was not paid forthwith upon any of the share capital, but was used by the company until 31st December, 1929.

On 28th February, 1929, a formal transfer of the 40 shares prepared by a solicitor was signed. The habendum is “subject to the several conditions on which” transferor “held the same immediately before the execution hereof”. This transfer, according to the books, was registered on the same day. When the dividend money was distributed in December, 1929, the Company paid that part of it which was referable to the 40 shares to the transferee Soutoi, and it is this payment which has given rise to the action, the appellant claiming that, her intestate being the person registered when the dividend was declared, it ought to have been paid to her.

The defence was that it was part of the verbal agreement for sale of the 40 shares that the whole of the dividend then about to be declared should go to the purchaser. The plaintiff objected to the reception of evidence of this character as conflicting with the terms of the written transfer, but nevertheless it was admitted.

The learned judge held that the date of sale was not later than 26th January; that the contract was oral and that it included as one of its provisions that the dividend about to be declared

should belong to the purchaser. The issue (which was before him as preliminary matter) whether or not the shares had been sold by the intestate on 26th January, having thus been decided against the plaintiff, it did not alter the legal position that the purchaser (by reason of Article 126) might not have been able herself in her own name to enforce payment against the Company if the latter had refused to pay her: the Company in fact had not refused but had paid her, and she was the person entitled as against the only other party concerned, the Company having for itself no interest. This is the effect of the judgment as we understand it.

Before this Court the argument of Mr. Wooding for the appellant has been that the terms of the contract having been reduced to writing, ought not to have been allowed to be contradicted by oral evidence: and that in any case the Company cannot set up the rights of a third party as against a claim by the registered owner. Mr. O'Reilly on the other hand puts the respondents' case in this way: on your (appellant's) own showing you had nothing but a bare legal interest, a bare trusteeship for Soutoi arising out of the oral contract of sale. Soutoi being then the real creditor (as the Company was the debtor) in respect of this dividend, the Company, knowing the facts to be that if it paid appellant the latter would pocket the money in breach of trust, was entitled, nay bound (in order that every one should receive his due and no more) to prevent this by paying Soutoi, the real owner of the money.

We proceed to examine the evidence and documents in these aspects.

Nothing would appear to hinge on delay in paying out the dividend: the material time, as regards registration, is the date of the dividend being declared: on that date, as we have seen, appellant's intestate was registered owner.

Now what is the proper construction of the document of transfer? It is dated 28th February, but we think that evidence was rightly admitted to show that it embodied a transaction of earlier date—we may take this as 26th January—and that the habendum (which we have quoted above) is to be read as speaking from that earlier date.

What then were the conditions which the habendum embodies? Surely, the conditions existing immediately before the agreement to sell, and the obviously material conditions are the articles of association. As to dividend, Article 43 says that "the transferor shall be entitled to receive back from the purchasing member in due course a fair and just proportion of the dividend which shall be declared and paid by the Company for the current year."

In this case the disputed dividend is not for the current year at all, but for a year past and gone. (A dividend of 1% was in fact declared later for the "current" year. No doubt the parties may agree to waive the effect of the article (which affects

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members *inter se* and not the Company), but, if their agreement is silent, the transferor will be entitled as against the transferee to a proportion of the current year's dividend up to date of settlement or at least of agreement to sell: a fortiori, to the whole of any dividend declared in respect of a past year as in this case.

Is then the agreement in the present case silent on the material point or can we accept Mr. O'Reilly's argument that the real agreement was the oral one of 26th January which included, as he says, an express provision in favour of the purchaser as to the destination of the dividend then just about to be declared? In one sense it may be said of every written agreement between parties whose previous discussions are verbal that the writing is not itself the agreement: in such a case those concerned do not take up the pen to write till their minds are at one, and particularly is this true where a formal document is in question. But the law of evidence covers that case, and if the parties either choose or are obliged (as here) to embody their agreement in permanent form, the law provides that an intention expressed or necessarily implied therein may not be varied by oral testimony directed to show that really something else was meant. Circumstances may indeed be given in evidence to explain the writing: here, for instance, the fact of payment in full may be admitted to show that the document is to be read as speaking from an earlier date than that which it bears. That does not affect the parties' intent on the matter now in dispute. But the evidence of Mr. Marfoe and Mr. Hing King went to alter the written evidence of the parties' agreement, and we think it ought not to have been admitted. We may say that we do not see the slightest reason to doubt its accuracy, while the probabilities are all in its favour. No one in the position of Calix Marlay would be likely to want in the circumstances to retain a right to receive an apportionment of the dividend. But this could have been provided for when the document was prepared, and such was not done, though those interested in having it expressed were in control of the situation. The facts (except as to the Company's knowledge of intended breach of trust) may well be as Mr. O'Reilly contends, but however that may be they cannot be established because of the rules of evidence. As the so-called intended breach of trust there is no evidence of it at all.

But that is not all. This is not a suit between the parties directly interested, but between one of them and the Company which has chosen to pay the other what in our view could not be proved to belong to that other. Even had the Company been right in its view of the parties' legal claims *inter se*, Article 10 seems to us absolutely fatal to its claim to found a defence in equity. The Company has in terms agreed with members by the Article not to recognise any interest in the nature of a trust.

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If the Company had paid Calix's representative instead of paying Soutoi what claim could the latter even with the best equitable right in the world to the money possibly have had against it in the light of this article? Surely, none at all. It chose to ignore its own articles and it must abide the consequences.

On either ground the appeal as to the 40 shares succeeds and the judgment appealed from must be set aside and in lieu thereof there should be substituted judgment for the appellant against the Company for the whole of the 5% dividend on the 40 shares. Appellant to have costs of appeal, but as from date of *forma pauperis* order, on that footing only: general costs below to appellant, costs limited to the issue *re* the 80 shares to the respondent, with set off.

Appeal allowed.

IN THE WEST INDIAN COURT OF APPEAL.

R. v. MOHAMED KHAN.

[BRITISH GUIANA.—NO. 1 OF 1936.]

Before Sir CHARLES F. BELCHER, Kt., Chief Justice of Trinidad and Tobago, President; Sir JAMES S. RAE, Chief Justice of the Leeward Isles; and Mr. C. M. MURRAY-AYNSLEY, Chief Justice of Grenada.

1936. FEBRUARY 2, 4, 7.

Evidence—Confession—Threats by persons not in authority—Induced by—Whether admissible in evidence—Hearsay—Inadmissibility of—Jury informed of, during the trial, but not in summing up—Whether misdirection in law.

A confession induced by threats from persons not in authority is admissible in evidence.

A. and B. were tried together for murder. A. was acquitted while B. was found guilty and sentenced to death. A. had made a statement in which he incriminated B. This statement was admitted in evidence, but the judge, in the presence of the jury, pointed out that a confession is only admissible in evidence against the person who made it and not against the other accused. In the course of his summing-up the judge did not repeat to the jury what he had already said in the course of trial. He, however, dealt with the evidence separately with respect to each accused.

Held, that the judge in his summing-up did not direct the jury that the statement made by A. was evidence against B., that there was no misdirection in law, and that the conviction must be affirmed.

Case stated by the Chief Justice of British Guiana under section 174 of the Criminal law (Procedure) Ordinance, Chapter 18 for the consideration of the West Indian Court of Appeal.

S. J. Van Sertima, K.C., for Mohamed Khan.

Hector Josephs, K.C., Attorney-General (*S. E. Gomes*, Assistant attorney-General, with him) for the Crown.

Cur. adv. vult.

R. v. M. KHAN.

PRESIDENT: The Court is asked to answer two questions reserved for it, as questions of law, by the Judge upon a criminal trial.

There were two prisoners, Mohamed Khan and Altaff Hussein, the charges against them being the murder of seven persons on the Island of Leguan on a night in the month of May, 1935. The trial lasted 22 days and at the end of it the jury acquitted Altaff Hussein, and (upon all counts, as may be inferred) found Mohamed Khan guilty and he was sentenced to death.

Mohamed Khan made a statement to the Police in which he implicated himself in the crimes and this statement was admitted in evidence against himself. The first question we have to answer is whether it was rightly so admitted. We have no doubt that it was. It appears that an hour before he made the statement he was subjected to threats by a hostile crowd, and we think it is a reasonable inference that these threats made the prisoner afraid and that his mind was still agitated from the emotion of fear when he made the statement: we may go so far as to say that it appears probable that he would not have made the confession just when he did, had the threats not been used, although the Judge was of opinion that when he made it he had no longer reason to be afraid (he being then in the hands of, and adequately protected by, the police). There was, however, no question of those from whom the threats proceeded being in a position of authority: they were outsiders. So that, even supposing the statement to have been made in order to avoid the violence with which he was threatened, it would have been admissible (if otherwise unobjectionable—its weight being another matter) according to established principle. We were asked by Mr. Van Sertima to say that the rule against the admissibility of confessions induced by promises or threats proceeding from persons in authority over the prisoner, may extend to the case where the threats, whencesoever proceeding, are the cause of the statement being made; whether because the prisoner expects (though unreasonably, as here) to benefit by the confession in the direction of avoiding the threatened violence, or even, it seems, because apart from all expectation of results the threats have reduced him to a mental state which of itself renders unlikely the truth of what he says. To assent to either branch of this proposition would be making new law: it may not perhaps be possible to assign an entirely logical basis to the existing rule, but its limits are clear and we cannot extend them. The question is therefore to be answered in the affirmative: the statement was rightly admitted, as voluntarily made.

The second question, thrown into the form in which alone its answer might affect the conviction, is whether the Judge in his summing-up directed the jury that a statement made by Altaff to the Police was evidence against Mohamed Khan. If he did,

that was clearly a misdirection and we ought to quash the conviction as the Court of Crown Cases Reserved did in *R. v. Gibson* (1887) 18 Q.B D. p. 537, within the principle of which Mr. Van Sertima very properly says he must bring himself if he is to succeed. It is true that there was also in that case an improper reception of evidence, which by itself would have warranted the quashing, whereas in the case before us no objection could have been taken to the mere fact of the statement being put in. for it was clearly admissible against Altaff who made it. But *Stubbs's* case (1855) Dears. l. p. 555 shows, at least inferentially, that a misdirection of law in the summing-up is by itself a ground for quashing a conviction, and though in the history of the Court of Crown Cases Reserved from 1848 to 1907 we can find no case where a non-direction was held to amount to misdirection, there is no good reason why it should not do so: as indeed has been held in the Court of Criminal Appeal (see *R. v. Stoddart* (1909) 2 C.A.R. at p. 229 for a statement of what should guide the appellate tribunal). That reasoning applies equally to either jurisdiction, careful as we should be not to confuse them.

We have then to consider the course of the trial as a whole, and the summing-up as a whole.

The trial included the giving of a great deal of evidence directed to the issue (treated separately) of admissibility of statements, and the first point to notice is that during the hearing of that issue the Judge said, in the presence of the jury, that a confession is only admissible against the maker of it and not against a person jointly charged. Neither counsel made in his address any reference to the question of extent of admissibility of the prisoners' statements.

The Judge in summing-up did not directly refer to it; at least he did not clearly draw the jury's attention to the necessity for disregarding the allegations in such a statement except as against the maker of them. That he should have done so goes without saying, more particularly when one looks at Altaff's statement of the 15th May which lays practically the whole of the blame on Mohamed Khan. Whether any direction whatsoever could remove the effect of that dramatic series of accusations from the jury's mind—I personally have little doubt that it could not, once it had been read to them—is immaterial: just as it is also immaterial that in Mohamed Khan's own confession and in the circumstantial evidence against him, there was ample other matter on which the jury might properly have convicted him. The practice of the Courts in criminal trials requires the direction, and specific warning, to be given and I have no doubt that a Court of Criminal Appeal would strongly deprecate their omission, (the question of "substantial miscarriage of justice apart). But our powers are more limited, and whatever objec-

tions may be taken to the adequacy of the summing-up, this Court must, before it can intervene, be satisfied affirmatively that there was a misdirection, not merely an omission to say what ought to have been said, Unless of course we find that that omission does amount, in its setting, to a misdirection. Such reference as there is in the summing-up to the confessions occurs at pp. 151 - 152. of the typescript. It includes one phrase which, if it stood alone, might be taken as a positive misdirection. That is to be found on page 152 and it reads "the whole of the statements made by the accused will be considered by you and not only the particular parts which implicate them." But, taken in its context, I am satisfied that what that means is either that the statements are evidence for the makers (respectively) as well as against them, or, at most, that the whole of a statement may be looked at as against the maker of it and not alone those parts of it which on the face of them directly implicate him in the commission of the crime charged.

Then there is matter immediately preceding the last-mentioned which might be regarded as raising, by omission, an inference to the same effect. It forms the rest of the learned Judge's references to the prisoner's statements and it runs as follows:—"In addition to the evidence I have read to you there are the confessions of the accused. Altaff made several statements and in one of these of the 15th May has implicated himself. I am not going into them in detail, but I point out to you what I consider is the important part in Altaff's statement for your consideration. He described Mohamed Khan slashing the old man (A. R. Khan) and one of the watchmen. After that he says: "Then we meet Yousouff and Jaitoon coming. He told me that I must chop the little boy and he will chop Jaitoon. I chopped the little boy and he went over and chopped Jaitoon." When this was done he goes on to say that he and Mohamed Khan went to the house of the old man. A. R. Khan, and described how Alima and the baby girl were killed. Another important part of this statement is that he and the accused wore yachting shoes in A. R. Khan's house that night which they found in the house near the table. The statement of Mohamed Khan which implicates him was given on the 14th May. In it he described the killing of these people at the back-dam. He says that Fancup said: "Give me back my cutlass" it was my cutlass he had, then he said. "You must chop, if you don't chop, I will chop your head." Then I chopped but I do not know whether I chopped off the finger or the hand." In this statement Mohamed Khan describes what occurred in the house of A. R. Khan that night and how the young wife of Majeed Khan was killed and the little girl.

After a close examination of this passage, however, I reach the conclusion that the proper and natural meaning to be attached to

it is that it amounts to a selection by the learned trial Judge out of each accused's statement, of the matter of self-accusation which it contained. It is unfortunate that, in dealing with either confession, the Judge should have referred by name to the other accused, but it is clear that when reference had to be made to, *e.g.*, Altaff's confession that he was in the house when the two female victims were killed, it was practically impossible for the learned Judge to sever this from all allusion to the circumstance that some one else was also stated to have been present in the house as the killer.

If the Judge had really meant the jury to take Altaff's statement into consideration as against Mohamed, we should have had some reference (which there is not), to those statements of Altaff relating to actions of Mohamed with which he, Altaff, does not associate himself.

It was argued by Mr. Van Sertima, "But how could an ordinary jury keep these matters separate in their minds without very careful direction?" It may be conceded at once that they could not: nor, as I have indicated above, do I think that the very clearest directions as to their duty would have been effectual to wipe out Altaff's statement entirely from their minds, once it had been read to them. But as long as such statements can be so read in a criminal trial at all, the risk of that must exist: to try the prisoners separately is the only remedy.

To conclude, I conceive that as a Court of Crown Cases Reserved that which we must consider, and alone consider, is what the reasonable and natural meaning is of the words the Judge used, and what is the reasonable and natural inference to be drawn from what he omitted to say as to the effect of Altaff's confession upon the charge against Mohamed Khan.

Applying that test, I do not feel able to say in this case that what the Judge said, or did not say, amounts to any misdirection, and I answer the second question in the negative: there was no misdirection in law and the conviction must stand. Perhaps it is as well to add that in my opinion, which my brother Judges share, this is a case in which, whatever objections might have been taken to the summing-up, there certainly was no miscarriage of justice in the verdict which convicted Mohamed Khan.

CHIEF JUSTICE OF THE LEEWARD ISLES: I have had the opportunity of reading the judgments of the President and of my brother Murray-Aynsley, and I am in full agreement that the confession of Mohamed Khan was properly received in evidence.

I am also in agreement on the second point of the case stated that the powers which this Court may exercise are limited to those which could have been exercised by the Court of Crown Cases Reserved, namely, questions of law alone.

The judgment of the President partially rests on his finding that the learned Chief Justice, when admitting the confessions of

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both accused, ruled that the confession of each was only evidence against themselves individually and not evidence against each other. Secondly, that at no time during the trial or in the summing-up was there any direction or indication to the contrary. I am in agreement with the view that in his summing-up the learned Chief Justice, dealt with the confessions separately when addressing himself on the evidence which affected each of the prisoners individually. He did not, however, repeat his cautions in summing up to the jury. The question is, therefore, whether in referring to the confession of Altaff on pages 151 and 152 which implicated the appellant, the learned Chief Justice did not thereby place before the jury evidence which could not rightly be considered by them as affecting the appellant. I am satisfied that the learned Chief Justice had no such intention. It is submitted, however, by counsel for the appellant, that whilst he could not contend that to the trained mind of a lawyer he could say there was a misdirection, yet when applied to the untrained mind of a jury, the reference to Altaff's confession which implicated the appellant Khan was such that the jury could reasonably feel that they might regard the confession of Altaff as evidence against Khan.

The learned Chief Justice then proceeded to deal with the statement of the appellant Khan which implicated him. He proceeds as follows: "But as Mr. Gomes, for the Crown, has pointed out to you the whole of the statements made by the accused will be considered by you and not only the particular facts which implicate them."

"The statements are before you and you can consider them and their contradictions and decide on what is true."

It is these last two paragraphs of the summing-up when read with the portion relied on by counsel for the appellant which have given me much thought. The wording of the last two paragraphs is ambiguous, and, if the summing up had ended there, it might be said that the failure again to direct the jury separately with regard to the individual confessions might likely have led them to believe that in considering the "whole of the statements of the accused" they could consider the confession of Altaff as affecting Khan. If so construed it would, of course, amount to a misdirection in law.

The learned Chief Justice, however, in recapitulating the evidence at the close of his summing-up distinctly dealt with the facts of each prisoner separately and in no way indicated that the confession of the one should be taken as evidence against the other. Following on he says: "I see no reason why you should not believe the Crown witnesses I have just mentioned on the different points I have put before you, or why the confessions should be untrue. But the decision is entirely with you and if

you believe these witnesses and think the confessions are true then you must find both of the accused guilty.”

The direction I have before referred to, taken separately, may possibly be said to be on the border line and was such as the jury might have been misled, but when it is considered in connection with the recapitulation of the summing-up of the learned Chief Justice it is clear that he dealt with the evidence separately and referred to the *confessions* of the accused and not the statements of the accused. Had the Judge any intention of withdrawing his ruling on the admission of the confession, it is rational to think that he would have done so and would so have been understood by the normal jurymen.

My answer to the question submitted is in the negative.

CHIEF JUSTICE OF GRENADA: As regards the first question in the case stated I am of opinion that the learned Chief Justice had ample evidence before him on which he could decide that the statement objected to was admissible, and I have nothing to add to what has been said already.

As regards the second question I will add a few observations, although generally I am in agreement with the reasoning of the President.

It will not be contended that there is any express misdirection as to the value of Altoff's statement as against the appellant. The most that can, I think, be alleged is that certain passages of the summing-up already quoted might lead an uninstructed jury to believe that they might regard Altoff's statements as evidence against the appellant, *e.g.*, page 152, lines 22-29.

In dealing with any summing-up it is always important not to stress unduly, isolated passages. It is necessary to consider what was said during the trial, the case as put by counsel and the summing-up as a whole (see *Turner's case* (1926) C.A.R. 171).

In the present case we find:—

(a) That a correct statement of the law was made during the hearing, at the time when the question of admissibility was under consideration. The statement was made “in the presence of the jury” and we must take it that it was made in such circumstances that the jury were likely to pay attention to it.

(b) No attempt was made by the prosecution to take the statement of Altoff as being evidence against the appellant.

(c) During the summing-up the learned Chief Justice was careful in dealing with the statements to emphasize in each case the facts incriminating the respective makers of them and not the allegations against the other accused.

Taking these three together I fail to see how there can be a misstatement of the law to the jury. It is true that it would have been more satisfactory if the necessary warning had been repeated several times during the summing-up. But, if it is

conceded that the powers of this Court are limited to those of the Court of Crown Cases Reserved, I think that defects such as these are not within our province any more than the many other possible mistakes in the conduct of a trial which will cause the Court of Criminal Appeal to intervene where the Court of Crown Cases Reserved was unable to do so.

The extensive research of counsel has been unable to find any case in which the Court of Crown Cases Reserved intervened in any case resembling the present one. In every case there was a misreception of evidence or an erroneous direction in a matter of law. As a matter of law I am unable to draw any distinction between a statement of the law during the hearing and one made during the summing-up. The Court of Criminal Appeal, in cases where a warning or direction was necessary, has been satisfied where it has been given during the hearing and not repeated during the summing-up, (e.g. *Stoddart's* case (1909) 2 C.A.R. at p. 238 *Howarth's* case.)

As to the point at which a warning or direction should be given, I think that this is a matter of expediency depending on the circumstances of the particular case.

Taking the case as a whole, I am unable to see that there was a misdirection in law, although it will be conceded by all that a further warning to the jury during the summing-up would have made the summing-up more satisfactory.

In my opinion the answer to the first question is in the affirmative; to the second, in the negative.

The conviction must stand.

J. B. BECKLES v. E. D. HOWELL.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE COURT OF ERROR OF BARBADOS.

JOHN BERESFORD BECKLES, Appellant (Defendant),

v.

EVERTON DRAYTON HOWELL, Respondent (Complainant).

Before Sir CHARLES F. BELCHER, Chief Justice of Trinidad and Tobago, President; Sir JAMES S. RAE, Chief Justice of the Leeward Islands; and Mr. B. A. CREAN, Chief Justice of British Guiana.

1936. FEBRUARY 15.

Local Government—Vestry—Board of Guardians—Separate entities—Vestryman—Disqualification—Poor Relief Act, 1892 and Vestries Act, 1911 (Barbados).

The appellant was convicted under section 9(2) of the Vestries Act, 1911, for that he sat and voted as a member of the Vestry on occasions after his seat had become void under section 9 (1) by reason of his entering into an agreement with the Vestry for supplying goods for the parish while himself a member of the Vestry.

On appeal to the West Indian Court of Appeal,

Held (1) that on a true construction of the Poor Relief Act, 1892 and the Vestries Act, 1911 the Vestry and the Board of Guardians were independent entities;

(2) that the disqualification under section 9 (1) of the Vestries Act, 1911 affected vestrymen only, and not members of the board of guardians;

(3) that the agreement to supply goods was made not with the Vestry but with the Board of Guardians; and

(4) that therefore the appeal must be allowed and the conviction be quashed.

The President delivered the following judgment of the Court:—

The Magistrate of District “A” convicted the Appellant of offences under section 9 (2) of the Vestries Act, 1911, in that he sat and voted as a member of the Vestry on occasions after his seat had, as was alleged, become void under section 9 (1) by reason of his entering into an agreement with the Vestry for supplying goods for the parish while himself a member of the Vestry. To deal shortly with the facts, which though not altogether clear in detail are not disputed, it appears that defendant was elected a vestryman of St. Michael’s for 1934 and again for 1935; that in December, 1934, he sold pigs (one at a time) to the Superintendent of the Almshouse for the use of the inmates and did the same again in January, 1935; it is therefore clear that if the sale of the first pig in either month was a “contract for supplying goods” such as avoided his seat under section 9 (1), he incurred penalties for each time he sat thereafter during the then current year; the number of sittings is, it would seem, agreed at ten (taking the aggregate of both years) and the total penalties imposed were

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£25, at £2. 10. for each occasion. He appealed from Mr. Ward's decision to the Assistant Court of Appeal. Mr. G. C. Williams, Judge of that Court, confirmed the decision, and on an appeal being brought to the Court of Error the learned Chief Justice, in that Court, dismissed it with costs. From the last mentioned judgment the defendant appeals to us.

It will be useful to note the grounds of the antecedent decisions. The magistrate found that, to be disqualificatory, the contract must be one made either with the Vestry of which the supplier (as we may call him for convenience) is a member or with a Parochial Board of which the supplier is a member. (The Board of Guardians is a Parochial Board as appears from section 8). He found further that a Board of Guardians has no independent existence as a unit of parochial administration and that it is a mere statutory committee of the Vestry which, in his opinion, is the proper authority to make contracts for almshouse supplies. Defendant was a member of the Vestry when he made the first contract in each year, and therefore disqualified thereby for the year in question and so exposed to penalty. The reasons given by the Judge of the Assistant Court of Appeal for upholding the Magistrate's decision were in effect the same as those which actuated the latter, save that the learned judge arrived at the conclusions he did, in the main, by a consideration of the nature of the control exercised over Mr. Waite, the Superintendent, which he found to originate from and reside in the Vestry. The learned Chief Justice was particularly impressed by the wording of section 24 of the Poor Relief Act of 1892 which, while giving the Guardians charge and control of the almshouses, ends with the phrase "subject to the authority of the Vestry." He considered that, whatever their duties under the law, there is nothing to prevent a Vestry from buying food for the almshouse inmates if it chooses, as in fact this Vestry ordinarily did (in the case of fresh meat at least) by calling for and accepting tenders; and the learned Chief Justice found that the contract in question should be treated on the same footing as if made upon tender called for and accepted by the Vestry; more particularly as the evidence shews that the tender-contract price did in fact determine what sum Mr. Waite should pay defendant for his pigs. The inference drawn by the learned Chief Justice was that these subsidiary contracts were also, like the main contract, made with the Vestry and not with the Board of Guardians.

We think we should dispose at the outset of a contention advanced by Mr. Adams that although a contract by a vestryman with a Board of Guardians may not in terms be obnoxious to section 9 (1), it should be so regarded by the Court because of the manifest object of the Legislature. It is not, however, enough that an action, to involve a penalty, should be within the mischief of a Statute, it must also be within its words. The legis-

ture has clearly not provided for this case, and in this we agree with the learned Magistrate; we must not strain a penal clause from any consideration that the consequences of our not doing so may be to let persons escape who are guilty of doing things equally reprehensible and of the same character as those which unquestionably involve the doers in punishment. The defendant then is only liable if the contracts in question were made with the Vestry; not if they were made with the Board of Guardians. For he was a member of the Vestry, and he was not a member of the Board of Guardians, when he supplied the goods.

Admittedly, Mr. Waite bought the pigs for the use of the almshouse and therefore as agent for a principal, who must in the circumstances have been either the Vestry or the Board. We may fairly presume that he was buying upon proper authority, proceeding from those whose duty it was to supply the almshouse inmates; and the legal incidence of this duty, that is to say, whether it fell upon the Vestry or upon the Board, must be the determining factor in our decision. It is of course conceivable, if not as a legislative provision likely, that it may rest on both of them or rather, since duplication ought not in reason to be presumed, upon either indifferently, so long as one of them performs it.

Mere course of dealing cannot be conclusive; for the bodies are, as we shall see, so nearly connected that there is no reason why one should not occasionally act as agent for the other in the performance of a statutory duty, and this may at times be convenient. If we find that the law definitely casts a duty upon one body and one only, but we also find another body performing the same duty, agency upon request is the most reasonable explanation. We must therefore examine the provisions of the law in order to see whose duty it is to buy almshouse food supplies.

In point of date the Poor Relief Act 1892-2, comes first, and we shall therefore begin with it. It is called an Act to consolidate and amend the Acts of the island relating to Poor Relief; we are satisfied that there is nothing which can be called Common Law relative to the subject, and so the Act (with the laws relating to Vestries and other laws, which are referred to in section 4) may be regarded as containing the whole of the relevant statutory provisions. There is to be over all a Poor Law Board to see that the Vestries perform their duties. Then there is to be an Inspector to visit (*inter alia*) Almshouses, and to make reports to the Poor Law Board. Part II of the Act deals with Boards of Guardians for the poor, of which there is to be one for each Parish, consisting of three members selected by the Vestry of the Parish from its own number, with the Churchwarden as Chairman; the Vestry fix and pay the Guardians' remuneration, grant leave of absence, etc., and appoint to vacancies. A Board is to meet once a fortnight and to report to the Vestry if it omits to meet. The Vestry is to

make returns to the Poor Law Board twice a year of almshouse inmates, staff, dietary scales, and expenditure, with particulars also of outdoor relief given, and also to furnish "further information....in their power....appertaining to their duties in connection with poor relief." The Vestry and the local Board of Guardians jointly prepare annual estimates for poor relief expenditure, and if the Guardians think a supplementary vote necessary they are to ask the Vestry to pay it and the Vestry is to do so, just as we shall see that it levies the ordinary rate out of which normal poor relief expenditure is met. The Board of Guardians is to assist and supply information to the Inspector. Then comes the important section 24, in these words: "The local Board of Guardians of each parish under this Act shall have the charge and control of the Almshouses, Infirmaries, or other institutions for the poor in their respective parishes, subject to the authority of the Vestry". By sections 25 and 26 the Guardians are to make regulations and lodge complaints for their infraction; these regulations they are first to submit to the Vestry for approval and then lay before the Governor in Executive Committee for confirmation. Section 27 contains provisions for union almshouses, supported by more than one parish. The Board of Guardians appoint an Inspector of the Poor, at a salary which they fix subject to the Vestry's approval, and the Inspector can take proceedings before the Magistrate in the name of the Guardians whenever the latter might prosecute. Section 30 seems to contain the only direct statutory power to grant outdoor relief; the Guardians sign orders for it, in money or goods, on the Parochial Treasurer or on a supplier; and then there is provision for appeals by individual paupers, from acts or omissions of Inspector or Guardians, to the Vestry. The last sentence of this section seems to us very important; it runs thus: "And provided always that the Vestry shall at all times have and exercise the right of ordering the execution of any duty in connection with the poor which the local inspector or Guardians shall..... omit to perform". Finally in section 31 there is given to the Guardians power to suspend or dismiss the Inspector.

In Part III, section 32 provides that the Vestries are to appoint Medical Officers; these must attend when ordered by the Guardians or any Vestryman; the Guardians are to give the Medical Officers a list of outdoor paupers. The Guardians (section 33) regulate almshouse dispensaries and make provision for medicines, and the Vestry have to allow for this in their rate estimates. The Medical Officers make quarterly returns to the Guardians of all pauper patients, indoor and out, and report to them upon sanitary conditions. The Chairman of the Board of Guardians is to grant relief to unsettled paupers pending settlement, and this to be refunded him on the order of the Chairman of the Guardians of the Parish for ultimate settlement; and is recoverable by

process, apparently to be directed against the latter Guardians; at least an indication that in certain cases Guardians may be sued as such, or their Chairman as such.

Turning now to the Vestries Act, 1911, which also is a consolidatory statute embodying, as appears from its title, pre-existing legislation on the subject, it is to be noted (section 8) that there are at least two kinds of parochial boards in each parish besides the Board of Guardians. Then we find the disqualificatory section 9 under which these proceedings are brought, and nothing more to concern us till we come to section 33, which provides for the appointment by the Vestry of a Parochial Treasurer who must not be a Vestryman; his duties are to receive all rates and pay all orders of the Vestry thereout; by section 36 he pays everything monthly to a bank account upon which he draws (presumably to pay vouched accounts.) Section 50 has been stressed by Mr. Adams; it lays down that it shall be the duty of the Vestry on the 25th March in every year or within 30 days thereafter to provide, *inter alia*, for the maintenance and education of the poor and for that and the other purposes there set out it is empowered to levy rates, so detailed. Section 48 requires the Vestry every June to publish in the *Official Gazette* accounts of what has been raised and spent in the preceding year (to 25th March); these are to be signed by the Parochial Treasurer and are to be in the form of Schedule A which has heads "Revenue of the Parish" and "Expenditure of the Parish" and subheads of expenditure which refer to Poor Relief, Education, Churches, and other matters, and are in turn divided up in minute detail.

Considering now these two laws together it is evident to us that apart from the raising of revenue no duty in regard to poor relief is laid upon a Vestry by the Vestries Act; it is not possible to spell out of section 50 anything more than a requirement to take certain steps once a year to raise money. Nor have we had it shewn to our satisfaction that poor relief was at any time in Barbados an obligation resting on the Vestry by common law, any more than in England, where it appears always to have been statutory; whatever may have been done in practice either there or here out of charity before the relevant Acts were passed. We have nothing therefore but the Poor Relief Act 1892 (and it may be amendments thereof) to consider: whose provisions have been outlined above.

Looking at those provisions as a whole and the scheme of poor law administration which emerges, we find it impossible to say that the Board of Guardians is a mere committee of the Vestry or servants of the Vestry. Poor Law Board at the top, Vestry as it were in the middle, and Board of Guardians at the foundation of the structure in immediate touch with the beneficiaries through the officers whom it appoints, each body has its own functions as part of an organised whole; and since organisation of

poor relief is the manifest end in view it will be reasonable to interpret any doubtful provision as being made with a view to separation, with co-ordination, of functions rather than as permissive of overlapping and consequent clashing. Is it possible then to say that the Board of Guardians is treated by the Act as a committee to be appointed by the Vestry to perform duties which are cast by law upon the Vestry? We cannot think so. That the Vestry pays the Guardians is not very material, for the Vestry raise and (through the Parochial Treasurer) spend the whole of the moneys available for poor relief (and other purposes), so that even the money directly paid out by the Guardians, and the salaries of their officers which they fix, come ultimately from the same common source. It is significant that if the Guardians fail to perform any duty, the remedy, or at least the primary remedy is not for the Vestry to do it itself but to order it, specifically, to be done by the Guardians. We think that is the meaning of the proviso to section 30 but even if it means that they are to get it done by a third party upon the Guardians' default, the result seems equally to exclude the possibility that the legislature meant the duties laid upon the Guardians to be capable from the beginning of concurrent performance by the Vestry. It might be otherwise, no doubt, if anywhere there was given to the Vestry a general duty of relieving the poor; though even then it could well be argued that so far as specific duties had been laid upon another body the general duty had been taken away. But the only general duty the Vestry has is to provide money; we saw that in dealing with the Vestries Act, and there is nothing that we can find in the Poor Relief Act to suggest the contrary. It may well be that at an earlier period of the Colony's history the Vestry by law or custom did as a body perform the whole of the duties appurtenant to poor relief; but we are concerned with the present time and with existing law.

It does complicate the matter a little that the Guardians are each and all Vestrymen, and if the law had said, which it does not, that for the purposes of poor relief the Vestry should be the Guardians, other considerations would arise and we should be loth to find that a mere change of name was enough to render the Guardians a distinct body from the Vestry; it would rather be a question of addition of functions to an existing body. But as the law stands we feel bound to hold that the Guardians constitute a distinct administrative entity with specific and different duties from those of the Vestry though they are subject, in the matter which concerns us, to the Vestry's control; such general or central control, without fusion of functions, is a perfectly familiar element in sub-parliamentary administration; there are many cases in England where local authorities are controlled by a central authority without any form of substitution of the latter for the former being

contemplated. We think then that in section 24 the authority of the Vestry referred to means such authority as is defined or given in the Act, as for instance in section 30 (it has many other functions of a supervisory kind as has been seen); the word authority is vague but this is the reasonable interpretation of it in this place, when we find no wider or concurrent powers given by any provision of the Act to the Vestry in the sphere of the Guardians' duties.

The rest of the relevant words of section 24 are clear and as wide as they can be; the Guardians are to have the charge and control of the Alms-houses; not therefore as a duty of the Vestry which the latter has delegated to the Guardians but as a duty which the law has imposed directly upon the Guardians and not upon the Vestry as a whole. Exactly how the Guardians are to sue or be sued (except where, as we have seen, particular provision has been made) or how execution could be had against them is another matter, but is not material to the present purpose.

We find therefore that Mr. Waite the Superintendent when he bought the pigs from the defendant did so as the agent of the Guardians, and that the latter being the body which has by law the duty of buying food for the Almshouse inmates were the principals, the real party, to the contracts as purchasers; the contracts were made not with the Vestry but with the Board of Guardians and as the appellant was not a member of the latter the contract was not one of a kind to carry with it avoidance of his seat as a Vestryman or the consequential penalties sued for by the respondent and imposed by the Magistrate under section 9.

We agree that had the legislature directed its mind to this class of contract it would have banned it with the rest, for it gives rise to precisely that potential conflict of interest and duty which it is clearly the legislature's object to obviate. It is enough to say that the legislature's words, which are clear, do not carry out that presumed intention, equally clear though that may be by inference.

The appeal must be allowed and conviction quashed with costs here and in all Courts below.

Appeal allowed.

J. E. KENDALL AND BOODHOO v. M. SINGH.

IN THE MATTER OF THE COMPLAINTS BY JANE ELIZABETH KENDALL
AND BOODHOO AGAINST MUNGAL SINGH, A LEGAL PRACTITIONER,

AND

IN THE MATTER OF THE LEGAL PRACTITIONERS
ORDINANCE.

[1931. Nos. 330, 331.]

BEFORE FULL COURT: DEFREITAS, C.J., AND SAVARY, J.

1931. OCTOBER 30, 31.

Solicitor—Delay in repaying moneys to client—Impecuniosity—Misconduct—Punishment—Legal Practitioners Ordinance, Cap. 26, Part II.

Where a legal practitioner through impecuniosity delayed in repaying to his client moneys properly due to him the Court while holding that he was guilty of professional misconduct made no other order except to direct that he pay the costs.

Consideration by the Full Court of two reports of the Legal Practitioners Committee finding that a legal practitioner had committed misconduct.

S. E. Gomes, Assistant to the Attorney-General, for the Legal Practitioners Committee.

E. G. Woolford, K.C., for the legal practitioner.

Cur. adv. vult.

The judgment of the Court was delivered by the Chief Justice as follows:—

This Court has considered two reports by the statutory Legal Practitioners Committee dated the 31st of August and the 6th of October, 1931, finding Mr. Mungal Singh, a barrister-solicitor, guilty of professional misconduct while acting as solicitor for Mrs. Jane Elizabeth Kendall in the matter of a divorce suit she

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instructed him to institute and conduct on her behalf against her husband, and as solicitor for one Boodhoo in the matter of proceedings against one Cooconiah for the recovery of a debt due to Boodhoo by her deceased husband Ramdat.

MRS. KENDALL'S COMPLAINT.

The Committee found, and we agree, that Mr. Singh was guilty of misconduct in that having received money from Mrs. Kendall for the purpose of making disbursements in the divorce suit, after long delay he made no disbursements and did not file the divorce petition, and he failed to repay to her on demand the money delivered to him for such disbursements. We find that Mr. Singh always admitted his liability to repay, and expressed his desire to repay, but that the fulfilment of his desire was hampered by his impecuniosity. However, he has now repaid the total sum he received from Mrs. Kendall. Seeing that he was and is contrite and has by full repayment made such amends as he can, we think that while the Committee's finding of professional misconduct must be confirmed, we may nevertheless deal with him leniently.

BOODHOO'S COMPLAINT.

The Committee found, and we agree, that Mr. Singh was guilty of misconduct in that he refused to repay to Boodhoo money provided by his client for disbursements that did not arise, and, in the resulting circumstances, could not have arisen. His refusal was inexcusable, for it was based on his self-serving conclusion that his client had insulted him; which is a conclusion, it is said, not infrequently reached by some other legal practitioners. We hope it will be generally understood in the future that when a client expresses in harsh language his grievance (whether well-founded or ill-founded) against his solicitor, the solicitor has no power whatever to pronounce judgment against his client for an insult and thereupon to punish his client by appropriating to himself money in his hands belonging to his client. However, this condition of megalomania was not of long duration in Mr. Singh. He was afterwards contrite and willing to repay. He has continued to be contrite, and it was due to his impecuniosity that he did not give early effect to his willingness to repay. He has now made such amends as he can by full repayment. We think that in the circumstances we may deal with him leniently, while confirming the Committee's finding that he was guilty of professional misconduct.

We think that the punitive jurisdiction of the Court will be adequately exercised when we order, as we now do, that in each of the two cases Mr. Mungal Singh do pay to the Secretary of the Legal Practitioners Committee thirty-five dollars for the Committee's costs, which sum includes \$25 for the fee to counsel who moved the Court on the Committee's report.

REX v. H. NICHOLAS.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF THE LEEWARD ISLANDS
ANTIGUA CIRCUIT.

REX

v.

HERMAN NICHOLAS.

Before Sir CHARLES F. BELCHER, Chief Justice of Trinidad and Tobago,
President; Mr. B. A. CREAN, Chief Justice of British Guiana; and Mr.
C. M. MURRAY-AYNSLEY, Chief Justice of Grenada.

1936. MAY 7.

*Appeal—Criminal matters—Error of law apparent upon record of Court—
Record—Meaning of—Writ of error—Criminal Appeal Act, 1907—Chapter 25,
section 5 (Federal Acts of Leeward Islands).*

By section 5 of Cap. 25 of the Federal Acts of the Leeward Islands an appeal lies to the West Indian Court of Appeal in criminal cases “for error of law apparent upon the record of the Court.”

Held (1) that the phrase “error apparent upon the record” is a technical expression which was used to define the cases in which writ of error lay, and

(2) that the word “record” used in this connotation had a precise and known meaning, namely, the formal record left by the Clerk of the Assize or other similar official which recorded certain of the formalities of the trial as indictment, arraignment, plea and issue, impanelling of the jury, verdict, judgment.

(3) that the section is intended to give to the West Indian Court of Appeal jurisdiction in those cases where a writ of error lay before the abolition of those writs by the Criminal Appeal Act, 1907.

PRESIDENT: These two cases are Appeals against judgment and sentence of the Supreme Court of the Leeward Islands in the Antigua Circuit.

It is necessary, before we can consider the Appeals on their merits, to decide the extent of the jurisdiction of the Court in these cases. The power of the Court to hear and determine appeals in Criminal cases arising in this Colony is defined in Cap. 25 of the Federal Acts of the Leeward Islands.

By that Act appeal lies

I. When a point of law has been reserved, which has not been done in this case.

II. By Section 5, “for error of law apparent upon the record of the Court”.

It is therefore under this Section that appeal lies in the present case, if it lies at all.

What is the “record of the Court”? The phrase “error apparent upon the record” is a technical expression which was used to define the cases in which writ of error lay, and the word “record” used in this connotation had a precise and known

meaning, viz: the formal record left by the Clerk of the Assize or other similar official which recorded certain of the formalities of the trial as indictment, arraignment, plea and issue, impanelling of the Jury, verdict, judgment. Certainty and uniformity had been given to the records by centuries of practice. Examples of such records in criminal cases are given in early editions of Blackstone.

Section 40 of Cap. 31 of the Federal Acts of the Leeward Islands prescribes the manner in which the records are to be kept in this Colony.

It has been argued before us that we should give a more extended meaning to the word "record" but, in our opinion, it must be assumed that the draftsman of the Act in using so consecrated a phrase intended to use the word "record" in the sense in which it had been used for centuries by English Lawyers, and further that the Section as a whole is intended to give this Court jurisdiction in those cases where a Writ of Error lay before the abolition of these writs by the Criminal Appeal Act of 1907.

It should be noted that if this is the correct interpretation, the rights of appeal conferred by the two Sections are the same as those existing in England before the year 1907. It is a matter of common knowledge that the Writ of Error was a remedy only in exceptional cases, because although the record set out the formalities previously enumerated, it contained nothing of the evidence produced at the trial or of the directions of the Judge.

For a criticism of the remedy afforded by this writ see the report of the Criminal Code Commissioners quoted in Stephen, 8th Ed., Vol. IV, p. 464, note b.

It is clear to us that none of the grounds alleged come within what would have been the scope of a Writ of Error, and, in consequence, we have no jurisdiction to entertain this Appeal.

We would like to add that, having examined the proceedings in these cases, it does not appear that the trial was in any way unsatisfactory, and nothing has been adduced on behalf of the Appellant which would cause us to interfere even if we had the powers of a Court of Criminal Appeal.

The Appeals must therefore be dismissed.

Appeals dismissed.

E. C. SIRJOO v. A. C. B. SINGH.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

E. C. SIRJOO, Appellant (Defendant),

v.

A. C. BAHADOOR SINGH, Respondent (Plaintiff).

Before Sir CHARLES F. BELCHER, Chief Justice of Trinidad and Tobago, President; Mr. B. A. CREAM, Chief Justice of British Guiana; and Mr. C. M. MURRAY-AYNSLEY, Chief Justice of Grenada.

1936. JUNE 26.

Practice—Equitable relief—Discretionary power of Court—Appeal—Refusal to order equitable relief within Court's powers.

The plaintiff brought an action to have a mortgage bill of sale set aside, and the defendant counterclaimed for moneys alleged to be due on the plaintiff's personal covenant contained in the bill of sale.

At the trial the judge found that there was no consideration at all for the bill of sale, that it was entirely bogus and executed merely to protect the plaintiff's chattels against his creditors. He therefore refused to assist the plaintiff with legal or equitable relief because he had signed the document as to which he sought relief with intent to deceive third parties; and he dismissed the counterclaim.

The defendant appealed.

Held (1) that the judge's refusal to give judgment for the plaintiff was within his powers; and

(2) that there was evidence to support the finding that no moneys were lent or due.

The judgment of the Court was as follows:—

This appeal is by the defendant in the court below, against judgment for the plaintiff below on defendant's counterclaim.

The claim was to have a conditional or so-called "mortgage" Bill of Sale set aside, and the counterclaim was for moneys alleged to be due on the grantor's personal covenant contained in the deed.

There was also a claim by the plaintiff for damages for trespass and conversion which events have rendered it unnecessary for us to consider.

Broadly stated, the issues were (*a*) on the claim, was the consideration wrongly stated: here the burden was on the plaintiff to prove that it was; and (*b*) on the counterclaim, what if anything was due on the covenant, and as to this the burden was defendant's as lender and covenantee.

Claim and counterclaim were heard together, plaintiff (grantor) opening; and at the end of the case the learned judge upon a finding of fact that there was no consideration at all for the Bill of Sale but that it was entirely bogus and executed merely to protect plaintiff's chattels against his creditors, gave judgment for

the defendant on plaintiff's claim to have the deed set aside, and for the plaintiff on defendant's counterclaim on the covenant, without costs to either.

The only substantial ground of appeal (of fifteen grounds set out) is that the finding of fact that defendant never lent any money at all was not warranted by the evidence. If the evidence supported that finding, defendant's claim failed: that is plain.

Plaintiff does not appeal against the judgment dismissing his claim: which circumstance, however, cannot assist defendant. For though the Bill of Sale is thereby left technically still extant, it is as a document worthless either as security or covenant, if the learned judge's finding of fact was right: as security, because of wrong statement of consideration; as covenant, because there was nothing which could be repaid.

The issue at the trial was obscured and much subsequent argument occasioned by the circumstance that, not contenting himself with pleading as he might have done that the consideration was not paid at the time of execution as stated in the deed which would have been all he need prove under Cap. 185, Sec. 10 in order to obtain his equitable remedy, plaintiff alleged further in statement and particulars that the actual consideration was a promise at time of execution to pay money (\$120) at some later time which promise was never implemented.

The facts which were either admitted or not seriously disputed were that at the time of giving of the Bill of Sale (6th December, 1934) the parties were on close terms of personal and business friendship: plaintiff was and had been for some time in financial straits and defendant knew of this: plaintiff's chattels had just been levied on by a creditor and that levy released by means of funds which defendant was instrumental in finding though he did not supply them. The preparation and registration of the Bill of Sale was wholly carried out by plaintiff or his agents, nor was the document perused by defendant, who did not know what either the exact principal sum or the rate of interest was until after execution, and asked for no copy of the deed. Nor did he take any steps to check the inventory or see that the chattels were insured. When the date mentioned in the document as that of the first half-yearly payment of interest (\$7.20) arrived, 6th June, 1935, it was not asked for. On 16th September, 1935, there was a violent dispute between the parties about some money which was admittedly due by the plaintiff to the defendant's sister: they parted in anger and next day, without any notice whatever to the plaintiff, defendant levied on the chattels comprised in the Bill of Sale. The date set out for payment of the principal was still nearly three months off, and at the time of the levy defendant had reason to know that plaintiff was in control of funds in cash, more than enough to pay off everything nominally due under the Bill of Sale. The goods were sold under the

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levy, and largely bought in on behalf of the plaintiff, only \$25.54 net was realised. At the trial of the action defendant was not in possession of any IOU, receipt, or memorandum, or any statement of account, which would tend to show either that he had made the advances he alleged or at a later date agreed the total with the plaintiff, but relied on the formal acknowledgment on the part of plaintiff contained in the deed. Neither party kept any books.

The rest of the evidence was chiefly oral, and consisted of positive affirmations by each party of the truth of his own case as pleaded, and a complete denial of the others.

Before us it has been argued by Sir Lennox O'Reilly (though not mentioned as one of the written grounds of appeal) that the learned judge's finding of fact involved the consideration of an issue of illegality in the contract evidenced by the Bill of Sale which neither party had raised; which issue ought not thus to be decided against the defendant without his having an opportunity to answer it. Mr. Butt, replying on the same side and developing this argument, has contended that the learned judge approached the case from a wrong angle. In refusing plaintiff the legal remedy of damages for conversion to which he was entitled as of the right if the Bill of Sale was void as a security, and in refusing him also the equitable remedy of setting aside a document found to be void, the learned judge must have decided to begin with (by inference, for there was no direct evidence) that the document was bogus and then proceeded to consider the parties' respective claims in the light of that finding, instead of confining himself to considering what the legal onus was upon each and whether he had discharged it. That is the argument as we understand it.

There is no doubt about what the learned judge found, but we see no reason for saying that he reached his finding in any way not open to him. Whether the issue raised by the plaintiff's claim is looked at broadly—was there erroneous statement of the consideration enough to avoid the security, or more narrowly, was there the particular erroneous statement of it to which plaintiff testified?—the natural method of approach for any tribunal of fact would be to consider what the consideration actually was, if any, which the parties had agreed upon. That was the central *factum probandum*, and anything relevant to its discovery was proper for the judge to consider. The whole of the evidence adduced on both sides, and inferences properly to be drawn had to be looked at once. It is certainly competent and necessary for the judge to keep in view that a document may be executed for some reason other than that stated in it (otherwise no Bill of Sale could ever be attacked by the grantor) and one of these reasons may be the defeating of third parties. All the circumstances are material when the enquiry is, did the parties mean

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what they said? and a highly important circumstance in this connection is the debtors financial position. It is altogether beside the mark to say that it might also be material on some other issue which was not raised: the point is that it was material on the issue which was raised. We think that there was evidence to justify the judge in finding as he did. That finding was conclusive of the whole case. In the light of it, what must be his judgment? Surely, that which he pronounced.

On the facts as found, the Bill of Sale was necessarily void: but the judge refused to assist plaintiff with either legal or equitable relief because he had signed the document as to which he sought relief with intent to deceive third parties, and this refusal was within the Court's powers. As to the defendant, his counterclaim failed because the fact was found that he never lent plaintiff any money.

The appeal in our unanimous opinion fails and must be dismissed with costs.

Appeal dismissed.

A. BARKEY v. L. JOB & G. JOB.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

ARTHUR BARKEY, Appellant (Plaintiff),

v.

LEAMINGSTAND JOB and GERALDINE JOB, Respondents
(Defendants).

Before Sir CHARLES F. BELCHER, Chief Justice of Trinidad and Tobago,
President; Mr. B. A. CREAN, Chief Justice of British Guiana; and Mr.
C. M. MURRAY-AYNSLEY, Chief Justice of Grenada.

1936. JUNE 26.

Contract—Insanity—Incapacity—Lands—Insane person goes out of possession—Trespasser enters—Date of entry—Statute of Limitation runs from.

Prior to 1917 B.G. was in possession of certain lands including a house. In that year he was removed to a lunatic asylum. There he remained until 1921 when he died intestate and without heirs. When he left in 1917 C.G. an illegitimate daughter of his was living with him in the house and she remained in occupation of the land or in receipt of the rents and profits thereof until the present time. In 1927 she sold the house and leased the land to the defendants who have since that date been in occupation.

In 1935 the plaintiff issued a writ for possession.

Held, (1) that in view of the fact that B.G. was at the time of leaving the house in 1917 insane and therefore incapable of creating between himself and C.G. any relation of principal and agent, master and servant or landlord and tenant, C.G. was a mere trespasser from the moment B.G. left the house and therefore the statute of limitations ran in her favour from that date and not from the death of B.G. in 1921;

(2) that being so, the statutory period of 16 years had expired before the commencement of the action in 1935 and the respondents were therefore entitled to judgment.

The judgment of the Court was as follows:—

This case is an appeal from a judgment of Manning, J., in favour of the Defendants. The salient facts are set out in that judgment and it is not necessary to recapitulate them here.

It should be noted that Manning, J., decided the case as regards the house and the land on different grounds having formed the opinion that the house remained a chattel. In this respect we differ from the learned Judge and consider that the house at material times formed part of the realty and therefore questions of title to the house are inseparable from those relating to the land on which it is built.

Before us Counsel for the Appellant contended that a title to a legal interest was established and that the Respondents were unable to show as in themselves or in Cecilia Grant through whom they claim any equitable estate.

In view of the finding of fact of Manning, J., that Benjamin Grant and not Catherine Grant was the purchaser in 1907 of the

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land in question, which finding we are unable to disturb, it is impossible to contend that any equitable estate was vested in Catherine Grant or in those claiming through her.

To put matters briefly we are of opinion that the Appellant has established a paper title to at least one undivided half of the land.

Against this the respondents set up a claim by limitation. If this is good the paper title of the Appellant is defeated and this is sufficient to dispose of the whole case.

Prior to 1917 Benjamin Grant appears to have been in possession. In that year he was removed to a lunatic asylum. There he remained until 1921 when he died intestate and without heirs. When he left in 1917 Cecilia Grant an illegitimate daughter of his was living with him in the house and has remained in occupation or in receipt of the rents and profits until the present time. In 1927 she sold the house and leased the land to the Defendants who have since that date been in occupation.

In view of the fact that Benjamin Grant was at the time of leaving the house in 1917 insane and therefore incapable of creating between himself and Cecilia Grant any relation of principal and agent, master and servant or landlord and tenant, it appears that from the moment that he left the house, Cecilia Grant was a mere trespasser and therefore the statute of limitations runs in her favour from that date and not as contended by the Appellant from the death of Benjamin Grant in 1921.

This being so the statutory period of 16 years had expired before the commencement of this action in 1935 and the Respondents are therefore entitled to judgment.

Appeal Dismissed.

BOGART v. L. MOHAMED.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

BOGART, Appellant (Defendant),

v.

LAL MOHAMED, Respondent (Plaintiff).

Before Sir CHARLES F. BELCHER, Chief Justice of Trinidad and Tobago, President; Mr. C. M. MURRAY-AYNSLEY, Chief Justice of Grenada and Mr. W. SAVARY, Chief Justice (Acting) of British Guiana.

1936. NOVEMBER 20.

Appeal—Negligence—Contributory negligence—Issue raised by defendant—Not specifically dealt with by trial judge—New trial ordered.

The issue of contributory negligence raised by the defendant not having been specifically dealt with by the trial judge a new trial was ordered.

The judgment of the Court was delivered by the President.

Respondent's bus was going South along a main road and collided with appellant's lorry which, going North, had just come out on to the main road from a private road. The point of junction of the roads is such that as the driver of the bus approached it he had the private road more directly ahead of him than was his own course along the public road, which, there, turned somewhat to the right, the entrance to the private road thus being on his left. Each vehicle was being driven by an employé. The statement of claim (respondent was plaintiff below) charged negligence in the lorry driver as to (1) wrong side (2) speed (3) no look out (4) failing to stop (5) dangerous driving. The defendant denied all these matters and alleged the accident to be due to the bus driver's own negligence regarding (a) speed (b) look out (c) wrong side of road (d) ineffective brakes; these matters were repeated by way of establishing the alternative defence of contributory negligence: but there was no counterclaim, the lorry having suffered only trifling damage. After a protracted hearing, the learned judge found negligence in the plaintiff as regards speed and wrong side, but that the cause of the accident was the negligent action of the lorry driver in trying to cross (to his own proper side) in front of the bus when, by stopping or otherwise, he could have avoided the consequences of the bus driver's negligence, as found, and therefore judgment was given for the plaintiff for the damage found to have been sustained by him. The grounds of appeal were (1) finding of negligence in lorry driver against weight of evidence (2) that, contributory negligence, *re* speed and wrong side, having been

found, respondent could not succeed: and there was also a ground as to basis of damage which may be passed over for the moment. Before us, it was not seriously argued that appellant was not negligent, and indeed there was abundant evidence of his negligence, as found by the judge, in that having entered with a slow-moving heavily-laden vehicle a main road along which he could see the bus proceeding at a fast rate, he tried to cross in front of the bus to get on to what would be his own proper side of the main road. But the point that was strenuously argued (and we permitted it to be argued because it was clearly raised on the pleadings, *vide supra*, though not so clearly covered by the grounds of appeal) was, that after the lorry driver showed to the bus driver his intention thus negligently to cross the road, the bus driver still had ample time and room to avoid a crash either by stopping altogether or, it may be, by passing behind the lorry: this latter was not so much stressed as the failure to stop, which was alleged to have been attempted and to have failed owing to defectively working brakes. As the learned judge did not deal with the alleged contributory negligence of the bus driver and stopped short of this enquiry which, in our opinion, was necessary in order to determine which party was liable, it becomes important to examine his findings and to see how he viewed the evidence as a whole, so that we may ascertain whether there is material before us to lead this Court to a positive conclusion on the point. He clearly finds that driving fast and on the wrong side in the particular case was negligence in the bus driver (and that must mean negligence in some way contributory to the accident, or it is immaterial). But then he goes on to find that the lorry driver could have avoided that negligence and did not, and that in the circumstances the lorry driver alone was responsible. It is, however, part of his finding that "on seeing that a collision with the truck was inevitable he (the bus driver) applied his brakes, leaving an impression of 91 feet in length," and a very little consideration will show that those two findings are inconsistent with each other. Even if it were not common knowledge, there was evidence that the bus, travelling at 30 miles an hour (the judge's finding as to its rate) with adequate braking, could pull up in very much less than 91 feet, and if the judge really meant to find that the brakes were not applied at all till the bus driver saw that a smash was inevitable unless he pulled up, and that he became aware of that circumstance while he still had 91 feet in which to operate, then the judge ought to have found that the person whose negligence was solely responsible for the accident (as regards the incidence of liability) was the bus driver: for in such a case either his brakes were not in order or he failed to apply them sufficiently hard or soon. But we cannot be sure that that is what the judgment means. Although there was evidence both ways as to the

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state of the brakes on the bus, the learned judge does not find as a fact whether they were working properly or not, making it appear either that he did not consider the point material or (in view of his general decision) that he meant to hold upon it in favour of the respondent. It is consistent with the words of the judgment that the judge may, at least in that part of it which is material here, have accepted the evidence of Clunis Alexander, the bus driver, namely, that he was only 20 feet off the lorry when he first saw the smash to be inevitable: in that case there was no opportunity of doing more than he did, presuming that it was also at that point that he first became aware that the lorry meant to cross in front of him. Such a finding would be in accordance with the gradual braking over 91 feet shown by the brake-marks, but on the other hand it would reject Alexander's statement that he did not put on the brakes at all until he was 20 feet off the lorry. In short, the important question being, had the bus driver time and ability to stop after he saw what the lorry meant to do, it must be decided how far away he was when he saw it and whether he then braked properly, and since we do not know what the judge meant to find on either of these points or indeed whether he ever addressed himself to the question, there is nothing for us to do but to send the case back for retrial. That is very unfortunate for the parties, but to decide the facts for ourselves anew on paper would be equally unsatisfactory, since despite the masses of evidence taken, it does not appear that the cardinal point was adequately dealt with, either in evidence or in the judgment.

In sending the case back for a new trial we are leaving open not only the question of liability but also that of damages, since it appears to us that in assessing the special damage the learned judge has proceeded on a wrong principle. Where (as here relating to the bus) evidence of value is given which is uncontradicted it should be accepted.

The appeal will be allowed; no costs of the appeal; the costs of the first trial to abide the result of the new trial; moneys now in Court for damages and costs to be paid out to the appellant.

Appeal allowed.

BACHEE v. BAGGAN.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

BACHEE, Appellant (Plaintiff),

v.

BAGGAN, Respondent (Defendant).

Before Sir CHARLES F. BELCHER, Chief Justice of Trinidad and Tobago, President; Mr. C. M. MURRAY-AYNSLEY, Chief Justice of Grenada; and Mr. W. SAVARY, Chief Justice (acting) of British Guiana.

1936. NOVEMBER 20.

Evidence—Conveyance or mortgage—Nature of transaction—Reasonable inference from evidence.

Where a person executes a conveyance and brings an action claiming that it was a mortgage, the right way to approach the matter is to consider which of the two hypotheses, namely, sale or mortgage, appears to be the reasonable inference.

The judgment of the Court was delivered by the Chief Justice of Grenada.

This is an appeal from a judgment of Manning, J. The proceedings arose out of a deed purporting to be a conveyance of certain lands in the colony and the claim of the appellant is for a declaration that the conveyance in question is really a mortgage and for ancillary relief. There is an alternative claim for various sums of money expended to the use of the respondent, which would only arise in the event of the principal claim being decided adversely to the appellant.

After a somewhat protracted hearing, the learned judge decided against the appellant both on the principal and alternative claims.

The facts of the case are briefly as follows:

The respondent is married to the appellant's brother. It does not appear that the respondent had any substantial means and it seems clear that in all transactions she was a mere nominee of the husband, and that there was a debt due by the appellant to the respondent or her husband. On 6th October, 1930, the appellant executed a deed, in the form of a conveyance of the equity of redemption of certain lands, in which the consideration was set out at \$300. The deed was prepared by a Mr. Mouttet, solicitor of this town, who was not called as a witness. Neither side seems to have been able to give credible explanation as to how the consideration of \$300 was arrived at. It is common ground that the antecedent debt of the appellant to the respondent or her husband formed part of it, and the appellant says that the balance was formed by a judgment debt of the appellant to Alston's which

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the respondent's husband undertook to satisfy, but in point of fact did not. The respondent says that the balance was formed of other moneys owing by the appellant to the respondent. It is this deed out of which the dispute arises between the parties; was it an out and out sale, or was it a mortgage in the form of a conveyance? The appellant and her brother have not given any adequate explanation as to why the somewhat unusual course alleged by the appellant should have been adopted. The learned judge appears to have attached very little weight to the oral evidence of the parties, and an examination of the notes of evidence shows that he could not have done otherwise; but there are certain circumstances in the case beyond controversy, and it is on the strength of these, if at all, that the appellant must discharge the onus on her of showing that the deed is other than what it purports to be. It is clear law that the plaintiff, if she can prove her case, is entitled to the remedy for which she asks. The problem before the Court is not a new one, and experience has shown that certain indications are to be looked for in examining these cases. The learned judge pointed out that the appellant continued in occupation of the premises and improved them, paid money on account of principal and interest of the mortgage, and paid rates and taxes. It also appears that the alleged consideration was inadequate and that the appellant received certain profits from rent for advertisement on the premises. The learned judge did not consider that these circumstances were sufficient to discharge the onus on the appellant. As he pointed out, the relationship between the parties modified the inference that should be drawn from the undisputed facts. But it appears to us that the learned judge was led into error by viewing the question of the onus of proof to be discharged by the appellant as unduly heavy. In particular he said: "The onus in a case of this kind is almost as great as on a prosecution in a criminal matter." We think that this is an overstatement. The right way to approach the matter is to consider which of the hypotheses, viz, sale or mortgage, appears to be the reasonable inference. In this case the hypothesis of sale does not appear to be reconcilable with the facts and the hypothesis of mortgage appears to be the only reasonable one in the circumstances. It therefore appears to us that the learned judge should have made the declaration claimed as to the transaction being a mortgage. On the other hand, the learned judge was not satisfied, and we think rightly so, as to the repayment of the debt due by the appellant. It will be therefore necessary, in allowing the appeal as we do, to order an account and to make the usual order for redemption consequent thereon. The appellant must have the costs of the trial and of the appeal.

Appeal allowed.

I. L. CUMBERMAC v. S. I. CYRUS.

IN THE WEST INDIAN COURT OF APPEAL.

IVAH LAGURE CUMBERMAC, Appellant (Defendant),

v.

SAMUEL IGNATIUS CYRUS, Respondent (Plaintiff).

[1937.—No. 1. BRITISH GUIANA.]

Before CREAN, C.J., British Guiana, President; COLLYMORE, C.J., Barbados; and GILCHRIST, Acting C.J., Trinidad and Tobago.

1937. JULY 8.

Appeal—Judgment after trial—Defendant not called in Court below on advice of counsel—Further evidence on appeal—Application for—Made after judgment on appeal reserved—Special grounds—West Indian Court of Appeal Rules, 1920, rule 8.

Judgment in an action was delivered on the 10th December, 1936. An appeal was brought, which was heard on the 5th and 6th July, 1937, when decision was reserved until 11 a.m. on the 8th July. At 9 a.m. on that day a motion was filed by the appellant for leave to lead oral evidence of the appellant before the determination of the appeal. In her affidavit in support of the application the appellant stated that her counsel at the trial informed her that it was unnecessary to call her as a witness, that the trial judge in his judgment commented on her omission to enter the witness box, that such omission operated to her prejudice, and that she was advised by her counsel who appeared for her on the hearing of the appeal that her evidence would have formed a determining factor or if believed would have had an important influence on the result of the action.

Rule 8 of the West Indian Court of Appeal Rules, 1920, provides that “The Court shall have . . . full discretionary power to receive further evidence upon questions of fact . . . upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence shall be admitted on special grounds only, and not without special leave of the Court.”

Held (1) that the words “special grounds” in rule 8 do not include cases where an applicant might have shaped his case better in the Court below, or where his advisers took a wrong view of the effect of certain evidence.

(2) that the application was without merit and must be refused.

Motion by the appellant that her evidence may be taken by the West Indian Court of Appeal before the determination of an appeal or that such order be made as to the Court may seem fit.

C. A. Burton, for applicant (appellant).

J. A. Luckhoo, K. C. (C. V. Wight, Acting Assistant Attorney-General with him) for respondent, not called upon.

CREAN, C.J.: The unanimous opinion of the Court is that the application should be refused. It appears to us most unusual to make an application of this sort at this stage of the proceedings. However, as it has been made, we will refer to the pretty well accepted rule that even though an applicant might have shaped his case better in the Court below, or his advisers took a wrong view of the effect of certain evidence, those circumstances are not special grounds upon which the Court of Appeal should grant

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leave for further evidence to be adduced. In our opinion, there is no merit in this application, and it is refused.

Application refused.

Solicitors: *E. D. Clarke* for applicant (appellant).
A. G. King for respondent.

I. L. CUMBERMAC v. S. I. CYRUS.
 IN THE WEST INDIAN COURT OF APPEAL.
 IVAH LAGURE CUMBERMAC, Appellant (Defendant),
 v.
 SAMUEL IGNATIUS CYRUS, Respondent (Plaintiff).

[1937.—No. 1. BRITISH GUIANA.]

Before CREAN, C.J., British Guiana, President; COLLYMORE, C.J., Barbados; and GILCHRIST, Acting C.J., Trinidad and Tobago.

1937. JULY 5, 6, 8.

Appeal—Judgment—Newspaper report—Accepted by counsel as substantially correct—Considered by Court of Appeal—Evidence—Conflicting testimony at hearing—Initial advantage of trial judge—Agreement for lease of immovable property for 3 years—Not in writing—No note or memorandum thereof—Action on agreement—Statement of claim—Acts of part performance pleaded in—Civil Law of British Guiana Ordinance, cap. 7, s. 3, proviso (d)—Defence of—Reply—Not necessary to plead acts of part performance in—Part performance proved—Precise terms of oral agreement—Oral evidence admissible to prove—Part performance—Meaning of—Referable to contract alleged or some such contract.

An oral judgment was given by the judge at the conclusion of a trial. A newspaper report accepted by counsel for appellant and for respondent as being a substantially correct report of the judgment and signed by counsel as such was considered by the Court of Appeal on the hearing of an appeal.

In cases which turn on the conflicting testimony of witnesses and the belief to be reposed in them, an Appellate Court can never recapture the initial advantage of the judge who saw and believed.

Proviso (d) to section 3 of the Civil Law of British Guiana Ordinance, chapter 7, enacts that “no action shall be brought whereby to charge anyone upon any lease of immovable property for a period exceeding one year unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged”: and proviso (c) to the said section enacts that “the relief by judgment for specific performance shall be granted in the case of immovable property on the same principles on which it is granted in England in the case of contracts relating to land or to interests in land.”

S. I. C. sued I. L. C. for specific performance of an oral agreement for a lease of certain premises for a period of 3 years at a rental of \$11.50 per month, and pleaded that he entered into occupation of the premises and paid \$11.50 per month as rent therefor.

I. L. C. pleaded proviso (d) to section 3 of the Civil Law of British Guiana Ordinance, chapter 7. No facts alleging part performance were pleaded in the reply.

Acts of part performance, and the oral agreement, were proved to the satisfaction of the trial judge.

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Held, (1) that as the facts necessary to constitute part performance were pleaded in the statement of claim, and the issue thereon clearly raised, it was unnecessary to repeat them in the Reply.

(2) that an action on foot of the contract would have been barred by proviso (b) to section 3 of cap. 7.

(3) that the ground upon which a Court of Equity enforces specific performance of a contract affecting immovable property, is that the person to be charged, is charged, not upon the contract itself, but upon the equities arising out of the changed position of the parties caused by the acts done by them in execution of the contract.

(4) that the acts alleged as part performance were referable to no other title than to such a contract as was alleged in the statement of claim or to *some* such contract.

(5) that where, as in this case, the acts of part performance are referable to *some* such contract, and are consistent with the contract alleged, oral evidence is admissible as to the precise terms of the contract; the necessity for writing is dispensed with, and the Court is entitled to find what the parties have actually agreed, although the terms of the agreement go beyond those to which the acts of part performance in themselves point.

(6) that the trial judge was entitled to receive evidence as to the acts of part performance to see if those acts were referable to, or consistent with, the agreement set up by the plaintiff, and to receive further oral evidence as to what the precise terms of the agreement were.

Appeal by the defendant from a judgment of Verity, J., decreeing specific performance of an oral agreement of lease by the defendant in favour of the plaintiff of the upper flat of a building at 215, King Street, for a period of three years from the 15th December, 1935, at a rental of \$11.50 per month. An oral judgment was delivered, but, on the appeal being filed, the trial judge wrote the following memorandum of his reasons for judgment.

“After consideration of the evidence adduced on behalf of both the plaintiff and defendant I accepted the evidence of the plaintiff himself rather than that of the defendant’s attorney as being the more credible and as being that of a witness who impressed me as a witness of truth. The defendant herself did not give evidence.

2. I therefore found as facts—

(a) that by verbal arrangement between the plaintiff, the defendant and the defendant’s attorney agreement was made for a lease by the defendant to the plaintiff of the upper flat of the building situate on lot 215, King Street, in the City of Georgetown, the property of the defendant and then in the occupation of the plaintiff for a term of three years and upwards from the 15th December, 1935, at a yearly rental of \$138 payable by monthly instalments of \$11.50, and

(b) that the plaintiff entered into occupation of the premises in pursuance of such agreement on the 15th December 1935, and has continued in occupation thereof paying the agreed rental as and when due.

3. On these facts I held—

(a) that there was an agreement which, if proved, could be

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enforced by decree for specific performance, a lease expressed in the terms of the agreement being sufficiently certain in terms as to be enforceable as to the term certain of three years.

- (b) that although there was no memorandum in writing sufficient to satisfy section 3 of the Civil Law of British Guiana Ordinance, cap. 7, the entry into possession by the plaintiff and the payment by him of the agreed rental was such performance as should be accepted as sufficient evidence of the existence of some such agreement as to raise the equitable doctrine of part performance and admit proof of the precise terms of the agreement by oral evidence;
- (c) that such part performance by the plaintiff in faith of the due performance by the defendant on her part of such agreement placed the plaintiff in a worse position than he would have been but for his acting in such faith in that it deprived him of his freedom to seek in other quarters the security of tenure which was the basis of his entry into the agreement with the defendant.
- (d) that it would therefore be inequitable to allow the defendant to repudiate to her own advantage and to the injury of the plaintiff an agreement entered into and acted upon by the plaintiff in such faith.

4. I therefore ordered that the defendant should take all necessary steps forthwith to execute a lease in the terms of the agreement and further made order for the payment by the defendant of the plaintiff's costs of this action."

The following were the grounds of appeal:—

1. The learned judge was in error in finding that the agreement alleged by the plaintiff was proved because—

- (a) There was no agreement in writing nor was there any memorandum or note in writing of the alleged agreement as required by section 3 of the Civil Law of British Guiana Ordinance, chapter 7 as pleaded in paragraph 4 of the Statement of Claim. The plaintiff did not in his Reply plead part-performance of the alleged agreement and he ought not to have been allowed by the learned judge to raise this ground at the trial or to succeed on it in reply to paragraph 3 of the Statement of Claim.
- (b) The part-performance alleged at the trial to have been in pursuance of the agreement relied on by the plaintiff was not unequivocally referable to the said agreement but was equally, if not more, referable to the agreement alleged on behalf of the defendant. The learned judge therefore erred in accepting such alleged part-performance as being sufficient to relieve the plaintiff from the requirements of

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section 3 of the Civil Law of British Guiana Ordinance, Chapter 7.

- (c) There was not proper parol evidence of the agreement alleged by the plaintiff whose oral testimony varied materially from his Statement of Claim, wherein he alleged in paragraph 2 that the defendant herself made to him the offer from which the said agreement arose. The learned judge erred in accepting the said evidence and in allowing it to operate to the prejudice of the defendant.
 - (d) The learned judge erred in accepting the said parol evidence, as there was no or no sufficient corroboration of the said evidence.
 - (e) The learned judge erred in considering or admitting the said parol evidence, as such evidence was not made admissible by a satisfactory establishment of part-performance of the agreement alleged by the plaintiff as appears from paragraphs (a) and (b) hereof.
 - (f) The learned judge erred in accepting the plaintiff's interpretations of paragraphs 2, 3 and 4 of the Statement of Claim of the alleged acceptance in writing dated 6th December, 1935, as such interpretation was repugnant to the ordinary meaning of the language in which they were expressed. The letter dated the 6th December, 1935, containing the alleged acceptance referred to in paragraph 4 of the Statement of Claim indicated a monthly tenancy. The words "payment of rent to be made as usual at the end of the month" related to the mode of payment and there was nothing to which the words "\$11.50" could relate except the nature of the rent, namely, its total value as distinct from its payability in fractions. The plaintiff having omitted to state \$138 if the rent was \$138 per annum the only meaning of the said letter was that the rent was \$11.50 per month and that it was payable at the end of every month. It therefore disproved the plaintiff's claim.
 - (g) The lease alleged in the Statement of Claim and in the plaintiff's letter of the 26th June, 1936, was uncertain in duration and was at variance with the oral evidence of the plaintiff at the trial and the learned judge erred in accepting such evidence.
2. The findings of fact in favour of the plaintiff were such as could not properly be made by anyone viewing the circumstances reasonably and were against the weight of the evidence.
- (a) The alleged acts of part-performance relied on, namely, the transfer of possession from one building to another on the same lot on the termination of the prior tenancy from month to month and the payment of rent for the new premises from month to month being unequivocal.

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(b) That on the inadequate parole evidence tending thereto the agreement alleged by the plaintiff was made.

C. A. Burton, for appellant.

J. A. Luckhoo, K.C., and *C. V. Wight*, Acting Assistant Attorney-General, for respondent.

Cur. adv. vult.

Reading the Court's judgment, the President said:—

This is an appeal from a decision of Mr. Justice Verity in the Supreme Court of British Guiana, whereby the appellant was ordered to execute a lease of premises situate on the upper flat of a building at lot 215, King Street, Georgetown.

An oral judgment was given by the learned judge at the conclusion of the trial and, subsequently, reasons in writing for his decision were attached to the record.

At the hearing of this appeal it was agreed by counsel on both sides that the newspaper report of the learned Judge's oral decision should be put before this Court and accepted as a substantially correct report thereof. This report has been signed by counsel for both parties and put before us for consideration.

The action was one for specific performance and was instituted by the respondent on foot of a verbal agreement which, he alleged, was entered into between him and the appellant and her attorney, Mr. Edward D. Clarke, a solicitor.

The terms of this agreement, according to the evidence of the respondent, were that the premises above mentioned were to be let to the respondent at an annual rent of \$138 payable at the rate of \$11.50 a month and that a lease of the premises for three years or upwards was to be granted to him within one year from the 15th day of December, 1935.

In the evidence given by the respondent at the hearing of the action, he describes how the above verbal agreement was entered into, and, amongst other things, he says he asked the appellant's attorney what guarantee he had that he would not be again asked to remove or that his rent would not be increased. In reply to this, the appellant's attorney told him he could have an agreement, and the respondent says that they thereupon agreed that he, the respondent, should take the premises for three years.

The respondent, at the trial of the action, gave minute details of how the above agreement was entered into. And, after hearing that evidence and accepting it, the learned trial Judge found as a fact that there was a verbal agreement entered into between the respondent and the appellant's attorney, whereby the respondent was to have a lease of this upper flat of the building on lot 215 for a term of three years from the 15th December, 1935. It might here be noted that the appellant herself did not give evidence.

The learned Judge also found as a fact that the respondent entered into occupation of the premises on the 15th December,

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1935, in pursuance of the alleged agreement or some such agreement, and continued in occupation thereof paying the agreed rental as and when due. The facts of occupation of the premises and payment of rent were admitted by the appellant.

It has been argued by counsel for the appellant that the Judge should not have found as he did on the facts. And, in the grounds of appeal, it is set out that the evidence of the respondent varied materially from his statement of claim, and as there was no, or no sufficient, corroboration of the evidence of the respondent relating to the above verbal agreement, the learned Judge erred in accepting it.

As to this contention we can only say that the learned Judge saw the respondent and the defendant's attorney in the witness-box. He heard them, and after seeing and hearing them, he found, as a fact, that the above oral agreement had been entered into between the parties.

We see no reason for criticising or disturbing this finding of fact, for we must bear in mind that in cases which turn on the conflicting testimony of witnesses and the belief to be reposed in them, the Appellate Court can never recapture the initial advantage of the Judge, who saw and believed. This view of the position of the Appellate Court is set out in the case of *Powell v. Streatham Manor Nursing Home* (1935) A. C. p. 243. We would refer also to the case of *Corea v. Cabral* (1928) L.R.B.G. page 97.

On this branch of the argument, as to the weight of evidence, we are referred to the case of *Jordan v. Money*, (1854) 5 H.L.C. at p. 217, and it is submitted that it is an authority for saying that where a plaintiff and a defendant give evidence and the plaintiff's story is denied by the defendant and there is nothing to shew that the one is more to be credited than the other the Judge cannot decide against the defendant.

On our reading of this case, we are unable to see that this case assists the appellant, and the case of *Sharman v. Sharman* (1892) 67 L.T. 834, which brother Gilchrist referred Counsel to, is directly in point. But, in any event, *Jordan v. Money* does not apply to this case, for, it was held as a fact, that there was corroboration of the plaintiff's oral evidence. There was corroborative evidence as found by the Judge in the general circumstances and the correspondence. For instance, the letter of the 6th December, 1935, of the respondent to the defendant's attorney informing him that the respondent agreed to take the premises from the 15th December, 1935 "as arranged." It is our view, and it was clearly the view of the trial Judge, that when the words "as arranged" were written, those words had reference to the oral agreement pleaded by the respondent in this case.

A further argument, which has been emphasised by counsel for the appellant is, that as there was no plea of "part-performance"

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in the reply of the respondent to the defence of the appellant he is debarred from calling oral evidence as to the alleged agreement.

In our opinion, the facts set out in the respondent's Statement of Claim manifestly indicate that he was relying on part-performance of the contract, as a ground for his claim, and we can see no necessity for a repetition of these facts in the reply, as the issue was already clearly raised.

It seems to us that the main point on which the appellant must rely is, that as the agreement on which this action was brought, was for a lease for a period of three years or upwards no action can be brought upon it, unless such agreement is in writing, or there is a note or memorandum of the agreement signed by the party to be charged thereunder.

This contention at the first glance, might appear as one of substance, because the Civil Law of British Guiana Ordinance, section 3, definitely and clearly lays it down that no action shall be brought to charge any one upon an agreement for a lease of immovable property for a period exceeding one year, unless it is in writing, complying with the Ordinance. And, as the agreement herein was for a lease of immovable property for 3 years, it is therefore argued by the appellant that no action can be founded on it in the absence of an agreement in writing contemplated by the Ordinance.

It seems to us that this point of law would be good, if this action were brought on foot of the contract. But it is not, the action is brought on the equitable side of the Court and only a remedy in equity is sought.

The learned trial Judge took the view that the ground upon which a Court of Equity enforces specific performance of a contract affecting immovable property, is that the person to be charged, is charged not upon the contract itself, but upon the equities arising out of the changed position of the parties caused by the acts done by them in execution of the contract. The authorities in support of this view are the cases of *Maddison v. Alderson* (1883), 8 Appeal Cases, p. 467 and other cases on the same principle. The old case of *Lindsay v. Lynch*, (1804) 2 Sch. & Lef. p. 1 cannot be followed on this point.

The equities arising out of this contract in dispute in favour of the respondent, it is submitted, were that he partly performed the contract by going into occupation of the above premises and so changed his position:—to his detriment, if the appellant were allowed to repudiate the contract.

This occupation of the premises by the respondent and his payment of the rent up to a certain period are the acts of part performance which he relied on, to take his case out the Ordinance which requires writing in such a contract.

It is agreed that the acts of part performance can only be relied upon for this purpose if they are such as to be referable to

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no other title than is contained in the alleged contract or in some such contract. If, however, the acts of part performance are referable to *some* such contract, and are consistent with the contract alleged, oral evidence is admissible as to the precise terms of the contract. The necessity for writing is dispensed with, and the Court is entitled to find what the parties have actually agreed, although the terms of the agreement go beyond those to which the acts of part performance in themselves point.

Once the trial Judge came to the conclusion that the acts of part performance were consistent with the contract alleged herein, it is submitted by counsel for the respondent the barrier was removed and oral evidence was admissible to find out what the precise terms of the agreement were. This rule of law is concisely stated by the Earl of Selborne in *Maddison v. Alderson*, when he says "there must be some *evidentia rei* to connect the alleged part performance with the alleged agreement."

It seems to us clear that the trial Judge was entitled to receive evidence as to the acts of part performance to see if those acts were referable to, or consistent with, the agreement set up by the respondent. This evidence was heard by him, and he found on it that the acts referred to some such agreement.

Once that was done, he was entitled to hear further oral evidence as to what the precise terms of the agreement were. He did hear further evidence, and on it he found that the acts done were exclusively referable to the agreement set up by the respondent, and, therefore, ordered specific performance of that agreement by the appellant, and in our opinion rightly so.

We conclude by saying, that it appears to us, that every aspect of the case was carefully considered by the learned trial Judge. With his finding of facts, and his application of the law to those facts, we are in complete agreement and, consequently, this appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *E. D. Clarke*, for appellant.

A. G. King, for respondent.

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IN THE MATTER OF THE COMPLAINT OF ALBERT ERNEST EUGENE
BARTRUM AGAINST LEONARD ARTHUR HOPKINSON, A LEGAL
PRACTITIONER,

AND

IN THE MATTER OF THE LEGAL PRACTITIONERS ORDINANCE.

[1931. No. 332.]

BEFORE FULL COURT: DEFREITAS, C.J., AND SAVARY, J.

1931. OCTOBER 30, 31.

*Solicitor—Champtous agreement—Misrepresentations—Punishment—
Struck off rolls—Legal Practitioners Ordinance, cap. 26, Part II.*

Where a legal practitioner entered into a champtous agreement with his client, and where he subsequently, by means of misrepresentations, induced his client to settle an action contrary to his client's real desires the Court ordered that he be struck off the Roll and granted him leave to apply for re-instatement on the expiration of three years if his conduct was such as to justify such a course.

Consideration by the Full Court of a report of the Legal Practitioners Committee finding that a legal practitioner had committed misconduct.

S. E. Gomes. Assistant to the Attorney-General, for the Legal Practitioners Committee.

E. G. Woolford, K.C., for the legal practitioner.

Cur. adv. vult.

The judgment of the Court was delivered by the Chief Justice as follows:—

Under a recent Ordinance the Chief Justice appointed five members of the legal profession to constitute (with the Attorney-General and the Crown Solicitor, as ex-officio members) the statutory Legal Practitioners Committee, for hearing applications to strike the name of a Legal Practitioner off the Roll of the Court on the ground of misconduct. The members are all men of repute and are competent to inquire into the conduct of legal practitioners. They give valuable service without any remuneration.

There is now before this Court a report of the 9th of September, 1931, by the Committee of their hearing of an application by Albert Ernest Eugene Bartrum that Leonard Arthur Hopkinson's name be struck off the Roll of the Court or that he be suspended from practising as a legal practitioner on the ground of his misconduct when acting as a barrister-solicitor on the complainant's behalf in his libel action against Mr. Wight and Mr. Phillips, respectively the proprietor and the editor of a newspaper: suit No. 165 of 1930. The writ claimed \$2,500 damages.

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It is clear that Mr. Hopkinson acted as the plaintiff's solicitor throughout and the Committee have correctly found that he had full control of the matter. Upon filing their defence the defendants paid \$120 into Court in satisfaction of the plaintiff's claim, with an admission of liability. On behalf of the plaintiff Mr. Hopkinson drew the \$120 out of Court and he thereupon filed a discontinuance of the action.

The Committee have correctly found that there was an improper agreement between Mr. Hopkinson, Mr. Mendonca (the solicitor who signed the writ), and Mr. Bartrum, that one-third of whatever sum for damages was recovered from the defendants should be taken by Mr. Hopkinson and Mr. Mendonca in full satisfaction of all claims for costs against Mr. Bartrum. By his letter of the 6th of October, 1930, and by his evidence before the Committee, Mr. Mendonca confirmed the fact of this agreement and the receipt by him of his one-sixth share under the agreement. It is said that such champertous agreements are common in this colony; it would therefore be well for the practitioners concerned to be warned that in consequence of such a champertous agreement in a case where the plaintiff's claim was without substance and judgment was given for the defendants with costs, the plaintiff's solicitor was held to be guilty of misconduct as a solicitor and to be personally liable to pay those costs.

In the report before us the Committee correctly found: "That Mr. Hopkinson misled his client into believing that the case would be struck out if the further sum (of \$12) was not paid to him for disbursements for putting the action on the hearing list." It is well known that an action cannot be struck out in such circumstances; and Mr. Hopkinson then had in hand \$14.60 overpaid by his client for the purpose of disbursements. The total amount of further disbursements for bringing the action to a hearing would have been \$6.40, which could easily have been paid out of the \$14.60 in hand, yet he demanded \$12 more. The Committee correctly found: "That Mr. Bartrum was induced by the said misrepresentations to accept the amount paid into Court instead of having his action heard as he desired."

The Committee conclude their report with the following: "The Committee therefore are of opinion that Mr. Hopkinson has been guilty of professional misconduct by entering into such a champertous agreement and also by falsely representing to his client that he was without the necessary funds and thereby inducing him to agree to the settlement of the action contrary to his client's wishes." We agree.

In Mr. Hopkinson's evidence before the Committee he said that his client told him about the libel action and asked him to act because Mr. Mendonca seemed to believe the charges against the plaintiff, the subject of the libel, and had no interest in the matter; that he told his client "he must pay me \$25 retainer."

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and also "disbursements." And he told his client he would wait until the trial of the action for the client to pay him a further fee to appear at the trial. None of this was believed by the Committee. They believed, as we believe, that the only agreement was the champertous bargain for Mr. Hopkinson to be paid for all his services with a share of the money recovered as damages. He acted throughout as the plaintiff's solicitor: he filed the writ, the statement of claim and the discontinuance, paying the Registry fees on them, and he wrote letters. It is clear that he deceived his client and pressed him to provide more money for disbursements than was required.

He wrote to his client on the 21st of April, 1930: "Kindly forward me immediately the sum of \$10, as papers are now ready for filing," that is, for filing the writ. In a letter of the 13th of May, 1930, to his client's father he said: "I was ready for filing weeks ago;" and he referred to his client "remitting the *disbursements fees* \$10, to me; *these* I have not yet received, hence delay." He received the \$10 from his client and he thereupon filed the writ: he paid \$2 on filing the writ, 96 cents for certifying two copies of the writ for service on the defendants: 48 cents on filing the plaintiff's authority to his solicitor, that is to say, the solicitor's retainer; \$2 for service of the writ on the two defendants and 96 cents for the return showing service: making \$6.40 in all. He well knew that \$6.40 was all that was required, yet he demanded \$10 for "disbursements fees" for filing the writ. In his evidence before the Committee he said: "That money (the \$10) was received by me and I filed the writ: *the balance I appropriated to my retainer—\$3.60. Filing the writ cost \$6.40.*" By "retainer" he means the inclusive fee of \$25 for all his services in the libel action, other than as counsel at the trial. It is not true that it was agreed to pay him this fee of \$25: but the agreement was that he should be paid only by means of a one-sixth share of the amount of damages recovered. He had no right to "appropriate" money delivered to him for a particular purpose, such as disbursements, and delivered to him on his request for money for that very purpose.

Notwithstanding that the fees on filing and serving the writ amounted in all to \$6.40 only and that he had a balance of \$3.60 in hand, he wrote deceitfully on the 5th of June, 1930: "I have to-day issued writ. . . . *In telling you that \$10 would have been enough for disbursements* I forgot that there would have been two defendants which would naturally increase the amount of *your disbursements.*" That means that he asked for too little when he demanded \$10 to meet \$6.40 disbursements. He does not tell his client that the disbursements amounted to \$6.40 only. He well knew that the extra disbursement would be only 48 cents, being the Registry fee for certifying a copy of the writ to be served on the second defendant, which fee was included in the

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\$6.40 that was paid. In the same letter he goes on to ask to be sent to him "by return of post, the sum of \$12 further for statement of claim which I already have for filing." He well knew that the filing of the statement of claim would cost \$1 only, yet he falsely represented to his client that \$12 was required for the purpose. In a letter of the 15th of June, 1930, to his client's father, he said: "My statement of claim has been ready for filing days now. . . . The last day for filing same is on Tuesday, the 17th instant, unless I am to ask the other side to allow me the concession of an enlargement of time which they have already told me they will not grant. It boils down to this, that unless I file on Tuesday I may have to go to the Court for an enlargement of time, and this will mean additional expense. Kindly avoid this and thereby lighten my task by letting me have the amount of \$12, asked for over a week ago, by Tuesday's post positively." He asked for \$12 more to lighten the task of paying, out of the \$3.60 in hand, a fee of \$1 on filing the statement of claim. It was filed on the 20th of June, three days out of time, and without any "enlargement of time" by order of the Court. Here again Mr. Hopkinson made a pressing and exorbitant demand for money to cover disbursements, which he falsely pretended was required. In his evidence he said: "I filed the statement of claim immediately after receiving the \$12. I paid \$1 for filing. Total disbursements were then \$7.40." So that out of \$22 he received for disbursements he had a balance of \$14.60 in hand.

The defence was filed on the 30th of June, 1930, with a payment into Court of \$120 in satisfaction of the plaintiff's claim; and the defence admitted liability for publishing the libel, so that the trial would merely be an assessment of the amount to be awarded as damages, without any further disbursement than \$6.48 payable for the hearing. It was Mr. Hopkinson's duty then to get the action put down for hearing on paying \$6.48 for Registry fees out of the \$14.60 of his client's money that he had in hand, money which he had demanded for the purpose of making disbursements in the libel action and which had been paid to him for that purpose only. He did not take this usual step because he desired, as the materials before us show, to settle the action instead of bringing it before the trial judge, as his client wished, for assessment of damages.

After the defendants had, paid \$120 into Court, Mr. Hopkinson did not take the next step of entering the action for trial, as his client desired, on paying \$6.48 out of the \$14.60 in hand, but he falsely pretended to his client that unless he received \$12 more for the hearing fees the action would come to an end by being struck out. He wrote to his client's father on 29th of July, 1930; "I have been made to understand that an application will be made this week to get the matter struck out for want of

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prosecution. Your son should have sent me the amount of \$12 in connection with it to prevent the adoption of such a course by the other side; he has not yet done so although quite a few weeks have elapsed since his promise. If he is still interested in the matter he might forward the amount to me without further delay. After all, it is his matter." That was an alarming letter. We think it is obviously untrue that he was made to understand any such thing. He was forcing his client, by deliberate misrepresentation, to provide him with money for disbursements that could easily be met with the money of his client that he then had in hand, and that was paid to him for the very purpose of such disbursements. He well knew that it was not possible at that stage of the proceedings for the action to be "struck out for want of prosecution." He was asked in a letter of the 21st of August, 1930, whether the action had been "put on the hearing list." In his reply of the 23rd of August he continued to deceive by writing, "Yours received yesterday. I have done nothing further, just waiting on your son all the time; fortunately the other side has done nothing either, or perhaps the matter would have been struck out for want of prosecution. Would be no fault of mine anyhow. He persisted in alarming his client by his gross misrepresentation of an impending striking out of the action, for the purpose of extorting money from his client. His client wished the action to go before a Judge to have the damages assessed, but after Mr. Hopkinson had written more than once strongly pressing for \$12 more to put the action down for hearing and alarming his client with false statements as to an impending striking out of the action, his apprehensive client at last wrote to him on the 30th September saying that "to complete the matter it would require much more than the \$12 asked for now" and inquiring whether in the circumstances it would not be wise to accept the \$120 paid into Court three months before. He has now succeeded in forcing his client to accept a settlement. During the three months his client had never mentioned acceptance of the \$120. If Mr. Hopkinson had been honest, he would have told his client in reply that his client was mistaken in thinking that more money would be required to complete the matter and that he would pay the hearing costs of \$6.48 out of the \$14.60 he had in hand and that no further disbursements would be required before getting the trial Judge's decision on the amount of damages to be paid by the defendants. If he had done so it is not at all likely that his client would have asked him to say if it was wise to accept the \$120. His client said in his evidence: "I agree to uplift the money on the understanding that if I did not pay the \$12 the matter would be struck out for want of prosecution"; and we believe him.

The Committee have correctly found that because Mr. Hopkinson falsely pretended that there was a lack of funds to get the

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action set down for hearing and because of his untrue statements that there would be a consequential striking out of the action for want of prosecution, his client was induced “to agree to the settlement of the action contrary to his client’s wishes. We agree with the Committee in not believing him when he swears: “I did not use the words (struck out for want of prosecution) to force Bartrum to pay the money.”

Mr. Bartrum put in evidence before the Committee a memorandum given to him in another case by Mr. E. A. Luckhoo, a solicitor in New Amsterdam. It shows beforehand the exact sum that would be required to meet the disbursement in respect of each of seven steps to be taken in bringing an action before the trial Judge. His memorandum might well be adopted as a model for guidance. Not only is the client not deceived, but he can clearly understand from it what the total amount of disbursements will be.

On behalf of his client, Mr. Hopkinson drew out the \$120 that had been paid into Court, and he thereupon paid the Registry fee of 48 cents on filing a discontinuance of the action. His statement of account in relation to the \$120 is as follows:

<i>Re</i> BARTRUM v. WIGHT AND PHILLIPS.			
Received	...	...	...\$120 00
Becessar v. Beekha	...	...	... 96
			\$120 96
Filing discontinuance	...	...\$	48
Retained for self	...	... <u>25 00</u>	
			<u>25 48</u>
Balance to you	...	...	<u>\$ 95 48</u>

We observe that he is careful to credit his client with 96 cents in relation to a suit entirely extraneous to the libel action, and that he debits his client with (and deducts from the \$120) 48 cents paid by him on filing the discontinuance. He also debits his client with the full amount of \$25 for his alleged ‘retainer’ fee, to which ‘retainer’ he said in his evidence he had appropriated the \$3.60, balance of the \$10 he demanded for filing the writ as “the disbursements fees, \$10,” and the \$11 balance of the subsequent \$12 given to him for disbursements for filing the statement of claim. His letters and his evidence show that he demanded and received \$22 for the purpose of disbursements prior to the filing of the discontinuance. In his statement of account he ignores disbursements, except the debit of 48 cents. He did not, as an honest man would, credit his client with \$22 and debit him with the \$7.40 of it which was spent. In our view it is manifest that his statement of account cheated his client of \$14.60, being the sum he had in hand for disbursements after paying \$7.40 out of the \$22.

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In a letter of the 9th of October, 1930, from his client's father with reference to the debit of the \$25 fee, Mr. Hopkinson was reminded that his inclusive fee was \$20, being "one-half of one-third share of the total amount drawn; you have therefore taken \$5 in excess of your share and I must ask you to forward a cheque for the \$5, and would be glad to have a *detailed account of the monies sent you to pay law costs in the matter*" of the libel action. Mr. Hopkinson has never supplied, as requested, a detailed account of law costs, that is to say, disbursements down to and including the filing of the statement of claim. The Committee find, and we agree, that the agreement was that Mr. Hopkinson should receive, as his inclusive fee in the libel action, one-sixth of the amount recovered, which in the result was \$20. So his statement of account cheated his client of a further sum of \$5, making \$19.60. Incidentally we would mention that Mr. Hopkinson could not recover in any Court the champertous \$20. In reply to the letter of the 9th October, 1930, he wrote on the 14th of October saying: "*Re* your letter received to-day, will be in New Amsterdam for the sessions on Saturday afternoon, the 19th instant, and will before I return to town see you and go into the matter. *I may at once tell you that one-third is correct*, but will be able to explain the \$5 when I come." The Committee say, and we agree, that Mr. Hopkinson was unable to explain away his plain admission that the one-third share was correct. Whatever was the agreement, whether for \$20 or \$25, he cannot escape the irresistible conclusion that he acted dishonestly towards his client in deducting from the \$120 a greater sum than he was entitled to and in defiantly continuing to withhold his client's money.

Mr. Hopkinson's precise statements in his letters and in his evidence antecedently deprived of beneficial effect the excellent advocacy of Mr. E. G. Woolford, K.C., on his behalf.

We agree with the Committee that he was guilty of misconduct. We think it is clear that his conduct was dishonourable and disgraceful.

It would be unfair to the public and to reputable legal practitioners to allow Mr. Hopkinson to continue to appear, on the ground of his name being on the Roll of the Court, to be a fit and proper person to be entrusted with the business as a barrister or a solicitor. The order of the Court is that Leonard Arthur Hopkinson is prohibited from acting in British Guiana as a barrister or a solicitor and that his name be struck off the Roll of the Court in which it is now registered and that he do pay to the Secretary of the Legal Practitioners Committee forty-five dollars for the Committee's costs, which sum includes twenty-five dollars for the fee to counsel who moved the Court on the Committee's report. Following precedents in the South African Courts, we grant him leave to apply to the Court to be reinstated after the

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expiration of three years from to-day's date if his conduct is such as to justify reinstatement.

This case makes it expedient for us to refer to persistent and credible statements that a few solicitors habitually refrain from paying counsel's fees, even when they have received those fees for the very purpose of paying them to counsel, and that a few solicitors habitually refrain from giving credit in their accounts with clients for the large sums of money which they mislead their clients into believing they are bound to pay a solicitor under the false name of a solicitor's retainer. It may be due to lack of moral courage that such statements are not brought by means of affidavit on oath to the knowledge of the Judges or of the Legal Practitioners Committee. We think it is well to warn the solicitors who may be concerned, and to inform litigants, that in either of those cases the solicitor is guilty of misconduct for which he is liable to be struck off the Roll of the Court.

Order for removal from Roll.

F. B. B. SHAND v. C. E. A. RAWLE.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF THE LEEWARD ISLANDS
DOMINICA CIRCUIT.

FRANCIS BYAM BERKELEY SHAND, Appellant (Plaintiff),

v.

CECIL EDGAR ALAN RAWLE and

JOSEPH ST. GERAUD (GIRAUD), Respondents (Defendants),

Before the Chief Justice of British Guiana (Mr. BERNARD ARTHUR CREAM),
the Chief Justice of Barbados (Mr. ERNEST ALLAN COLLYMORE), and
the acting Chief Justice of Trinidad and Tobago (Mr. WILLIAM JAMES
GILCHRIST).

1937. JULY 22.

Practice—Statement of claim—Summons to strike out—No appearance of defendant—Application by plaintiff for dismissal of summons—Summons adjourned indefinitely—Hardship on plaintiff—Denial of his rights to have action heard and disposed of—Order set aside on appeal.

Appeal—Leave to—May be made to West Indian Court of Appeal in first instance—Extension of time to lodge appeal papers—West Indian Court of Appeal (Amendment) Rules, 1930, rule 4.

On the 15th December, 1936, the defendants took out a summons for an order striking out the statement of claim on the ground that it disclosed no reasonable cause of action against the defendants and was frivolous and vexatious and an abuse of the process of the Court. The summons was returnable for the 21st December, 1936: it was not heard then, but the Registrar notified the parties that the hearing had been fixed for the 5th March, 1937. The plaintiff attended on that day, but the defendants did not appear in support of their own summons nor were they represented by counsel or solicitor. The plaintiff thereupon applied for a dismissal of the summons, but the judge adjourned the hearing indefinitely. The plaintiff appealed against the order.

Held (1) that the order adjourning the matter generally was bound to have the effect of delaying the hearing of the plaintiff's action indefinitely, and thus constituted a hardship on the plaintiff and a denial of his legal rights to have the action heard and disposed of, and

(2) that the summons must consequently be dismissed, and the appeal allowed.

As soon as an appeal is entered the West Indian Court of Appeal has jurisdiction to hear an application for leave to appeal even though no application was made in the first instance to the Supreme Court of the colony for such leave.

The West Indian Court of Appeal granted the appellant an extension of time under Rule 12 (4) as enacted by rule 4 of the West Indian Court of Appeal (Amendment) Rules, 1930, to lodge the documents and papers required for the hearing of an appeal.

The Chief Justice of British Guiana delivered the judgment of the Court:—

The summons in this case was taken out on the 15th December 1936, and it called upon the appellant to attend the Court in chambers on the 21st December, 1936. The summons was not heard on this date, but a notification was sent to the appellant on

the 24th February, 1937, by the Registrar that the hearing had been fixed for the 5th March, 1937. The appellant attended on this day in chambers. The respondents though notified by the Registrar of the day of hearing did not appear in support of their own summons nor were they represented by Counsel or Solicitor.

Application was thereupon made by the appellant for the dismissal of the summons; but, this was refused by the learned Judge and the hearing of the summons was adjourned. And as appears from the note of the learned Chief Justice it was adjourned indefinitely.

From this order of adjournment the appellant appeals as it is submitted by him it has the effect of delaying indefinitely the hearing of his action and denying him legal rights to which he is entitled, that is, to have his action heard and disposed of.

An appeal from an Order of adjournment or from an Order refusing an adjournment, is unusual, but not without precedent; especially if the Order of adjournment causes any undue hardship to the appellant.

The adjournment of this summons left the appellant in a very indefinite position; for until the respondent elected to fix a day for the hearing of it the appellant was debarred from setting down his case for hearing and that position might easily be considered as an injustice to the appellant.

At the outset we should like to say that we are not concerned on the hearing of this appeal, with appellant's statement of claim in this action or the affidavit filed in support of the summons.

Though we have already granted the appellant an extension of time within which to file his affidavit of service of the notice of appeal we think it proper to set out herein that our authority for so doing is Rule 12 as amended by rule 4 (4) of the West Indian Court of Appeal (Amendment) Rules 1930. In our view that rule clearly gives power to this Court to make such an order

And we should also mention the preliminary objection raised by Mr. Imbert for the respondents that as this appeal is from an interlocutory Order, leave of the Judge who made the Order should first have been obtained.

We feel bound to say that this point has been very ably argued by Counsel for the respondents and in the course of this argument he has referred us to the Leeward Islands Act, Chapter 25, section 3 of which enacts that an appeal shall be to the West Indian Court of Appeal from any final judgment or decision of a Judge of the Supreme Court sitting as a Court of first instance and by leave of the Judge or of the Court of Appeal from an interlocutory Order made by a Judge in the course of any proceeding.

We are also referred by him to Rule 18 as amended by Rule 5 (2) of the above 1930 Rules which says whenever under these rules an application may be made either to a Supreme Court or to the

Court (which means this Court) it should be made in the first instance to the Supreme Court or a Judge thereof. And it is argued by him that as this rule is still in existence, and admittedly no application was made to the Supreme Court or Judge then the appellant is not properly before this Court and has no right to have this appeal heard.

This argument we think is a most plausible one and worthy of a good deal of consideration. But at the same time we are unable to agree with it for we take the view that once the appeal is entered even though no application has been made to the Supreme Court or a Judge thereof this Court has jurisdiction to hear the application which we have already done and given leave to appeal. And our authority for so doing is the case of *Brown v. Brook* (1902) 86 L. T.R. 373 and 18 T. L. R. 383 referred to in the Yearly Practice, 1934 at p. 1,270. It appears to us that once the appeal is entered an application may be made to the Court of Appeal notwithstanding the rule, and apart from that it would seem from the judgment of Lord Justice Scrutton in the case of *Jones v. S. R. Anthracite Collieries, Ltd.* (1921) 90 L.J. K.B. 1315 that the main object of the Court of Appeal is to do justice between the parties without being prevented by technical objection..

As the respondents did not appear on the day fixed by the Court below for the hearing of their summons it appears to us that the learned Chief Justice used his discretion on a wrong principle when he refused to dismiss this summons when the application to do so was made by the appellant.

It is true that the Registrar made some statements when the summons was called; but that did not alter the fact that the respondents were in default in not appearing either personally or by Counsel or Solicitor when their own summons was called. And while we, fully appreciate the difficulties in the way of the respondent Mr. Rawle appearing personally which have been so clearly explained to us by Mr. Imbert, at the same time we have to bear in mind the legal rights of the appellant. He appeared in response to a notice from the Registrar of the Court to answer this summons against him. When there was no appearance by or for the respondents who took out the summons, the appellant was entitled to ask that it be dismissed, and in our opinion he was entitled to an Order dismissing it. The order adjourning the hearing generally is considered by him to be a hardship and a denial of his legal rights, and as we agree with this view, we are of opinion that he should succeed on this appeal.

It seems clear to us that the order adjourning the matter generally is bound to have the effect of delaying the hearing of the appellant's action indefinitely. If it has that effect the appellant is denied his right of being heard and on that denial alone of his right he is entitled to succeed on this appeal.

The order of the Court therefore is:—The appeal is allowed

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and the summons taken out against the appellant is dismissed. The respondents are given 21 days for the filing of their defence. If within this time a fresh summons is taken out by the respondents or either of them the time for filing defence is extended for a further 14 days from the date of determination of such summons if necessary. The appellant is allowed the costs of appearing on the summons. But when we have regard to the defects and omissions in the preparation of this appeal we do not feel justified in granting costs of appeal to appellant.

Appeal allowed.

G. MARK v. W. DOTTIN.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

GEORGE MARK, Appellant (Plaintiff),

v.

WILLIAM DOTTIN, Respondent (Defendant).

Before Mr. C. C. GERAHTY, Chief Justice of Trinidad and Tobago, President; Mr. B. A. CREAN, Chief Justice, British Guiana; and Mr. G. E. F. RICHARDS, Chief Justice, St. Lucia.

1937. SEPTEMBER 22.

Appeal—Question of fact—Finding of trial judge—Presumed to be right—Onus on appellant to establish otherwise.

When a case tried by a judge without a jury comes before the Court of Appeal, that Court will presume that the decision of the judge on the facts was right and will not disturb it unless the appellant satisfactorily makes out that he was wrong.

The judgment of the Court was as follows:

This is an appeal from the judgment of Gilchrist, J. in a case arising out of a collision between a motor car driven by the Respondent and a motor cycle ridden by the Appellant.

The collision occurred at the Montrose junction on 31st December, 1935, and the Appellant received certain injuries.

The learned trial Judge found on a consideration of the whole evidence that:

(a) he could not accept the case for the Plaintiff (Appellant) that the accident in question was due to the negligence of the Defendant (Respondent).

(b) the collision was due to the Plaintiff taking the curve on his wrong side, in other words, "cutting the curve" and that in consequence he placed the Defendant in a position of peril and

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that in the agony of an impending collision, he, the Defendant pulled over his car to his right to avoid a head-on collision.

(c) in doing so he the Defendant in the circumstances in which he was placed by the Plaintiff acted reasonably.

(d) when the Defendant so acted the Plaintiff also pulled over to the same side and a collision resulted.

(e) the collision was brought about by the negligence of the Plaintiff.

The Appellant appeals against all these findings and contends that the finding that the Appellant was guilty of negligence is against the weight of the evidence.

We have carefully perused the evidence and considered the arguments addressed to us by Counsel and are of opinion that there is ample evidence to support the findings of the trial Judge.

On the evidence as a whole we find ourselves in agreement with the trial Judge that the account given by the Respondent, who, on the evidence, appears to be an experienced and competent driver, as to the movements of both parties immediately preceding the collision is more reasonable and probable than the version given by the Appellant.

Moreover, his version is supported by the evidence of Herman Antoine, who saw the collision take place, and by Tackoordeen who also witnessed it.

Counsel for the Appellant has drawn our attention to what he describes as "a change of front" between the statements made to the police shortly after the accident by the Respondent and his witness Antoine and their evidence as well as to various discrepancies in their evidence. He has also sought to cast a doubt upon the evidence of Tackoordeen based upon the spot from which Tackoordeen alleges that he witnessed the accident. On the other hand, Counsel for the Respondent has pointed out that there are also discrepancies in the evidence for the Appellant. These discrepancies and the points raised by Appellant's Counsel we have been informed, were substantially put at the trial to the learned Judge who, in weighing the evidence, we must presume, paid due regard to them.

Despite the criticism of this evidence to which we have also given our careful attention it appears to us to be quite clear that the Respondent must have driven his car across to his right hand side of the road for no other reason than to avoid a head-on collision.

We cannot agree with the proposition that the Respondent should have assumed that the Appellant would cross over to his correct side. The Appellant was from the beginning in the wrong by taking the curve on his incorrect side and when the Respondent made for his right hand side of the road, it appears to us reasonable that he should conclude that the Appellant would

continue in the course he had taken and made use of the opening which the Respondent had given him.

Notwithstanding his findings in favour of the Respondent, the trial Judge proceeds to point out in paragraph 9 of his judgment that "assuming the Respondent to be negligent in going to the right, the Appellant on his own evidence by the exercise of reasonable care and skill in the handling of his motor cycle could have avoided the collision by taking to his right."

This statement may possibly be said to be redundant in view of the finding of no negligence on the part of the Respondent, but nevertheless we find ourselves substantially in agreement with it having particular regard to the Appellant's own evidence that when he got to the middle of the junction he saw the respondent's motor car as far away as 40 yards.

We are of opinion that the proper conclusions to be formed from the facts are: that the Appellant was in fact taking the corner on his wrong side and that the conduct of the Respondent in the short time available to him, and in all the circumstances was reasonable.

Now all the findings of the trial Judge in this case are decisions on questions of fact arising out of the evidence which, as usually is the case in this class of litigation, is conflicting.

In the case of *Corea v. Cabral*, Reports of decisions in the Supreme Court of British Guiana, 1928, and in the West Indian Court of Appeal at p. 97, on an appeal from the Supreme Court of St. Vincent, this Court drew attention at p. 98 to various decisions on the subject of appeals against decisions of questions of fact arising out of conflicting evidence. It will suffice here to mention three of such cases:—

S.S. Hontestroom v. S.S. Sagaporack (1927), A. C., p. 37.

Khoo Sit Hoh v. Lim Thean Tong (1912), A. C. 325 P.C.

Colonial Securities Trust Co. v. Massey (1896) 1. Q. B. 38.

In the last mentioned case the head note is as follows:—

"When a case tried by a Judge without a Jury comes before the Court of Appeal, that Court will presume that the decision of the Judge on the facts was right and will not disturb it unless the Appellant satisfactorily makes out that he was wrong."

We have been referred to the case of *Powell and Wife and Streatham Manor Nursing Home* (1935) A. C. 243, which sets out at length the principles which should guide a Court of Appeal on the hearing of appeals on questions of fact, one of which is that where the Judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the Appellate Tribunal can be: and the Appellate Tribunal will generally defer to the conclusions which the trial Judge has formed. In the case before us the Appellant has not satisfied this Court

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that the decision of the learned trial Judge is wrong, in fact we agree with the conclusions formed by him on the facts as found. Accordingly the appeal is dismissed with costs.

Appeal dismissed.

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IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

ALEXANDER HUTCHINSON RIGSBY, Appellant (Defendant),

v.

MAYOR, ALDERMEN and BURGESSES OF SAN
FERNANDO, Respondents (Plaintiffs).

Before Mr. C. C. GERAHTY, Chief Justice of Trinidad and Tobago, President; Mr. B. A. CREAN, Chief Justice, British Guiana; and Mr. G. E. F. RICHARDS, Chief Justice, St. Lucia.

1937. SEPTEMBER 22.

Appeal—Amount sought to be recovered does not exceed £200—Full Court—Exclusive jurisdiction of—No appeal to West Indian Court of Appeal—West Indian Court of Appeal Act, 9 & 10 Geo. 5, c. 47, s. 3 (1)—Judicature Ordinance, cap. 35, s. 32 (2)—Judicature Ordinance, No. 34 (Revised Edition, 1905), ss. 20(7), 33, 34—Amount claimed dependent on a finding—Not recoverable in absence of such—Separate declaration as to finding—Incidental and ancillary—Jurisdiction of Full Court not ousted—West Indian Court of Appeal—No jurisdiction in—Trinidad.

It is provided by section 32 (2) of the Judicature Ordinance, cap. 35 and by section 33 of the Judicature Ordinance No. 34 (Revised Edition 1905) of the laws of Trinidad and Tobago that an appeal shall not lie to the West Indian Court of Appeal but shall lie to the Full Court (which shall have exclusive jurisdiction) in all actions where the amount of the claim debt or damages sought to be recovered does not exceed the sum of two hundred pounds.

The plaintiffs' claim was (a) for a declaration that at the time when the defendant acted as a councillor on the 9th July, 1936, he had ceased to be qualified and/or had become disqualified to act as a councillor; and (b) to recover from the defendant the sum of \$480 payable under Ordinance No. 40 of 1935, as a fine by him in respect of his so acting.

The trial judge found that the defendant was disqualified when he acted as a councillor on the 9th July 1936, and ordered the defendant to pay to the plaintiffs the fine of \$480 fixed by section 31 (1) of the Ordinance. He did not make any declaration as claimed in the statement of claim, but treated the question of the alleged disqualification as a fact in issue between the parties. The formal order, however, contained this finding in the form of a declaration in accordance with the statement of claim.

The defendant appealed to the West Indian Court of Appeal.

Held, that as the major relief claimed was for a sum of money, any declaration accompanying such relief was merely incidental and ancillary; and that the West Indian Court of Appeal therefore had no jurisdiction to hear the appeal, exclusive jurisdiction to hear such appeal being in the Full Court.

The judgment of the Court was as follows:—

This is an appeal from the judgment of Perez, Acting J., whereby he ordered that judgment be entered for the Plaintiffs-Respondents for the sum of \$480.00 with costs.

The writ in the action is endorsed as follows:—

“The Plaintiffs’ claim is to recover the sum of \$480.00 being the amount of the fine for payment of which the Defendant has by virtue of the San Fernando Corporation Ordinance, No. 40 of 1985, become liable by reason of his having acted in a Corporate Office namely that of a Councillor of the Borough of San Fernando after ceasing to be qualified for such Corporate Office.”

The material facts of the case stated shortly are, that the Appellant, a Solicitor by profession, was struck off the Rolls on the 10th March, 1934. He was elected a Councillor of the Borough of San Fernando on 1st November, 1934, for a period of three (3) years in accordance, with the provisions of the Municipal Corporations Ordinance, Cap. 230. On the 16th of May, 1936, Ordinance No. 40 of 1935 came into operation. This is an Ordinance to consolidate the laws relating to the Borough of San Fernando, to revise the same, and to make further provision for the good government of the Borough.

A disqualification, which did not appear in Cap. 230 under which the Appellant was elected, is introduced by Section 12 (2) (f) as follows:—

“(2) A person shall be disqualified for being elected and for being a Councillor . . .

(f) if, being a person possessed of professional qualifications, he is disqualified to exercise the practice of his profession on account of any act involving dishonesty, and during the period he is so disqualified.”

On the 9th July, 1936, the Appellant acted in a Corporate Office of the Borough of San Fernando by attending, speaking and voting at a meeting of the Council.

These facts and others are set out in paragraphs 1 to 7 of the Statement of Claim, paragraph 8 of which runs as follows:—

“The Plaintiffs’ claim is (a) for a declaration that at the time when the Defendant acted as alleged in para. 7 hereof” (*i.e.*: when he acted as a Councillor on the 9th July, 1936) “the Defendant had ceased to be qualified and/or had become disqualified to act as a Councillor of the said Borough of San Fernando and (b) to recover from the Defendant the sum of \$480.00 payable as a fine by him in respect of his so acting by virtue of the provisions of the San Fernando Corporation Ordinance, No. 40 of 1935.”

In his Defence the Defendant denied, *inter alia*, that he had been disqualified to exercise the practice of his profession on account of any act involving dishonesty.

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In his written judgment the learned trial Judge made a finding that the Defendant was disqualified from exercising the practice of his profession on account of an act or acts involving dishonesty and that he was so disqualified when he sat as a Councillor on the 9th of July, 1936, and made an order "that the Defendant do pay the Plaintiffs the sum of \$480.00, the fine fixed by Section 31 (1)".

It is to be observed that the learned Judge did not make any declaration as claimed in the Statement of Claim, but treated the question of the alleged disqualification as a fact in issue between the parties.

On the other hand the formal order contains this finding in the form of a declaration in accordance with the Statement of Claim.

On the 8th of September, 1937, the Solicitor for the Plaintiffs-Respondents filed a notice of the intention to take a preliminary objection to the jurisdiction of this Court to hear this appeal and to apply to have the said appeal dismissed or struck out with costs.

On the 10th of September, 1937, the appeal came on for hearing and on the preliminary objection being argued to its completion this Court reserved its decision thereon.

At the instance of and by agreement of Counsel, the appeal was then heard on its merits, subject to the determination of the preliminary objection to the Court's jurisdiction. On the conclusion of these arguments the Court further reserved judgment.

The jurisdiction of the Court is conferred by Section 3 (1) of the West Indian Court of Appeal Act, 1919 (*9 & 10 Geo. V.—C. 47*), and is as follows:—

"3.—(1) The Court of Appeal shall have jurisdiction and power to hear and determine appeals including reserved questions of law from any of the Courts of the Colonies to which this Act for the time being applies, subject, however, to the provisions of this Act, and to any provisions which may be made by the Legislature of any of those Colonies as to appeals from that Colony, and to Rules of Court made under this Act."

It has been provided by the Legislature of this Colony by Section 32 (2) of the Judicature Ordinance, Cap. 35, that an appeal shall lie to the Full Court (which shall have exclusive jurisdiction) in all "appeals in all actions and matters in which, prior to the 1st of January, 1918, the Supreme Court exercised a Summary Jurisdiction."

Prior to 1st January, 1918, the Summary Jurisdiction above mentioned was exercised by virtue of the provisions of Sections 33 and 34 of the Judicature Ordinance, No. 34 of the 1905, Revised Edition, Section 33 of which is as follows:—

"33. It shall be lawful for the Supreme Court to exercise a Summary jurisdiction at law in all actions where the amount of the claim, debt or damages sought to be recovered does not ex-

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ceed the sum of two hundred pounds, and in all actions for the recovery of the possession of lands where the value of such lands does not exceed the sum of five hundred pounds.”

It is clear, and it is not disputed that the action under consideration, in so far as the amount sought to be recovered, would have been within the Summary jurisdiction of the Supreme Court.

The argument was confined to the subject of a declaration as first mentioned in the Statement of Claim.

It was contended by Counsel for the Appellant that, as a declaration is an equitable relief or remedy, it could neither have been granted by the Court in its Summary jurisdiction at law under Section 33 nor in its Summary jurisdiction in equity under Section 34, which must be strictly construed.

It is to be observed that, had this action been instituted by Writ of Summons prior to 1918 to the Summary jurisdiction of the Court, a Statement of Claim might not have been required and the action then could have proceeded to trial without any formal claim for a declaration.

Now what is the nature and effect of the declaration claimed in the Statement of Claim?

It seems to us that the word “declaration” is somewhat unfortunate in this particular case, since all that was sought by the Plaintiffs was the expression of a finding by the Judge that at the time the Defendant acted as a Councillor on 9th July, 1936, he was disqualified so to do, which finding is in fact to be found in the penultimate clause of the Judge’s written judgment.

In any event such a finding is an essential basis for judgment in respect of any breach of Section 31 (1) of the San Fernando Corporation Ordinance, 1935 (No. 40 of 1935), which is as follows:—

“31.—(1) If any person acts in a Corporate Office without having made and subscribed to the declaration by this Ordinance required, or without being qualified at the time of making the declaration, or after ceasing to be qualified, or after becoming disqualified, he shall for each offence be liable to a fine not exceeding four hundred and eighty dollars, which shall, at any time, on a resolution of the Council, be recoverable with full costs of suit by action in the Supreme Court by the Town Clerk in the name of the Corporation.”

It is obvious that such a finding is implied by any judgment based upon the provisions of Section 31 (1) and therefore the expression of such a finding in the form of a declaration is merely to express what has necessarily been already implied.

The declaration in fact made does not in our view in any way extend, add to or affect the cause of action or the result of the action.

In other words we agree with Counsel for the Respondents that such a declaration is merely ancillary to the claim as made in the

A. H. RIGSBY v. MAYOR, &c., OF SAN FERNANDO.

Writ of Summons.

While we are sensible of the distinctions to be drawn between Section 56 of the County Courts Act, 1888 (*51 & 52 Vict.—C. 43*), and Section 33 of Ordinance No. 34 of the 1905 Revised Edition and of the distinctions between Section 89 of the Judicature Act, 1873 (*36 & 37 Vict.—C. 66*), and Section 20 (7) of Ordinance No. 34 of the 1905 Revised Edition, we think the principles to be applied to the question before us are similar to those enunciated in *Rex v. The Cheshire County Court Judge & The United Society of Boiler Makers, 1921, L. J. K. B.—Volume 90, p. 772*, and *Simpson & Latton v. Crowle & others at p. 878* of the same report, that is to say, that so long as the major relief claimed is for a sum of money within the limits of the Summary jurisdiction, any declaration accompanying such relief is merely incidental and ancillary.

In considering the analogy together with the distinctions between the provisions of Section 89 of the Judicature Act, 1873 and Section 20 (7) of Ordinance No. 34 of the 1905 Revised Edition, we do not find any reason for departing from the principles expressed in the cases above referred to, and in fact we are of opinion that this was a claim which could have been properly brought before the Court in its Summary jurisdiction.

In the circumstances we have no alternative but to hold that this Court has no jurisdiction to entertain this appeal.

The appeal must therefore be struck out with costs to the Respondents in so far as they relate to the preliminary objection.

Appeal struck out.

A. ALI v. I., M. & R. LUCES.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

AMJAB ALI, Appellant (Defendant),

v.

IRENE, MARIE AND RUDOLPHO LUCES,

Respondents (Plaintiffs).

BEFORE MR. C. C. GERAHTY, Chief Justice of Trinidad and Tobago (President); MR. B. A. CREAN, Chief Justice, British Guiana; and MR. G. E. F. RICHARDS, Chief Justice, St. Lucia.

1937. SEPTEMBER 22.

Appeal—Judgment—Oral—Taken down by counsel while being delivered—Transcript—Considered by Court of Appeal—Evidence on which trial judge could have reasonably found as he did—Unsafe to disturb finding.

A transcript of the oral judgment of a trial judge as taken down by appellant's counsel while it was being delivered was allowed to become part of the proceedings on the hearing of an appeal.

If there is evidence on which a trial judge could have reasonably found as he did, then it is unsafe to disturb his finding.

CREAN, C.J., British Guiana:

On the 3rd of August, 1936, Rudolfo Luces and his two sisters Irene and Marie, who are the Respondents herein, were passengers in motor cab H 6108 the property of Amjab Ali the Appellant in this appeal. On this day the motor cab was being driven by one Neville Gittens who was at that time the servant of Amjab Ali.

They left the house of the Luces about 10 a.m. and were driven by Gittens to Staubles Bay. The Luces say that Gittens picked up another man at Carenage and that he travelled in the motor cab with them to Stauble's. The name of this man they learned later was Charles Fournellier. But he does not agree with their evidence as to where he entered the car on this morning.

From the evidence of the three Luces it appears that when they arrived at Stauble's Bay the driver Gittens went away in the car and returned at 2 p.m. and asked them if they were ready to return. They said they were not, and asked him to return later which he did, arriving at 5 p.m.

At this time it appeared to the Luces that Gittens had been drinking; but, it did not appear to them that he was so drunk that he could not manage the wheel of the car and so they set out with him on the return journey along with Fournellier. Marie Luces in the front seat beside the driver, Irene, Rudolfo and Fournellier in the back. The evidence given by the Luces shows that there was a good deal of traffic on the road and that Gittens

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was driving fast. Marie Luces told him so; but, he replied that he was not going "so fast," and continued at the same speed.

At Point Cumana near a curve on the road another car approached them from the opposite direction. Gittens was then driving fast on the left centre of the road and according to the Luces' evidence he gave a hard pull to the left of the road, and struck a culvert on the left side. After this, so far as the Luces are concerned, all else was oblivion, until they regained consciousness on the way to hospital. But Lance-Corporal Thomas says that when he went to this spot later on the same evening, he saw taxi cab H 6108 in the ditch on the left side of road coming to Port-of-Spain with its radiator and bumper jammed.

On these facts Irene, Marie and Rudulfo Luces brought an action in the Supreme Court of Trinidad and Tobago against Amjab Ali the proprietor of the motor cab and Neville Gittens the driver of it alleging in their Statement of Claim that on the 3rd of August, 1936, they were passengers for reward in the said motor cab at that date owned by Amjab Ali and at the material time driven by and in the charge of Neville Gittens the servant or agent of Amjab Ali. It is also alleged in the Statement of Claim that by reason of the negligence of the said Defendant Neville Gittens the Plaintiffs suffered injuries, loss and expense.

The Defendant Neville Gittens did not file a defence and so judgment was given against him. But Amjab Ali did, and in it he admits he was the owner of this motor cab on the 3rd of August, 1936. He denies the Luces were passengers for reward, or at all, but were being driven gratuitously and without his knowledge, consent, or his approval.

The case came on before Mr. Justice Gilchrist and immediately after a hearing which lasted three days he give an oral judgment, but after this wrote what his findings were. In this written note of his judgment he says: "Taking the evidence as a whole I accept the case for the Plaintiffs. As to Gittens. While I am inclined to say he has not told the truth when he said "he did not bathe at Stauble's, I in other respects accept his evidence and "am satisfied that the Plaintiff's hired taxi 6108 for reward to take them to "Stauble's Bay and back to Port-of-Spain at two shillings a head and that "he (Gittens) was paid six shillings. Find that time of accident Gittens was "servant and agent of the Defendant. Negligence in Gittens proved. I reject "the allegations of contributory negligence alleged by the Defendant Amjab Ali in his defence. I find in favour of Plaintiffs for damages."

Following this finding the learned trial Judge awarded to Irene Luces damages of \$360.78. To Marie \$213.23 and to Rudulfo \$96.80. The total amount of damages was \$675.81 and it is clear from the record that judgment was given against both defendants Amjab Ali and Neville Gittens.

Amjab Ali now appeals from this decision. Neville Gittens

does not. The reasons given by Amjab Ali the Appellant why he should succeed in this appeal are set out in detail in his notice of appeal. One of these is that the learned trial Judge did not pay any (or alternatively due and sufficient) regard to the documentary evidence and photographs.

At the beginning of the hearing of this appeal Mr. Hannays Counsel for the Appellant produced a transcript of the oral judgment of the trial Judge as taken down by him while it was being delivered by the Judge immediately after the conclusion of the trial and asked that it should become part of these proceedings. There being no objection to this, the copy of the oral judgment was allowed to become part of the proceedings.

When this copy of the oral judgment was admitted to become part of the record, Counsel for the Appellant referred the Court to page 4 thereof where it is said by the trial Judge "When Court is confronted with evidence which is to rebut presumption in favour of Plaintiff must have something better than that", and argued that those words indicated that the Judge approached the consideration of the case on a wrong principle. But though it must be admitted that these words, having regard to their context, are not very revealing as reported, still, I think that the learned trial Judge meant no more than what was said in the case of *Barnard v Sully* as this decision was obviously in his mind during the trial. From that decision, which has not been over-ruled, so far as I know, it appears that if a Plaintiff proves that the damage caused, was caused by the negligence of Defendant's car, and it is proved that it was the Defendant's car but no proof given of who was driving it when damage caused, then a trial Judge is not justified in dismissing Plaintiff's case; because as it is usual for a Defendant to drive his own car or his servant or agent to do so, evidence should be given by Plaintiff that he or his servants were not driving it before the Plaintiff's case can be dismissed. It seems to this Court that this is the particular presumption the learned trial Judge is referring to, and not to a presumption that there was an onus on the Defendant to prove that the Plaintiffs were not passengers for reward.

The two points which Counsel for the Appellant submitted and emphasized in his argument that called for the most careful consideration were: (1) as to the Luces, the Plaintiffs in the case, being passengers for reward and (2) if they were, was the Defendant negligent while acting in the course of his employment as servant of Amjab Ali the Appellant.

As to the first of these the main contention of the Appellant is, that the party which set out from the Luces' house on the 3rd August, 1936, was a friendly picnic party and that the Defendant Gittens, the driver, was one of that party. If that were so, it is most unlikely that the Plaintiffs were passengers for reward.

And as to the second point it is contended that as Gittens was

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one of the picnic party he was on his own business, and not his master's business and therefore could not be considered as acting in the course of his employment when this smash occurred.

On these two aspects of the case this appeal has been mainly argued and during it the attention of this Court has been called to the evidence of the Luces, the Plaintiffs, in which they say Gittens was not one of their bathing picnic party but that when they got out of the car at Stauble's Bay he went away in it and did not return till 2 p.m. when none of them were ready to go home. They told him so, and he went away again in his car and returned at 5 p.m.

In the final stages of the trial when Counsel for the Plaintiffs was addressing the Judge leave was asked of the Court to recall Fournellier one of the witnesses for the defence as an important piece of evidence had just been brought to the notice of Counsel for Defendant. He was recalled, and produced a photograph of Marie Luces and Gittens in the sea shewing Gittens holding the arm of Marie—Marie was then also recalled and denied it was she who was in the photograph. Notwithstanding her denial the learned trial Judge found that she was the lady in the photograph and refers to that fact in his oral judgment when he asks the question therein why the Plaintiffs lie on issues that do not seriously affect the case.

The submission of Counsel for the Appellant as to this is, that as the photograph proved conclusively that Gittens was at some time of that day in the party at Stauble's Bay and as the Plaintiffs have all lied as to it, he submits that as it was a fact of such vast importance for a decision in the case, that there was no other course open to the Judge but to reject the evidence of the Plaintiffs entirely.

This piece of evidence was undoubtedly of great importance because it has a very strong bearing on the fact as to whether or not this trip of Gittens to Stauble's Bay and back was in the course of his employment and I think Counsel for the Appellant went so far as to submit that if the Plaintiffs were disbelieved as to this fact it was impossible for a reasonable jury to believe the other parts of their evidence and therefore this case should be considered as not coming within the principles of the House of Lords cases *S.S. Hontestroom* A.C. 1927 and *Powell v. Streatam Nursing Home*, A.C. 1935.

It must be accepted that Rudulfo Luces' story as to Gittens not being with his bathing party on this day is untrue and the question of his being one of the party was a fact for grave consideration before coming to a decision in this case: Nevertheless, I cannot see how this case can be considered as not coming within the principles laid down in the above two cases for the guidance of Courts of Appeal, in appeals on fact. One of these principles I apprehend is that a Court of Appeal, must, in order

to reverse, not merely entertain doubts whether the decision below is right, but be convinced it is wrong.

Here, there was the evidence of Rudulfo Luces that he paid the six shillings the agreed taxi-cab fare, the evidence of Gittens the driver who says he received that fare and that he was then in the employment of the Appellant. Notwithstanding, however, the production of the photograph, and in spite of the falsehoods which he thought it proved, the learned trial Judge found that Rudulfo was speaking the truth as to the payment of fare, and Gittens as to his working on that day for the Appellant.

Whether Rudulfo paid this fare or not, and whether Gittens was working in the course of his employment on this day, I am unable to say. It has been submitted that it is wildly improbable in view of the evidence of the photograph; but, I think whether or not it is improbable, is not a question which a Court of Appeal can put to itself. If it does, it puts itself in the position of the trial Judge, without his advantage of seeing all the parties and witnesses and living in the atmosphere of the case for the three days the hearing lasted.

It is quite true that the evidence as to the photograph is evidence as to a fact which was of importance and required consideration before a decision was come to in the case. But even though the words used by the learned trial Judge in his oral judgment indicate that it did not seriously affect the case, I think it must be assumed that he fully noted the significance of that evidence and considered it before giving his judgment in favour of the Respondents.

I am unable to see that there is any phase of this appeal, which is on fact, that is not considered and provided for in the House of Lords cases above referred to, and where the principles are laid down which should guide a Court of Appeal in appeals from findings on fact. One of these is, if there is evidence on which the trial Judge could have reasonably found as he did, then it is unsafe to disturb his findings. In this case, there was the evidence of Rudulfo Luces and Gittens on which he could have reasonably found as he did; therefore, I think this appeal should be dismissed with costs.

RICHARDS, C.J., St. Lucia:

I have had the advantage of reading the judgment just delivered by my brother Crean.

Apart from the question as to the meaning to be attributed to the expression "presumption in favour of the plaintiff" used by the learned trial Judge in his oral judgment, upon which question this Court is unanimous, the most important question for the consideration of this Court, as I see it, is whether or not the learned trial judge was wrong in his determination of the question

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as to whether or not the Plaintiffs-Respondents were, on the 3rd August, 1936, passengers for reward in motor cab H 6108, and to this question I shall restrict my remarks.

The photographic negative (which I have not seen) and the photograph—two of the exhibits in this case—I think should both be taken to indicate some degree of friendliness between the Plaintiffs and Gittens, the driver.

If the evidence of the witness Fournellier is to be believed, when he states that he took both the negative and photograph at Stauble's Bay on the 3rd August, 1936, the photograph shows clearly that Gittens was not speaking the truth when he stated that he did not bathe at Stauble's Bay on that date and it also shows—as the learned trial Judge himself expressly found—that Marie Luces also swore falsely when she stated that she was not one of the two persons appearing in that photograph.

The note taken of his oral judgment shows that the learned trial Judge expressed his difficulty, in accounting, possibly only for the lie told by Marie Luces, with respect to the photograph, but possibly and even probably also (on the assumption that he believed Fournellier's evidence regarding the photograph) in accounting for the statement of Gittens that he did not bathe at Stauble's Bay on the 3rd August, 1936, by the question which he puts to himself "Why lie on issues that do not seriously affect this case?" which question—even bearing in mind the imperfections in form and expression inevitable in the delivery of an oral judgment—to my mind, shows that the learned trial Judge neither misunderstood nor disregarded the photograph, but that he realized that it did affect the case although in his opinion, not seriously. This photograph, be it observed, was never put to Gittens, who, in his evidence admits that, in his statement to the Police, he said he had four friends in the taxi.

While I think it is clear that the learned trial Judge was under no misapprehension as to the duty of the Plaintiffs to discharge the onus of proving that they were passengers for reward, the argument on behalf of the Appellant on this point, as I understand it, is substantially that this Court should find—

(a) that, principally because the fact that Marie Luces, directly, and Gittens, indirectly, lied with respect to the photograph, the learned trial Judge was not entitled to credit the evidence as to payment made by the Plaintiffs for being conveyed to and from Stauble's Bay.

(b) that the incontrovertible evidence of friendliness contained in the negative and photograph goes so closely to the root of this matter as to destroy the evidence that the Plaintiffs were passengers for reward, and went to establish the proposition put by the defence, that this excursion to Stauble's Bay was in the nature of a picnic, but with neither of these submissions can I agree.

The learned trial Judge's finding of the crucial fact that the

Plaintiffs were passengers for reward obviously rested mainly upon the oral evidence of the Plaintiffs and Gittens (who was originally a co-defendant with the Appellant and called as a witness at the instance of Counsel for the Defendant-Appellant) which oral evidence, it is clear, the learned trial Judge accepted. In my view the negative and photograph together are by no means conclusive as refuting the oral evidence of payment, despite the fact that Marie Luces, who was the only witness confronted with, and examined upon, either of these exhibits, namely the photograph only, lied with respect to it, and despite the fact that both negative and photograph indicate friendliness between the Plaintiffs and Gittens. I cannot see that friendliness is necessarily inconsistent with payment, nor do I feel that, in the learned trial Judge's finding of fact that the Plaintiffs were passengers for reward, is to be found such a glaring improbability as would justify this Court in allowing this appeal on that ground, particularly as no witness contradicts the evidence of payment of two shillings on account, alleged to have been made on the 2nd August, 1936, and as the only evidence that can be said to be in direct conflict with the evidence of further payment on the 3rd August, 1936, is the statement of Fournellier that he paid nothing himself nor did he see any of the Luces give Gittens any money; nor (although I am not prepared to state that, if I had heard the case in the first instance, I would have come to the same conclusion as the learned trial Judge) am I satisfied, generally, that he, with well recognized advantages as compared with this Court was wrong, and therefore I agree that this appeal ought to be dismissed with costs.

PRESIDENT: This is an appeal from the judgment of Gilchrist J., in a case arising out of a motor car accident on the 3rd of August, 1936, in which he gave judgment for the Plaintiffs-Respondents and awarded damages.

The vehicle in question was a car plying for hire, No. 6108, owned by the Defendant-Appellant and driven by one Neville Gittens, a Defendant in the action, who, it is alleged, was the servant or agent of the Appellant at the material time.

In his written notes of judgment the learned trial Judge made the following findings:—

(a) that the Plaintiffs hired the car for reward to take them to Stauble's Bay and back to Port-of-Spain at two shillings a head and that Gittens was paid six shillings.

(b) that at the time of the accident Gittens was servant and agent of the Defendant Amjab Ali.

(c) that Gittens had been proved to be negligent

(d) that he rejected the allegations of contributory negligence raised by the Defendant Amjab Ali in his defence.

The Judge also reviewed the evidence orally, notes of which,

taken by Counsel at the time, were produced at the hearing of this appeal and have been put in as part of the proceedings.

The two main issues for consideration on this appeal are:— (1) Were the Plaintiffs-Respondents passengers for reward on the occasion in question? and (2) If so, was Gittens acting within the scope or in the course of his employment?

It has been contended by Counsel for the Appellant that the learned Judge has misdirected himself as to the onus on the first of such issues by wrongly assuming that there was a presumption in favour of the Respondents that they were in fact passengers for reward.

On perusing the notes of the Oral judgment submitted by Counsel, this contention has not, in my opinion, been established. It is clear, I think, that where the learned Judge refers at page 4 to the presumption in favour of the Respondents, he has in mind and is in fact referring to, the presumption discussed in *Barnard v. Sully*, 47 *T.L.R.* 557, with which he deals at page 5 in connection with the latter issue.

I am satisfied that the learned Judge fully appreciated that the onus on the first issue set out above rested on the Respondents.

It is also clear, I think, from a perusal of the evidence of the Respondents that such onus was in fact accepted by them, more particularly so as they set out to create the atmosphere that Gittens was no friend of any of them, in fact that he was a comparative stranger, and that the “outing” in question was entirely a business arrangement.

Indeed, it is on this point that I find myself in considerable difficulty in this case, for when the trial of the case was nearing its completion, a witness for the defence, one Fournellier, who was also a passenger in the car on this occasion, was recalled and produced a photograph depicting Gittens and the Respondent Marie Luces bathing together in an obviously friendly setting and a negative (which has apparently been mislaid subsequent to the trial) showing Gittens in a group with the three Respondents in a typical bathing-party environment.

No explanation of the photograph or the negative has been given by the Respondents, in fact on being recalled Marie Luces denies that she appears in the photographs, but does not doubt that Gittens is in it. Yet it is not disputed that it is Marie Luces and Gittens in that photograph and that the photograph was taken on the occasion in question.

The Respondents must have known that photographs were taken on this occasion, for a glance at the photograph of Marie Luces and Gittens shows clearly that they posed for it, and I have to ask myself how they could have taken the risk of presenting their case in the way that they did in the face of the possibility of such photographs being produced at the trial?

The explanation would appear to be this. They did not expect

Fournellier to be called as a witness and in fact he did not receive a summons until the night before he gave evidence. Again, the only camera mentioned in the case is one which belonged to Respondents and which was missing after the accident. They did not know what had become of this camera, it had disappeared like their bathing costumes, which, Lance-Corporal Thomas testifies, Fournellier collected in his presence after the accident, and for which the Respondents were subsequently compensated in damages.

Now the question of the effect of this documentary evidence was considered by the learned trial Judge, and, according to the notes of his oral judgment, he was satisfied that the photograph is almost conclusive that it represented Marie Luces and Gittens and he formed the conclusion that the lie involved is a lie on issues which do not seriously affect this case.

Incidentally the learned Judge also expressed the view that he had heard a number of untruths from every one of the witnesses, not excepting the Lance-Corporal.

On an analysis of the evidence I agree with the Judge in this respect, but with this qualification, that the photographs do in fact corroborate the evidence of Fournellier and Lance-Corporal Thomas in a material respect.

I cannot, however, agree with the conclusion of the learned trial Judge that the lie proved by the photographs is one which does not seriously affect the issue whether or not the Respondents were passengers for reward.

Where, as in this case, three Plaintiffs and the driver with whom they were associated, come into Court and by means of a proved lie jointly set out to create an atmosphere tending to establish a relationship between them to negative the defence put forward that they were not passengers for reward, I can draw no other conclusion than that they did so deliberately to misrepresent facts involved in a vital issue.

It does not seem to me that the conclusion to be drawn from the photographs produced, which speak for themselves, can be affected in any way by the demeanour of the witnesses when giving their evidence, be they the Respondents or the other witnesses in the case, or by any of those considerations which render it inexpedient for an Appellate Court to interfere with findings of fact arising out of conflicting evidence.

On the contrary, it seems to me that the Appellate Court is in just as good a position as the trial judge to draw its own conclusions on the effect of the admitted fact of this untruth, which constitutes positive evidence refuting the oral evidence of the Respondents and of Gittens, in, what I consider to be, a most material respect.

I thus find myself in the position of being unable to sever that particular evidence from the rest of the evidence, and to conclude

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that that part of their evidence relating to payment is true, even though there is no direct evidence to negative such payment. In my view the evidence of the photograph strikes at the root of the trustworthiness of their testimony as a whole.

Having regard to the fact that the onus was upon the Respondents to prove that they were passengers for reward, I am of opinion that, in the absence of any explanation as to their proved untruths, which, in my view, are aimed to undermine and obscure the proper trial of a vital issue, they cannot, on the evidence before the Court, be held to have discharged that onus with the degree of certainty required.

Moreover, I feel that the production of such important evidence as the photographs, almost at the conclusion of the trial, tended to confusion in regard to the issue in which, I think, it is so closely involved, and substantially added to the difficulties of the learned trial Judge in arriving at his conclusions on that issue.

I regret that I find myself obliged to differ from the majority of the Court by holding, for the reasons given above, that the appeal should be allowed and that there should be a new trial.

Appeal dismissed.

**REPORT
OF
DECISION**

IN THE JUDICIAL COMMITTEE OF THE PRIVY
COUNCIL ON APPEAL FROM THE WEST
INDIAN COURT OF APPEAL.

1935.

G. B. DUPIGNY, &c. v. F. PINARD & CO.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE WEST INDIAN COURT OF APPEAL.

GEORGE BERNARD DUPIGNY and BEATRICE ALEXANDRINA
BERTHA SUTHERLAND, Appellants
(Defendants),

v.

F. PINARD AND COMPANY, Respondents (Plaintiffs).

(PRIVY COUNCIL APPEAL No. 60 OF 1934).

Present at the hearing:—Lord BLANESBURGH, Lord RUSSELL OF

KILLOWEN, Sir LANCELOT SANDERSON.

1935. JUNE 4.

Judgment—Verdict of jury—Judgment for plaintiff—Amount to be quantified by a referee—Formal order not drawn up—Report of referee—Embodied in draft order—Draft order initialled by defendant—Not a consent judgment.

Executor—Moneys advanced to—For business of deceased—Used in—Beneficiaries under will—Not liable to lenders.

A civil action was tried before a jury who made certain findings. A discussion ensued thereon and the jury was discharged. The judge decided that on the jury's answers there must be judgment for the plaintiffs, but that the amount for which judgment should be entered must be a matter of enquiry. By agreement the question of *quantum* was referred to the Bishop of Roseau Pending his report no order was drawn up. As a result of the Bishop's report the figures were agreed at £1,849. 4. 3. A draft order was accordingly prepared and initialled as approved by counsel for the plaintiffs and the appellants. It was recited in the order that "all parties" had "agreed to be bound by the findings of the referee," namely, the Bishop of Roseau. The West Indian Court of Appeal held that the order, though not so expressed in fact, was a judgment by consent, that it contained an "express agreed recital" that the jury had found a verdict for the plaintiffs the truth of which recital the appellants could not dispute, and that the parties had definitely agreed to be bound by the Bishop's conclusions.

Held, (1) that the order was in no sense of the word a consent order. The judge had decided adversely to the appellants that upon the jury's findings the plaintiff was entitled to judgment against them for an amount to be quantified by the referee. The only consent was, upon the footing of an existing adverse decision as to liability, that the *quantum* should be ascertained by a particular referee.

(2) The approval of the draft order was merely a recognition that an order in terms of the draft would correctly represent the order which the judge had made.

The fact that moneys were advanced to a legal personal representative for the purpose of being used by him, and were used by him, for the benefit of a business in which persons are beneficially interested under a will, can of itself create no liability to the lender on the part of the beneficiaries, and is no justification in law for judgment being entered against them.

There lived formerly at Roseau, Dominica, one Wilson Dupigny who carried on business as a merchant and druggist under the style "Wilson Dupigny." He died on the 17th December, 1909, leaving him surviving his wife and seven children, three of whom were Wilson Patrick Leonard Dupigny (hereinafter called Leonard Dupigny), the appellant Mrs. Sutherland and the appellant George Bernard Dupigny. By his will which was duly proved on the 3rd February, 1910, he appointed his wife and Leonard Dupigny his executors and bequeathed his residuary estate (which included the business) to his wife and seven children and their heirs and assigns for ever in equal shares as tenants in common. The will provided that in the event of any of the said children dying without leaving lawful issue their shares and if one his or

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her share should revert to the others of his said wife and children. At the time of his death his son the appellant George Leonard Dupigny was an infant.

The testator's business was carried on after the testator's death under the name "Estate Wilson Dupigny," the management being in the hands of Leonard Dupigny so long as he lived, and in the hands, of his widow after his death on the 14th August, 1926.

The testator's widow died on the 2nd December, 1912, having devised and bequeathed all her property to her daughter Camilla. Camilla died on 17th November, 1928, unmarried and without leaving lawful issue. The appellant George Bernard Dupigny attained his majority on the 21st April, 1912.

On the 1st June, 1929, the plaintiff issued a writ of summons against the three surviving children of the testator (including the two appellants) and the administratrix of Leonard Dupigny claiming moneys lent and the price of goods supplied to the defendants as persons who since the testator's death had carried on business under the trade name of "Estate Wilson Dupigny." One of the children died after the issue of the writ, and she disappeared from the case.

The trial of the action took place before a jury who found (1) that from time to time the plaintiff loaned money to Leonard Dupigny and that some of these loans went to the assistance of "Estate Wilson Dupigny"; (2) that the plaintiff was given to understand and she understood that some of these loans were for the purpose of carrying on the business of "Estate Wilson Dupigny" and to help it from time to time; and (3) that the moneys so advanced and which actually went to the assistance of "Estate Wilson Dupigny" as vouched for, including those admitted by the defendants, have not been repaid.

Held (1) that the second finding would appear quite irrelevant to any question of liability to the plaintiffs on the part of the appellants;

(2) that the first and third findings merely establish liability on the part of Leonard Dupigny and his estate but of no one else.

(3) that there was a complete failure on the part of the plaintiff to establish any fact upon which in law any liability to the plaintiff could attach to the appellant Mrs. Sutherland, or (except as to four items admitted by him) to the other appellant.

The judgment of the West Indian Court of Appeal constituted by Sir Charles F. Belcher, Chief Justice of Trinidad and Tobago, President; Sir Robert Furness, Chief Justice of Barbados; and Sir James Stanley Rae, Chief Justice of the Leeward Islands, was delivered by the President on the 4th day of May, 1934, as follows:—

This is an Appeal from a Judgment of the Supreme Court of the Leeward Islands (Dominica Circuit) in favour of the Plaintiffs for £1,849, 4, 3. after trial by a jury upon a claim comprising fourteen items which may be classified as:—items 1, 4 and 6 money paid for defendants, item 2 interest on No. 1, items 3, 5, 7 and 9 direct advances to the defendants, items 10, 11, 12 and 13 bills endorsed for defendants' accommodation, and item 14 goods supplied. The defence was that the payments were made, if at all, to a third party or third parties who were not agents for the defendants either on a basis of partnership or otherwise. All the transactions arose out of a business which belonged originally to the defendants' father who died in 1909.

The business was managed by one of the sons till he (the son) died in 1926; and thereafter at material times it was managed by the son's widow. Some of the transactions claimed upon relate to the period between the father's and the son's deaths, some to the period of the son's widow's management.

Before the case went to the jury, Counsel for the defendants had in open Court admitted their liability without reservation for certain of the items which were based upon transactions entered into while the son's widow was managing the business. The questions left by the Judge to the jury are in two sets, of which we consider the second to be an alternative revised statement of the first, but we think that both must be read together. We think that what was left to the jury was to say whether the plaintiffs advanced the money claimed to the defendants in connection with the business, and how much of it remained unpaid and was consequently to be recovered by the plaintiffs.

The jury answered this somewhat vaguely by saying that some moneys were so lent and remained unrepaid and that plaintiffs should have judgment for these moneys but they did not fix the amount or deal with the items one by one. In this connection it must be borne in mind that they had the admissions above referred to before them.

After the finding there was some discussion between Court, Counsel and Jury, and it was finally agreed by Counsel to refer to an arbitrator to fix the amount for which judgment should be entered and the Bishop of Roseau was chosen as such and agreed to act.

There were no formal terms of reference, but the Bishop clearly considered as appears from his report and we think properly so that what he was asked to say was how much of the moneys and goods claimed went to the business. The Bishop noting that of the fourteen claims, four were admitted during the trial, reported to the Court that eight more were admitted by Counsel for defendants before him. We must conclude since nothing suggests the contrary that these admissions were as unequivocal as against the defendants as those made at the trial. There were then left items one and two, and on these the report shows that the only question raised before the Bishop was whether or not the money had gone to the "Estate," *i.e.*, to the business and the Bishop found that it had.

Judgment was then formally entered after its terms had been agreed and initialled by Counsel. The judgment itself recites that there had been a verdict for plaintiffs without the jury fixing the amount, reference of "the issues herein" by consent to the Bishop "for an account to be taken and enquiry made as to the amount to be recovered by the plaintiffs on the findings of the jury" and that all parties had agreed to be bound by the findings of the Referee, and the plaintiffs were adjudged £1,849. 4. 3. and costs to be taxed.

We shall now deal shortly with the grounds of Appeal as lodged. The first is that the jury did not return a verdict for the plaintiffs. We do not see how this can be said to be so,

having regard to the express agreed recital just referred to. The next is that the Judge failed to put proper questions to the jury. We think that the issues were so narrowed by the admissions made at the trial, narrowed, that is to say, simply to a question of whether certain sums went to a particular business in which defendants' interest as principals was admitted, that the elaborate questions suggested in the Appeal Notice were no longer (if ever) necessary, and that the true issue was presented to the jury, if not in such clear terms as it might have been. Thirdly, it is objected to that the nature of partnership and of estoppel respectively was insufficiently explained. This also we think met and covered by the admissions. Looking at the reference to the Bishop we consider that all he was asked to say was whether the items claimed but not admitted were on the same footing (as regards the tracing to the business of the sums claimed) as those which had been admitted and that the parties definitely agreed to be bound by his conclusions and although it is not expressed in so many words to be a judgment by consent we find that in fact it is so. The Appeal is therefore dismissed with costs.

George Bernard Dupigny and Beatrice Alexandrina Bertha Sutherland, two of the defendants, appealed to the Judicial Committee of the Privy Council. The other defendant Lucy Anne Dupigny did not appeal.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by Lord Russell of Killowen as follows:—

This appeal came before their Lordships' Board in peculiar circumstances. It is an appeal from an order of the West Indian Court of Appeal which dismissed an appeal from a judgment of the Supreme Court of the Leeward Islands Dominica Circuit. The judgment in question was entered in an action tried before the acting Chief Justice of the Leeward Islands and a special jury; but the record contains none of the evidence which was given by the various witnesses at the trial. The explanation of this exceptional state of affairs is that the appellants base their appeal upon the contention that the findings of fact by the jury did not establish any ground of liability of the appellants to the plaintiffs, and that accordingly the trial judge was wrong in law in ordering judgment to be entered against the appellants. Such being the contention of the appellants the omission of the evidence from the record is explained and justified. In a trial before a judge and jury, all facts, the proof of which is essential to the establishment of legal liability on the part of a defendant, must be either admitted or proved, and if in dispute they must be found by the jury, either as answers to specific questions, or as flowing from those answers or as involved in a general verdict for the plaintiff. Upon the facts so admitted or

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proved, the judge has then to determine as a matter of law whether judgment should be entered for the plaintiff or defendant.

The facts relevant to this appeal may now be stated.

There lived formerly at Roseau, Dominica, one Wilson Dupigny who carried on business as a merchant and druggist under the style "Wilson Dupigny." He died on the 17th December, 1909, leaving him surviving his wife Mary Emma Dupigny and seven children, viz., (1) Camilla Dupigny (2) Joseph Dupigny (3) Wilson Patrick Leonard Dupigny (hereinafter referred to as Leonard Dupigny) (4) Lilian Dupigny (5) the appellant Mrs. Sutherland (6) Agnes Dupigny and (7) the appellant George Bernard Dupigny. By his will, which was duly proved on the 3rd February, 1910, he appointed his wife and Leonard Dupigny his executors, and devised and bequeathed his residuary estate (which included the business) to his wife and his seven children and their heirs and assigns for ever in equal shares as tenants in common. The will provided that in the event of any of his said children dying without leaving lawful issue their shares and if one his or her share should revert to the others of his said wife and children. At the time of his death at least one of the said children (viz., the appellant George Bernard Dupigny) was an infant. The testator's widow died on the 2nd December, 1912, having devised and bequeathed all her property to Camilla Dupigny. Agnes Dupigny died on the 31st January, 1923, unmarried, and without leaving lawful issue. Leonard Dupigny died on the 14th August, 1926, intestate and letters of administration to his estate were granted to his widow Lucy Anne Dupigny on the 6th September, 1926. Camilla Dupigny died on 17th November, 1928, unmarried, and without leaving lawful issue. The appellant George Bernard Dupigny attained his majority on the 21st April, 1912. These facts are alleged and admitted in the pleadings in the action now in question.

The following facts are also admitted either expressly or inferentially in the pleadings, viz., that the testator's business was carried on after the testator's death under the name "Estate Wilson Dupigny," the management being in the hands of Leonard Dupigny so long as he lived, and in the hands of his widow after his death.

The writ of summons in the action was issued on the 1st June, 1929. The plaintiff was originally described as Alice Sylvia Pinard trading as F. Pinard & Company. At the trial this was amended by order of the Judge so that the action became one in which the plaintiffs were "F. Pinard and Company." The defendants were the three surviving children of the testator and the administratrix of Leonard Dupigny. They were described as "trading in copartnership in the name of Estate Wilson Dupigny." The said Lilian Dupigny died after the issue of the writ and disappears.

from the case. The indorsement of the claim is for moneys lent and the price of goods supplied to the defendants as persons who since the testator's death have carried on business in co-partnership under the trade name of "Estate Wilson Dupigny."

The statement of claim is framed upon the same footing; but the difficulty of a claim upon the footing of a partnership commencing on the death of the testator is apparent in view of the fact that the children were not then all *sui juris*.

The administratrix of Leonard Dupigny put in no defence. The appellants delivered a joint defence in which they denied that they had ever been partners in the business or that they had ever carried it on. They alleged that it had been carried on by Leonard Dupigny after the death as if he were sole owner, and after his death by his administratrix. They denied that they had ever consented to the carrying on of the business.

Such being the rival contentions of the parties the action proceeded to trial.

After a trial lasting some 10 days the Judge on the 23rd September, 1933, summed up the case to the jury. Criticism might be directed against the summing up in several respects, but for the present purpose its importance lies in the questions which were put to the jury. One would have expected to find one or more questions framed for the purpose of ascertaining whether or not the appellants had at the relevant times been carrying on the business either personally or through the agency of some one else; and whether or not the moneys had been lent and the goods had been supplied to them personally or to the agent on their behalf. At one stage the Judge had in his summing up stated that one question which he would leave to the jury would be: "Did Miss Pinard on behalf of F. Pinard & Co. loan money from time to time to the defendants as a business?" Such a question (hereinafter referred to as the suggested question) though inartistically framed, might if answered in the affirmative have amounted to a finding of partnership. It was not however put to the jury. The only questions left to the jury and the answers to them were as follows:—

QUESTIONS.

1. Did Miss Pinard from time to time on behalf of F. Pinard & Co. loan money for the purpose of assisting the business of Wilson Dupigny?
2. Was she given to understand and did she understand that these loans were for the purpose of carrying on the business and to help it from time to time?
3. Has the money so advanced or any part thereof been repaid?
4. Does the plaintiff recover the amount claimed on the pleadings?

ANSWERS.

1. The jury find that from time to time Miss Pinard on behalf of Pinard & Co. loaned money to Mr. W. P. L. Dupigny and that some of these loans went to the assistance of Estate Wilson Dupigny.
2. Miss Pinard was given to understand and she understood that some of those loans were for the purpose of carrying on the business of Estate Wilson Dupigny and to help it from time to time.
3. The moneys so advanced and which actually went to the assistance of Estate Wilson Dupigny, as vouched for, including those admitted by the defendants have not been repaid.
4. Plaintiff to recover the amounts as covered by the finding of the jury.

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A discussion ensued upon the jury's findings, which was adjourned, the jury being discharged. Arguments were heard on the 25th September, 1933. The Judge decided that upon the jury's answers there must be judgment for the plaintiffs, but that the amount for which judgment should be entered must be a matter of enquiry. By agreement the question of *quantum* was referred to the Bishop of Roseau. Pending his report no order was drawn up. As the result of the Bishop's report the figures were agreed at £1,849 4s. 3d. A draft order was accordingly prepared and initialled as approved by counsel for the plaintiffs and the appellants, and on the 25th October, 1933, an order (following the terms of the draft) was passed and entered. It runs thus:—

This action having on the 12th, 13th, 14th, 15th, 18th, 19th, 20th, 21st, 22nd, 23rd, 25th day of September, 1933, been tried before His Honour Bernard H. A. F. Berlyn, Acting Chief Justice of the Leeward Islands, with a special jury of the Dominica Circuit, and the jury having on the 23rd day of September, 1933, found a verdict for the plaintiffs without fixing the amount to be recovered; and His Honour the Acting Chief Justice having with the consent of all parties herein referred the issues herein to his Lordship the Right Reverend James Moris, C.S.S.R., Lord Bishop of Roseau, for an account to be taken and enquiry made as to the amount to be recovered, by the plaintiffs on the findings of the jury. And all parties having agreed to be bound by the findings of the said Referee and the said Referee having on the 11th day of October, 1933, heard counsel for the plaintiffs and defendants and having on the 17th day of October, 1933, presented his findings to the Court; And His Honour the Acting Chief Justice having thereupon directed that judgment be entered for the plaintiffs for £1,849 4s. 3d. and their costs of action: Therefore it is adjudged that the plaintiffs recover against the defendants £1,849 4s. 3d. and their costs of action to be taxed. The appellants appealed to the West Indian Court of Appeal upon the grounds (amongst others) that no verdict for the plaintiffs had been returned by the jury, and that on the pleadings and on the answers returned by the jury to the questions put to them judgment could only have been given for the appellants.

The appeal was dismissed, the judgment of the Court being delivered by the Chief Justice of Trinidad. This judgment appears to rest on two grounds. (1) That at the trial counsel for the defendants had "admitted their liability for certain of the items"; that the first question left to the jury and the suggested question must be read together; and that therefore what was left to the jury was "to say whether the plaintiffs advanced the money claimed to the defendants in connection with the business,"

and that the jury had answered this "somewhat vaguely" by saying that some moneys were so lent and remained unrepaid, but did not fix the amount. (2) That the order of the 25th October, 1933, was, though not so expressed in fact, a judgment by consent, that it contained an "express agreed recital" that the jury had found a verdict for the plaintiffs the truth of which recital the appellants could not dispute, and that the parties definitely agreed to be bound by the Bishop's conclusions.

Their Lordships feel no doubt that the grounds upon which the appeal was dismissed are incapable of being supported the order was in no sense of the word a consent order. The Judge had decided adversely to the appellants that upon the jury's findings the plaintiffs were entitled to judgment against them for an amount to be quantified by the referee. The only consent was, upon the footing of an existing adverse decision as to liability, that the *quantum* should be ascertained by a particular referee. The approval of the draft order was merely a recognition that an order in terms of the draft would correctly represent the order which the Judge had made. Nor can the first question actually put to the jury and the suggested question be read together. There is no possible justification for this. But if it is to be taken that the question left to the jury was such as is indicated by the Court of Appeal, the answer given, far from being (as the Court of Appeal seem to think) that the money was "so lent" (*i.e.*, lent to the defendants), is in fact that the money was lent to Leonard Dupigny. Finally the Court of Appeal rely upon the fact (as alleged by them) that "Counsel for the defendants had in open Court admitted their liability for certain of the items." This is a complete misconception of what took place. The shorthand notes are included in the record. In the first place no admission of any kind was made on behalf of the appellant Mrs. Sutherland: and in the second place the admissions made on behalf of the other appellant, were not in any sense admissions on the footing of the existence of a partnership, but on the footing of the existence of other special grounds of liability affecting the four items in question.

Their Lordships now proceed to consider whether upon the findings of the jury judgment was rightly entered against the appellants, or whether the appeal should have succeeded.

As before stated the only facts upon which legal liability against the appellants can be established are those which have been found by the jury either expressly or by implication, or which have been admitted. In the present case no admission has been made of any fact involving liability except the admissions on behalf of one appellant in regard to four items. The case accordingly stands thus:—the plaintiffs have alleged liability on the part of the appellants, and the only facts which have been established are those which the jury have found, *viz.*, (1) that money was loaned to Leonard Dupigny some of which went to the

assistance of the business "Estate Wilson Dupigny"; (2) that Alice Sylvia Pinard was given to understand and understood that some of these loans were for the purpose of carrying on the business, and (3) that the moneys so advanced which went to the assistance of the business had not been repaid. The second finding would appear quite irrelevant to any question of liability to the plaintiffs on the part of the appellants; the first and third findings merely establish liability on the part of Leonard Dupigny and his estate, but of no one else. There has been a complete failure on the part of the plaintiffs to establish any fact upon which in law any liability to the plaintiffs could attach to the appellant Mrs. Sutherland, or (except as to four items) to the other appellant. The fact that moneys were advanced to Leonard Dupigny (the legal personal representative of his father) for the purpose of being used by him, and were used by him, for the benefit of a business in which the appellants were beneficially interested under the father's will, can of itself create no liability to the lender on the part of the appellants, and is no justification in law for judgment being entered against them.

This is not a case for a fresh trial. The plaintiffs have failed to make out their case against the appellants and the matter should be dealt with accordingly.

As against the defendant Lucy Anne Dupigny, in as much as she has not appealed, the judgment necessarily stands notwithstanding that she was only sued as administratrix of her husband but for a sum reduced by the amount covered by the admissions of the defendant George Bernard Dupigny. As against the appellant Mrs. Sutherland the judgment must be wholly set aside, and the action dismissed with costs. As against the appellant George Bernard Dupigny the judgment entered against him should be restricted to the total of the four admitted items, viz., £79 13s. 91/2d., but their Lordships think without costs.

This appeal should accordingly be allowed and the judgment of the 25th October, 1933, amended so as to produce the results hereinbefore indicated. As so amended it should omit all the words subsequent to the words "Dominica Circuit," and in lieu of the omitted words there should be substituted the following:—"It is adjudged (1) that the plaintiffs recover against the defendant Lucy Anne Dupigny the sum of £1,769 10s. 51/2d. and their costs of action to be taxed; (2) that the plaintiffs recover against the defendant George Bernard Dupigny the sum of £79 13s. 91/2; and (3) that as against the defendant Beatrice Alexandrina Bertha Sutherland the action be dismissed with costs to be taxed." Their Lordships will humbly advise His Majesty accordingly.

The respondents must pay the costs of the appellants of the appeal to His Majesty in Council, and to the West Indian Court of Appeal.

Appeal allowed.

The Property of the Colony of British Guiana.

Re MIRIAM ABRAMS, a married woman, Debtor,

v.

Ex parte THE CHARLESTOWN SAW MILLS, LIMITED,
Creditors,

[INSOLVENCY NO. 15 OF 1933.—DEMERARA.]

1934. MARCH 12, 13. BEFORE STEWARD, J. (Acting).

Married woman—Trader—Insolvency notice—Failure to comply—Act of Insolvency—Insolvency Ordinance, Chapter 180, Section 7—Undischarged debts—Liability to insolvency proceedings.

H.C. Humphrys, for petitioning creditors.

A. J. Parkes, for debtor.

STEWARD, J. (Acting): This is a petition for a receiving order on behalf of the Charlestown Saw Mills, Limited, the petitioning creditors against the debtor Miriam Abrams, a married woman.

The Insolvency notice was issued on December 11th, 1933, for the sum of \$2,468.98, amount due on a final judgment obtained by the petitioning creditors on the 13th September, 1933.

This notice was served on the debtor on the 13th December, 1933. The debtor did not comply with this notice. On the 8th February, 1934, the debtor filed a notice that she was disputing the following statements contained in the petition:—

- (1) That within a year before presentation of the petition the debtor carried on a trade or business in the colony.
- (2) That the debtor committed an act of Insolvency by failing before the 19th December, 1933, to comply with requirements of an Insolvency notice and/or that the debtor had suspended payment of her debts.

The petition came on for hearing on March 12th, 1934.

Evidence was led for the petitioning creditors and the following is a summary of the relevant portions of the evidence, which led the Court to grant the petition.

- (1) Simao de Freitas mentioned that at the time of making the promissory note upon which final judgment was obtained he handed the debtor Mrs. Abrams a cheque for \$100 to buy tyres for her bus.
- (2) Jerome de Freitas said he had known the debtor a few years and that she had bought tyres for buses from him on account and amount not yet recovered.
- (3) Charles Bestley Roman said he had sold a car to the debtor and that the debtor used the car as a bus and that

the debtor still owes him the balance of the purchase money.

- (4) David Michael Gibson said he knew Mrs. Abrams well, that she kept a number of buses at lot 2, Lamaha Street, that they ply for hire in the city and that the debtor had given the witness a pass to travel on her buses.

Several other witnesses were called and this was the close of the petitioning creditors' case.

The debtor was not called and only one witness, the debtor's husband, was called, one Joseph Abrams, he told the Court that he lived apart from his wife and admitted he did not know much.

The reasons for granting a receiving order against the debtor are that

- (1) The debtor is a married woman and she is subject to the Insolvency laws as if she were a *feme sole* in accordance with Section 7 (1) of the Insolvency Ordinance, Chapter 180.
- (2) The debtor committed an act of insolvency as is set out in Section 3 (f) of the Insolvency Ordinance, Chapter 180.
- (3) That on perusing the dicta of Vaughan Williams, J., and Wright, J., in the case of *In re Dagnell*, 1896, 2 Q.B. 407 the Court came to the conclusion on analysing the evidence led before it that the debtor had trade debts still undischarged at the date of the petition and that there was sufficient evidence that the debtor was carrying on trade at that date.

Solicitors: *J. E. de Freitas; W. D. Dinally.*

ELDORADO BLOCK C., BK. v. E. A. JAMES.

ELDORADO BLOCK CO-OPERATIVE CREDIT BANK,
Plaintiffs,

v.

E. A. JAMES, Defendant,

[1931. No. 9.—BERBICE.]

BEFORE SAVARY, J.

1931. OCTOBER 26, 27; DECEMBER 3.

Immovable property—House—Owned by owner of land—Magistrate's court—Execution issued by—Not leviable against such house—Whether void or merely voidable.

Where the owner of a house is also the owner of the land on which the house stands the house is immovable property.

Execution therefore cannot lawfully be levied against such a house by virtue of a writ of execution issued out of a magistrate's court. Such an execution is void, and not merely voidable, and any sale consequent on such execution is a nullity.

E. A. Luckhoo, solicitor, for the plaintiff.

J. Eleazar, solicitor, for the defendant.

Cur. adv. vult.

SAVARY, J.: This case raises an interesting point with regard to the law of execution.

On the 2nd of January, 1931, the plaintiff bank purported to buy at execution sale by a bailiff of the Magistrate's Court a board and shingle building (described in the Writ of Execution) levied on by virtue of the said writ issued from the Magistrate's Court of the Berbice Judicial District, at the instance of the

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plaintiff bank who had recovered judgment against Joseph Hezekiah Wills and Jessie Ann Wilson in the Magistrate's Court of the said district. These parties lived in this building as man and wife.

On the 17th of January, 1931, at the instance of the defendant, a writ of execution was issued out of the Supreme Court to sell certain immovable property of the said J. H. Wills and J. A. Wilson. The immovable property is described in the inventory of the property levied on as "Lot 40 b, section A. and lot 40 b, section B, Eldorado . . . with the buildings and erections thereon," and the building is separately described as follows: "One board and shingle building. . . ."

The sale of the land and buildings thereon by the marshal was duly advertised, and on the 13th of March, 1931, the plaintiff bank opposed the sale on the ground that this building was its property.

In the reasons of opposition the bank makes it clear that this building is on lot 40 b, section A, and lot 40 b, section B, and that the building described in the said advertisement of sale is the same building that the bank purported to buy under the writ of execution issued at its instance.

On the 27th of March, the plaintiff bank brought this action to restrain the sale at execution by the marshal in so far as the board and shingle building was concerned, and the case is substantially that set out in the reasons of opposition. The defence is mainly one of law, *i.e.*, that this building is owned by the said Jessie Ann Wilson, one of the judgment debtors, and stands on her land and therefore forms part of her immovable property and cannot be sold by a bailiff under a writ of execution issued out of a Magistrate's Court. Other questions raised in the statement of defence were not pressed.

In reply the bank raised two points: (*a*) that the building purchased by it is partly on lot 40a and the said lot 40b of section A; (*b*) that the defendant cannot question the validity and sale at execution under which the bank bought, as only the judgment debtors can do so.

The attempt made at the trial to prove that the building was partly on lots 40a and 40b of section A failed, and I do not think that any Court could be expected to come to that conclusion on the evidence before me. I am satisfied on the evidence and the admissions in the reasons of opposition and the statement of claim that this building is as stated in the statement of claim on the land in question, *i.e.*, lot 40b, section A, and lot 40b, section B.

The short points then for decision are: (1) has the plaintiff bank acquired a good title to this building bought by it at execution sale under a writ of execution issued from the Magistrate's Court, and (2) if not, can the defendant question the validity of the sale. In my opinion the bank has acquired no title to this building, as I am satisfied on the evidence that the

building bought by it formed part of the immovable property of the judgment debtor. Jessie Ann Wilson, at the time of the sale, and it was not competent for a bailiff to sell part of this immovable property under a writ of execution issued from a Magistrate's Court.

Section 51 of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 15, enacts, in the first part thereof, that for the purpose of executing any process of execution issuing out of a Magistrate's Court every house or building belonging to the owner of the land on which it stands shall be dealt with as immovable property and be leviable accordingly. Transport No. 128 of 1922, gives title to Jessie Ann Wilson of lot 40b, section A, and lot 40b, section B, and I am satisfied that the building bought by the bank stands on it and is part of her immovable property. It has not been suggested that it belongs to anyone else and the whole case was argued on the assumption that it was hers. The maxims "*quicquid plantatur solo solo cedit*" and "*omne quod solo inaedificatur solo cedit*" seem to me to apply in the absence of any evidence to the contrary.

It is necessary to point out here that the return of the bailiff on the writ of execution issued at the instance of the plaintiff bank is as follows: "I hereby certify that I have executed this writ by levying on the following, one board and shingle building measuring about 21 feet by 18 feet on 7 ft. wooden blocks with galvanized zinc roof, situate at Eldorado Village, West Coast, Berbice, with defendant's right, title and interest in and to the land on which the said building is situated at a *yearly lease*." It appears from this return that this building was on land leased from year to year, but no attempt was made at the trial to prove this for the simple reason that there is no foundation whatever for suggesting that this building was on leased land. When the acting bailiff who made this return was cross-examined this is what he said: "I can't say who gave me the information that this house was on leased land. I am inclined to think that I made it (the return) as a matter of routine."

I have no doubt whatever that this return was made in order to bring the matter within the second part of the said section 51, which declares that a house on leased land shall be dealt with as movable property. This return, if correct and true, would have enabled the bailiff to sell the building. But the evidence satisfies me that there was no justification whatever for this return, and I cannot help coming to the conclusion that it was made with the connivance of a representative of the plaintiff bank to avoid having to apply for a Judge's fiat for a writ of execution to issue from the Supreme Court.

It is this incorrect return that has led to the litigation, and I trust that bailiffs will realise that incorrect returns made without any justification may lead to expense and trouble.

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It is idle to imagine that a return by the bailiff who has executed a writ of execution will have the effect of converting immovable into movable property.

That being so, what is the position when a bailiff of a Magistrate's Court purports to sell a house or building which section 51 of the above-mentioned Ordinance declares to be immovable property and leviable accordingly.

In my opinion the sale is a nullity. It is not a mere matter of irregularity in procedure in respect of an execution issued by a Court competent to do so and under which a sale could competently be made by a bailiff but it is an issue of a writ of execution and a sale thereunder beyond the competency and jurisdiction of a Magistrate's Court. See *Blanchenay v. Burt*, (1843) 4 Q.B. 707 for the distinction between a voidable writ and a writ that is a mere nullity. Section 50 of the said Ordinance provides that where no movable property can be found the judgment creditor can apply, by petition, to the Supreme Court for a writ of execution, and if and when a Judge gives his fiat, the Registrar proceeds to levy and sell the immovable property in the authorised manner.

It is clear from this section that there is no jurisdiction in a Magistrate to issue a writ of execution authorising a bailiff to sell immovable property, and *a fortiori*, no jurisdiction in a bailiff to sell immovable property by virtue of a writ of execution issued from a Magistrate's Office authorising him to sell movable property.

Mr. Luckhoo, solicitor-advocate of the plaintiff bank, submitted several propositions to me and referred to certain authorities, but it seems to me that they all deal with cases of irregular execution, which is on an entirely different footing. Irregularity may make the process voidable, but want of jurisdiction makes it void.

In *Salmond on Torts*, 7th Ed., p. 627, it is stated: "Process which is void is no defence at all, and an action will lie without taking any steps to set it aside. But when process is merely voidable, it is sufficient justification until it has been set aside."

The case of *Brooks v. Hodgkinson* (1859) 4 H. & N. 712, supports this view. There a plaintiff, who had been taken in execution under a writ of *capias ad satisfaciendum* which had been issued under certain circumstances without an order of the trial Judge, was held entitled to succeed on a claim for trespass to the person although no proceedings had been taken to set aside the writ. Baron Watson makes the position clear in these words: "In my opinion the writ is not merely irregular, but absolutely void, because it has been issued contrary to law."

Riddell v. Pakeman (1635) 2 C. M. & R. 30, lays it down that where the writ is voidable through irregularity, it must first be set aside, since, until set aside it is good and valid.

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And in *Sigobind v. Ramtohol* (1915) B.G.L.R. 149, Major, C.J., came to a similar conclusion and also forcibly pointed out the difference between a voidable and a void process.

The authorities seem to me to establish two propositions: (1) where a process is irregular and voidable only, it must first be set aside by a competent Court before the irregularity can be relied on by the party attacking it; (2) where a process is void, it is a mere nullity and cannot be relied on and need not be set aside before it is attacked.

If my opinion as to the law applicable is correct. I can see no good reason for holding that the defendant cannot question the validity of the sale. It is unnecessary to decide the point as to whether only a judgment debtor can question an irregular execution. This is a case of void execution, a mere nullity, and I fail to see on what grounds it can be urged that a void execution holds good in certain circumstances, and is a nullity in others.

It would follow that the plaintiff bank can found no good title to the building in dispute from the purchase at execution sale when, in my view, the whole process was void and a mere nullity. From my view it would follow that the plaintiff bank appears to be in the same position as before the execution was issued.

It is unnecessary to make any order to set aside the execution in view of the authorities previously referred to.

The plaintiff bank is not entitled to the injunction asked for, and I dismiss the action with costs.

Judgment for defendant.

Ex parte R. A. HILL.

Ex parte RICHARD ALBERT HILL.

[1932. No. 90.—DEMERARA.]

BEFORE FULL COURT: SAVARY, C.J., (ACTING) AND

JOSEPHS, J., (ACTING).

1932. APRIL 1.

Criminal law—Summons—Application for—Refusal—Ground of—Magistrate may have to give evidence—Full Court—Application for an order on Magistrate to show cause—Refused—Ground given by magistrate a good one—Undesirable that magistrate issuing summons should be a witness.

A magistrate was requested to issue a summons. He refused on the ground that he might have to give evidence in the matter. An application was made to the Court for an order *nisi* on the magistrate to show cause why he had not issued the summons.

Held, that the application must be refused. The ground given by the magistrate for refusing the summons was a good one, as it was undesirable that a magistrate who issues a summons should subsequently be called upon to give evidence as a witness.

Applicant in person.

No written judgment was delivered.

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P. K. & A. A. JAMES

v.

A. P. CAMISULI & G. WILLIAMS.

[1931 No. 258.]

BEFORE SAVARY, C.J., (ACTING).

1932. FEBRUARY 16, 17, 18, 19, 23; APRIL 4.

Negligence—Contributory negligence—Onus of proof—Contemporaneous negligence—Simultaneous and combined negligence—Effect of.

By-laws—Ultra vires—Traffic Orders, December, 12, 1930, No. 21—Summary Conviction (Traffic) Offences Ordinance, 1930, (No. 35). s.2.

Where there is a substantial interval of time between the initial negligence of the defendant or of the plaintiff respectively and the negligence which was the proximate cause of the injury, the question is, could either party by the exercise of reasonable care have avoided the consequences of the other's negligence.

The onus, in an action based on the negligence of the defendant, being on the plaintiff to prove that it was the defendant's negligence which substantially caused the injury—

(a) where the negligence of the plaintiff and the defendant is contemporaneous or so early contemporaneous as to make it impossible to say that either could have avoided the consequences of the other's negligence, then both have contributed to the accident, and the defendant succeeds;

(b) where the accident was the result of the simultaneous and combined negligence of both the plaintiff and the defendant, or if the negligence of the

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one was so mixed up with the negligence of the other in causing the accident as to render discrimination impossible, then the plaintiff failed.

The governing words in section 160A of the Summary Conviction Offences Ordinance, 1893, as enacted by section 2 of the Summary Conviction (Traffic) Offences Ordinance, 1930 (No. 35) are "direct the route to be observed by vehicles."

Regulation 21 of the Traffic Orders of the 12th December, 1930, made under the said section, and declaring certain streets to be right of way streets is not a regulation directing the route to be observed by vehicles and is therefore *ultra vires*.

P. N. Browne, K.C., and S. J. Van Sertima, for plaintiffs.

G. J. deFreitas, K.C., for defendants.

Cur adv. vult.

SAVARY, C.J. (Ag.): The plaintiffs are claiming from the defendants the sum of \$1,200 for damage alleged to have been caused to their motor car. No. 2721, by the negligence of the second-named defendant Williams, while driving a bus, No 3106, the property of the first-named defendant.

The collision occurred at a spot in that part of Middle Street, which is intersected by west Carmichael Street, which spot is about 14 feet to the nearest edge of the grass to the north-east of it.

The collision was between the plaintiffs' Graham-Paige motor car which was travelling in a southerly direction along west Carmichael Street and the defendants' Ford bus which was coming along Middle Street from the east.

The defendants denied the plea of negligence and alleged that the accident was caused by the negligence of the plaintiffs' servant.

The plaintiffs called as witnesses of the collision Henry Atherly, driver of the car, Sgt.-Major Barrow, Mildred Haynes, Hyderalli Bacchus, and a boy called Harold Mc Arthur. Of these witnesses only Sgt.-Major Barrow is of any assistance to the

Court in determining the real issue in the case. Atherly and McArthur put up stories which would make an accident practically impossible; Haynes's story does not assist the Court materially, and I find it impossible to place any reliance on Bacchus.

The defence called George Williams, driver of the bus, and one Stewart. Similarly, I find it difficult to rely on the whole of the evidence of these witnesses.

I am not unmindful of the fact that, in cases of this nature, the events to be observed are taking place quickly—often it is a matter of seconds—and that the powers of observation of different persons vary considerably, but I cannot help feeling that the merits of real accuracy have in the case of most of the witnesses suffered from the effects of partisanship and a desire to win.

It will be apparent from these observations that an analysis of the evidence would be unprofitable and I shall content myself

with stating such findings as I am able to extract from the evidence. I am satisfied (1) that the stationary bus was opposite to the south-western gate of the Promenade Gardens and near to east Carmichael Street corner; (2) that the plaintiffs' car was travelling down west Carmichael Street at a speed in excess of that allowed by law, and greater than a prudent and careful driver would travel at when approaching a cross street with a blind corner on one side, and too fast to enable the driver to have his car under proper control; (3) that the driver of the plaintiffs' car did not slacken or reduce his speed when approaching the corner of Middle Street; (4) that the driver of the plaintiffs' car blew his horn when approaching the said corner and somewhere about the residence of the Chief Justice and kept towards his left side; (5) that the driver of the car, when in sight of the bus, signalled that he was proceeding straight down west Carmichael Street; (6) that the driver of the car, when quite near to the corner and to the bus, swerved to the right, so as to try and pass in front of the bus; (7) that the driver of the car should, if he had been driving carefully, have seen that the bus was making no attempt to slow down or stop; (8) that the driver of the car continued on his way at the same speed, as he considered he was on a main road and expected the bus which was not on a main road to slow down or stop to allow him to cross; (9) that the driver of the bus did not keep a proper look out and saw the car only when it was within a short distance, *i.e.*, when an accident was almost inevitable, and did not see the signal made from the car or hear its horn; (10) that the bus was approaching west Carmichael Street corner at a speed in excess of that allowed by law, and greater than was prudent, but not quite as fast as the car; (11) that the driver of the bus did not slacken or reduce his speed and began to apply his brakes only when he turned to the left in order to try and avoid the car; (12) that the driver of the bus considered he was entitled to cross before the car as he believed he was nearer to the corner than the car when he saw the car; (13) that the driver of the bus realised that the car would have to stop to allow the bus to cross in front of the car; (14) that the driver of the bus knew that west Carmichael Street was a main road for the purposes of the "Traffic Directions," and that Middle Street was not; (15) that at the interval of time, *i.e.*, when careful drivers would have seen that an accident was inevitable if both vehicles proceeded on their course, the bus was slightly nearer the corner of west Carmichael Street than the car was to the corner of Middle Street, but, as the car was travelling faster than the bus, this made no appreciable difference in relation to the probability of the two vehicles colliding; (16) that the impact took place at the moment that the bus was beginning to turn to the left and the car was straightening from the swerve, *i.e.*, the bus struck the car at slightly less than a

right angle; (17) that both vehicles were travelling too fast to enable the respective drivers to have their vehicles under proper control.

In cases of negligence arising out of a collision between two vehicles the tribunal is entitled to try and reconstruct the collision and to form a theory of the collision. That theory will be sustained so long as it is reasonably consistent with the evidence as a whole: *per* O'Connor, L.J., in *Casey v Martin* (1920) 54 Ir. L.T. 185. This seems a reasonable view to take as otherwise in a large number of cases of this nature the Court could never come to a conclusion.

The question of speed is an important element in a consideration of an accident of this nature, and the difficulties of the trial Judge in forming a conclusion on this point are great, when one bears in mind the fact that both drivers stated they were proceeding at about 14-15 miles per hour. Can I believe this? If I did, it would be difficult to explain how the collision took place as both drivers admitted that at that speed they could stop immediately, or within a car length at least. It seems clear to me, that when I take into consideration the nature of the accident, the damage to the motor car, and the moving from position of the Electric Company's post by the impact, I can come to no other conclusion but that both vehicles were travelling much too fast, the car about 25 to 30 miles per hour and the bus about 20 to 25.

It is a case of two vehicles approaching a corner much too fast and without a proper look-out, each prepared to take a risk in the hope that the other would do what was necessary to avoid the consequences of his rashness. The driver of the car considered he had the right of way and could approach and cross the corner at an unsafe speed, the driver of the bus believed he had the right to cross in front of the car as he thought he was nearer the corner in question, even if the car had to stop, which he should have realised was not easy to do at that short distance. Neither, in my opinion, really made any attempt to avoid the carelessness of the other until it was too late, and the conclusion is forced on me that both drivers were guilty of negligence which continued to a point when it became practically impossible to avert the accident.

Counsel for plaintiffs submitted that, even if both were guilty of negligence, the plaintiffs should succeed because the driver of the bus could have avoided the consequences of the plaintiffs' negligence by the exercise of reasonable care. But it seems to me that it can be predicated of the plaintiffs with equal force that their driver could also have avoided the consequences of the other's fault. Although the collision took place at a spot where the two vehicles could or should have seen one another about 70 to 80 feet at least before meeting, it must be remembered that a car

proceeding at 10 miles an hour covers roughly, five yards in one second of time, so that it appears to me that the negligence of the parties was so nearly contemporaneous as to make it impossible to say that either could have avoided the consequences of the other's negligence, considering the speed at which each was travelling.

It would follow from this that, in my opinion, the negligence of each party contributed to the collision and the plaintiffs have not discharged the onus cast on them of satisfying me that it was the negligence of the defendants that substantially caused the injury.

There remains the question of legal liability to be considered on the footing of the conclusions reached by me.

The House of Lords has recently considered the law of liability for negligence in reference to fast moving vehicles in the case of *Swadling v. Cooper*, (1931) A.C.1. Lord Hailsham, who delivered an opinion concurred in by the other four Law Lords, laid down certain propositions which seem to me applicable to the facts of this case. I think they can be stated as follow: (1) where there is a substantial interval of time between the initial negligence of the defendant or of the plaintiff respectively and the negligence which was the proximate cause of the injury, the question is, could either party by the exercise of reasonable care have avoided the consequences of the other's negligence; if he could, then that party is legally responsible for the accident; (2) where the negligence is contemporaneous or so nearly contemporaneous as to make it impossible to say that either could have avoided the consequences of the other's negligence, then both have contributed to the accident and the defendant succeeds.

See also *Hargrove v. Burn* (1929) 46 T.L.R. 59, where Lord Hewart, C.J., told the Jury in his summing up that if the accident was the result of the simultaneous and combined negligence of both the plaintiff and the defendant, or if the negligence of the one was so mixed up with the negligence of the other in causing the accident as to render discrimination impossible, then the plaintiff failed.

The reason for the plaintiff failing in his action where the second proposition is applicable is because the onus is on him to prove that it was the defendant's negligence that substantially caused the injury, and if the conclusion of the trial Judge is that the negligence of both contributed to the collision, the plaintiff has not discharged the burden cast on him and which he sets out to prove when he institutes his action.

The conclusions previously set out in this judgment invite the application of the second-named proposition, and under the circumstances the defendants ought to succeed.

I will now deal with the question raised by the defence as Regulation 21 of the Traffic Orders of the 12th of December,

1930, being *ultra vires*. The power to give traffic directions is contained in subsection 1 of section 160A, of the Summary Conviction Offences Ordinance, 1893, as amended by the Summary Conviction (Traffic) Offences, Ordinance, 1930. The effect of this section is that (a) when certain conditions set out in the section exist or are likely to exist or (b) in the interests of public safety or (c) for the better control of traffic, the Inspector General of Police may “direct the route to be observed by vehicles. . . in or along or near to such public way.” The words “such public way” seem to refer to a public way or ways, on which such conditions exist or are likely to exist, and to limit the application of the power to direct the route of vehicles on a particular way or on particular ways for the better control of traffic. The provisions of subsection (2) of the said section appear to support this view. It enacts as follows: “Any such directions may be given generally or for particular occasions or in respect of particular public ways or streets. . . .”

I am unable to see how these provisions can be said to be equivalent to a general power to control traffic. In addition, the governing words are in my opinion, “direct the route to be observed by vehicles.” Can it be said that a general regulation declaring certain streets to be right of way streets, is a regulation directing the route to be observed by vehicles? I apprehend not.

The route to be observed by vehicles seems to me to be something different to a right given to vehicles that are proceeding along certain streets. Compare the language of section 45 of the Road Traffic Act, 1930: “The Minister shall . . . prepare a code . . . comprising such directions as appear to him to be proper for the guidance of persons using roads”

It is impossible for me to come to the conclusion that the restricted language used in section 160A can have the same wide application as the words in the Road Traffic Act set out above. I therefore come to the conclusion that regulation 21 is *ultra vires*, although I am aware that the Courts strive, if possible, to uphold the validity of By-Laws and Regulations by giving a benevolent interpretation to the language creating the power to make them. But in the view which I have formed of the case this opinion does not affect the question of liability. At the time of the accident both parties believed the regulation valid and even assuming that it were so, it cannot justify the driver of a car, because he is on a “main road,” proceeding at an excessive speed, when approaching a corner and continuing on his way at that speed without regard to other traffic or without taking into account the probability if he so continued, of an accident occurring.

In my opinion the validity or non-validity of this regulation does not, in the circumstances of this case, affect the question of

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liability, and I have dealt with it in deference to the arguments of both counsel on the point.

There will be judgment for the defendants with costs.

Judgment for defendants.

Solicitors: *M. S. Fitzpatrick; A. G. King.*

S. W. OGLE & LEG. PRAC. ORD.

IN THE MATTER OF SAMUEL WOODBURY OGLE, A LEGAL
PRACTITIONER.

AND

IN THE MATTER OF THE LEGAL PRACTITIONERS
ORDINANCE CHAPTER 26.

[1932. No. 100.]

BEFORE FULL COURT: SAVARY, C.J. (ACTING) AND KING, J. (ACTING).

1932. APRIL 1, 18.

*Solicitor—Using moneys received from client—Denial of such receipt—
Inability to repay—Professional misconduct—Struck off Roll—Legal Practi-
tioners Ordinance, chapter*

On the 2nd September, 1929, a legal practitioner received \$159.54 from Ram-
sunahi on behalf of Frederic Thomas to pay to the Buxton-Friendship Co-
operative Credit Bank. Between that time and June, 1931, Mr. W. G. Delph,
Secretary of the Banks Committee of the Local Government Board which
Committee supervises and controls co-operative credit banks, on several occa-
sions asked the legal practitioner about the matter, and he stated that the mort-
gage by Frederic Thomas to Ramsunahi (from which mortgage moneys were to
be obtained to pay off the indebtedness of Frederic Thomas to the Bank) had not
been passed. During that period the legal practitioner had used the money for his
own purposes, and he knew he had so used the money when he represented to
Mr. Delph that he had not received it. When Mr. Delph demanded the money in
June, 1931, the legal practitioner was unable to repay it as he had not the neces-
sary amount at his command. The legal practitioner was unable to make restitu-
tion until the 16th October, 1931, two months after a complaint was filed against
him under the Legal Practitioners Ordinance, and the day before the hearing.
The Legal Practitioners Committee found that he was guilty of misconduct.

At the hearing before the Committee the practitioner deposed to circumstances
which the Committee did not believe to be true.

On the Committee's report coming on for consideration by the Court counsel
for the practitioner stated that he was not controverting the Committee's find-
ings on the facts or on the question of misconduct.

Held, (1) that the finding of misconduct was a most proper one, it was of a se-
rious character and was deliberately persevered in for a considerable period of
time, and that the Court could not shut its eyes to the attitude of the legal practi-
tioner at the inquiry before the Committee when he made statements on oath
which the Committee did not believe to be true; and

(2) that the legal practitioner must be struck off the Roll with leave to apply to
be reinstated after the expiration of 12 months if his conduct is such as to justify
re-instatement.

Consideration by the Court of a report of the Legal Practitioners Committee finding misconduct against a legal practitioners.

E. F. Fredericks and *R. S. Miller*, for the legal practitioner.

S. E. Gomes, for the Legal Practitioners Committee.

Cur. adv. vult.

The judgment of the Court was delivered by King, J. (Acting):—

This Court has considered a report by the Legal Practitioners Committee dated the 3rd day of March, 1932, finding a *prima facie* case of misconduct against Mr. S. W. Ogle, a solicitor, in the following circumstances:—

Mr. Ogle was employed by the Buxton-Friendship Co-Operative Credit Bank to recover by action from one Frederic Thomas an amount of \$169.22 due by him to the Bank. For the purposes of the action, the Bank, in August, 1928, paid Mr. Ogle a fee of \$10 and advanced to him sums amounting to \$28.48 to cover the costs of the proceedings. Mr. Ogle duly filed a writ and judgment was given for the Bank on the 21st of November, 1928. Thomas paid a portion of the judgment direct to the Bank and on the 2nd of September, 1929, one Ramsunahi on behalf of Thomas paid to Mr. Ogle the balance of the judgment and costs of the action—a sum of \$159.55. This sum represented a portion of a loan made by Ramsunahi to Thomas on the security of a mortgage which Mr. Ogle had negotiated and which was passed on the 2nd of September, 1929. In the first quarter of 1929, Mr. Ogle had informed Mr. W. G. Delph, the Secretary of the Banks Committee of the Local Government Board, which Committee supervises and controls co-operative credit banks, that he was negotiating with Ramsunahi for a loan on mortgage to Thomas out of which the Bank's judgment would be satisfied. Between that time and May, 1931, Mr. Delph enquired several times about the mortgage and was told by Mr. Ogle that he was endeavouring to get Ramsunahi to settle the matter. At length in June, 1931, following on an accidental meeting and conversation with Ramsunahi Mr. Delph informed Mr. Ogle that Ramsunahi had told him that he (Ogle), had received the money in the Thomas case. Mr. Ogle then admitted that he had received the money and promised to pay it over as soon as possible. During June and July, 1931, Mr. Delph asked Mr. Ogle for payment on three or four occasions. Each time Mr. Ogle replied he would endeavour to pay. On the 13th of August, 1931, Mr. Delph filed an application under the provisions of the Legal Practitioners Ordinance asking that Mr. Ogle be required to answer the allegations contained in an affidavit accompanying the application and that his name be struck off the roll of the Court

or that he be suspended from practising as a legal practitioner or that such other order be made as the Court should think just. On the 16th of October, 1931, the day before the hearing of the application by the Legal Practitioners Committee began, Mr. Ogle had made full restitution to the Bank in respect of the money received by him and of the interest which the Bank might have earned had the money been paid over on its receipt in September, 1929. At the hearing by the Committee Mr. Ogle denied that Mr. Delph had approached him at all before June, 1931, in connection with Thomas' matter and that he had misrepresented to him the facts about the mortgage and the receipt of the money. He stated that when Mr. Delph came to him in June, 1931, he informed him and believed that he had already paid the money to the Bank and that it was not until Mr. Delph brought the bank's books to him that he became satisfied he had not so paid. He excused the non-payment on the ground that between November, 1928, and the middle of 1930, he had paid eight amounts varying between \$96.24 and \$72.48, moneys recovered in proceedings by him on behalf of the Bank, and that he had forgotten that he had not paid the money in Thomas's case. The Committee did not accept Mr. Ogle's evidence which was contradicted by Mr. Delph.

2. In the circumstances narrated the Committee found as follows:—

“The Committee finds that the Legal Practitioner received \$159.54 in cash on the 2nd of September, 1929, from Ramsunahi on behalf of Thomas to pay to the Bank; that between that time and June, 1931, Mr. Delph on several occasions asked him about the matter and he stated that the mortgage had not been passed; that during that period he used the money for his own purposes; that he knew he had so used the money when he represented to Mr. Delph that he had not received it; that when Mr. Delph demanded it in June, 1931, he was unable to pay it as he had not the necessary amount at his command and that subsequently he was unable to make restitution until the 16th of October, 1931, when there was paid on his behalf the amount of \$200 to Mr. Crane, the applicant's solicitor. The Committee by a majority finds the Legal Practitioner guilty of misconduct.”

3. On the Committee's report coming on for consideration by the Court Mr. Fredericks, who appeared for Mr. Ogle, stated that he was not controverting the Committee's findings on the facts or on the question of misconduct. Referring to *Re a Solicitor* (1895) 11 T.L.R., 169, he said he could not invoke the authority of that case as in the matter now before the Court there had been misrepresentation and deceit on the part of Mr. Ogle. He, however, intimated that there were certain facts which had not been placed before the Committee which, had they been brought to light, might have influenced the Committee into taking a different

view of the conflict of evidence between Mr. Ogle and Mr. Delph. If the Court considered that an affidavit setting forth these facts might be filed he would ask for an adjournment of the hearing for the purpose. The Chief Justice cited *In the matter of G. Besley Wilson*, a *solicitor* (1889) 5 T.L.R. 654, in which case a Divisional Court ruled that on the consideration of a report by a committee of the Incorporated Law Society under the Solicitors Act, 1888, an affidavit by the solicitor might be received. This ruling, however, was as stated by A. L. Smith, J., clearly based on the fact that under the practice obtaining before the Act of 1888 affidavits were admitted on the consideration of the Master's report. The Chief Justice referred to section 13 of the Act of 1888 the fourth paragraph of which provided that the report of a committee should have the same effect and be treated by the Court in the same manner as a report of a master of the Court. Section 28 of the Legal Practitioners Ordinance (Chap. 26) follows closely the provisions of section 13 of the English Act, but subsection (4) merely states that on consideration of the report the Court may make any order thereon that to the Court seems proper. Section 29 of the Ordinance empowered the Court to refer a report to the Committee with directions for its finding on any point required by the Court, but this provision seems limited to cases where the Committee had failed to make a finding on material which had been brought before it and not to extend to the re-opening of an inquiry for the purpose of taking further evidence after a report had been filed. On the Court intimating that it appeared it could not go outside of the report, and that it was doubtful whether any further evidence could be received at that stage, Mr. Fredericks said he would not press his application, but would address his further remarks on the basis of the report as it stood.

4. Mr. Fredericks proceeded to urge in mitigation of punishment the youth of the offender; that he was a married man with a family dependent on him; that the mere fact of his being before the Court that day had injured his reputation in the eyes of the community and had caused him much suffering and would be a strong deterrent to him in the future from conducting himself in such a way as to risk a recurrence of his present unhappy position; that the finding of misconduct by the Committee was a majority finding indicating a divergence of opinion among the members; that Mr. Ogle was guilty of a single breach of trust *vis-a-vis* the Bank whereas the evidence established that in a number of other transactions involving the receipt of about \$1,000 he had faithfully fulfilled his duty; and finally, that he had made full restitution whereby the Bank not only suffered no loss of money received on its behalf but was, in addition, compensated in respect of any profit it might have made on the use of its money had it been duly accounted for. Expressing on behalf of Mr. Ogle deep contrition

for what he had done, Mr. Fredericks submitted to the Court that the honour of the profession would be sufficiently vindicated and the conscience of the Court in the exercise of its punitive jurisdiction satisfied, if Mr. Ogle were severely reprimanded and ordered to pay the costs of the proceedings.

5. The Court is of the opinion that the findings of fact by the Committee are amply justified by the evidence and that the finding of misconduct on those facts was a most proper one. Further, the misconduct was of a serious character and was deliberately persevered in for a considerable period of time. The Court, too, cannot shut its eyes to the attitude of Mr. Ogle at the inquiry before the Committee. In *re a Solicitor*, (1912) 1 K.B. 302, at p. 313, Darling, J., said "How did he meet the charges? The Committee have said that he met them by statements which they could not accept. As he made those statements on oath it amounts to this—that on oath he said what the Committee of the Law Society believe to be untrue. Speaking for myself I am quite convinced that he did on oath swear to that which he knew to be absolutely false." The Court adopts those words in the present case. True it is that on the consideration of the report by the Court wiser counsel prevailed and Mr. Ogle adopted a different attitude and sought the leniency of the Court: but that attitude was not adopted until an unimpeachable adverse report by the Committee had been filed against him. Repentance in such circumstances and at so late an hour—the twelfth not the eleventh, surely—savours more of fear of punishment than of a due appreciation of the quality of the offence committed.

6. Of the grounds urged by Mr. Fredericks in mitigation of punishment this Court can give weight to but two—the youth of the offender and the fact of restitution *in integrum*. The fact that the finding of misconduct by the Committee was not unanimous, but by a majority, is not now relevant in view of this Court being of the opinion, as already stated, that the finding of the Committee was a most proper one. A divergence of opinion among the members of the Committee is doubtless a circumstance to be taken

into consideration by the Court in arriving at a conclusion as to whether the legal practitioner was or was not guilty of misconduct, but when the Court has arrived at a conclusion on that point there seems no good ground for paying further attention to that divergence. The measure of punishment is to be determined by reference to the quality of the misconduct found to have been committed, not by reference to the unanimity or otherwise of the Committee in finding the misconduct. That Mr. Ogle was guilty of a solitary breach of trust whereas he had accounted faithfully in other transactions for sums amounting to \$1,000 approximately, is hardly valid as a ground for mitigating the punishment for that breach of trust. Had Mr. Ogle been in default in respect of any of those other transactions he would have rendered himself

liable to punishment for such default. In being faithful he but fulfilled his duty, he did no act of supererogation.

7. Despite the eloquent and impassioned appeal made by Mr. Fredericks, the Court cannot accept his suggestion as to the punishment to be imposed. Reference to cases in which so lenient a course has been adopted readily shows that the misconduct dealt with was of quite a different character to that in Mr. Ogle's case. Giving due weight to the submissions made the Court orders that the name of Samuel Woodbury Ogle be struck off the Roll of the Court in which it is now registered with leave to apply to be reinstated after the expiration of twelve months from to-day's date, the 18th of April, 1932, if his conduct is such as to justify reinstatement, and that he do pay to the Secretary of the Legal Practitioners Committee thirty-five dollars for the Committee's costs, which sum includes twenty-five dollars for the fee to counsel who moved the Court on the Committee's report.

Order for removal from Roll.

CHARLESTOWN SAW-MILLS v. H. HUSBANDS.

THE CHARLESTOWN SAW-MILLS, LIMITED, Appellant,
 v.
 HENRY HUSBANDS, Respondent.

[1932. No. 48.]

BEFORE FULL COURT: SAVARY, C.J., (ACTING) AND MCDOWELL, J.,
 (ACTING).

1932. MAY 6, 11.

Mortgage—Merger—Execution sale—Magistrate's Court—House levied upon—Notice of mortgage given to bailiff—Purchased by mortgagee—Proceeds of sale—Execution creditor—Mortgagee—Who entitled.

A building, along with the lease of the land on which it stood, was mortgaged to the appellant. The property mortgaged was taken in execution at the instance of the respondent in pursuance of a judgment of a magistrate's court. Notice of the mortgage was given to the bailiff by the appellant. The property levied upon was purchased by the mortgagee. The proceeds of sale which were less than the amount due on the mortgage were claimed by the respondent, the execution-creditor in the magistrate's court, and by the appellant, the mortgagee. The magistrate was of the opinion that by virtue of the sale at execution the mortgage was extinguished by merger, and that there remained no mortgage on which the mortgagee could claim the proceeds of sale. The mortgagee appealed.

Held (1) that the purchase by the mortgagee of the mortgaged property had the effect of extinguishing the charge on the property created by the passing of the mortgage, but that the debt created by the mortgagee still remained;

(2) that as notice of the mortgage was given to the bailiff, the property levied upon was sold subject to the mortgage ; and

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(3) that as the mortgagee purchased the interest of the judgment debtor, that is to say, what was left after the charge was paid, he must be entitled to proceeds of what was paid for that interest in priority to the judgment-creditor.

Appeal from a decision of Mr. C. R. Browne, acting Stipendiary Magistrate, Georgetown Judicial District. The facts appear from the judgment.

G. J. deFreitas, K.C., for appellant.

A. J. Parkes, for respondent.

Cur. adv. vult.

The Chief Justice delivered the judgment of the Court:—

This is an appeal from a decision of Mr. Browne, Magistrate of the Georgetown Judicial District, who held that the appellants were not entitled to the proceeds, \$55.57, of a sale at execution of a building and unexpired term of a lease, which were bought by the appellants, who were mortgagees of the property sold.

The learned Magistrate held that as a result of the purchase by the mortgagees the mortgage and the mortgage debt were extinguished by merger and that there remained no mortgage on which the mortgagees could claim the proceeds of sale. Section 43 of the Summary Jurisdiction (Petty Debt) Ordinance empowers a judgment-creditor to levy execution on the movables of a judgment-debtor and section 51 declares that a building which is on leased land and is the property of the lessee is to be deemed to be movable property and that the building and the interest of the lessee in the lease are to be sold as movable property.

No provision is specifically made in the Ordinance for the sale of property that is subject to a mortgage. Property of this description can, in our opinion, be sold by the bailiff subject to the mortgage. Executions issuing from the Magistrate's Court are governed by statutory enactments, contained in the Ordinance previously referred to, and it is necessary on this point to consider whether a building and lease, mortgaged as this property was, can be said to be movable property of the judgment debtor. We agree with the learned Magistrate that, in order to determine the effect of a mortgage and the respective rights and liabilities of mortgagor and mortgagee, the principles of Roman-Dutch Law must be applied. Section 3 (b) of the Civil Law Ordinance, Ch. 7. enacts that the law as to mortgages shall be the law and practice of the Supreme Court before the passing of this Ordinance, which introduced in the colony the Common Law of England with certain exceptions of which the law of mortgages is one. It is admitted that a mortgage of property under Roman-Dutch Jurisprudence did not vest any right of ownership in the mortgagee, but merely gave him a charge on the property mortgaged. It follows that this property remained

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that of the judgment-debtor after the mortgage was passed, and in our opinion it was movable property of the debtor which it was competent for the bailiff to seize under a writ of execution issuing from the Magistrate's Court. As notice of the mortgage was given it was in our opinion sold subject to such charge.

The next question that arises is whether the learned Magistrate came to a correct conclusion when he held that the mortgage and mortgage debt were extinguished as a result of the purchase of the property by the mortgagee. We agree with the submission of Mr. de Freitas, counsel for the appellants, that such a purchase had the effect of extinguishing the charge on the property created by the passing of the mortgage but that the debt remained. In our opinion there are two parts to a mortgage under Roman-Dutch Law, the charge and the debt and it does not necessarily follow that the extinguishment of the charge carries with it the debt also. The form of writ under Order 4 Rule 6 of the Rules of Court recognises this dual incident of a mortgage, as it provides a form of writ in the case of a mortgagee seeking to enforce the debt without asking for a decree of foreclosure as this term is understood in the colony.

By the Deeds Registry Ordinance, section 12 (2), a mortgage of movables is passed in the same manner as a mortgage of immovables and it seems that it has the same effect and incidents. It next falls for us to ascertain the practice of the Supreme Court in the case of sales at execution of property subject to a mortgage. Recent amendments to the Deeds Registry Ordinance are of no avail as they apply only to sales at execution by the Supreme Court. We were informed by counsel for the appellants that the practice of the Supreme Court was to allow the mortgagee, after the costs had been paid, to claim any balance of the proceeds of sale not exceeding the amount due on his mortgage in priority to any payment to the judgment-creditor by the Marshal, and that this was so even where the mortgagee bought the property. This practice is not admitted by Mr. Parkes, counsel for the respondent, but it seems to us that the form of Letters of Decree supports the appellants' contention since it is therein provided that the property is transferred free of the mortgage.

In addition the practice of the Supreme Court in cases of sales at execution of immovables subject to mortgage as laid down in *Adamson v Higgins* (1922) B.G.L.R. 24, seems to support Mr. de Freitas's view and by analogy a similar practice should obtain as to the sale of movables subject to mortgage.

After all the mortgagee has bought the interest of the judgment-debtor which means in this case what is left after the charge is paid and it seems to us to be sound to hold that he must be entitled to the proceeds of what is paid for that interest in priority to the judgment-creditor.

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The Privy Council in the case of *Gordon Grant & Co., Ltd., v. Boos* (1925) B.G.L.R. 211 held that a mortgagee who gets a decree for sale of the mortgaged property and buys it at the public sale for a nominal amount can next proceed to sue the mortgagor on his personal covenant for the amount of the debt less the amount of the nominal bid. This seems to be a principle analogous to the one laid down by us and applied by the Supreme Court under Roman-Dutch Jurisprudence.

We therefore find that appellant's counsel has correctly informed us of the practice of the Supreme Court before the passing of the Civil Law Ordinance, and in our opinion the appellants were entitled to claim the sum of \$55.57, the proceeds of sale in this case.

The appeal is allowed with costs. Fee to counsel \$25.

Appeal allowed.

Solicitor for appellant: *J. Edward de Freitas.*

R. SINGH v. SUKHDAL & MANGROO.

RAMDAYAL SINGH, Petitioner.

v.

SUKHDAL, Respondent,

and

MANGROO, Co-Respondent.

[1932. No. 56.]

BEFORE DE FREITAS, J., (ACTING). 1932. MAY 23; JUNE 4.

Divorce—Petition for—Allegation in—Bastardising child born in lawful wedlock—Struck out of Petition—Adultery—Particulars—Best furnished—Application for further and better particulars—No order—Adjournment of trial if prejudice shown.

On the application of the co-respondent the words “as a result of such adultery the respondent gave birth to a male child on the 17th July, 1931” appearing in a petition for dissolution of marriage were struck out.

The petitioner alleged in his petition that the adultery complained of had been committed during the months of July, August, September, October and November, 1930, on dates presently unknown to him, and that it took place in the house of the co-respondent where the respondent was staying with the petitioner’s sister who was the wife of the co-respondent. It was also alleged that on the 17th July, 1931, the respondent gave birth to a male child of which the paternity was in issue.

The co-respondent applied to the Court for further and better particulars and more especially as to dates, of the acts of adultery alleged.

Held, that in the circumstances of this case there could be no difficulty in the co-respondent knowing what sort of case he must be prepared to meet especially when there was an allegation that the respondent gave birth to a child the paternity of which was apparently in issue and which must have been conceived during that period.

Under the Matrimonial Causes Rules, 1920, particulars of a pleading need not be supported by affidavit.

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DE FREITAS, J. (ACTING): This is an application by the co-respondent, the respondent being in default, for an order—

- (a) requiring the petitioner to amend his petition by deleting the words “as a result of such adultery the respondent gave birth to a male child on the 17th July, 1931” set out at the end of paragraph 6 thereof;
- (b) for further and better particulars and more especially as to dates, of the acts of adultery alleged in paragraph 6 of the petition;
- (c) that in default of such amendment or the furnishing of such particulars, the petition should stand dismissed with costs;
- (d) for an extension of time to the co-respondent to serve and file his answer;
- (e) for the costs of this application; and
- (f) for such other relief as may be just.

It is unfortunate that it should fall to my lot as an acting Judge to decide the point of practice now raised, as I understand, for the first time in the Colony, whether a petitioner for a legal dissolution of his marriage on the ground of adultery can be permitted to allege in his petition that a child born *prima facie* in wedlock is not the issue of the marriage. Prior to the decision of the House of Lords in 1924 in *Russell v. Russell* (1924) A.C. 687 the rule in legitimacy declaration suits, where the legitimacy of a child was directly in issue, forbidding either spouse to give evidence in a matrimonial cause or proceeding tending to show that he or she did not have marital intercourse, if such evidence would tend to bastardise a child *prima facie* born in wedlock, was not applicable to suits in which adultery was the issue. But since that decision this rule of law has been extended and held to be applicable not only to legitimacy suits but to all proceedings instituted in consequence of adultery.

It must be observed, however, that while this rule founded as it is on decency, morality and public policy (see *Goodright v. Moss* (1777) 2 Cowp. 591; 98 E.R. 1257 and *Russell v. Russell* (supra)) precludes either spouse from proving by his or her own evidence non-access or non-intercourse, it does not exclude *aliunde* evidence to prove that access or intercourse was impossible during or at the relevant period; nor does it apply where conception has taken place before the marriage (*Poulett Peerage Case* (1903) A.C. 395) or whilst husband and wife are living apart under a separation order (*Andrews v. Andrews* (1924) P. 255); or under a deed of separation (*Mart v. Mart* (1926) P. 24, or perhaps even by an oral agreement (*Rimmer v. Rimmer* (1930) 46 T.L.R. 624, note).

The effect of the ruling in *Russell v. Russell* (supra) is clearly explained, if I may respectfully say so, by Mr. Justice Swift in *Warren v. Warren* (1924) 41 Times Law Reports at p. 601 where after citing the following passage from Lord Finlay’s speech in that

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case: “There is a strong presumption that the child of a married woman was begotten by her husband. This, however, is not a presumption *juris et de jure*; it may be rebutted by evidence. The fact that the wife had immoral relations with other men is not of itself sufficient to displace the presumption of legitimacy; non-access by the husband at the time when the child must have been begotten must (unless there is incapacity) further be proved”: he continues thus: —“the only evidence by which the presumption that a child born in wedlock is legitimate can be rebutted is by proof that at the time of the conception the husband had no sexual intercourse with the wife. This may be proved by independent evidence showing that they were physically apart at the moment when conception must have taken place—it may be proved by other means—but it is clear that it cannot be proved by the evidence either of the husband or of the wife proving non-access or non-intercourse. But when that has been said it seems to me that all that *Goodright v. Moss* (supra) and *Russell v. Russell* (supra) lay down has been said. A statement by a husband that he has not been near his wife and has not had sexual intercourse with her is inadmissible: a statement by a wife that her husband has not, at the time of her impregnation, had access to or intercourse with her is equally inadmissible. I find however no authority for saying that a statement made or evidence given by a wife to the effect that whilst her husband had access to her and whilst, presumably, he was having intercourse with her she committed adultery, is to be excluded.”

It is submitted by the learned counsel for the petitioner that as *aliunde* or independent evidence is admissible to prove non-access, there can be no valid objection to a petitioner averring in his petition as in the present case that a child born during the marriage is not his, since “any matter which may be proved at the trial may be alleged in the petition.” This may sound plausible, but in my opinion it is untenable. Divorce proceedings are not governed in every respect by the same rules of pleadings as ordinary actions, and although the Matrimonial Causes Rules are not exhaustive, it seems to me that to allow a petitioning husband to make an averment supported as it is by an affidavit that *as the result or in consequence* of the wife’s adultery previously alleged in the petition a child was born, is in effect to permit a declaration to be made by him in direct contravention of the ruling of the House of Lords in *Russell v. Russell* (supra), except perhaps where the allegations in the petition clearly show that the respondent has given birth to a child which must have been conceived whilst the husband and wife were living apart under a separation order as in *Andrews v. Andrews* (supra) or under a deed of separation as in *Mart v. Mart* (supra), or before the marriage as in the *Poulett Peerage* case (supra). There is nothing to prevent the petitioner putting the

paternity of the child in issue, if so desired, when stating the name of or referring to that child in the petition as he must do under the English Matrimonial Causes Rules and as is usually done here though not specifically required by our rule, in setting out the issue of the marriage, but he should not, and in my opinion cannot, be allowed to declare that the child which was born *prima facie* in wedlock is not the issue of the marriage. It is said however by the learned counsel for the petitioner that the wife has confessed to the adultery (see paragraph 7 of the petition). Assuming that to be so it does not in the least afford any excuse for the allegation complained of. If the confession or admission is corroborated, or if uncorroborated is in the opinion of the trial judge in the circumstances proved before him genuine and worthy of being acted upon, the petitioner will have established the adultery necessary to entitle him to the divorce subject of course to any question of connivance, collusion or condonation and there can be then no necessity for him to allege or still less to attempt to prove that he is not the father of the child.

In the Weekly Notes of the 2nd August, 1924, p. 228, two months after the decision of *Russell v. Russell* (supra) the following notice dated July 23, 1924, was issued out of the Principal Probate Registry in England:—

“PLEADINGS IN MATRIMONIAL CAUSES.

“In view of the decision of the House of Lords, in the case of *Russell v. Russell*, and pending any direction of the Court with regard to the matter, no pleading which alleges that a child born in wedlock is not the issue of the marriage between its parents will be received in the Registry, except by special direction of a Registrar.

Affidavits containing such an allegation as before-mentioned will be subject to rejection in any case in which it appears to the Registrar that they contravene the decision in *Russell v. Russell*.

Principal Probate Registry,
Somerset House,
London, W.C. 2,
July 23, 1924.”

Reference is made to the above at p. 338 of the Annual Practice, 1932, under the heading of Particulars of Adultery and I have not been able to find any direction by the Court to the contrary.

In the latest edition (1931) of *Browne & Laty* on Divorce, Chapter II, dealing with petitions generally, at p. 394 I find in paragraph 7 of the precedent given for Husband—Petition for Dissolution of Marriage, the following:—

“7. That on the _____ day of _____ 19 _____,
“the said respondent was delivered of a child named
“ the paternity of which is in issue,”

and at page 399 the learned authors one of whom is of the Divorce Registry state that “ where the birth of a

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“child to the wife is alleged, the paternity must never be denied, nor will “the words ‘*as a consequence of such adultery ‘the respondent was delivered of a child’* (adultery having been alleged in the previous paragraph) “be allowed.”

Again I observe that in *Warren v. Warren* (supra) where the petition as originally filed contained an allegation that the respondent was delivered of a male child whereof the petitioner was not the father, nor was the father thereof known to the petitioner, the words after “a male child” were struck out by an amendment made four months before the trial and the words “the paternity whereof is in dispute” substituted. In view of the foregoing and after the best consideration I have been able to give I have come to the conclusion that the words “as a result of such adultery” appearing at the beginning of the last sentence of paragraph 6 of the petition should not be allowed to remain. I can see no reason why the co-respondent who is a party to these proceedings and upon whom the paternity of the child in question is attempted to be fixed should not be entitled to object to the offending words in the petition. The learned counsel for the petitioner advanced no argument nor cited any authority to support his objection on this point.

I therefore order and direct that the words “as a result of such adultery” at the beginning of the last sentence of paragraph 6 of the petition be struck out, with liberty to the petitioner within 14 days to make such consequential amendments to the petition as he may be advised.

Now as to the application for further and better particulars.

The petitioner alleges in paragraph 6 of his petition that the respondent after the 4th day of July, 1930, resided with his (the petitioner’s) sister one Madelene Phulmat, the wife of the corespondent, at Strandgroen, Mahaica, and there during the months of July, August, September, October, and November, 1930, the exact dates whereof are presently unknown to the petitioner committed adultery with the co-respondent at Strandgeon, East Coast, Demerara, and that the respondent gave birth to a male child on the 17th July “as a result of such adultery.” These last six words I have just held should be struck out.

In paragraph 7 the petitioner alleges that the adultery was committed in the house of the co-respondent. The petition is dated 8th February, 1932, and was served upon the co-respondent on the 8th March, 1932. On the 17th March, 1932, the co-respondent’s solicitor applied by letter to the petitioner’s solicitor for particulars of dates, times and places of the acts of adultery alleged to be committed by the respondent with the corespondent.

To this letter the petitioner’s solicitor replied on the 29th March, 1932, stating that particulars as to the dates are already furnished in paragraph 6 of the petition which are the best parti-

culars available at present, and that as to place particulars of this are amply furnished in the third and seventh lines of the said paragraph. On the 21st April, 1932, the co-respondent's solicitor again repeats his request for particulars saying that he is advised by counsel that the reply contained in the petitioner's solicitor's letter of the 29th March, is "by no means satisfactory" and that in paragraph 6 of the petition "there appears a somewhat vague allegation of adultery having been committed during July, August, September, October, and November, a period of five months."

To this the petitioner's solicitor replies on the 25th April, that the plea is no "vague but a real allegation of adultery committed during the months mentioned" and that the particular dates in each month are not at present within the knowledge of the petitioner and further refers to the next paragraph of the petition in which the place is alleged to be the house of the co-respondent at Strandgroen, Mahaica. The co-respondent not being satisfied with the particulars now applies to the Court for an order for further and better particulars and more especially as to dates.

The object of particulars is to enable the applicant "to know what case he has to meet at the trial and so to save unnecessary expense and avoid allowing parties to be taken by surprise." (*Spedding v. Fitzpatrick* (1888) 38 Ch. D. 410, 413; *Weinberger v. Inglis* (1918) 1 Ch. 133, 138), and "to prevent surprise and to limit and to particularise events in order that both parties should come to trial fully prepared for the issues." (*Thompson v. Birkley* (1883) 47 L.T. 700).

In divorce cases, however, where as in this case there is an allegation that the respondent was living for five months in the same house with the petitioner's sister and her husband, the co-respondent, during which months the adultery is alleged to have been committed, can there be any difficulty in the co-respondent knowing what sort of case he must be prepared to meet especially when there is an allegation that the respondent gave birth to a child the paternity of which is apparently in issue and which must have been conceived during that period? (cf. *Smith v. Smith and Liddard*, (1859) 29 L.J. (P. M. & A.), p. 62).

The co-respondent has not yet filed his answer but his solicitor has been informed that the petitioner has given all the particulars available at present. A simple denial of the allegation of adultery, will, it seems to me, be sufficient and if perchance at the trial any evidence is offered which takes the co-respondent by surprise he will no doubt be entitled to ask for an adjournment to enable him to meet the evidence of which he has had no notice. I do not think therefore that the co-respondent will be placed at a disadvantage in filing his answer without any better particulars than have been furnished.

As was said by the Judge Ordinary in *Smith v. Smith and Liddard* (supra) by ordering further particulars I should impede

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rather than aid the ends of justice. The case of *Hartopp v. Hartopp* and *Cowley* (1902) 87 L.T. 188) cited by Mr. Stafford is certainly a very strong case in support of his application for particulars, but I think it is distinguishable from the present case inasmuch as the acts of adultery there alleged were founded on an allegation that the respondent was visited almost daily by the co-respondent from the month of April, 1901, down to the month of February, 1902, whereas in the present case the parties were living in the same house.

Mr. Stafford also stressed the point that the particulars furnished by the petitioner's solicitor were not supported by an affidavit. I certainly think that our Matrimonial Causes Rules are in need of revision in this and in other respects. The English Rule 27 requires all particulars whether given under order or otherwise to be filed with a verifying affidavit, but I can find no similar provision in the local rules.

In the circumstances I feel I must refuse the application for further and better particulars, but I confess that I have come to this conclusion only after very careful deliberation.

The co-respondent will be allowed ten days' extension of time for filing his answer.

Neither party being wholly successful I make no order as to costs.

Solicitors: *L. Ramotar*, for petitioner;
R. G. Sharples, for co-respondent.

REPORTS OF DECISIONS

THE SUPREME COURT

BRITISH GUIANA

IN

THE WEST INDIAN COURT OF APPEAL

AND IN

The Judicial Committee of the Privy Council

ON

APPEAL THEREFROM.

1931-1937.

EDITED BY

E. MORTIMER DUKE, LL.B., (Lond.),

Barrister-at-law, Middle Temple; Registrar of Deeds and
Registrar of the Supreme Court, British Guiana.

GEORGETOWN, DEMERARA:

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1940.

JUDGES OF
THE SUPREME COURT OF BRITISH GUIANA
1931-1937.

SIR ANTHONY DE FREITAS, KT., O.B.E.	...Chief Justice.
SIR BERNARD ARTHUR CREAN, Kt.	...Chief Justice.
WILLIAM JAMES GILCHRIST	...Puisne Judge.
*WILLIAM SAVARY	...Puisne Judge.
*JOHN VERITY	...Puisne Judge.
CARLETON GEORGE LANGLEY	...Puisne Judge.
†HECTOR JOSEPHS, K.C., Attorney-General	...Chief Justice (Ag.)
BERNARD FRANCIS KING	...Puisne Judge (Ag.)
FRANK JOHN JAMES FOSTER MCDOWELL	...Puisne Judge (Ag.)
GUILHERME JOSE DEFREITAS, K.C.	...Puisne Judge (Ag.)
SYDNEY JACOB VAN SERTIMA, K.C.	...Puisne Judge (Ag.)
PHILIP FRANCIS STEWARD	...Puisne Judge (Ag.)

*Acted as Chief Justice.

†Also acted as a Puisne Judge.

WEST INDIAN COURT OF APPEAL.

As at present, no reports of decisions in the West Indian Court of Appeal are published separately, the decisions in that Court are included in the British Guiana Law Reports.

METHOD OF CITATION.

The Reports will be cited as (1931-1937) L.R.B.G.