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CASES

DETERMINED IN THE

SUPREME COURT OF BRITISH GUIANA.

REX,

v.

BALMAKUND.

[1940 No. 339.—DEMERARA.]

Before FRETZ, C.J. (Acting).

1940. DECEMBER 23; 1941. JANUARY 31.

Criminal law and procedure—Indictment—Murder—Manslaughter—No evidence of—Issue of manslaughter not to be left to jury.

Where, upon the trial of an indictment for murder, there is no evidence upon which the jury could properly return a verdict of manslaughter, the trial Judge should not leave to the jury the question of a verdict of manslaughter.

Application by the accused Balmakund under section 174 of the Criminal Law (Procedure) Ordinance, Chapter 18. The facts appear from the judgment.

E. V. Luckhoo, for the accused Balmakund.

L. A. Hopkinson, for the Crown.

Cur. adv. vult.

FRETZ, C.J. (Acting): This is an application to reserve certain questions of law arising from the trial of the prisoner Balmakund for murder, for consideration of the Court of Appeal.

The application is made under section 174 of the Criminal Law (Procedure) Ordinance, part of which section reads "where any person has been convicted of an indictable offence the Judge of the Court before whom the cause has been tried may, in his discretion, reserve any question of law which has arisen on the trial for the consideration of the Court of Appeal."

It is clear that the provisions of this section are intended to protect the prisoner from wrongful conviction where there would be some doubt existing as to the application of the law to the facts of the case.

It is also clear, however, that there is an equal duty cast on the trial Judge of exercising his discretion as to the reservation of any such question for the consideration of the Court of Appeal.

There was evidence to show that the prisoner killed his brother by means of a cutlass, wounding him on the left side of

the neck whilst his brother was in a stooping position, and the prisoner standing behind him. The injury inflicted was a gaping wound three inches long down to the cervical vertebrae which severed the carotid artery and the left jugular vein.

At the time the crime was committed the prisoner with this brother (deceased) and Sookhai, a lad aged about 14 were the only persons present.

A written confession by the prisoner given to Corporal Ragnauth Singh was ruled out after discussion as being inadmissible, there being some lingering doubt in my mind as to whether this written statement may not have been obtained by means of undue influence exercised at the time of writing.

The prisoner previous to the written statement made conflicting statements, firstly to the effect that Sookhai had delivered the blow with the cutlass, and subsequently that be (prisoner) had given "one chop" and Sookhai had also given "one chop." Sookhai himself testified to the effect that the prisoner had killed his brother with the cutlass whilst standing behind him and whilst his brother was in a stooping position. The medical evidence showed that his brother had received but one wound as already described, causing death.

The first question raised in the Notice of Motion seemed to have been based on a misconception of my directions to the jury to whom a warning and directions were given on the question of material corroboration of the witness Sookhai's evidence, should they consider him in the light of an accomplice.

With reference to questions 2, 3, 4 and 5 on the motion paper, objection was taken by counsel for the defence as to the admissibility of the written statement by the prisoner, and the jury were asked to retire as according to the usual practice, it being manifestly in the interest of the prisoner that they should do so, whilst the discussion took place as to whether or not the written document could be admitted. The prisoner himself was permitted to testify on his own behalf on the question. There arose in my mind some doubt as to the possibility of the written statement having been obtained by the police officer by means of some inducement or threat at the time it was actually obtained. The prisoner was accordingly given the benefit of the doubt, and the statement in writing deemed to be inadmissible.

The jury were made aware of all the circumstances, as discovered in evidence, that took place previous to the written statement in question; these facts were subsequently freely discussed before them and indeed these witnesses again testified. The jury therefore had ample opportunity of observing their demeanour and were also finally directed to disregard the verbal statements of the prisoner previous to the written statement, should they believe that those verbal statements had been induced by unfair

means. The recent case of *Rex* v. *Cowell* (1940) 2 K.B., p. 49, may in this respect be found to be instructive.

As regards the questions 6 and 7, I am of the opinion that there is in this case no evidence to go to the jury on the question of manslaughter; that being so, I declined to put that question to them. Moreover, where there is no evidence of manslaughter, the question should not be left to the jury as has been clearly laid down in *Phillis* 32 T. L. R. 414 (1916), *Thomas Clinton* 12 Crim. App. R. 215 (1917), *Robinson* 16 Crim. App. R. 140 (1922) *et alia.*

Arguments raised under question 8 were not pursued by counsel at the hearing of the motion and therefore do not call for further comment.

The several cases cited by counsel during the hearing of this application have been carefully considered and whilst being not unmindful of my duty as trial Judge to efficiently guard the prisoner and afford him the protection under the law relating to this matter nevertheless in the exercise of my discretion I find that am unable to grant this application.

Application refused.

SOOGOO AND CHANDICA, (Appellants),
v.
DOOLARIE, (Respondent).
[1941. No. 178.—DEMERARA.]
BEFORE FULL COURT: FRETZ AND STUART, JJ.
1941. AUGUST 14. 30.

Criminal law and procedure—Malicious damage—Tree—Summary Jurisdiction (*Offences*) *Ordinance, cap. 13, s. 52—Plantain tree not a tree.*

A plantain tree is not a tree within the meaning of section 52 of the Summary Jurisdiction (Offences) Ordinance, cap. 13.

Appeal by the defendants from a decision of the Magistrate, West Demerara Judicial District, convicting them of unlawfully and maliciously cutting plantain trees growing in open land contrary to section 52 of the Summary Jurisdiction (Offences) Ordinance, Cap. 13.

J. A. Luckhoo, K.C., for appellants.
S. L. van B. Stafford, K.C., for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by Fretz, J., as follows:—

The appellants were convicted and sentenced by the magistrate for the West Demerara Judicial District for that they unlawfully and maliciously cut and broke down plantain trees valued at fifty-five dollars growing in open land; the charge was brought under section 52 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13, as amended by section 3 of Ordinance No. 21 of 1932.

The grounds of appeal as argued by Counsel for the appellants are that the charge does not lie under the section quoted which only applies to trees and their subsidiaries such as saplings—further that the complaint should have been brought under section 54 or 55 of Chapter 13 which section concerns vegetable products growing elsewhere than in a garden. It was contended that plantains being garden fruit and plants would more reasonably fall under these latter sections than under section 52 which deals with trees of the type which grow in parks and parkland. After careful consideration of the sections to which reference has been made we agree that this argument affords a substantial ground of appeal and consider that the appellants were convicted under a section not applicable to the charge as laid and to the facts of the case.

The appeal is therefore allowed but under the circumstances we make no order as to costs.

Appeal allowed.

NEW BUILDING SCTY., LTD. *v.* L. D. SARRABO.

NEW BUILDING SOCIETY, LIMITED, Applicant,
v
LEOPOLD DUNCAN SARRABO, Respondent.

[1941. No. 175—DEMERARA.]

BEFORE STUART, J. 1941. SEPTEMBER 5.

Immovable property—Title to—Registration of—Deeds Registry Ordinance, cap. 177, ss. 28, 30.

An order *nisi* was made under sections 28 and 30 of the Deeds Registry Ordinance, chapter 177, for registration of title to land. Notice of the order was served upon a person who claimed to be the owner of the land, and the order was published in the Gazette for three successive Saturdays. The person who claimed to be the owner entered opposition to the order *nisi* being made absolute: there was no other opposer. The court found that the opposer had no right to the land and made the order absolute.

Originating Summons by the New Building Society, Limited, under sections 28 and 30 of the Deeds Registry Ordinance, chapter 177, for an order that title to the north half of lot 11, section A, with a strip of land attached, situate at Golden Grove, East Coast, Demerara, be passed by the Registrar of Deeds and registered in the name of the society. An order *nisi* for registration was made by Mr. Justice Stuart in Chambers on July 14, 1941. In accordance with the terms of the order, the summons and affidavit in support were served on Leopold Duncan Sarrabo and the order was published in the Gazette on three successive Saturdays. Sarrabo opposed the application of the society that the order be made absolute, and the hearing was adjourned into Court for the taking of evidence.

By transport dated September 23, 1893, No. 347, Jose da Silva acquired title for "Firstly, south half of lot number 46 (forty-six), section A, south half of . . ., south half of . . ., south half of . . ., south half of . . ., south half of . . ., south half of. . ., south half of . . ., south half of . . ., which forms one half of a share in the Village of Golden Grove, situate on the East Sea Coast of the County of Demerary, and Colony of British Guiana, with all the buildings and erections thereon, and Secondly, lot number 11 (eleven), section A, in the Village of Golden Grove, in the Parish of St. Paul, in the County of Demerary, and Colony of British Guiana with the buildings and erections thereon." The word "Firstly" was at the foot of the first page, and the whole of the remaining portion of the description appears on the second page, of the document.

In addition to lot 11, section A, Jose da Silva acquired possession of a strip of land lying between the public road and lot 11, section A.

In 1918 Jose da Silva sold lot 11, section A, with the strip, to Carlos da Silva who entered into possession. On account of a

defect in the power of attorney made by Jose da Silva in Madeira, transport could be, and was, passed only for the south half of lot 11, section A. On January 30, 1920, Carlos da Silva transported to his brothers John and Manoel two thirds of the south half of lot 11, section A. Thereafter, Carlos, John and Manoel da Silva entered into possession of lot 11 section A with the strip.

On July 21, 1920 they sold to Leopold Duncan Sarrabo lot 11 with the strip, for $3,000. On July 26, 1920, Sarrabo applied to the British Guiana Building Society Limited, for a loan to enable him to complete the purchase. In his application he offered, as part of his security, 11 section A (whole). He stated that he was "now purchasing lot 11 . . . and cottages," and he described the buildings thereon as follows: "lot 11, 2 board and shingle cottages, 1 building at present used as a shop."

The area of the south of lot 11 section A is 0.242 of an English acre, and the area of lot 11 section A with the strip is 0.632 of an English acre.

At the request of Sarrabo, lot 11 section A with the strip was inspected on August 17, 1920, on behalf of the society. Sarrabo did not receive the notice which the society had sent to him as to the date of the inspection, and so he was not present. However, on August 18, 1920, he wrote the society a letter in which he stated that John daSilva had told him that the society had "inspected his property," and that he, Sarrabo, had learnt "that the two buildings on lot 11 are insured with the Hand in Hand."

The society agreed to grant the mortgage. Thereupon Sarrabo interviewed the society's solicitors who pointed out that Carlos, Manoel and John da Silva only had title for the south half of lot 11.

On September 17, 1920, Sarrabo, in a letter to the society, stated that through an error of his "the application should have been made for S½ of 11 (according to the transport) . . . This however, does not in any way whatsoever interfere with an inch of the lot as you inspected it. It is only my description that is wrong, and that is due to the fact that at the time I made the application I was not in possession of the transport and regarded it as lot 11. I shall be obliged therefore if you will please amend my application accordingly."

The society, believing that the property which had been inspected was really the south half of lot 11 section A as stated by Sarrabo, agreed to the description being amended accordingly.

On October 18, 1920, Carlos, Manoel and John da Silva transported the south half of lot 11, section A, to Sarrabo, who on the same day passed a first mortgage on the said property in favour of the British Guiana Building Society, Limited.

On the passing of the transport for the south half of lot 11, section A, Sarrabo went into possession of lot 11, section A, with the strip.

Sarrabo failed to observe and perform the covenants of the mortgage, and the mortgagee obtained a foreclosure judgment against him in the sum of $1,754.30. Execution was in fact levied against lot 11, section A, and the strip, but the execution papers (which followed the transport and mortgage of October 18, 1920) only referred to the south half of lot 11, section A. The mortgagee purchased the property at execution sale on November 3, 1936, and judicial sale transport therefor was passed in favour of the British Guiana Building Society, Limited, on February 8, 1937.

The assets of the British Guiana Building Society, Limited, were vested in the New Building Society, Limited, by Ordinance No. 12 of 1940.

J. E. de Freitas, solicitor, for applicant.
C. Shankland, for opposer.

STUART, J.: Applicants the New Building Society, Limited, applied in Chambers for an order under sections 28 and 30 of the Deeds Registry Ordinance, chapter 177. A rule *nisi* was granted and respondents appeared to oppose.

On Order in Chambers the affidavits filed were treated as pleadings, and oral evidence has now been heard as far as is required.

It appears that respondent who did not impress me favourably in the box bought in 1920 property including *inter alia* the property in question for $3,000 of which he obtained $2,700 on first mortgage from the predecessors in title of the applicants.

Respondent bought from three Da Silvas who held under a somewhat complicated but sound title obtained in the three previous years.

The history of the property in question, to wit, lot 11, section A, of Golden Grove in this Colony, is relevant to the extent set out below.

In 1918 the property was sold under circumstances correctly stated in the affidavit supporting this application.

In 1893 the whole of this lot 11 had been transported, numbered *secondly*, with a number of other lots numbered *firstly*, all of which were labelled “south half”, and in 1918 there arrived from the owner overseas a power to transfer his remaining property lot 11 and some properties more recently acquired. The owner was an absentee married in community with his wife alive and he had power to sell.

Someone overseas in copying out the powers seems to have got confused and labelled lot 11 as south half of lot 11. Anyone reading transport No. 347 of 23rd September, 1893, put in at the trial can readily understand how such an easy error could occur in a document drawn in a country such as Madeira where

the English of the legal practitioners at that time, as now, is necessarily that of persons dealing with a foreign tongue.

Actually the Registrar of Deeds in 1918 took the point that the words "south half" limited the power, and transport No. 347 was annotated as leaving the north half still alive; and so this remains to-day. Nobody has attempted to touch the derelict north half, which I find to have been left solely because of an error in the power of attorney.

How has respondent treated it? In Exhibit "Z" he draws the applicant's predecessor in title to a state of attention. He points out that what he mistakenly thought was lot 11 is only "the south half of lot 11" but he says it is the same land I wished to mortgage, the same land that was pointed out. In other words, he says "your security is the same; to wit, all that I am buying; all that varies is the technical description for transport."

He at any rate should never be heard in this court to say that as to part of that same land he has title adverse to his mortgagee.

In 1936 respondent got hopelessly into arrears, and the property was sold up in respondent's presence, one Savory, whose evidence I accept, pointed out the whole and more than the whole of the true and original lot 11, to wit lot 11 and the strip hereafter mentioned as the land mortgaged *nominatim* under the heading title and description of "South half of lot 11."

Respondent did not object but after the sale, he attempted to obtain, by a process closely akin to fraud, control of portion of the property actually pointed out to the marshal

A curious extra problem is added to the above by the presence of what is called the strip; this is shown as such on Exhibit "A" and is the usual little piece of accretion that time so very often adds to property depending upon some relatively ancient survey.

Clearly the strip was pointed out. Clearly the strip was known by respondent, who paid rates in 1926 "on the strip to lot 11." And yet respondent did not object.

The strip was an extra to lot 11. It was a face to lot 11: without it, lot 11 would be devoid of much frontage: that property belonged to it: or rather, with it in the hands of a third party, lot 11 loses half its value.

It would be grossly improper to permit respondent to derogate from his own grant. When he bought lot 11 plus what might come with it, he mortgaged what he bought in full to the society without whose help he could not have bought. If he mortgaged less, it would have been a fraud.

I find that prior to 1936 he had no possession adverse to his mortgagee; he could not have had, without fraud; and fraudulent possession would not have helped him, it would in fact have been "clam." In other words, he would have purported to make a clean breast of the technical definition, while obscuring from his

mortgagee the result of the words "south half" by means of the representation in his abovementioned letter.

Any lingering doubt as to what the transported "south half of lot 11" meant, disappears when it is observed that this is transported "without" four specific buildings the owners of which are mentioned by name.

That is to say, the land is transported, and not all the edifices thereon. The land on which these four buildings stand is, as to two of them, partly the north half of lot 11 and partly the strip, and as to the other two, *vide* the map annexed to the application, wholly the strip.

This consideration confirms, if confirmation be needed, my findings of fact.

The rule *nisi* is made absolute: by consent of plaintiffs no order as to costs.

Mr. Shankland who argued this case for the respondent continually referred to all manner of matters not in evidence: the carelessness of the applicants' predecessor society; the ancient history of land holdings in British Guiana: into these unevidenced matters I do not follow him.

Application granted.

U. M. DIAS *v.* J. MUNROE.

URSULA MENDES DIAS, Plaintiff,

v.

JAMES MUNROE, Defendant.

[1941. Nos. 64 AND 65.—DEMERARA.]

BEFORE STUART, J. 1941. SEPTEMBER 3, 9.

Money-lender—Mortgage—Willing and voluntary condemnation—Consent judgment—Action on mortgage—Defence—Mortgagee an unregistered moneylender—Available to borrower—Mortgage deed not an estoppel.

Money-lending—Business of—Holding out as money-lender—Isolated transactions—Investing money in mortgages—Whether conducting business of money-lending—Money-lenders Ordinance, cap. 68.

The defence that a plaintiff is not registered as a money-lender as required by the Money-lenders Ordinance, chapter 68, is available to a defendant where the plaintiff is suing on a mortgage passed by the defendant under the Deeds Registry Ordinance, chapter 177.

The defendant passed two mortgages in favour of the plaintiff—one on July 13, 1936, for $800 with interest at the rate of 10 per cent, per annum, and the other, on March 13, 1939, for $900 with interest at 8 per cent.

On March 8, 1940, the plaintiff sued to bring the mortgaged properties to sale at execution, and to recover the amounts due on the mortgages.

The defendant pleaded that at the times when the mortgages were passed, the plaintiff was a money-lender within the meaning of the Money-lenders Ordinance, cap. 68.

In support of his plea, he alleged the following money-lending transactions by the plaintiff. In 1924, 1925, 1926 and 1927 the sums of $8, $160, $15 and $15 respectively, were lent on promissory notes (one in each year). In 1933 and 1934 mortgages valued at $1,443 and $500 respectively were purchased by the plaintiff from her brother-in-law for the amounts then due and owing on the mortgages; the interest payable under the 1933 mortgage was 8 per cent, per annum, but it was subsequently reduced by the plaintiff to 7 per cent., and later to 6 per cent.; the interest payable on the two 1934 mortgages (aggregating $500 in value) was 10 and 11 per cent, respectively. In 1935 the sum of $36 was lent on one promissory note at 16 2/3 per centum per annum; the sum of $1,800 was lent on 4 mortgages,—one for $300 at 10 per cent.; one for $200 at 10 per cent.; one for $800 at 8 per cent.; and one for $500 at 8 per cent.; and a mortgage valued at $500 was purchased by the plaintiff in similar circumstances, and under the same conditions, as the purchases in 1933 and 1934. In 1936 the plaintiff lent $70 on a bill of sale at 21 per cent., $450 on a mortgage at 10 per cent., $800 to the defendant on a mortgage (one of the mortgages sued upon) at 10 per cent, and $330 to the defendant on a promissory note at 10 per cent. The plaintiff did not lend out any money in 1937. In 1938 the plaintiff lent $2,500 on a mortgage at 6 per cent., $110 on 2 promissory notes, one of them for $60 being at 16 2/3 per cent, per annum; and $105 on a bill of sale at 19 per cent. In 1939 the plaintiff lent the defendant $900 on a mortgage (one of the mortgages sued upon) at 8 per cent.

Held, that the plaintiff did not conduct the business of a money-lender.

The plaintiff sued for the recovery of amounts due under two mortgages. The facts and arguments appear from the judgment.

S. L. Van B. Stafford, K.C., for plaintiff.

J. A. Luckhoo, K.C., E. V. Luckhoo with him, for defendant.

Cur. adv. vult.

STUART, J.: In these two actions the mortgagee sues the mortgagor for capital and interest on the first and second mortgage

bonds dated 13th July, 1936, and 13th March, 1939, for $800 and $900 respectively; the first at 10 per cent, the second curiously enough at 8 per cent.

The defence is an unequivocal allegation that the plaintiff was a money-lender, but unregistered at all material times. This, if proved, would be fatal to plaintiff's claim: *vide* Chapter 68.

By way of particulars, though not under that name or form, the defendant has pled in both actions that a number of specified transactions, then and there set out, show plaintiff to have been a money-lender at all relevant times.

The plaintiff's reply *inter alia* contends in the last paragraph thereof that the mortgages sued on are judgments, or at any rate judicial acts, of this Court, and that the defendant having consented thereto is now estopped from his proposed defence. With this I cannot agree: under whatever disguise the moneylender hides, if money-tender he be, the Court will attempt to penetrate to the true facts and haul the miscreant, if miscreant he be, into the open where evasion of the law becomes not merely unprofitable but impossible. But of course the person must be a money-lender.

It is of course quite fatuous to infer that every lender of money is a money-lender. That particular word in that form clearly means primarily what in ordinary parlance it is taken to mean, a man whose business is money-lending. Here in British Guiana the definition is statutory. A money-lender (section 2 of Chapter 68) is one whose business is money-fending or who holds himself out as a money-lender, except for certain exceptions none of which apply to this case.

In order to simplify the facts at issue, the plaintiff admitted that although certain traverses were made in the reply for the purpose of a further preliminary point, the allegation of the lending of money set out in the defence was correct as stated. The Court then asked counsel for the defence if he had any further allegations found since pleading, and he had. These were duly stated and admitted *ad hoc, i.e.,* for the purpose of the argument. Counsel for the defence was then asked to give any further or supplementary evidence over and above both the facts he had pled, now admitted, and the further facts he had submitted now also admitted. He either had no further facts to prove, or elected to give no more: from what occurred in the Court, I am persuaded that the former was the case. In the result, there was no dispute as to the facts. These above admissions with other admissions showed that:—

1. Plaintiff was and is a rumshop and provision and general store merchant, apparently in a good and profitable way of business.

2. Plaintiff has made money either from the profits of this business or since she began to make investments that is to say since

she began to *lend money* by obtaining the interest on the money thus lent.

3. Plaintiff admits having made the following loans:—

(*a*) 1924.—18th March—Pro. note from F. France ...$ 8 00
(*b*) 1925.—23rd January—Pro. note from D. Durant Mangar ... 160 00
(*c*) 1926.—22nd March—Pro. note, D. Durant Mangar ... 15 00
(*d*) 1927.—8th February—Pro. note, A. Charles ... 15 00
(*e*) 1933.—27th November—Transfer by Manoel Dias to plaintiff of D'Andrade's mortgage. Principal $2,000— purchased for the principal and interest then due $1,443 at 8 percent.; reduced by Ursula Dias to 7 per cent., and later to 6 per cent.
(*f*) 1934.—26th March—Transfer by Manoel Dias to plaintiff of two of Desmona Durant Mangar the wife of Julian Mangar's mortgages, purchased for balance of principal and interest then due $500 (interest at 10 per cent.).
Original mortgages Nos. 126 and 153, passed on 21st September and 23rd November, 1931, for capital sum of $350 and $275 respectively at interest of 10 per cent, and 11 per cent.
(*g*) 1935.—11th February—Goberdhan's mortgage for $300 at 10 per cent.
(*h*) 1935.—20th March—Goberdhan's promissory note $36 for $6 interest.
(*i*) 1935.—15th April—S. T. Prince's mortgage for $200 at 10 per cent.
(*j*) 1935.—4th June—J. B. McLean's mortgage $800 at 8 per cent.
(*k*) 1935.—9th September—Transfer by Manoel Dias to plaintiff of W. L. Grant's mortgage. Principal $600— purchased for balance principal and interest then due $500.
(*l*) 1935—18th November—J. B. McLean's mortgage $500 at 8 per cent.
(*m*) 1936—6th February—Bill of Sale Job Rodney $70 at 21 per cent.
(*n*) 1936—29th June—W. L. Grant's mortgage for $450 at 10 per cent.
(*o*) 1936—13th July—Munroe's mortgage for $800 at 10 per cent.
(*p*) 1936.—19th August—Munroe's Pro. note for $330; $30 interest.
(*q*) 1937—Nil.
(*r*) 1938—30th May—A. Querino's mortgage for $2,500 at 6 per cent.
(*s*) 1938.—30th May—Munroe's Pro. note $50.

(*t*) 1938.—31st August—Bill of Sale by Joe Benn for $105 at 19 per cent.

(*u*) 1938.—24th December—Pro. note for $60; $10 for interest.

(*v*) 1939—13th March—Munroe's Mortgage for $900 at 8 per cent.

The above list calls for the following comments. There is no information as to what was lent from 1927 to 1933. This does not mean any was lent, and it does not mean none was lent. The onus on defendant to prove his allegations does not place any counter onus on plaintiff to give information, if plaintiff elects not to give it upon points not raised by defendant.

Plaintiff elected to admit everything specifically charged and to say this does not constitute the business of money-lending. It may be noted that no lending was alleged for 1937. The information available to defendant was obviously detailed, and normally what would be confidential, and it was agreed between the parties that no lending took place in 1937.

4. It was further agreed that in the period following the above figures plaintiff did take out a licence as a registered moneylender but that she did this *ex abundanti cautela,* and neither advertised the fact, nor acted upon that licence in any way different from her processes and proceedings in the prior period.

In the result her admitted dealings fail into the following table:—

YEAR.	TOTAL.	PRO-NOTES.	MORTGAGES.	INTEREST.
1924	$ 8 00	1	Nil	Nil
1925	160 00	1	Nil	Nil
1926	15 00	1	Nil	Nil
1927	15 00	1	Nil	Nil
1928-1932	Not in evidence.			
1933	$1,443 00	Nil	1	8% to 6%
1934	500 00	Nil	1	10%
1935	2,390 00	...	4	10% to 8%
	36 00	1	...	16⅔%
1936	1,200 00	...	2	10%
	330 00	1	...	say—10%
	70 00	Bill of Sale	...	21%
1937	No transaction occurred.			
1938	$ 2,500 00	Nil	1	6%
	50 00	1	Nil	
	60 00	1	Nil	16⅔%
	105 00	Bill of Sale	...	19%
1939	900 00	Nil	1	8%

The question for the Court on these facts is "Is plaintiff a money lender?"

One or two further points may be noted *re* this table:—

The transactions in 1924, 1926 and 1927 almost fall under the principle *De minimis non curat lex.* Very few persons of any substance are owed less than such sums per annum. The item in 1925 is as isolated as can be.

In addition, the 1924 to 1927 items are stale as evidence, under what is quite a penal provision.

The mortgages appear to be investments of a very reasonable and normal character. Some persons are fortunate enough to be able to make investments to be able to save money: in that there is no fault, and saving and investment in reason, while they may attract the tax officers these days, have never been held a defect.

The total mortgage transactions amount to $7,893 and some may be reinvestment, so that at the worst the total is $7,893. The various transactions are isolated.

It is laid down in *Edgelow* v. *McElwee* (1918) 118 Law Times p. 178 (2nd. column) that a man may "follow concurrent callings," so that a shopkeeper may also be a money-lender, but the 1st column of the same page gives the test. It is "always a matter of degree." It is a ready and usual hypothesis that a successful store-keeper may become an investor. Some waste money, some save. Of those who save, some invest in wild-cat schemes, others extend their business, some lay up their money in Government securities, others in mortgages, while a few, a very few, spend their money on others, laying up their treasure where rust and moth do not corrupt, where thieves do not break through and steal, and where insincere and twisted mortgagors do not attempt to use the state's enactments of control, to attempt to avoid their own obligations.

The case of *Edgelow* v. *McElwee,* I quote and requote because both sides quoted and requoted it for different reasons at varying angles.

That case laid down that a judge should be active to detect the disguised money-lender. Agreeing with this, I believe that the same judges, had their attention been directed to the point, would have held that a judge must be equally active to detect the sometimes equally disguised cheat who borrows money and tries to avoid repayment, by accusing the person who has mistakenly regarded him as an honest borrower of being a money-lender.

Returning to the list. From 1933 to 1939 plaintiff gave for knew of: but I assume she gave) 4 promissory notes and 2 bills of sale, not a vast number for seven years.

Of these the first Promissory note, item "h," in 1935 is obviously associated with the preceding mortgage, item "g," with the same man. I imagine, and consider myself correct and warranted in imagining, that the mortgagor spent a few guineas, about 6, more than he meant to, and was temporarily accommodated obviously without security.

The second promissory note $330, in 1936, is by defendant, and is fairly deductible as being the 1939 mortgage in embryo.

The two promissory notes in 1938 are also part of the defendant's accumulating liability.

In other words, no single promissory note from 1933 to 1939 is ever given, save to a person who *already* is a mortgagor indebted to defendant.

These do not strike me as evidence of the business of a money-lender, but they do strike my knowledge of men and affairs as being natural assistance temporarily given by a mortgagee investor to mortgagors in temporary embarrassment. Any wise investor would act as defendant did.

As to the bills of sale, the sequence of Chapters in the Laws of British Guiana, is:—

Chapter 65—Sale of Goods
" 66—Pledge of Goods
" 67—Bills of Sale
" 68—Money-lenders
" 69—Pawnbroking

If a Bill of Sale is *ex facie* a money-lending transaction, must this Court take Chapter 67 as *pro non scripto*?

If there is more here than meets the eye, it has never been alleged on the pleadings. Everything alleged on the pleadings has been admitted save the deduction that the facts alleged, if proved, mean the carrying on of the business of a money-lender.

We all, if we can, lend money to the Government; we all, if we can, make our investments, small or great.

It is true that the Courts will watch with vigilance lest men hide one practice behind the name of another.

If mortgages or promissory notes really hide the continuing business of money-lending the Court must say so, if justified on the facts,

If a money-lender's facade hides a pawnbroking establishment the Court will say so as the Full Court here did last month in the case of *Worrell* v. *Learmond, Gazette* of August 30, 1941, at page 398. There, there were 17 cases of a certain suspicious transaction in one month, not as here 9 mortgages, 4 inter-related promissory notes and 2 bills of sale in seven years.

Here at least three of the mortgage transactions to wit (e), (f) and (k) are transfers of mortgages from another earlier mortgagee, all at the current value of principal and interest then due. If this is effective money-lending as defined and I understand it, and as the world understands it, then money-lending has become a lamb-like "business" of a complete inoffensiveness. These cases are obviously transparently cases of investments transferred by a brother-in-law to his sister-in-law.

I find as a fact that on the maximum alleged by the defendant as admitted *ad hoc*, by the plaintiff, the defendant has in no way satisfied me that the plaintiff ever conducted the business of a money-lender as defined in Chapter 68 section 2, or as defined by commonsense, or at all.

Under those circumstances the point taken, as it were by demurrer, or exception, or whatever it is, in the penultimate paragraph in each case of the two "replies" filed by plaintiff must succeed.

Thence it follows that judgment is given for plaintiff as prayed with costs. The case was clearly fit for counsel, but I do not need to find it thus because of the large amount involved.

I specially order that as all witnesses were properly in attendance that the costs of the plaintiff's witnesses of whom statements were taken relevant to the issue be allowed at the discretion of the Registrar.

As an appeal may well be brought by a defendant prepared to take the point defendant has taken in this case, I stay execution, conditionally upon security being given to the satisfaction of the Registrar and to the satisfaction in reason of the plaintiff. Security to be given in seven days. Appeal to be entered within the usual time.

Judgment for plaintiff.

Solicitors: *R. G. Sharples*; *W. D. Dinally.*

C. R. DREPAUL *v.* E. R. DEBIDYAL.

CECIL RAMSARAN. DREPAUL, B.R. No. 512 OF 1910,
Applicant,
v.
EDITH RAMDASIA DEBIDYAL, B.R. No. 1364 OF 1914,
Respondent.

[1940. No. 308.—DEMERARA.]

KANAYYA, B.R. No. 582 OF 1901, Applicant,
v.
TILAMMAI, B.R. No. 70 OF 1907, Respondent.

[1940. No. 341.—DEMERARA.]

BEFORE CAMACHO, C.J.

1941. May 3.

Matrimonial causes—Dissolution of marriage—Of immigrants—Cap. 208, s. 131—Proceedings commenced before magistrate—Under Immigration Ordinance, cap. 208, s. 153—Marriage before minister of Christian religion—Not applicable to.

The procedure prescribed by section 153 of the Immigration Ordinance, chapter 208, whereunder a decree of dissolution of marriage of immigrants, as defined by section 131 of the Ordinance, may be granted by the Chief Justice on proceedings commenced before a magistrate, does not apply to marriages of immigrants contracted or solemnised before a minister of the Christian religion.

Agnes Jugdeah v. *John Boodhoo* 1. 11. 1926, not followed.

V. D. P. Woolford, for the applicant in both cases: *Agnes Jugdeah* v. *John Boodhoo* 1. 11. 1926, heard before Berkeley, C.J., (Ag.) is a precedent for granting the decree of dissolution of marriage of immigrants contracted or solemnised before a minister of the Christian religion on proceedings commenced before a magistrate.

Chief Justice: The acting Chief Justice granted the decree in that case on the assumption that Smyth, C.J. had made a decree on May 21, 1900 in similar circumstances in Ramroop v. Gharbi. Reference, however, to the proceedings in that matter in Minutes Supreme Court (Full), May to September, 1900, at pages 737 and 739 discloses that the acting Chief Justice acted on a false assumption, inasmuch as the marriage in that ease was not contracted or solemnised before a minister of the Christian religion, but was contracted before a magistrate.

C. Lloyd Luckhoo, for the respondent Tilammai, not called upon.

The Chief Justice then gave the ruling contained in the head-note.

Solicitor for respondent Tilammai: *E. A. Luckhoo,* O.B.E.

ETWARIA, Appellant,
v.
BOERASIRIE COMMISSIONERS, Respondents.

[1941. No. 177.—DEMERARA.]

BEFORE FULL COURT: SIR MAURICE V. CAMACHO. C.J.,
FRETZ AND STUART, JJ.

1941. AUGUST 29; SEPTEMBER 26.

Workmen's compensation—Agriculture—Employer not engaged in—Employee not employed in agriculture.

Workmen's compensation—Forestry—Meaning of.

The deceased was employed by the Boerasirie Commissioners for 11 years as a labourer, weeding, clearing bush, etc. The Commissioners are a body constituted under the Boerasirie Creek Ordinance, chapter 135, for the purpose of conserving and distributing the waters of the Boerasirie Creek. They are empowered to construct and maintain works necessary for those purposes. They are also charged with the provisions for navigation of, and traffic on, the Boerasirie Creek and on any other creeks or waterways affected by works constructed or maintained by them. They supply water for agricultural purposes to the plantations mentioned in the Schedule to the Ordinance, but they do not themselves engage in cultivation of the soil or husbandry.

On January 13, 1940, the deceased was attached to a sworn land surveyor engaged by the Commissioners to make certain surveys. He was employed in cutting lines or paths through bush and generally to assist the surveyor in his work. He also worked as a boathand. On January 18, 1940 the surveyor directed the deceased to carry a surveying instrument to a spot in the bush. While engaged in carrying out the surveyor's order, the deceased was bitten by a snake, and subsequently died from gangrene of the leg caused by the snake-bite.

The legal representative of the deceased claimed from the Commissioners compensation under the Workmen's Compensation Ordinance, 1934 (No. 7). The magistrate, who adjudicated, found that the deceased was employed in agriculture, or if not in agriculture, in forestry, both unprotected occupations, and disallowed the claim. The legal representative appealed to the Full Court.

Held (1) that the deceased was not at any time engaged, under his employment with the respondents, in forestry which is "the science or art of forming, caring for, or cultivating forests; the management of growing timber, whereas the business of the Commissioners is that of conserving and distributing water;

(2) that a body constituted by statute whose only connection with agriculture is to supply water for agricultural purposes is not engaged in agriculture; and

(3) that, although the deceased may have been employed by the respondents in cutlass work, weeding, clearing bush and "creek agricultural work" (whatever this last expression may mean), he cannot be said to have been employed in agriculture, when performing work of the respondents who are not engaged in agriculture.

Appeal by the plaintiff from a decision of Mr. F. O. Low, Magistrate, West Demerara Judicial District. The facts and arguments appear from the judgment.

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

H. C. Humphrys, K.C., for respondents.

Cur. adv. vult.

The judgment of the Court which was prepared by the Chief Justice and read by Fretz, J. was as follows:—

This appeal arises out of a claim under the Workmen's Compensation Ordinance by the appellant, the legal representative of one Soodoo, a workman employed by the respondents, who died as the result of personal injury sustained in the course of and arising out of his employment with the respondents.

The Magistrate who adjudicated found that the deceased was employed in agriculture, or if not in agriculture, in forestry, both unprotected occupations, and disallowed the claim.

The question which this Court is called upon to determine is whether the deceased was employed in agriculture or forestry. The respondents are a body constituted under the Boerasirie Creek Ordinance, ch. 135. Their powers and duties are set forth in sec. 8 of the Ordinance. Primarily they are constituted for the purpose of conserving and distributing the waters of the Boerasirie creek and are empowered to construct and maintain works necessary for those purposes. They are also charged with the provisions for navigation of and traffic on the Boerasirie creek and on any other creeks or waterways affected by works constructed or maintained by them. They supply water for agricultural purposes to the plantations mentioned in the schedule to the Law, but they do not themselves engage in cultivation of the soil or husbandry.

The deceased was employed by the respondents for over 11 years as a labourer, weeding, clearing bush, etc. On the 13th of

January, 1940, he was attached to a Sworn Land Surveyor engaged by the respondents to make certain surveys. The deceased was employed in cutting lines or paths through bush and generally to assist the surveyor in his work. He also worked as a boat-hand. On the 18th of January, 1940, the surveyor directed the deceased to carry a surveying instrument to a spot in the bush. While engaged in carrying out the surveyor's order the deceased was bitten by a snake and subsequently died from gangrene of the leg caused by the snake bite.

Persons employed in agriculture or forestry, unless such employment be in connection with any engine driven or machine worked by mechanical power, are excepted from the benefits of the Ordinance.

In the opinion of this Court the respondents are not engaged in forestry. "Forestry" is defined as the science or art of forming, caring for, or cultivating forests; the management of growing timber. The respondents' business is that of conserving and distributing water. The deceased was not at any time engaged, under his employment with the respondents, in forestry. Was he engaged in agriculture? The word agriculture is derived from two Latin words, "agri" and "cultura," or culture of the field. Mr. Webster defines agriculture as the art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock; tillage; husbandry; farming. The respondents' business included none of these activities although they conserved and delivered water to agriculturists for irrigation and tillage purposes. A manufacturer of agricultural implements and tools is not engaged in agriculture. A drilling company whose sole business is that of boring wells on plantations or farms to supply water to plantations or farms for the purpose of tillage are not engaged in agriculture. A body constituted by statute whose only connection with agriculture is to supply water for agricultural purposes is not, in the opinion of this Court, engaged in agriculture.

The election of the respondents as members of the Boerasirie Commission by the proprietors of plantations, or the fact that some of them may be privately engaged in agriculture, does not affect the nature of the business of the respondents as Commissioners. Although the deceased may have been employed by the respondents in cutlass work, weeding, clearing bush, and "creek agricultural work," whatever this last expression may mean, he cannot be said to have been employed in agriculture when performing the work of the respondents who are not engaged in agriculture.

On the submission based on the alleged disregard by the

deceased of the advice of his medical advisers, this Court agrees with the Magistrate's conclusion.

The appeal is allowed with costs to be paid by the respondents

The claim is returned to the Magistrate to assess compensation.

Appeal allowed.

MOHAMAD DIN, Plaintiff,

v.

BOODHOO AND TETRI, Defendants.

[1939. No. 204.—DEMERARA.]

BEFORE SIR MAURICE V. CAMACHO, C.J.

1941. SEPTEMBER 1, 2, 3, 26.

Immovable property—Lands about to be transported in lots—Means of access to each lot—To be provided—Local Government Ordinance, cap. 84, s. 25 (*1*)*; now Public Health Ordinance, 1934* (*No. 15*) *s. 135* (*1*)*—Servitude not created.*

The statutory requirement that an owner of land must provide means of access to a lot about to be transported does not create a servitude. It merely imposes a duty on the owner to exclude from the lots about to be transported, so much land as is necessary to provide means of ingress to and from each lot.

Action by the plaintiff for (*a*) a declaration that the plaintiff is entitled to the use of a certain way, (*b*) an injunction to restrain the defendants from obstructing the way, and (*c*) $500 damages. The facts appear from the judgment.

J. A. Luckhoo, K.C., and *C. A. Burton,* for plaintiff.

C. Shankland and *L. M. F. Cabral,* for defendants.

Cur. adv. vult.

CAMACHO, C.J.: In this action the plaintiff claims a right of way over land, now held by the defendant Boodhoo and formerly by the defendant Tetri, an injunction restraining the defendants from obstructing the said way, and damages.

The defendants, while denying the claim, counterclaim for rectification of the description in the transport of the land now held by Boodhoo.

In or about the year 1908, the New Colonial Co., Ltd., owners of Windsor Forest estate, determined to sell certain portions of the estate in lots, and engaged the services of Mr. Roberts, Sworn Land Surveyor, to demark the several lots and to prepare the necessary plans.

By sec. 27, ch. 84, then operative, an owner who desired to sell land in separate lots to several purchasers, was required to submit a plan of the land to the Local Government Board, indicating the method of sub-division, the streets, roads, and means of access to each lot, and the provision made for drainage. On its approval by the Board, the plan was required to be deposited in the Deeds Registry, and transport could only be passed in conformity with the plan. Sale or transport made or passed in contravention of the section was declared a punishable offence.

By plan dated the 29th October, 1908, (referred to as the October plan) the surveyor carved out of the estate 31 lots of land of varying dimensions. The dispute in this case relates to lots numbered 24 and 25 on the plan.

The evidence discloses that some time prior to October, 1908, Tetri, the female defendant, entered into negotiation with the Company for the sale to her of lot 24. The lot is marked on the plan "reserved", and is shown to be bounded on the east by a private road, on the west by lot 25, on the north by lot 26 and on the south by lot 22. The plan shows the western boundary of lot 25 to be the high or middle walk dam of the estate. At the time when the plan was prepared free access to lot 25 could be had from the middle walk dam and accordingly no reservation is shown on the plan of any right of way over lot 24 in favour of lot 25.

Later in 1908, the surveyor submitted another plan dated 11th December, 1908, (referred to as the December plan) showing the sub-division of lots 21 and 25. The plan was approved by the Board and was subsequently deposited. By the sub-division of lot 25 into 25A and 25B, (the latter shown on a subsequent plan as lot E) 25A became landlocked, and in order to provide means of ingress and egress to the lot the surveyor marked off, by paals, from lot 24, a strip of land designated "dam" which runs from the east boundary of 25A through lot 24 to the private road on the east boundary of the last mentioned lot.

On the 22nd of May, 1909, the Company transported to the defendant Tetri lot 24, as the same is defined by the October plan. On the same day the Company transported to Rorakhan lot 25A, as that lot is defined by the December plan. Rorakhan subsequently sold lot 25A to several persons and from those persons the plaintiffs father, one Imambaksh, acquired the lot under transport dated the 28th June, 1921. After the death of Imambaksh, and by virtue of his will, the plaintiff, in 1931,

became a co-owner of lot 25A. In 1937 Tetri sold and transported lot 24 to her son Boodhoo. In the affidavit verifying sale lot 24 was stated to be the lot defined by the October plan. The Registrar intervened on the ground that the October plan does not comply with the law, and when the Boodhoo transport came to be passed, lot 24 was in fact transported by reference to the December plan, that is to say, subject to the right of way or dam delineated on that plan.

The litigation arises out of the exercise by the plaintiff of his alleged right of way from lot 25A through lot 24 along the dam to the road bordering the east boundary of the last mentioned lot.

Several issues have been raised. The plaintiff claims that the several lots were sold with the reciprocal burden and benefit of their apparent servitudes, and that lot 24 must be regarded as a servient tenement to lot 25A. With this submission the Court entirely disagrees. Up to the time when the lots were sold they were held in absolute ownership by the Company, as an integral part of the estate Windsor Forest and there did not exist any servient tenement. When the lots were demarked to be sold the Company came under statutory obligation to provide means of ingress and egress for each lot, the statutory obligation did not, however, create a servitude. It merely imposed a duty on the Company to exclude from the lots so much land as was necessary to provide means of ingress and egress to and from each lot.

Another issue is that raised by the claim of the plaintiff of user by his predecessors in title of the said way without any interruption from the year 1909 to the year 1931. The evidence on this submission is too meagre to enable the Court to find any right in the plaintiff by long and uninterrupted user.

The third submission, that sec. 27 of ch. 84 and the transport to Boodhoo, with reservation of the right of way, create an easement in favour of the owner of lot 25A is the submission with which the Court is concerned.

It is argued for the plaintiff that the October plan is an illegality inasmuch as it contravenes sec. 27 of ch. 84, that the transport to Tetri was an offence against the law, of which she could not be allowed to take advantage, and she must therefore be deemed to have acquired title to lot 24 subject to the reservation of the right of way shown on the December plan. Moreover, that as Boodhoo in fact obtained title expressly subject to the right of way, the plaintiff possesses the easement claimed.

The validity of this argument depends on:

(1) whether the October plan complied with the law;

(2) (*a*) whether the December plan constituted a breach of the Company's contract with Tetri, and

(*b*) whether the enforced variation in the transport to Boodhoo infringed the right of Tetri and Boohdoo;

(3) whether the mere delineation, on a plan required by law, of a dam on lot 24 confers on the owner of lot 25A an easement over lot 24, notwithstanding that

(*a*) there were other means of access to lot 25A, and

(*b*) the original transport of lot 24 was passed free from the alleged easement.

With regard to (1), did the October plan show means of ingress and egress to that portion of land which is now numbered 25A other than through lot 24? If it did, then the October plan complied with the law. Reference to the plan shows that when the lots were originally demarked, lot 25 was an entire lot with means of ingress and egress throughout its length and breath by way of the high or middle walk dam of the estate. It is not an accident or a mistake that a right of way was not reserved over lot 24 for the purchasers or would-be purchasers of lot 25. In my opinion the October plan when it was prepared, so far as lot 25 is concerned, complied with the provisions of sec. 27 of ch. 84

As to (2), if regard is had to the plan, the Company sold to Tetri lot 24 free from any easement whatsoever, and the transport to Tetri confirms the view that in the contemplation of the parties Tetri was to have the lot free from all encumbrances. As previously stated in this judgment, lot 25 was subsequently subdivided by the December plan into lots Nos. 25A and 25B. The effect of the subdivision was to shut off the way of access to 25A from the high or middle walk dam of the estate and from any other portion of the estate. The Company, by their surveyor, in order to comply with the law, delineated on the December plan a right of way over lot 24. In my opinion, the Company thereby committed a breach, or attempted a breach, of their contract with Tetri, nevertheless, when the transport came to be passed to her she obtained lot 24 without any reservation. In my view, having regard to the contract between the Company and Tetri, as evidenced by the October plan, the Company when sub-dividing lot 25 should have reserved a way over 25B to the middle walk dam in favour of lot 25A and had no right in law to reserve a way over lot 24. The evidence does not disclose that lot 25B had, at the time of the preparation of the plan, been alienated to any person. If the subdivision was made and the plan prepared in contemplation of sale of lot 25B a way ought to have been reserved over that lot in favour of lot 25A.

As to (3) the delineation of the right of way over lot 24 did not, in the circumstances, create an easement over the lot inasmuch as the contract with Tetri and the subsequent transport to her did not reserve any such right. Tetri must therefore be held to have obtained an indefeasible unencumbered title to the lot. What, however, is the effect of the transport to Boodhoo with the reservation of the right of way? The application for the

passing of transport to him was made with reference to the October plan. The transport actually issued to him referred to the December plan. Although acceptance of transport of the land as described in the December plan was forced upon Boodhoo, nevertheless, it is urged that Boodhoo is entitled only to the area which his transport gave him. Assuming such to be the position of Boodhoo under his transport, what is the position of Tetri? If she was entitled, as she was under her transport, to the whole of lot 24 without reservation and in fact transported to Boodhoo less than she owned, the untransported portion of lot 24 is still vested in Tetri. Moreover, assuming, as I must, that Tetri's transport was prior in point of time to Rorakhan's transport, the December plan should not have been accepted and Rorakhan's transport should have been passed with reference to the October plan. I therefore hold that the plaintiff is not entitled to any right of way over lot 24. The conclusion will not inflict hardship on the plaintiff for I am satisfied he has other means of access to lot 25A.

This action is dismissed. The plaintiff must pay the costs.

Judgment for defendants.

Solicitor for defendants: *Carlos Gomes.*

J. E. WILLS *v.* J. ELEAZAR.

JOHN ELEAZER WILLS, (Plaintiff),

v.

JOSEPH ELEAZAR, (Defendant).

[1938. No. 201—DEMERARA.]

BEFORE CAMACHO, C.J. 1941. MAY 19, 20, 30.

Solicitor—Rules of Court, 1900, Order 32, rule 5 (2)—Omitting in absence of reasonable explanation or excuse to protect action from becoming deserted and abandoned and incapable of being revived—Negligence—Claiming declaration of title in action—Negligence—Opposition action to transport deserted and abandoned and incapable of being revived under Order 32, rule 5 (2)—Rules of Supreme Court (Deeds Registry) 1921, rule 7—Expiration of time for bringing a fresh opposition suit—Action to restrain passing of transport brought on same grounds as contained in opposition suit—Negligence.

Practice—Opposition to transport—Rules of Supreme Court (Deeds Registry) 1921, Rule 7—Mandatory effect of—Action not filed within ten days after certificate of Registrar as to entry of opposition—Cause of action founded on notice of opposition disappears.

Immovable property—Title to—By prescription—Right accrued due before 1917—Saved by Civil Law of British Guiana Ordinance, cap. 7, s, 2 (3)—Declaration of title by Court under cap. 7, s. 4 (1) unnecessary—Exception—Where person proposes to transport right.

Practice—Declaration of prescriptive title—Claim for—Procedure is by way of petition—Whether right accrued before or after 1917—Rules of the Supreme Court (Declaration of Title) 1923.

A solicitor is guilty of negligence as a solicitor—

(*a*) if he, being the solicitor for the plaintiff in an action, omits, in the absence of any reasonable explanation or excuse, to protect the action from being deemed under rule 5 (2) of Order 32 of the Rules of Court, 1900, to be deserted and altogether abandoned and incapable of being revived; or

(*b*) if he, on behalf of his client, claims, in an action and not by way of petition, a declaration of prescriptive title, whether the right accrued before or after the year 1917; or

(*c*) if, on behalf of a client, he institutes an action founded upon the same grounds of opposition to a transport which were the subject-matter of an opposition action which had under the Rules of Court become deserted and abandoned and incapable of being revived, and after the time had expired for bringing the action under rule 7 of the Rules of the Supreme Court (Deeds Registry), 1921.

If an action founded upon a notice of opposition to the passing of a transport is not brought within the time prescribed by rule 7 of the Rules of the Supreme Court (Deeds Registry), 1921, the right to maintain the action on the stated grounds of opposition is extinguished, that is to say, the cause of action founded on the notice of opposition disappears. Rule 7 is mandatory and must be rendered effective: otherwise, after opposition entered, an opponent would be free to hold up the passing of transport indefinitely by a mere threat of litigation.

Prescriptive rights to immovable property which accrued prior to January 1, 1917, are saved by section 2 (3) of the Civil Law of British Guiana Ordinance, cap. 7, notwithstanding section 4 (1) of that Ordinance.

A person whose prescriptive rights to immovable property are saved by section 2 (3) of the Civil Law of British Guiana Ordinance, cap. 7, need not invoke a declaration of title by the Court under section 4 (1) of that Ordinance. It was, however, decided in *Transport Reece to Neilson* (1917) L.R.B.G. 136 that there is an exception to this rule, namely, where the person proposes to transport those rights.

Where a person seeks a declaration of prescriptive title, whether the right accrued before or after the year 1917, he must approach the Court by way of petition, and fulfil all other requirements of the Rules of the Supreme

Court (Declaration of Title), 1923. A declaration of title may not be sought in any other way.

Action by John Eleazer Wills against Joseph Eleazar for negligence as a solicitor. The facts appear from the judgment.

R. S. Miller, for the plaintiff.

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

Cur. adv. vult.

CAMACHO, C.J.: This action arises out of two previous actions—Suit No. 34 of 1936 and suit No. 158 of 1937—brought by the defendant on behalf of the plaintiff, both actions being founded on grounds of opposition contained in a notice of opposition to transport of the property subsequently mentioned in this judgment.

The plaintiff claims damages from the defendant by reason of defendant's alleged negligence as the plaintiff's solicitor. The particulars of negligence relied on are briefly:—

(1) That the defendant tiled opposition to transport on behalf of the plaintiff, instituted suit No. 34 of 1936 to implement the opposition and thereafter by his neglect caused the suit to be deemed deserted and abandoned.

(2) That the defendant in bringing suit No. 158 of 1937 on behalf of the plaintiff was negligent in that he,

(*a*) had not by other and prior proceedings obtained a declaration of title to the east centre quarter of lot 96 Buxton, as required by section 4 (1) chapter 7; and

(*b*) set out in suit 158 of 1937 the reasons of opposition set out in the previous suit which had been deemed deserted and abandoned when it was not competent for him to do so.

The narrative of the litigation, to be gathered from the allegations in all three suits, is illuminating. In January 1936, Judith Rebecca Guy, as administratrix of the estate of John Isaac Fox, and Stanley A. Thierens, as the father and natural guardian of his minor children, were in occupation of east quarter of lot 96 Buxton. The plaintiff, at the time of the advertisement of the transport, hereunder mentioned, of the east quarter of the said lot, occupied and, by himself and his predecessors, had occupied for a period of over 60 years the east centre quarter of the lot, immediately at the back of the said east quarter. From the middle walk public way a path runs along the south side of the lot and was used by the plaintiff and his predecessors for the said period as a way of access to the said public way. In November 1935, the way of access was obstructed by Thierens and on the 11th, 18th and 25th of January, 1936, Guy advertised transport of the said east quarter of the lot in favour of the children of Thierens. On the 18th of January, 1936, the defendant, on behalf of the plaintiff, entered opposition to transport without reservation of the right of way claimed, on the ground of the exercise of the right by the plaintiff and his predecessors for over 60 years. Consequential on

the notice of opposition and in accordance with the Rules of the Supreme Court (Deeds Registry) 1921 the Registrar on the 18th January 1936 certified entry of opposition and the defendant within ten days thereof, as required by rule 7 of the said rules, that is to say, on the 25th of January, 1936, on behalf of the plaintiff, instituted suit No. 34 of 1936 naming Guy and Thierens as defendants and in which he repeated as the plaintiff's cause of action the grounds of opposition set out in the notice of opposition. The remedies sought in suit No. 34 of 1936 were—

(1) An injunction to restrain passing of transport without reservation of the plaintiff's right of way.
(2) A mandatory injunction to remove the obstruction to the right of way.
(3) Damages.

As to first ground of negligence relied on.

The statement of claim was delivered on the 14th February 1936. The defendant, as the plaintiff's solicitor did not, however, take any further step in the action, and on the 1st June 1937, a certificate in pursuance of Order 32 rule 5 (2) was issued declaring the action deserted and abandoned and incapable of being revived. Prior to the date of the certificate under sub-rule (2) the action was deemed abandoned under sub-rule (1) of the rule and could not have been revived without leave of Court. In the absence of any reasonable explanation or excuse the omission by the defendant to protect this suit from abandonment amounted in my opinion to negligence as a solicitor. I therefore hold that this ground of negligence is established. The plaintiff was not called upon to pay any costs of this action and suffered no other damage except such damage as might be held to flow from the combined effect of abandonment of this suit and the institution of suit 158 of 1937.

To continue the narrative:

Subsequent to abandonment of suit No, 34 of 1936, the defendant, according to the plaintiff's evidence, which I wholly accept, represented to the plaintiff that he (the defendant) would be able to have the suit revived without cost to the plaintiff. As, however, the suit had been deemed abandoned without any possibility of revival the representation could not be implemented. After at first demurring to the proposal the plaintiff ultimately agreed that the defendant should proceed. On the 4th of June, 1937, the defendant on behalf of the plaintiff instituted suit No. 158 of 1937. On the issue of the writ the defendant applied for an interim injunction and for leave to serve the application with the writ. The defendants in that action objected by affidavit that it was not competent for the plaintiff to reinstitute the proceedings. The objection would not appear to have been argued before the judge in chambers, the leave prayed was accorded, and the interim injunction granted. I would at this stage

observe that the issue of a writ commencing an action is deemed to be the act of the party and, moreover, that in action No. 158 of 1937 leave to issue the writ was not in fact obtained.

The issues raised and the remedies sought in action No. 158 of 1937, save that a declaration of prescriptive title was invoked, were the same issues and remedies as those raised and sought in suit No. 34 of 1936. Paragraph 6 of the statement of claim in the 1937 action set out the same grounds of opposition and cause of action as did the notice of opposition and the statement of claim in the 1936 suit. Moreover, paragraph 7 of the 1937 suit repeated those grounds and stated the plaintiff's reliance on them. The 1937 action was in effect resuscitation by means of a fresh writ of the grounds of opposition and of the 1936 suit which had been abandoned. As in the 1936 litigation so in the 1937 litigation the defendant delayed bringing the suit to hearing. Pleadings were closed on the 23rd July, 1937. It was not, however, until the 19th January 1938 after protests by the plaintiff to the defendant that the defendant, on behalf of the plaintiff, requested the cause to be placed on the Hearing List. On the 21st, March, 1938, the plaintiff changed his solicitor and it is serviceable to state, contrary to the contention by the defendant, that this change did not affect the result of the action. The action was tried on the 1st, June 1938 before Mr. Justice Verity. From the Judge's notes, meagre though they be, it would appear that counsel for the defendants objected that the statement of claim disclosed the same grounds of opposition to transport and the same cause of action as disclosed in abandoned suit No. 34 of 1936. It was submitted that paragraphs 6 and 7 of the statement of claim should therefore be deleted and that the action could not be maintained. The paragraphs were deleted by order of the Court, whereupon counsel for the defendants submitted that the plaintiff could not rely on possession to establish title inasmuch as he could acquire prescriptive title only by declaration by the Court, and that the declaration was a condition precedent to the action for injunction to restrain Transport. The learned trial judge dismissed the suit as disclosing no cause of action and the plaintiff was mulct in the sum of $265.50 for costs. No reason for dismissal of the suit, other than it disclosed no cause of action, was assigned. I must, however, assume that in arriving at his judgment the learned trial judge did not confine his attention to the arguments adduced before him but took judicial notice, as he was bound to do, of the rules of Practice and Procedure of the Supreme Court.

This brings me to consideration of the second ground of negligence relied on.

In the suit before this Court the defendant alleges that his instructions and the pleadings in the 1937 action disclosed that

the plaintiff and his predecessors had exercised the right of way for over 60 years, that the right accrued prior to the 1st January, 1917, when chapter 7 came into operation, and that had this consideration been presented to the learned trial judge the 1937 action could not have been dismissed on that ground, inasmuch as it was not incumbent on the plaintiff to obtain, prior to action brought, a declaration of title when seeking, as indeed he was, only to oppose transport. I agree that rights accrued prior to 1st January, 1917, are saved by section 2 (3) of chapter 7 notwithstanding section 4 (1) of that law. This Court has so held in *Lalbahadursing* v. *McPherson & Ors.* (1939). L.R. B.G. 80. I am equally ready to concede that a person whose rights are saved by the law need not, except where he proposes to transport those rights, invoke a declaration of title by the Court under section 4 (1) chapter 7, as was decided in *Transport Reece to Neilson* (1917) L.R. B.G. 136. If, however, the defendant, as he freely admitted, well knew of the effect of the Law and of acquisition by the plaintiff of the right prior to 1917, why did he involve the plaintiff in unnecessary expense and needless litigation in seeking a declaration when the plaintiff was opposing Transport only? Had the defendant's present argument, founded on the plaintiff's right to oppose transport without prior declaration of title, been brought to the attention of the learned trial judge the result would have been inevitably the same. From whatever standpoint regarded so much of the action as sought a declaration of title could not have been entertained. If the right accrued in terms of section 4 (1) of chapter 7, declaration of title under that section was a condition precedent and thus the action would be wrongly conceived. If on the other hand, as maintained by the defendant, the plaintiff had acquired the right prior to 1917 a declaration was not required in or for opposition proceedings. Moreover, and this I consider concludes the argument, if the defendant was seeking, on behalf of the plaintiff, a declaration of title, whether the right accrued before or after 1917, he should have approached the Court by way of Petition and fulfilled all other requirements of the Rules of the Supreme Court (Declaration of Title) 1923. A declaration of title may not be sought in any other way. (*Transport Reece to Neilson* cited above). With the knowledge of the facts possessed by the defendant and with the knowledge of the law and Rules of Court which he possessed, or ought to have possessed, he was wrong in instituting suit for a declaration of title and he was hopelessly wrong in the procedure he adopted. The point was not obscure, it had been decided for the guidance of all practitioners by Mr. Justice Hill in the 1917 Transport case; and the 1923 rules plainly state the only method by which a declaration of title could be obtained.

I therefore hold that in bringing suit No. 158 of 1937 on this alleged cause of action the defendant was negligent as a solicitor.

As to the third ground of negligence relied on.

Was it competent for the defendant to set out in action No. 158 of 1937 reasons of opposition to an action which had by rule of Court been deemed deserted and abandoned? To put the question more shortly, could the defendant allege as the cause of action grounds of opposition which he knew or ought to have known had been abandoned? Did the abandonment preclude the defendant from raising in the 1937 suit the same grounds of opposition as were contained in the notice of opposition and as were raised in the earlier action. Under Order 32 rule 5 (2) the 1936 action was deemed abandoned. The certificate issued under it terminated the earlier action beyond possibility of revival. Whatever may be the wider implications of that rule the rule does not stand alone. There are other rules of the Supreme Court which bear on the question. Rules of the Supreme Court (Deeds Registry) 1921 govern opposition to transport proceedings and consequential actions. They are rules of procedure and practice prescribed by the judges by virtue of chapter 177 of which this Court will take, and of which the trial judge, although silent, must have taken, judicial notice. Rule 2 of those rules permits an opponent within 14 days after the first advertisement of a transport to enter opposition by filing notice in the Registry. The rule prohibits the filing of any opposition later than the specified time. Rule 3 of the same rules requires the Registrar to certify entry of opposition and rule 7 compels an opponent to bring his action to restrain transport within 10 days after the Registrar has so certified. The 1936 action to implement the opposition was brought within the time allowed by rule 7. It was abandoned. The writ in the 1937 action was issued on the 4th June, 1937, more than a year after the time allowed by rule 7. The rule is mandatory and must be rendered effective: otherwise, after opposition entered, an opponent would be free to hold up the passing of transport indefinitely by a mere threat of litigation. In my view, if the action is not brought within the prescribed time, the right to maintain the action on the stated grounds of opposition is extinguished, that is to say, the cause of action founded on the notice of opposition disappears. The defendants might have applied under rule 11 of the 1921 rules for an order of abandonment thus obtaining transport without further delay, but omission to make the application does not, in my opinion, enable an opponent to institute the action based on the grounds of opposition stated in the notice after the time fixed by rule 7 has gone by. The effect of the certificate under Order 32 rule 5 (2) was to determine for the time being the right to enforce the cause of action based on the notice of opposition, whether it did or did not altogether destroy it, and rule 7 of the 1921 rules finally extinguished the right. I therefore hold that it was not competent for the defendant to institute the 1937 suit or

to allege in that suit the same cause of action or grounds of opposition he had set forth in the earlier suit and that in so doing he was negligent.

On the grounds—

(1) that defendant was negligent as a solicitor in failing to proceed with suit No. 34 of 1936 and thereby caused it to be deemed abandoned;

(2) that defendant was negligent as a solicitor in seeking a declaration of prescriptive title in opposition proceedings, suit 158 of 1937, and by reason also of the adoption by him of wrong procedure;

(3) that the defendant was negligent in bringing action 158 of 1937 on the same grounds of opposition after abandonment of the earlier suit and after the time had expired for bringing it under rule 7 of the 1921 rules—

I hold that the defendant is liable in damages to the plaintiff inasmuch as, to the injury of the plaintiff, he ignored plain provisions of law and failed to observe the rules of procedure and practice of this Court.

Although proof of the easement claimed was frustrated by the negligence of the defendant a Court cannot assume the right in the plaintiff and I do not therefore award any damages for the alleged loss.

I award to the plaintiff the sum of $265.50, the money loss actually sustained by him, with costs. Fit for Counsel.

Judgment for plaintiff.

Solicitors: *H. A. Bruton; J. Eleazar.*

I. I. PARK *v.* HARWADIN.

ISAAC ISAIAH PARK, Appellant (Defendant),
v.
HARWADIN, Respondent (Plaintiff).
[1939. No. 120.—DEMERARA.]
BEFORE FULL COURT: CAMACHO. C.J., FRETZ AND STUART, JJ.
1941. MAY 9, 16; OCTOBER 10.

Appeal—Full Court—Extension of time—After expiration of time limited or allowed—Permissible—Rules of Court, 1900, Order 45, rule 4.

On November 22, 1938, judgment was delivered in an action, and the order was entered on December 7, 1938. On an application filed on January 16, 1939, the defendant on January 30, 1939, was given leave to appeal and to file his notice of appeal motion within 28 days after that date and thereafter to proceed in due course with his proceedings in appeal. The notice of appeal motion was not filed within 28 days after January 30, 1939. On an application filed on March 17, 1939, the defendant on March 27, 1939, was given, notwithstanding that the time limited therefor had expired, liberty to file his notice of motion of appeal and to file his copies of the record in the appeal for the use of the judges of the Full Court on or before April 24, 1939.

On the hearing of the appeal it was contended by the respondent that there was no jurisdiction in the Court to make the order of March 27, 1939.

Held, that, in an appeal to the Full Court, an order may be made enlarging the time for doing any act in relation to the appeal even though the application for the same is not made until after the expiration of the time appointed or allowed.

S. L. van B. Stafford, K.C., H. B. S. Bollers with him, for appellant.

J. A. Luckhoo, K.C., E. V. Luckhoo with him, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by Stuart, J., as follows:—

This is an appeal against a judgment of Mr. Justice Langley entered the 17th December, 1938. Mr. Justice Langley adjudicating on a land dispute restrained the defendant from interference with a certain lot 16 as laid out by D. C. S. Moses, Sworn Land Surveyor, at Plantation Mount Sinai, Berbice, and also gave Plaintiff the sum of $25 as damages with taxed costs.

Against this, appellant appeals and puts up a rival survey already discussed and discarded by Mr. Justice Langley.

The Full Court of three judges heard the appeal some months ago, and owing to the heavy demands upon the time of Sir Maurice Camacho, Kt., Chief Justice of this Court, the reasons have only now been drafted and are given without his signature. However, the decision given was unanimously agreed to by all three judges shortly after the hearing.

[His Honour considered the evidence and continued:]

We therefore approve of the result of Mr. Justice Langley's judgment although not for his reasons.

As Respondent's Counsel raised a totally unnecessary point *in limine* and spent much time in arguing it we feel constrained to deal with it.

We dislike the technicality of the point, but fortunately can escape from it, and did overrule it, within the narrow compass of the local Rules governing appeals.

An order given earlier in the proceedings was attacked as being an unauthorised enlargement.

Now the order was an enlargement of an enlargement, and is attacked as such. To us it appears permissible in view of the last words in our appropriate Order 45, rule 4. Under Order 64, Rule 7, in the English Rules, the position is superficially different; applicant's order is there expressly authorized: here it is authorized only by the deduction above made.

Now we are of the opinion that the Court can re-open or can cure a case such as this on cause shown, but here no cure is actually required.

Under all the circumstances of this case with respondent losing the point *in limine*, and appellant losing his main attack on Mr. Langley's judgment, this Court dismisses the appeal, but makes no order as to costs in this Court.

Appeal dismissed.

Solicitor: *P. M. Burch-Smith* for appellant.

M. DOUGLAS *v.* DEM. CO., LTD.

MATILDA DOUGLAS, Plaintiff,

v.

DEMERARA COMPANY, LIMITED, Defendant.

[1940. No. 162—DEMERARA.]

BEFORE STUART, J.

1941. SEPTEMBER 8, 9, 10, 11; NOVEMBER 5.

Immovable property—Action for negligence—Allowing fire to spread—Plaintiff's possession of land—Effect of.

The plaintiff and her predecessors in title had been in possession of a fruit garden for far more than the longest period of prescription allowed by law. From 1895 to 1930, this piece of land was described as lot 271, Mocha. The predecessor in title of the plaintiff sold this piece of land to the plaintiff on July 9, 1931, and the plaintiff acquired title therefor, *sub nomine* of lot 271, Mocha, by judicial sale transport dated March 21, 1932, No. 251, after an execution sale on March 1, 1932, for arrears of rates.

The defendant set a fire which spread to the land of the plaintiff, and damaged her cultivation.

For the defendant it was contended that the fruit garden of which the plaintiff was in possession was not lot 271, Mocha, but lot 285, Mocha, which was sold at execution for arrears of rates on November 28, 1933, and purchased by the defendant in whose favour judicial sale transport was passed on January 15, 1934, No. 60.

The Court found that there was no dependable evidence on the part of the defendant as to where lot 271 really was, and accepted the evidence of the plaintiff which was to the effect that the fruit garden was lot 271.

Held, that even assuming that the land of which the plaintiff was in possession was lot 285 (and not lot 271), Mocha, the execution sale of lot 271 in favour of the plaintiff did not in fact or in law interrupt the long continued and uninterrupted possession *nec vi nec clam nec precario* of the fruit garden.

Action by Matilda Douglas against Demerara Company, Limited, for damages suffered through a fire which spread from the land of the company to the land of the plaintiff. The facts appear from the judgment.

A. J. Parkes, for plaintiff.

H. C. Humphrys, K.C., for defendant.

Cur. adv. vult.

STUART, J.: This is an action by one Mrs. Douglas claiming as Owner of Lot 271, Mocha Village, Demerara, against the adjoining landowner for damages due to negligence in allowing a fire to spread from their lands to hers.

There are three issues in this case. *First*—Was the fire started by defendants or their agents on defendants' land or elsewhere?

Unless this is answered in the affirmative, plaintiff cannot recover. Now the admitted position was that the defendant company owned not only the plantation known as Prosperity, but also with one possible exception, the plaintiff's land, all the lots of the adjacent Mocha Village, relevant to this action.

Mocha Village was laid out by two surveyors, the "front" by Hackett in March, 1842: the "back" by Rainsford in March,

1858. Both plans are in marked "I" and "H" respectively. There is also a plan marked "A" and one marked "G" of which hereafter.

Satisfactory evidence has been produced to show that one Brighton was in possession of a lot which was described for many years, certainly from 1895 to 1930, as lot 271.

On the lot thus possessed Brighton grew *inter alia* several mango trees and 29 bearing orange trees.

To-day the burnt stumps of the latter and the unburnt former testify, on inspection by the Court, that the lot was in cultivation at least as early as 1895. Mr. Gilchrist the most responsible person called for the defence, has seen the mango trees and confirms this. The Court finds that Brighton was in possession *nec vi nec clam nec precario* of a piece of land which everyone thought until the year 1941, to be lot 271, and which for all the Court can say, may still be.

Exhibit "D", the Will of the late Brighton, shows that he left what he called lot 271, meaning his fruit lot to his widow Louisa Brighton. Exhibit "C" shows that she sold it and gave a receipt for the purchase money (twenty-five dollars) to plaintiff on the 9th July, 1931, and plaintiff received transport on the 21st, March, 1932.

This transport was as the result of a judicial sale for arrear rates. The Court takes judicial notice of the fact that in six months' work in British Guiana it has been repeatedly impressed upon the Court in cases heard here at Georgetown and in Berbice that title is a matter difficult of proof in this Colony, that the land law is a curious mixture of Roman Dutch Law and English procedure mostly re-enacted in Statute, and that again and again the only way of obtaining title even on *bona fide* sale is by arranging for a levy for arrear rates for a Judicial sale *ad hoc* and *post hoc* for a "clean" title. The Court is satisfied from the dates of the sale and the transport, itself Exhibit "B," that this was the case on this occasion. The sale is as fictitious as one to John Doe. Does it interrupt prescription?

The transport describes the lot as 271, and the plaintiff entered before transport into quiet and undisputed possession of the fruit garden, the mango trees, the orange trees *et alia.* This she had had for 8 years, when a fire swept across her property.

[His Honour reviewed the evidence and continued:]

Mr. Humphrys' second point however is of interest. It may be stated thus. The piece of garden land used by the plaintiff and her predecessors in title and known to them as lot 271 is so described in the Statement of Claim, and plaintiff bases her case upon her having obtained transport about 1932. Defendant knew exactly what his defence was: to wit, that the plaintiff had been in possession of the wrong lot: but defendant carefully

avoided saying so in his defence. The Court is of opinion that pleadings are meant primarily to clarify the issues: here pleading was to obscure the real defence, which is indicated somewhat as the meaning of an obscure cross-word or acrostic light is tucked away in ambiguous phraseology or in phraseology which while not ambiguous is painstakingly unclear.

That being so, the defence fails to speak for itself. Plaintiff's counsel stated that had be had any idea that defendant was really denying plaintiff's title he would have pled long possession. On the facts this was obvious. The Court was prepared to amend if necessary, but actually the necessity did not arise.

To provide the evidence upon which defendants' contention was based, defendants called one Durham, a Sworn Land Surveyor.

[His Honour then reviewed the evidence of Durham, and continued:]

In the complete absence of any dependable evidence the Court has no data as to where lot 271 really is, and deciding on the evidence in this case must assume that it is where the plaintiff's husband says it is.

[His Honour continued to review the evidence of Durham, and proceeded:]

The Court finds as a fact that there is no evidence of location it can rely upon, but in the circumstances of this case the Court goes further.

The Court is satisfied that plaintiff (with predecessors) has had possession of this fruit garden for far more than the longest period of prescription required bylaw. The Court now assumes that Durham's evidence means something. If it proved, which it does not, that lot 271 was topographically not coincident with plaintiff's fruit garden, then Mr. Humphrys' further argument is that the fruit garden is and always has been another lot belonging to defendant company; and, alternatively or rather reversely, that the title obtained by plaintiff by judicial sale in 1932 interrupted plaintiff's possession, and that now plaintiff owns only lot 271 some distance away from the fruit garden: in actual propounded fact (2 foot links multiplied by 96 or 192 feet to the north of the fruit garden).

With this proposition this Court will not agree.

Faced by the apparently absolute statement of Ordinance 4 of 1936 section 2, I was prepared to say that I would not accept a positive order in a case so inequitable as this, and that some superior court could accept the responsibility, but I am glad to find that others have felt the same.

In *Khan* v. *Maraj* (1930) L.R.B.G., p. 9,

In *Lacon* v. *Matthews* (1931-37) L.R.B.G., p. 516,

In *Gondchi* v. *Hurrill* (1931-37) L.R.B.G., p. 507,

In *Lalbahadursingh* v. *McPherson* (1939) L.R.B.G., 81, a series of single judges ranging from Savary, J., to Sir Maurice

Camacho, our late Chief Justice, have revolted from similar inequity.

On those cases I find in fact and in law that the fictitious title snatching sale of 1932 did not in fact or in law interrupt the long continued and uninterrupted possession *nec clam nec vi nec precario* of this fruit garden. Detailed analysis of those cases is perhaps a matter for a higher court if this unrighteous defence is taken further.

Judgment for the plaintiff is given in the sum of one hundred and eighty dollars ($180.00) and costs. The case is declared suitable for Counsel.

Judgment for plaintiff.

Solicitors: *T. A. Morris,* for plaintiff,
J. E. DeFreitas, for defendant.

CHRISTINA BOSE, Plaintiff,

v.

SHIWPRASHAD and RAMPERSAUD, EXECUTORS OF ESTATE OF SURJI, DECEASED, WHO WAS EXECUTOR OF RAMKISHUN, DECEASED, Defendants.

[1931. No. 199.—DEMERARA.]

BEFORE STUART, J. 1941. SEPTEMBER 19; NOVEMBER 24.

Judgment—Review of—Against executors—Estate represented—Mistake in proceedings as to—Corrected.

The plaintiff was a creditor of the estate of R. deceased. The plaintiff and S. read the will of R. as meaning that S. was the sole beneficiary thereunder. On the true construction of the will, S. was not the sole beneficiary.

At the request of S., and under a mistake as to the meaning of R's. will, the plaintiff released the real eventual beneficiaries thereunder, and took a promissory note from S., for $390, the amount due to her by the estate of R, deceased.

Held (1) that to let the transaction stand would give the beneficiaries under the will of R. the sum of $390 which they had no right to have;

(2) that there was a mistake of law as to the interpretation of the will, and the Court will refuse to allow the maxim "*ignorantia juris neminem excusat*" to be used to perpetrate a clear injustice;

(3) that the plaintiff is ordered to rank as a creditor of the estate of R. to the extent of $390.

Action by the plaintiff for a review of judgments. The plaintiff obtained judgments against the defendants in their capacity as executors of the estate of Surji deceased. Surji was the executor of Ramkishun deceased, and the plaintiff now claimed that the judgments be reviewed in order to enable him to recover the

amount of the judgments against the estate of Ramkishun, deceased. The necessary facts appear from the judgment herein,

C. L. Luckhoo, (*J. A. Luckhoo, K.C.,* with him) for plaintiff.

L. M. F. Cabral, for defendants.

Cur. adv. vult.

STUART, J.: Surji, and her friend the Plaintiff, misread the will to mean that Surji was sole beneficiary, and Bose who was creditor of Ramkishun's estate, at Surji's request waived her claim on that estate and under a mistake as to the meaning of the will released the real eventual beneficiaries and took a Promissory Note for $390, the amount of their indebtedness.

Subsequently Bose lent Surji more and then later filed against Surji's estate to find that the assets had disappeared. They in fact remained in Ramkishun's estate now indirectly administered by the defendant.

Bose should of course have recovered from Ramkishun's estate for $390, but the further loans have nothing whatever to do with this estate.

Now the mistake in this case is a mistake of law, and incidentally an idiotic mistake in law that almost no one of commonsense would have made: but the parties do not seem to have had much education so that I accept the mistake as one that occurred.

"*Ignorantia juris neminem excusat*" or as it is quoted here "*Ignorantia juris haud excusat*" applies, I take it, in two cases; first in criminal matters, and secondly in civil cases where money had been paid in mistake of law.

It is argued that the parties had money transactions founded upon a mistake of law. This applies certainly to the further payments made by the plaintiff to Surji after Surji became executrix, and with regard to those sums the Court makes no order.

The $390, however, was advanced before the mistake arose: by mistake plaintiff subsequently allowed Surji to give her a Promissory note and to release the estate. This was not a payment of money. To let the transaction stand would give the beneficiaries under the will of Ramkishun $390 they had not right to have.

In *Huddersfield Banking Company, Limited,* v. *Lister* (1895) 2 Ch. 273, a case of a mistake of law as to the ownership of fixtures, Vaughan Williams, J., found the support of Lindley, J., in the Appeal Court for his refusal to allow the maxim to be used to perpetrate a clear injustice. I take the same view here. I do not see why plaintiff should recover any costs caused by her stupid mistake but give an order which seems to me to be equitable. The plaintiff is ordered to rank as a creditor of the estate of Ramkishun to the extent of $390. If there is an estate left she will eventually recover. If there is not, it is her own foolishness. The estate is given a year to pay the money. No order as to costs.

Judgment for plaintiff.

Solicitors: *D. P. Debidin; C. Gomes.*

A. R. GOMES AND W. CADOGAN *v.* J. E. TOBIAS.

ANTHONY R. GOMES AND WILLIAM CADOGAN, Plaintiffs,

v.

JAMES EMANUEL TOBIAS, Defendant.

[1938. No. 338—DEMERARA.]

BEFORE STUART, J.

1941, OCTOBER 2, 3; DECEMBER 5.

Partnership—Constitution of—Mining (*Consolidation*) *Ordinance, cap. 175,* s. *55—Mining partnership—Civil Law of British Guiana Ordinance, cap. 7, s. 20—Taken out of operation of.*

By virtue of section 55 of the Mining (Consolidation) Ordinance, cap. 175, a mining partnership is taken out of the operation of section 20 of the Civil Law of British Guiana Ordinance, cap. 7.

Action by Anthony Richard Gomes and William Cadogan against James Emanuel Tobias for a declaration that a mining partnership existed between them, and for consequential relief.

J. A. Luckhoo, K.C., for plaintiffs.
S. L. van Batenburg-Stafford, K.C., for defendant.

Cur. adv. vult.

STUART, J.: In this action Mr. S. Van Batenburg Stafford, K.C., has raised an interesting point *in limine.*

He argues that Plaintiffs have pled an agreement partly written and partly oral, and that under section 20 of the Civil Law of British Guiana Ordinance, Chapter 7, this is not effective. He argues that no agreement of partnership can be disclosed on a note in writing in itself not containing all the terms. His authorities for these propositions are ample and authoritative, and were this not an agreement of a special type specially dealt with in a separate Ordinance, he would probably succeed. Plaintiffs have produced certain letters from defendant to a third person one Feddy, and have quoted *Gibson* v. *Holland* (1865) L.R. 1 C. P. pages 1 & 5. Into this angle it is unnecessary to go. The question of how far part performance makes up for a failure to satisfy the Statute of Frauds, hardly seems to help, as part performance in equity only really lay in cases of land transactions, and the Judicature Acts in no way altered the position.

What is in my opinion final in this point *in limine* is that what is alleged is a "Partnership in respect of a gold mining business", and this seems to me to mean a "mining partnership" and nothing else.

On reference to Chapter 175, Section 55 (1) it is quite apparent that by that section mining partnerships are taken out of the operation of the Statute of Frauds, that is to say, in local parlance,

out of the operation of section 20 of the Civil Law of British Guiana Ordinance.

It is argued that a mining partnership had not come into existence at the time of the first alleged agreement because the first agreement was prior to the working or staking of the claims; but this must occur in all cases of mining partnerships. These transactions are continuing ones. The defendant obtained claims, so the pleadings allege, for a mining partnership, and that mining partnership then and there came into being when implemented by actual work on the claim, and so when the pleading alleges that defendant must account for the profits, the pleadings are alleging something not requiring writing.

To hold that a person can do what plaintiffs allege that defendant did, and cannot be brought to book, is to drive a cart and horses through section 55 which is obviously intended to suit the law to the less formal manners of gold miners.

The preliminary point is therefore overruled with costs, the point being certified as fit for Counsel. Upon payment of the costs of appearance in this argument and of noting judgment, the main case will be set down for trial in ordinary course.

Defendant's objection overruled.

Solicitors: *M. S. Fitzpatrick,* for plaintiffs;
R. G. Sharples, for defendant.

JAGNANDON, Plaintiff,

v.

POTEE AND RAMDEEN, Defendants.

[1941. No. 17.—DEMERARA.]

BEFORE STUART, J.

1941. SEPTEMBER 24, 29, 30; DECEMBER 5.

Barristers and solicitors—Obligation to the Court—In ex parte matters—To give clear statement of all law so far as relevant, and research and knowledge directed to point in issue has led them—If they wish to retain confidence of Court.

Practice—Pleading—Signed by solicitor only—Amount claimed exceeds $500—Leave to defend granted—Defence signed by solicitor only—Pleading properly signed.

Barrister—Acting as solicitor—Amount claimed exceeds $500—Specially indorsed writ—Leave granted to defend—Request to Registrar to place action on hearing list—Signed by barrister—Only solicitor legally empowered to sign—Action not properly on hearing list.

All barristers and solicitors are officers of the Court, and are under an obligation, when appearing *ex parte*, if they wish to deserve and retain the confidence of the Court, to give a clear statement of the whole law, so far as is relevant, and so far as research and knowledge, directed to the point in issue, has led them.

Where leave to defend has been granted on a specially indorsed writ in which a sum exceeding $500 is claimed, the defence is properly signed, if signed by a solicitor alone.

Where leave to defend has been granted on a specially indorsed writ in which a sum exceeding $500 is claimed, a barrister can no longer act as a solicitor, and consequently he cannot sign a request to the Registrar to enter the action on the hearing list. Where a request was so signed, it was held that the action was not properly placed on the hearing list.

Action by Jagnandon against Potee and Ramdeen on a specially indorsed writ for the sum of $638.76. The writ was filed by Eustace Gordon Woolford, K.C., acting as solicitor for the plaintiff. Leave was granted to defend. The defendants filed a defence which was signed by their solicitor. The next document filed in the action was a request to the Registrar to enter the action on the hearing list. This was filed on July 29, 1941, and it was signed by the King's Counsel, acting as Solicitor for the plaintiff. The action was placed on the hearing list. On September 20, 1941, a solicitor filed in the Supreme Court Registry an authorisation in writing from the plaintiff authorising him to act as his solicitor in the action. The action came on for hearing on September 24, 1941, when counsel for the plaintiff submitted that the action was undefended inasmuch as the defence should have been signed by both barrister and solicitor, and should be treated as if it had not been filed. Counsel for the defendants submitted that the action should be treated as if it were not on the hearing list, inasmuch as the request to so enter it could only be signed by a solicitor, and a King's Counsel was not authorised to act as a solicitor in an action involving more than $500 after an order has been made granting the defendant

leave to defend. The submission of counsel for the plaintiff was accepted by the trial judge, Stuart, J., and he gave judgment for the plaintiff for the amount claimed with costs. On September 29, 1941, Stuart, J., set aside the judgment, and the action came on again for hearing on September 30, 1941. On that date counsel for the plaintiff and counsel for the defendants renewed their submissions, and decision was reserved. After decision was reserved the plaintiff's solicitor produced to the Registrar a request signed by him, the plaintiff's solicitor, to have the action entered on the hearing list. This request was not filed, pending the decision on the submission made by counsel for the defendants.

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

G. M. Farnum, for the defendants.

Cur. adv. vult.

STUART, J.: This matter appeared before this Court on the 24th September, 1941, the 29th September, 1941, and the 30th September, 1941.

On the first day Mr. Woolford appeared for plaintiff, and argued successfully that Mr. Farnum for the defendant could not appear, as the defence filed was only signed by an Attorney, Mr. deFreitas, and, as such was invalid in view of Order XVII. Rule 6 which he quoted to me and which reads—

"Every pleading shall be signed by a *Barrister* and the Solicitor of the party and shall not be received by the Registrar if not so signed, . . . provided . . ."

This rule clearly excluded the appearance for the defence, upon the legality of the filling of which, Mr. Farnum's right to appear, depended.

Mr. Farnum's reply was a counter-attack which failed and which has been sufficiently dealt with in the judgment, now rescinded, of the 24th September 1941.

Mr. Farnum's reply had to fail then, because it could only be raised if his own position was valid.

Mr. Farnum's "Defence" in fact wag only signed by a Solicitor.

Mr. Farnum being ruled out, he was only heard *amicus curiae;* Mr. Woolford's application became *ex parte.*

Now all barristers and solicitors are officers of this Court, and are under an obligation, when appearing *ex parte,* if they wish to deserve and retain the confidence of the Court, to give a clear statement of the whole law as far as relevant, and as far as research and knowledge generally directed to the point in issue, has led them.

This, Mr. Woolford purported to do, and in reliance on his statements, the Court gave him judgment.

Now it almost immediately afterwards appeared that Mr. Woolford had not correctly quoted the law.

The judgment consequently was rescinded on 29th September,

1941, the matter was reargued on the 30th. The judgment then reserved is now given.

At the time when Mr. Woolford quoted Rule 6 of Order XVII., he should have known that the said Rule had been repealed for some *nine years.* Mr. Woolford posed before the Court, probably accurately, as a pundit upon professional points, and indicated, in so many words, that he had disputed over and inspired the relevant legislation and rules affecting the inter-relation of the Bar and Side Bar in the last 20 years; and the Court believes this to have been the case.

Obviously, Mr. Woolford forgot the repeal of Rule 6 of Order XVII. This must surely be so, or else he did not appreciate that the matter having become *ex parte*, the Court was entitled to the truth, the whole truth, and nothing but the truth from him.

The substituted Rule now reads as it has read for 9 years:—

"6 (1) The signature of Counsel shall not be necessary to a pleading, but where pleadings have been settled by Counsel they shall be signed by him, and if not so settled then they shall be signed by the Solicitor.

(2) *Irrelevant.*

(3) In any cause or matter where, under the provisions of any ordinance or rule, a Barrister or Solicitor is entitled to act alone, it shall be sufficient if the pleading is signed by a Barrister or a Solicitor as the case may be . ."

Under this rule defendants' defence, signed by Mr. deFreitas, and which has never ever been suggested as being other than one prepared by Mr. deFreitas, was in order. Mr. Farnum was in order in appearing.

Mr. Woolford's signature of the Request for Hearing was not in order as the Defendants had "filed a Statement of Defence, etc.", as provided in Ordinance 15 of 1931, section 3 B (b) (i); and Mr. Woolford could no longer sign alone and, expert as he was on the subject, must have forgotten that he could no longer sign alone, and that the rule he was relying upon was repealed, for of course he could not have so misled the Court deliberately.

Mr. Woolford's objection is overruled. Mr. Farnum's objection is allowed with costs at all stages, to wit, of the appearances set out above and of noting this judgment. The matter is declared fit for Counsel.

Action removed from hearing list.

Solicitors: *Albert Ogle,* for plaintiff.
J. E. deFreitas, for defendants.

M. P. CAMACHO, LTD., (Plaintiffs),

v.

C. D. PATTERSON AND K. A. THOMPSON (Defendants).

[1939. No. 78.—DEMERARA.]

BEFORE LUCKHOO, J. (Acting).

1941. DECEMBER 10, 11, 12, 15.

Contract—Whether permanent and irrevocable—Guiding Principles.

Contract—Terminable on notice—Course of conduct of business put an end to by one party—Whether other party entitled to determine contract without notice.

Semble, that where a party to a contract which is terminable only upon notice put an end to the course of conduct of the business which was the subject matter of the contract, the other party to the contract is entitled to determine the contract without giving notice.

Action by the plaintiffs against the defendants for goods sold and delivered and moneys lent and advanced. The necessary facts appear from the judgment.

H. C. Humphrys, K.C., for plaintiffs.

G. M. Farnum, for defendants.

Cur. adv. vult.

LUCKHOO, J., (Acting): The plaintiffs in this action on the 17th day of March, 1939, filed a specially Indorsed Writ in which they claimed from the defendants the sum of $3,360.71 for the price of goods sold and delivered by them to the defendants and for moneys paid and advanced by them to and for the defendants on and between the 5th day of January, 1937, and the 7th day of March, 1939, wrongly stated in their claim as the 16th day of March, 1939.

The defendant Thompson on behalf of himself and the defendant Patterson with whom he carried on a partnership business as grant-holders in the Essequebo River for the purpose of felling, squaring and selling of greenheart timber (among other woods) filed an affidavit of Defence on the 6th day of April, 1939, to the plaintiffs' claim in which he deposed that, in the year 1936 it was verbally agreed between the plaintiffs and them, plaintiffs would supply goods and advance cash to the partnership on account of the purchase price of greenheart timber to be delivered by the partnership to the plaintiffs within a reasonable time. That in pursuance of such agreement the plaintiffs advanced cash and supplied goods and received payment for the same in timber. *See paragraph 3* of the said affidavit. The defendants admit that up to and inclusive of the 7th day of March, 1939, the plaintiff's supplied them with goods and advanced them cash to the extent of $6,300.69, that they (the defendants) delivered from time to time various quantities of timber but allege in the said affidavit of Thompson that the said quantities of timber were paid for in

advance by the plaintiffs. They agree as to the quantities set forth in the particulars attached to the Statement of Claim, save that they were not given credit for 1,600 cubic feet delivered to the plaintiffs in the month of November, 1938. The plaintiffs at the hearing agreed that the sum of $480 should be credited to the defendants' account.

The defendants in paragraph 8 of the said affidavit allege that they never agreed to purchase goods from the plaintiffs and never requested them nor received any money from them on loan. They further allege that all goods and cash supplied to them were supplied on account and in advance of the purchase price of timber to be supplied (quantity not stated nor the time within which to do so) by them to the plaintiffs.

They further allege that the contract as stated in the affidavit of Defence, was entered into for an *indefinite period* and it was understood and implied between them and the plaintiffs that either party should give to the other a *reasonable Notice* to terminate the same. That they were and always have been ready and willing to deliver timber within a reasonable time to the extent of the value which they had in hand in goods and cash advanced to them on account of the purchase price of timber; and that the plaintiffs never gave them any notice of their intention to determine the said contract or to bring this action.

The defence in the action was filed on the 23rd May, 1939, and substantially raised in the form of pleas the statements contained in the affidavit of Thompson with this addition that the plaintiffs had no authority either to lend money or to sell goods as such acts were *ultra vires* the Company. This contention was abandoned at the hearing, at any rate no evidence was led in support thereof. In paragraph 12 of the defence the defendants allege that since the commencement of the action they offered the plaintiffs 2,400 cubic feet of greenheart but their offer had been refused by the plaintiffs.

[His Honour, after reviewing the evidence, found that the documentary evidence supported the arrangement alleged by the plaintiffs, and constituted the defendants as debtors to the plaintiffs in the sum claimed for moneys lent and advanced and for goods supplied. His Honour then continued:]

Suppose for the sake of argument I could rely wholly upon the evidence of the defendant Thompson, have the defendants established by that evidence and the correspondence in the case:—

(*a*) That the contract which they alleged they entered into with the plaintiffs was for an indefinite period, and if so,

(*b*) That reasonable notice of plaintiffs' intention to terminate was necessary?

It is clear from such evidence that the defendants had not an unlimited supply of greenheart timber.

"*Prima facie* every contract is permanent and irrevocable where

no time is stipulated and where there is no provision for its determination and it lies upon a person who says it is revocable or determinable to show either some expression in the contract itself or something in the nature of the contract from which it is reasonably to be implied that it was not intended to be permanent and perpetual but was to be in some way or other subject to determination": *per James, L. J., in Llanelly Railway and Dock Co.* v. *London and North Western Railway Co.* L.R. 8 Ch. 942, 949.

That implication is amply supplied in this case as it is clear from the evidence that there is not on the defendants' grant any inexhaustible supply of greenheart, in other words, the nature of the subject matter contracted for to be supplied is not unlimited. Then there was no obligation on part of the plaintiff's to take greenheart timber from the defendants at all times. The various extracts from the letters to which I have already referred show that the alleged contract was not to be indefinite.

If, therefore, the contract set up by the defendants was not indefinite and there was no time stipulated for, by the parties, was notice necessary?

It seems to me that either it was an agreement which must be capable of determination at the will of either party, or it was an agreement which cannot be so terminated; and, if it cannot be so terminated, there is no terminus whatever provided for by the alleged agreement, and if so, the agreement is one which in its nature must continue and must run on, which it is not for the reasons I have just stated.

The loan of money and the supply of foodstuffs by the plaintiffs depended upon the personal trust and confidence which they reposed in the defendants and which in its nature cannot be supposed to be of a perpetual character, and when as in this case that trust and confidence were lost it was open to the plaintiffs to put an end to the relationship which existed between them and the defendants, however harsh might be the result.

Let us examine the letter of the 12th day of March, 1939, Ex. A24, written by the defendants to the plaintiffs. In that letter the defendants laid down certain conditions upon which the delivery of timber they then contemplated selling to Booker Bros., McConnell & Co., Ltd., would be delivered to the plaintiffs and the terms on which future deliveries to them would be made, departing altogether from any existing contract they had with the plaintiffs. In other words they themselves put an end to the course of conduct of the business between them and the plaintiff's which existed since the 5th day of January, 1937.

In those circumstances, how can they complain that reasonable notice to determine the alleged contract was necessary. They themselves brought about an end to the existing relationship.

I find as a fact that the transaction entered into between the

plaintiffs and defendants is that set out in the Statement of Claim and after giving credit for the value of timber delivered by the defendants there remains a debt of $2,781.71 payable by them to the plaintiffs.

The defendants have not satisfied me that the moneys advanced and goods supplied were made on account of the purchase price of timber to be delivered. In addition there was never any agreement as to the quantity and time of delivery. The defendants would have had good grounds for a defence to an action by the plaintiffs founded upon a breach of contract to deliver timber. Much reliance was placed by learned counsel for the defendants that among the items given in the particulars supplied there appear various entries "paid cash on account timber" but in my opinion these book-keeping entries cannot supplant the real transaction between the parties.

During the course of his courageous argument I drew Mr. Farnum's attention to an alternative claim based upon the same evidence on which the plaintiffs could succeed in obtaining judgment in their favour—a claim for an account stated. Mr. Farnum very properly agreed that they could in view of the written exhibits.

Mr. Humphrys, whilst not abandoning the form of his original cause of actions, *ex majore cautela,* applied for an amendment by adding the alternative claim based on an account stated between the plaintiffs and the defendants. This form of pleading is commonly used where there is an admission of indebtedness from which the law may imply an undertaking to pay. More correctly it is where two parties in account with each other agree and balance. There is then a new contract by the party in debit to pay the balance, the consideration being the discharge of the items on each side of the account. An action can be brought on the account stated without going into all the transactions which led up to it.

[His Honour then considered the question of costs and continued:]

There will therefore be judgment for the plaintiffs for the sum of $2,781.71 and costs to be taxed—such costs not to include any of the interlocutory proceedings with which Mr. Justice Langley dealt.

I grant a stay of execution of both judgment and costs until the hearing and determination of the Cause No. 332/1941 for the County of Demerara, which has been instituted by the defendants against the plaintiffs.

Liberty to apply.

Judgment for plaintiffs.

Solicitors: *J. Edward de Freitas; R. G. Sharples.*

THE WEST INDIAN COURT OF APPEAL

REPORTS OF DECISIONS

OF

THE COURT

SITTING IN

TRINIDAD AND TOBAGO

[1939]

AND IN

BRITISH GUIANA AND GRENADA.

[1941.]

JUDGES OF THE COURT:

G. E. F. RICHARDS, C.J., St. Lucia.

E. A. COLLYMORE, C.J., Barbados.

SIR MAURICE V. CAMACHO, C.J., British Guiana.

SIR CHARLES C. GERAHTY, C.J., Trinidad and Tobago, President.

J. H. JARRETT, C.J., Leeward and Windward Islands.

W. T. S. FRETZ, C.J., (Acting), British Guiana.

G. E. F. RICHARDS, Judge specially appointed (Leeward and Windward Islands).

ALSTON & CO., LTD. *v.* F. W. GUY.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

ALSTON & COMPANY, LIMITED, Appellants (Defendants),
v.
FREDERICK WELLINGTON GUY, Respondent (Plaintiff).

[1939. No. 3—TRINIDAD AND TOBAGO.]

Before RICHARDS, Chief Justice, St. Lucia, (President); COLLYMORE, Chief Justice, Barbados; and CAMACHO, Chief Justice, British Guiana.

1939. OCTOBER 3.

Negligence—Action based on—What must be proved—Otherwise, action fails.

Negligence—Res ipsa loquitur—Doctrine of—Application of—Explanation offered by defendant—Consistent with negligence—and without negligence on part of defendant—Onus of proof—Shifted back to plaintiff—To prove negligence.

In order to succeed in an action for negligence, the plaintiff must, by reasonable evidence, afford affirmative proof of negligence.

The occurrence of an accident is not in itself evidence of negligence.

A scintilla of evidence, or a mere surmise, that there may have been negligence on the part of the defendant would not justify judgment for the plaintiff. The judgment must proceed on reasonable and proper proof of negligence. Nor is mere suspicion sufficient. Evidence must be adduced of some specific act of negligence. Again, if the evidence leads only to conjecture as to the cause of the accident, the plaintiff fails.

Where the evidence is equally consistent with the absence or existence of negligence in the defendant, the plaintiff fails.

Mere allegation or proof that a defendant was guilty of other acts of negligence is irrelevant, if the negligence did not cause the injury complained of.

The doctrine of *res ipsa loquitur* is inapplicable unless the facts proved are more consistent with negligence in the defendant than with a mere accident. Nor can it be applied to evidence of an unexplained accident, if the evidence is as consistent with the cause of the accident having been the plaintiff's negligence, as with its having been that of the defendant.

Where the defendant (in an action to which the doctrine of *res ipsa loquitur* applies) gives a reasonable explanation, which is equally consistent with the accident happening without their negligence as with their negligence, the burden of proof is shifted back to the plaintiff to show that it was negligence of the defendant that caused the accident.

The judgment of the Court was as follows:—

This appeal which has afforded occasion for interesting and able argument by Counsel arises out of an action brought by Frederick Wellington Guy against Alston & Co., Ltd., and wherein the learned Trial Judge entered judgment for the Respondent.

The Appellants are manufacturers, and distributors for sale, of matches known as The Comet Brand of matches. The matches sold by the Appellants are labelled on the box "Safety Matches." On 14th June last year the Respondent purchased a box of these

matches and later that same day, according to his evidence, when striking one of them on the prepared surface of the box all the matches within the box exploded and took fire, thereby causing the injuries which are detailed in the statement of Claim.

The Respondent alleged:

(1) breach of warranty,

(2) the matches were dangerous in themselves, of which danger the Respondent did not have warning, and

(3) negligence.

The learned Trial Judge whose findings are under review held that:—

(1) inasmuch as no contractual relationship existed between Appellants and Respondent the plea of breach of warranty failed.

(2) The matches must be excluded from the category of dangerous things. Moreover, assuming them dangerous by reason only of some special peculiarity, liability would not attach to the Appellants for damage resulting from their use, apart from negligence, unless the Appellants were aware of the danger and, assuming ignorance of the Respondent of this danger, failed to give notice thereof.

(3) The Respondent knew "Comet" Matches were not always safe to use.

(4) The doctrine *res ipsa loquitur* applied and the Appellants not having discharged the burden thereby cast on them the Respondent was entitled to succeed.

On the issue of warranty the finding is not controverted in this Court by either party. Nor was it seriously or, alternatively, convincingly argued for the Respondent that the learned Trial Judge was wrong in holding that the matches were excluded from the category of things dangerous in themselves. The following considerations were nevertheless pressed upon the Court. It was argued, primarily, that the Appellants were aware of danger, and failed to give notice and, secondly, that the Respondent, notwithstanding the learned Judge's finding on the point, was an unsuspecting user of the matches. The judicial finding as to the Respondent's knowledge is sought to be rendered nugatory by appeal to the record wherein, it is argued, no support is to be found for the Judge's conclusion. When reference is had to the evidence, the Respondent's own testimony places the question beyond dispute. "I had heard of these other people being burnt by Comet Matches, before my accident and one since." (p. 36).

In the light of this statement how can it be reasonably contended that the respondent remained in ignorance of risk of danger? His further testimony "I am still using Comet Matches" (p. 33) emphasises the mental attitude of the respondent on the element of danger, if any. In the view of this Court the record

discloses evidence which affords ample support to the finding by the learned trial Judge of knowledge on his part.

Inasmuch as the respondent has not entered a cross appeal, and regard being had to agreement by this Court with the trial Judge's finding on the point, it would be idle to pursue discussion on this aspect of the case.

Subject to subsequent observations on the effect of the finding of the Respondent's knowledge the decision here, as in the Court below, hinges on the issue of negligence, that issue itself depending on the question—on whom, in the last analysis, did the burden of proof properly rest?

In approaching examination of the question certain guiding principles enunciated by a series of Judicial rulings must be borne in mind. Simply stated the authorities lay down that—

(1) In order to succeed in an action for negligence the plaintiff must, by reasonable evidence, offer affirmative proof of negligence (*Scott* v. *London Dock Co.*, 3 H. & C. 601).

(2) The occurence of an accident is not in itself evidence of negligence. (*Simpson* v. *London General Omnibus Co.*, L.R. 8 C.P. 392).

(3) A scintilla of evidence, or a mere surmise, that there may have been negligence on the part of the defendant would not justify judgment for the plaintiff. The judgment must proceed on reasonable and proper proof of negligence (*Toomey* v. *L.B. & C. Railway Co.*, 3 C. B.N.S. 146). Nor is mere suspicion sufficient. Evidence must be adduced of some specific act of negligence (*Lovegrove* v. *L. B. & S.C. Railway Co.*, 10 C.B. 690).

Again if the evidence leads only to conjecture as to the cause of the accident the plaintiff fails.

(4) Where the evidence is equally consistent with the absence or existence of negligence in the defendant the plaintiff fails.

(5) Mere allegation or proof that a defendant was guilty of other acts of negligence is irrelevant if the negligence did not cause the injury complained of.

Wakelin v. *London and South Western Railway Co.*, 12 A.C. 41, and *Cotton* v. *Wood* 8 C.B.N.S., are apt illustrations of the rules which govern the onus of proof resting on the plaintiff in an action for negligence.

In the former case Lord Halsbury lucidly explains the position:—

"It is incumbent upon the Plaintiff to establish by proof that her husband's death has been caused by some negligence of the defendant, some negligent act or some negligent omission, to which his death is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails. And if in the absence

of some direct proof circumstances which are established are equally consistent with the allegations of the plaintiff as with the denial of the defendant, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition. She may establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails because *in pari delicto potior est conditio defendentis.* It is true that the onus of proof may shift from time to time as matter of evidence but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue, *e.g.*, the negligence, has discharged that burden." At the trial evidence was adduced on behalf of the respondent of injuries inflicted on others by Comet Matches for the purpose, among other reasons, of showing that the appellant's matches were defective and negligently manufactured. The respondent's burden is not however discharged by testimony of this nature. He must prove that his own injury was caused by the negligence of the appellants. "Mere allegation or proof that the Company were guilty of negligence is altogether irrelevant. They might be guilty of many negligent acts or omissions which might possibly have occasioned injury to somebody but had no connection whatever with the injury for which redress is sought and therefore the plaintiff must allege and prove not merely that they were negligent but that their negligence caused or materially contributed to the injury." *per* Lord Watson, in *Wakelin* v. *London and South Western Railway Co., supra.*

In the instant case however it is claimed that the burden of proof of negligence did not lie on the respondent inasmuch as the relevant facts and circumstances establish the application of the doctrine *res ipsa loquitur.* It must however be observed that the doctrine is inapplicable unless the facts proved are more consistent with negligence in the defendant than with a mere accident (*Crisp* v. *Thomas,* 63 L.T. 756). Nor can it be applied to evidence of an unexplained accident if the evidence is as consistent with the cause of the accident having been the plaintiff's negligence as with its having been that of the defendant. Moreover, it is for the Judge, and consequentially also for this Court, to say whether in the circumstances of this case the happening of the accident is more consistent with the appellant's negligence than not. The learned trial Judge has applied the maxim and the question for determination by this Court is whether he was right in so doing and, if that question is answered favourably to the respondent, this further question becomes urgent for adjudication, have the appellants offered an explanation of such a nature as to cast back on the respondent the burden of proving affirmatively negligence in the appellants?

The *Annot Lyle,* 11 P.D. 114; *Carfue* v. *L.B. & S.C. Railway*

Co., 5 Q.B. 747; *Kerney* v. *L.B. & S.C. Railway Co.*, L.R. 5 Q.B. 411, are cases which occur to the mind as examples of the application of the doctrine. The reported facts of cases afford little or no assistance, each case must be decided upon its own circumstances. What then are the facts and circumstances which led the learned Judge to hold that the application of the maxim is pertinent in this case? The maxim is deemed to be applicable in the case of inanimate things under the actual or notional control of the defendant, *e.g.*, it was applied in the case of an anchored ship damaged by another in course of navigation; to the case of an object falling from a building; to the case of a stone present in a bun and to a case of deleterious chemicals in an article of clothing. In the case under discussion the appellants released on the market a box of matches manufactured by them which reached the respondent in the same condition in which it left them. So long as the article remained in the possession of the respondent without improper interference by him it remained in the notional control of the appellants. So long also as the Respondent used the article in the manner in which it was intended to be used by the appellants it remained in their notional control. If, however, the respondent used the article in manner not intended by the appellants, can it be said that it remained in their control? The answer in the opinion of this Court would be in the negative. Having bought these matches the respondent struck two of them on the prepared surface of the box without untoward incident. On striking a third, the matches within the box, although according to the evidence of the respondent the box was closed, immediately exploded. In this state of the evidence the respondent contends that the Judge was right in holding that the doctrine applied and if those were the only facts this Court would have no criticism to offer. The Court will assume for the purposes of this judgment that the ruling of the learned trial Judge was right in law. At the trial however, the appellants offered several suggestions or explanations. They said in effect that having regard to the manner in which the Respondent struck the match and the manner in which he held the box in the act of striking he used the article in a manner different from that intended by the appellants; Moreover that a match-head was rubbed along the friction surface of the box to the corner thereof near which lay the exposed heads of the matches in the box; that assuming the accuracy of the suggestion, the struck match would pass extremely close to the match heads within the box at the moment when the match-head which was struck was still in its explosive state; thus, say the appellants the accident might have been caused. This suggestion is supported by evidence. If the box is examined the trace of a match having been struck on the box and in the direction indicated by the appellants is clearly to be seen. The learned trial Judge found

that at the time when the match was struck by the respondent the box was slightly open and although, according to his finding, open only to a less degree than 1/32 of an inch, it is clear that the match heads within the box must have been exposed to that extent. Incidentally the Court is in some difficulty to conceive how the learned Judge, calculated, with such mathematical precision, the degree to which the box was open.

Another suggestion put forward by the appellants was the possibility of a spark thrown off by the struck match making contact with the heads of the matches within the box. On this feature of the case the learned Judge remarks: "It must be included in the category of possible causes of the accident." The learned Judge thereupon avoids the necessary consequence of his finding by the consideration which he expresses, that "safety" matches are negligently manufactured if they give forth sparks when struck. The description "Safety" does not import a warranty and this particular allegation of negligence was not made by the respondent in the course of the trial and if made might have been met by a plea of contributory negligence.

A further suggestion advanced by the Appellants was the possibility of the flame of the ignited match having been held in close proximity to the match-heads which were within the opened box.

It is not for the appellants to prove affirmatively the suggested cause to be the real cause of the accident provided the Court accepts the suggestion or explanation as a reasonable possibility.

Adopting the language of Langton, J., in *the Kite*, 1933, P., p. 170—"What the defendants have to do here is not to prove that their negligence did not cause the accident. What they have to do is to give a reasonable explanation which, if accepted, is an explanation showing that it happened without their negligence. They need not even go so far as that because if they give a reasonable explanation, which is equally consistent with the accident happening without their negligence as with their negligence, they have again shifted the burden of proof back to the plaintiffs to show—as they always have to show from the beginning—that it was the negligence of the defendants that caused the accident."

In *Ballard* v. *North British Railway Co.,* 1923 S.C. (H.L.) 43/54 Lord Dunedin puts the point in this way—"If the defendants can show a way in which the accident may have occurred without negligence—the pursuer is left as he began, namely, that he has to show negligence."

Respondent's Counsel, for whose assistance throughout the argument the Court is indebted, referred to the case *Winnipeg Electric Co.* v. *Geel,* (1932) A.C. 690. That case was decided under a Canadian Statute which provided that the onus

of negativing negligence in an action for damages in the class of cases governed by the Statute remains on the defendant throughout the proceedings.

The following passage from Lord Wright's speech at p. 695 of the report is enlightening: "But the onus which the section places on the defendant is not in Law a shifting or transitory onus. It cannot be displaced merely by the defendant giving some evidence that he was not negligent, if that evidence, however credible, is not sufficient reasonably to satisfy the Jury that he was not negligent. The burden remains on the defendant until the very end of the case." On this authority Learned Counsel submits that judgment must go for the respondent. The Court is unprovoked by the submission. Apart from other distinctions which may be drawn between the *Winnipeg* case and the instant case, the learned trial Judge expressly found that one at least of the suggestions offered by the appellants was reasonable. In the finding this Court concurs. The explanations offered are at least, equally consistent with the absence or existence of negligence in the appellants. The Court concludes that whatever may have been the initial burden of proof which lay on the parties that burden was cast back on, and was undischarged by, the respondent. On this conclusion the appellants are entitled to judgment. It is also the view of the Court that knowledge of danger on the part of the respondent found by the learned trial Judge would preclude the respondent from succeeding. The judgment of the Court below is accordingly reversed.

The appellants are entitled to their costs here and of the trial.

Appeal allowed.

C. GARCIA *v.* GLOBE THEATRES, LTD.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

CARMEN GARCIA, Appellant (Plaintiff),

v.

GLOBE THEATRES, LIMITED, Respondent (Defendant).

[1939. No. 1—TRINIDAD AND TOBAGO.]

Before RICHARDS, Chief Justice, St. Lucia, (President); COLLYMORE, Chief Justice, Barbados; and CAMACHO, Chief Justice, British Guiana.

1939. OCTOBER 3.

Principal and agent—Undisclosed principal—When he may not sue on contract entered by agent on his behalf.

Contract—Purchase of ticket—For seat at theatre—Power to refuse to sell—Right of ticket holder—To enter theatre and stay and witness whole performance—Subject to good behaviour and compliance with rules of management—Licence—Not to be revoked arbitrarily—When licence revocable—Where personality of purchaser material or important—Ticket purchased by agent—Circumstances of case.

No one is obliged to bind himself by contract, and, therefore, a theatre may decline arbitrarily to sell a ticket without stating reasons.

After selling a ticket, any interference with the contractual relationship then existing is a violation of a legal right, unless there be established a sufficient justification. The licence granted by the sale of a ticket includes a contract not to revoke the contract arbitrarily.

The purchaser of a ticket for a seat at a theatre has a right to enter and stay and witness the whole performance, provided that he behaves properly and complies with the rules of the management.

The appellant was employed by the respondents as cashier of the Globe Theatre for 4½ years, during which period she rendered satisfactory service, and on July 1st, 1937, she resigned of her own free will and with the approval of her husband.

After her resignation the appellant, at times accompanied by her husband, frequently attended performances at the Globe Theatre to the knowledge of the managing director.

The appellant never received any notification from any one connected with the Globe Theatre, to the effect that admission would be denied her in future.

On the afternoon of January 21, 1938, the appellant, having previously given her husband the money with which to purchase 2 tickets for their admission to witness the matinee performance at 4.30 p.m., and accompanied by him, entered the premises of the Globe Theatre. Thereupon, the appellant's husband purchased 2 tickets for the sum of two shillings, the appellant meanwhile standing a few feet away from, but within view of, the booking office.

Having purchased the 2 tickets, the appellant's husband joined her and they together proceeded to enter the "house," whereupon the ticket collector refused to accept the tickets stating that she was acting upon the orders of the managing director. The managing director was in the lobby of the theatre, and, on his being approached in the matter, he replied that the appellant's husband could enter the theatre, but not the appellant; and, upon being asked why, stated that he had no reason to give.

No attempt was made by the appellant to conceal her identity at or about the time the tickets were purchased, she having no reason for any such concealment.

C. GARCIA *v.* GLOBE THEATERS, LTD.

The appellant sued the respondents for breach of contract. At the trial no attempt was made by the defendants to show that the appellant was not a fit and proper person to enter the theatre and witness the performance on January, 21, 1938, or to justify or assign any reason for refusing to admit her.

The tickets sold to the appellant's husband bore endorsements in the following words: "The management reserves the right to revoke the licence granted by this ticket by refunding the price" which endorsement was known to the appellant. The purchase price was not, however, refunded to the appellant,

Held (1) that this was not a contract in which importance was attached to the personality of the contracting party, inasmuch as there was no previous refusal to sell tickets to the appellant, no notification or knowledge that the sale of a ticket to her would be denied, no attempt to conceal her identity, no reasons known to the appellant, and none given by the respondents, for refusing her admission, no attempt made by the respondents to show that the appellant was not a fit and proper person for admission, and the performance was an ordinary matinee performance for admission to which tickets were being sold indiscriminately and not of any such special character as a first-night performance;

(2) that the appellant's husband did not contract in such a manner as to import that he was the real and only principal;

(3) that the appellant was entitled to sue, as an undisclosed principal, upon the contract made on her behalf by her husband; and

(4) that the endorsement on the ticket did not have the effect of enabling the licence to be revoked arbitrarily and regardless of refund of the money.

The judgment of the Court was as follows:—

This is an appeal from a judgment of the learned Chief Justice of Trinidad arising out of an action for alleged breach of contract. Before the Court of first instance numerous facts were in dispute, but this appeal proceeded on the basis that the findings of fact were correct and no longer in dispute. The following is a summary of such findings:—

(*a*) That the appellant, a married woman, was employed as cashier by the Globe Theatres, Limited, for 4½ years, during which period she rendered satisfactory service and at the expiration of which time she had not, as alleged, been dismissed, but of her own free will and with the approval of her husband resigned in July, 1937.

(*b*) That during the six months that elapsed between July, 1937, and the 21st January, 1938, when the cause of this action arose, the appellant, at times accompanied by her husband, frequently attended performances at the Globe Theatre to the knowledge of Mr. Gokool, the Managing Director.

(*c*) That the appellant neither about a week before the 21st January, 1938, as alleged, nor at any time prior to that date, received any notification from anyone connected with the Globe Theatre, to the effect that admission would be denied her in future.

(*d*) That on the afternoon of 21st January, 1938, the Appellant, having previously given her husband the money with which to purchase two tickets for their admission to witness the matinee performance at 4.30 p.m., and accompanied by him entered the premises of the Globe Theatre. Thereupon the husband purchased two tickets for the sum of two shillings, the appellant

meanwhile standing a few feet away from, but within view of, the booking office.

(*e*) That, having purchased the two tickets, the Appellant's husband joined her and they together proceeded to enter the "house," whereupon the ticket collector refused to accept the tickets stating that she was acting upon the orders of the Managing Director, Mr. Gokool.

(*f*) That Mr. Gokool, who was in the lobby of the theatre, upon being approached by both the Appellant and her husband and upon being asked by her husband if it was true that he had given orders that they were not to be admitted to the theatre, replied that he could enter the theatre, but that his wife could not, and further—upon being asked why—stated that he had no reason to give.

(*g*) That no attempt was made by the Appellant to conceal her identity at or about the time the tickets were purchased, she having no reason for any such concealment.

The learned Chief Justice makes the observation that no attempt was made by the Respondent to show that the Appellant was not a fit and proper person to enter the theatre and witness the performance on 21st January, 1938, or to justify or to assign any reason for refusal to admit her.

Upon the foregoing the learned Chief Justice then proceeds in his written judgment to apply the relative principles of law, recognising, it appears, the general rule that an undisclosed principal may sue in his own name on any contract duly made on his behalf, but treating this case as if the right of the Appellant falls within one of the exceptions to the general rule. Thus he states: "Such a contract is one, in my view, in which importance is essentially attached to the personality of the contracting party and on such a contract, if made by an agent without disclosure of the fact of his agency, the principal cannot sue." This finding is based upon a statement on p. 460 of the 19th Edition of Chitty on Contracts in support of which the case of *Collins* v. *Associated Greyhound Racecourses,* (1930) 1 Ch. 1, is quoted. In that case the Plaintiff, an undisclosed principal, sought to rescind the sale of shares in a company sold to two persons, his agents, but failed, so far as is relevant for the purposes of the present discussion, because Article 14 of the Articles of Association of the Company contained the usual provisions that the Company was entitled to treat the registered owners (in that case one Mason and Ovington, the Plaintiff's agents) as absolute owners and because, from the very nature of the transaction, the directors of a company owed a duty to their fellow members and to the Company to consider the personality of the applicant for shares before deciding to accept the application so as to see that such applicant was a responsible and fit person to become a member.

This Court does not regard that case as analogous to the one before it.

It was further urged by counsel for the Respondent that this case comes within yet another exception to the general rule and that, assuming that her husband was in fact the Appellant's agent (and indeed the learned Chief Justice in effect, upon the facts, so finds) the Appellant could not sue because her husband contracted in such a manner as to import that he was the real and only principal. *Humble* v. *Hunter* (1848) 12 Q.B. 310, is an authority for this last mentioned exception to the general rule. There the undisclosed principal failed as plaintiff on the ground that his agent executed a charter party in which he expressly described himself as "Owner" of the ship, the question turning upon the form of the contract in which an assertion of title to the subject matter of the contract was made by the agent.

Beyond the fact that the appellant's husband actually produced the necessary money and paid with it the price of two tickets we can find no circumstance that could be taken to import that he was acting as the real and only principal. The proposition that payment by an agent imports in itself that the person paying is the principal can clearly be negatived as in the case of *Phelps* v. Prothero (1885) 100 R.R. 763, where the consideration appeared upon the agreement to move from the agent only and even where the payment was in fact made by the agent's own cheque. In the last quoted case, as in others, the fact that any other person is interested is not even disclosed. In the case before us the mere sale of two tickets at once revealed that much at least. Moreover, it must be borne in mind that the learned Chief Justice found that it was the appellant's money half of which was to be spent for her own benefit.

We agree with the statement of law that if a contract, in which importance is attached to the personality of the contracting party, is made by an agent without disclosure of the fact of his agency, the principal cannot sue upon the contract, but we hold that the fact that the personal element is important or material must be established, in order to enable a party to the contract to justify his refusal to carry it out in favour of the undisclosed principal, and established in such a manner as is exemplified in *Said* v. *Butt* (1920) 3 K.B. 497. The facts there and the reasons upon which the judgment is based make it easily distinguishable from the case now under discussion. In delivering judgment McCardie, J., stated at p. 499: "It is well to state at once one or two points with regard to theatres which seem to be well established. In the first place it is settled by *Hurst* v. *Picture Theatres*: (a) that the purchaser of a ticket for a seat at a theatre has a right to enter and stay and witness the whole performance provided that he behaves properly and complies with the rules of the management; and (b) that the licence granted by

the sale of the ticket includes a contract not to revoke the contract arbitrarily." The facts in the case of *Said* v. *Butt* were that for reasons obvious in the circumstances and well known to the plaintiff the Palace Theatre had expressly refused to supply the plaintiff personally with tickets. He had then used the services of one Pollock to disguise the fact that he himself was the purchaser. It was the first performance of a play at the Palace Theatre. The learned Judge there expresses the view that a first night at that theatre is an event of great importance, the result of which may make or mar a play, that such occasions have become to a large extent a species of private entertainment, special events with special characteristics. He held that the personal element was in that case strikingly present and that the plaintiff as an undisclosed principal could not in those particular circumstances constitute himself a contractor with the Palace Theatre. No similar circumstances are present in the case before this Court. There is here, according to the undisputed findings of fact, no previous refusal to sell tickets to the appellant, no notification or knowledge that the sale of a ticket to her would be denied, no attempt to conceal her identity, no reasons known to the appellant and none given by the respondent for refusing her admission, no attempt made by the Respondent to show that the appellant was not a fit and proper person for admission and lastly, but by no means least, no evidence that the spectacle desired to be seen was of any such special character as a first night performance. Indeed it appears to have been an ordinary matinee performance for admission to which tickets were being sold indiscriminately. At p. 93 of Isaacs on the Law of Theatres, Music-Halls, Cinemas, etc., a text book to which the learned Chief Justice makes reference in his judgment, the author, after discussing the case of *Said* v. *Butt* states: "It is...doubtful whether the personal element would be so material to a contract in the case of a ticket purchased for an ordinary performance."

Recognising, as it does, the principle that no one is obliged to bind himself by contract, and that therefore a theatre may decline arbitrarily to sell a ticket without stating reasons, but that, after selling a ticket, any interference with the contractual relationship then existing is a violation of a legal right unless there be established a sufficient justification, this Court holds that in this particular case no such justification has been shown either upon the ground that the appellant's husband contracted in such a manner as to import that he was the principal or upon the ground that, in the circumstances, the personality of the undisclosed principal—the appellant—was important or material.

The tickets sold to the appellant's husband bore endorsements in the following words: "The management reserves the right to revoke the licence granted by this ticket by refunding the pur-

chase price" which endorsement was known to the appellant.

The learned Chief Justice treated this endorsement as immaterial on the ground that, as no attempt or offer was made to refund the purchase price, the condition was not complied with. It was argued for the Respondent that the effect of this endorsement was to put the parties of such a contract in the same legal position as they would have been before the decision in the case of *Hurst* v. *Picture Theatres,* (1915) 1 K. B. 1, and as enunciated in the case of *Wood* v. *Leadbitter* (1845) 13 M. & W. 838, that is, that the licensee would be liable to have the licence revoked arbitrarily and regardless of refund of the money. This Court, however, construing the endorsement in a manner which it conceives to be reasonable and consistent with the apparent general intent of its language, and interpreting as it considers its duty to interpret—its terms in their ordinary sense, cannot uphold the submission that revocation is accomplished without refund of the money, but holds that in accordance with the method of revocation prescribed by the Respondent Company itself, until and unless the refund is made, any attempted revocation would be incomplete and therefore invalid.

In the result this appeal is allowed and it is ordered that judgment be entered for the appellant in the sum of one shilling with costs here and in the Court below.

Appeal allowed.

I. R. DASILVA *v.* T. A. DURANT.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

I. R. DASILVA, Appellant (Defendant),
v.
T. A. DURANT, Respondent (Plaintiff).

[1940.—No. 1.]

Before SIR CHARLES GERAHTY, Chief Justice, Trinidad and Tobago, (President); Chief Justice J. H. JARRETT, Leeward and Windwards Islands; and Acting Chief Justice W. T. S. FRETZ, British Guiana.

1941. JANUARY 23, 24, 25.

Precedents—Negligence—Accidents on public road—Cases decided in days of horse drawn vehicles on roads inferior in quality and design, and less frequented by traffic generally—Application of—Conditions now existing on modern highways, and volume and kind of traffic thereon—Due regard to be paid to.

Public road—Legitimate passage over—Right to occupy for—To be exercised with reasonable care—Having regard to rights of other users and to rules governing present day traffic.

Negligence—Vehicles on road—Overtaking vehicle—Duty of—To allow adequate margin of safety—Not liable if vehicle overtaken suddenly swerves on to overtaking vehicle.

In accepting and applying principles enunciated in cases decided in the days of horse-drawn vehicles on roads inferior in quality and design and less frequented by traffic generally, due regard should be had to conditions now existing on modern highways and to the volume and kind of traffic using such highways.

While a user of the highway still maintains the right to occupy any part of it for legitimate passage, yet that right can only be exercised with reasonable care having regard to the rights of other users thereof and to the rules governing present day traffic. For example, a cyclist has a right of passage on any part of the road but he must exercise that right with due regard to other and faster moving traffic. He should in normal circumstances follow the rule of the road, and it is his duty not to swerve or deviate in the path of other traffic which might reasonably be expected to be on the road without using reasonable care.

It is the duty of an overtaking vehicle to allow an adequate margin of safety between his vehicle and the vehicle overtaken.

A motor car was overtaking a cycle which was maintaining a straight course, the cyclist had 3 to 4 feet available to him on his near side. The motor car, when overtaking the cycle, was 2 to 3 feet from it. While the cycle was being overtaken and partially passed by the motor car, the cyclist swerved suddenly to the right, and there was a collision between the cycle and the motor car as a result of which the cyclist suffered injuries. The driver of the motor car had no indication that the cyclist intended to swerve or deviate outwards from his straight course.

Held (1) that, but for the cyclist's act of swerving to the right, the clearance of 2 to 3 feet allowed by the driver of the motor car was an adequate margin of safety; and

(2) that the driver of the motor car could not be held to have failed in his duty to take care.

I. R. DASILVA *v.* T. A. DURANT.

Appeal by the defendant Isabella R. da Silva from a judgment of the Chief Justice of British Guiana, reported in (1940) L.R.B.G. 108, ordering judgment to be entered for the plaintiff Thomas Arthur Durant in an action for negligence. The facts appear from the judgment.

H. C. Humphrys, K.C., for appellant.

C. V. Wight, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by the President, as follows:—

This is an appeal from the learned Chief Justice of British Guiana by which he awarded damages in the sum of $627 to the respondent for injuries received on the 27th May, 1939, arising out of an accident on the Vlissengen Road, Demerara, in which the respondent who was riding a bicycle, came into collision with a motor car driven by the appellant's agent.

The material facts are that the respondent was riding his bicycle going south along Vlissengen Road between 6.15 and 6.45 p.m.

At the same time the appellant's car was being driven in the same direction on the same road. The appellant's car made to overtake the respondent who was riding on his correct side of the road, which at that point is 19 feet 9 inches wide.

The respondent's version of the accident is that the appellant's car swerved on to him when his bicycle and another car coming from the opposite direction were in a line across the width of the road.

According to the respondent he was riding 3 to 4 feet from the parapet on the eastern side of the road. He alleges that he felt a stab on his right hand which was pulled away from him causing him to be thrown from the bicycle. This, according to his testimony, happened when the appellant's car was abreast of him. It would appear from his evidence that he was not clear how and by what part of the car he was struck. He maintains that he kept to his side of the road and did not change his course. He admits that he is very deaf but says he is capable of hearing a car's horn or the ring of a bell. He adds that on this occasion he did not know a car was coming behind him.

The respondent's witness da Costa describes the accident as happening when the bicycle and the two cars were together on the road and that it was the front left fender of the appellant's car which came into contact with the front wheel of the bicycle. In cross-examination, he admits that it is possible that the front wheel of the bicycle may have turned into the road and struck the car. He states that when he saw the appellant pass the respondent and the other car there was very little room for him to do so.

The evidence of P.C. Simon Benjamin, who examined the car,

discloses that there were no marks on the fenders of the car and that scratches were visible only under the left door knob. Examination of the bicycle showed damage to the head lamp and handle bar.

The injuries sustained by the respondent were confined to his right wrist and hand.

The appellant's case in brief is that in overtaking the respondent, her agent allowed a space of 2—3 feet between the bicycle and the car and that in the act of passing, the respondent swerved his bicycle into the car and thus brought about his own injuries.

The driver testifies that he saw the cyclist in front of him going in the same direction and riding some 7—8 feet from the east edge of the road. At this time another car was approaching from the opposite direction. He sounded his horn whereupon the cyclist changed his direction and went 3—4 feet nearer the east parapet. The oncoming car passed him and he made to pass the cyclist. He denies that at any time the three vehicles were abreast. He heard a crash when the portion of the car in which he was sitting had already passed the cyclist and says that when he last saw him the cyclist was 3—4 feet from the parapet.

He states that he passed him with 2—3 feet to spare. He concludes that the cyclist must have swerved 2—3 feet across although he did not see him do so. The witnesses Gomes, Kennard and deFreitas, who were in a car following the appellant's car, all testify to the effect that they saw the cyclist suddenly swerve to the right into the car which was travelling not less than 3 feet clear from him and that there was plenty of room if the cyclist had not swerved. The witness de Freitas corroborates the driver as to the sounding of the horn, which fact though not confirmed by either Gomes or Kennard is not contradicted by either the respondent or his witness da Costa.

On the question of evidence the learned Chief Justice in his judgment remarks that the respondent and the appellant's agent have afforded him but little assistance. Otherwise he confines his comments to the evidence of da Costa and Kennard. He in no way impugns the credibility of any witness but merely comments that Kennard's view of the road in front and of the accident could not have been perfect having regard to his position at the back of the car.

The learned Chief Justice has not indicated his opinion of the value of the evidence of Gomes and de Freitas. He merely sums up the evidence which was adduced by the respective parties as being diametrically opposed and addresses his mind to the question on which party primarily lay the duty of taking care It will be useful at this juncture to set out such findings as appear in the judgment:—

(1) at the moment of collision the appellant's car had over taken the respondent,

(2) the roadway at that point is 19 feet 9 inches wide,
(3) there was a space of only 2—3 feet between the bicycle and the car in overtaking and passing,
(4) there was no other vehicle on the road at that point, thus implying that the car approaching from the opposite direction had already passed as contended for the appellant. There is, in our view, ample evidence in support of this finding which shows at any rate that on this point the Chief Justice believed the appellant's witnesses,
(5) there was nothing to prevent the appellant's agent from passing the respondent safely by driving nearer to the western side of the road,
(6) it is not established that the respondent was seen by the appellant's agent to be aware of the latter's intention to overtake and to pass him,
(7) the respondent was on his proper side of the road and as close to the edge as could reasonably be expected,
(8) the appellant's agent allowed insufficient space to afford safe passage should the respondent exercise his right to take more room,
(9) that if the respondent did swerve a matter of 2 or 3 feet he had a right to do so and the appellant's agent ought to have calculated upon the exercise of that right,
(10) the respondent did not know of the close proximity of the appellant's car,
(11) the appellant's agent had the respondent in full view for some distance before he attempted to pass and had more than 16 feet of free roadway at his disposal.

On these findings and on the application of the principles laid down in *Mayhew* v. *Boyce* (1816) 1 Starkie 423 and *Wordsworth* v. *Willan & Others* 170 E.R. 810, the learned Chief Justice held that the respondent's injury was caused by the negligence of the appellant's agent in not leaving sufficient room when overtaking and passing the respondent and further that the respondent was not guilty of contributory negligence.

It is to be observed that certain factors in the case have not been made the subject of specific findings. For instance, there is no finding as to whether or not the appellant's agent sounded his horn as alleged by himself and one of his witnesses.

If the appellant's agent did so sound his horn did the respondent fail to hear it by reason of his deafness? Although the Chief Justice finds that the respondent did not know of the close proximity of the appellant's car, it is not clear whether this lack of knowledge was due to the deafness of the respondent or to the absence of any warning of approach of the appellant's car.

It is not suggested anywhere in the evidence that the defective hearing of the respondent was within the knowledge of the appellant's agent. This Court is therefore of opinion that it

may be accepted as a fact that the appellant's agent was not so aware. Again there is no finding as to whether the car ran into the cyclist or the cyclist swerved into the car.

It is interesting to note that in the Statement of Claim it is pleaded that the appellant's agent struck the respondent from the rear of the bicycle, whereas at the hearing the witness da Costa testified that the front fender of the car which had passed the back wheel of the bicycle came into contact with its front wheel.

Reference however to the evidence of P. C. Simon Benjamin makes it quite clear, in the opinion of this Court, that the point of impact was at or about the centre of the car, thus negativing the respondent's contention that the car ran into him, and tending to confirm the appellant's allegation that the respondent swerved into him. In any event the learned Chief Justice has taken into account the possibility of the latter happening in arriving at his final conclusions.

This judgment will therefore proceed on the basis that (*a*) the cyclist was riding 3—4 feet from the eastern edge of the road keeping a straight course as admitted by both sides, (*b*) the car in overtaking and passing the cyclist left a clearance of 2-3 feet and accordingly there was 5—7 feet of roadway available to the cyclist, (c) the cyclist swerved across this clearance coming into contact with the car at or about its centre as indicated by the scratches found under the left door knob, (*d*) at the material time and place the road was clear of traffic, (*e*) there was no impediment, obstruction, rut or hole on the roadway to have caused the cyclist to swerve or deviate from his course, (*f*) the cyclist was labouring under the disability of defective hearing, (*g*) the cyclist was not aware of the close proximity of the car and (*h*) the weight of evidence is in favour of the appellant's agent having sounded his horn before overtaking the cyclist.

In the first instance it is necessary to examine the cases of *Mayhew* v. *Boyce* and *Wordsworth* v. *Willan and Ors.* upon which the learned Chief Justice has founded his judgment. In our view the facts in the former case are clearly distinguishable from the present one. There, the vehicles were horse-drawn vehicles being driven at night up a hill. The front coach was approaching an angle in the road to the left closely pursued by another vehicle of the same kind. On the front vehicle taking an oblique course from left to right in order to negotiate the turning the pursuing vehicle in attempting to pass made insufficient allowance for the outward swerve of the coach in front and in consequence collided with it in the rear. In other words, the driver of the overtaking vehicle having two courses at his disposal, one being safe and the other hazardous, elected to take the one which was hazardous. The driver was accordingly held liable for the mischief which ensued and was not protected by the fact that he kept to his own side of the road instead of

going further over to the right. Moreover, it appeared that the situation of the front vehicle had been seen for some time before the overtaking vehicle had come up and that the driver of the latter might by driving nearer to the right side than he did have effectually guarded against the mischief.

In the present case the vehicle in front was a bicycle and the overtaking vehicle a motor car. The road is straight and there is no question of negotiating an angle in the road or of the cyclist changing his course before being overtaken. On the contrary, it is the cyclist's case that he was keeping a straight course at the material time. The overtaking vehicle in this case had partially passed the cyclist and it was the latter who swerved into the former.

According to the passage in Vol. XXIII of Hailsham's Edition of the Laws of England at page 639, referred to in the judgment of the learned Chief Justice, and for which *Mayhew* v. *Boyce* is cited as the authority, "overtaking vehicles must observe the rule of the road, and should allow for the vehicle which they are about to pass pulling out towards the middle of the road, unless the person in charge of it is seen by the person in charge of the overtaking vehicle to be aware of the latter's intention."

But it would appear that the learned Chief Justice has in effect extracted from the decision in *Mayhew* v. *Boyce* the proposition that a vehicle has a right to swerve at will in the path of other traffic on the highway and that the driver of an overtaking vehicle must calculate upon the exercise of that right when overtaking. In his application of that proposition to the facts of the present case he has held that a space of 2—3 feet left by the appellant's driver to the cyclist was insufficient for the cyclist to exercise that right.

This Court, however, is unable to accept the proposition that any right existed in the cyclist in the circumstances of this case to swerve suddenly and capriciously, as he did, while being overtaken and partially passed by the appellant's car, notwithstanding the fact that he may not have been aware of the proximity of the overtaking car before it began to pass him.

The learned Chief Justice has referred on the question of sufficiency of room to the case of *Wordsworth* v. *Willan and Others* in which it was stated by Rook, J. that "a driver was not to make experiments, he should leave ample room, and if an accident happened from want of that sufficient room, he (the defendant) was no doubt liable."

In that case also the facts are in no way analogous to those in this case, there the overtaking vehicle when being driven furiously, ran into the plaintiff's horse which had become alarmed and was jumping about in the road.

Accepting, as we do, the proposition that it is the duty of a driver of an undertaking vehicle to allow an adequate margin of

safety between his vehicle and the vehicle overtaken, that case, we think, in its application to the facts in the present case, affords no assistance in determining what in fact is a sufficiency of room.

Furthermore, accepting the finding of fact that only a space of 2—3 feet was left between the car and the bicycle, this Court is unable to agree with the learned Chief Justice in holding that a clearance of 2 to 3 feet is, in the circumstances, insufficient, having regard to the fact that the cyclist had 3—4 feet available to him on his near side, and in all, a space of 5—7 feet in which to regulate and pursue his course.

This Court takes the view that in accepting and applying principles enunciated in cases decided in the days of horse-drawn vehicles on roads inferior in quality and design and less frequented by traffic generally, due regard should be had to conditions now existing on modern highways and to the volume and kind of traffic using such highways.

While a user of the highway still maintains the right to occupy any part of it for legitimate passage, yet that right can only be exercised with reasonable care having regard to the rights of other users thereof and to the rules governing present day traffic.

For example, a cyclist has a right of passage on any part of the road but he must exercise that right with due regard to other and faster moving traffic. He should in normal circumstances follow the rule of the road and it is his duty not to swerve or deviate in the path of other traffic which might reasonably be expected to be on the road without using reasonable care.

In the present case the driver of the overtaking car had no indication that the cyclist who was maintaining a straight course at the material time intended to swerve or deviate outwards from that course and in allowing him a clearance of 2—3 feet, which but for the cyclist's act of swerving to the right would have been an adequate margin of safety, this Court is of opinion that the appellant's driver cannot be held to have failed in his duty or that the respondent's injury was caused by his negligence.

In the result this Court finds that the respondent has failed to discharge the onus upon him of establishing negligence in the appellant and accordingly we have no alternative but to reverse the decision of the learned Chief Justice.

Having arrived at this conclusion the questions arising out of the deafness of the respondent and the warning of approach said to have been given by the appellant's agent together with the further point raised in this Court as to the amount of damages awarded do not call for decision.

This appeal is allowed and it is directed that judgment be entered for the appellant with costs here and in the Court below.

Appeal allowed.

Solicitors: *H. C. B. Humphrys,* for appellant;

Arthur G. King, for respondent.

S. LANDER *v.* H. G. GENTLE.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF GRENADA.

SYDNEY LANDER, Appellant (Plaintiff),

v.

HAROLD G. GENTLE, Respondent (Defendant).

[1941. No. 1.—GRENADA.]

BEFORE SIR CHARLES C. GERAHTY, (Chief Justice of Trinidad and Tobago), President; Mr. W. T. S. FRETZ, (Acting Chief Justice of British Guiana); and Mr. G. E. F. RICHARDS, (Judge, specially appointed).

1941. APRIL 5.

False imprisonment—Person bound and removed to mental hospital—Action at common law.

A doctor, in consequence of a *bona fide* belief that a person was dangerous by reason of actual lunacy, caused him to be conveyed, whilst bound, to a mental hospital in order that he may be kept under observation until it was decided whether the person was certifiable as a lunatic or not.

Held, that an action lies against the doctor at common law at the instance of the person removed to the hospital.

The judgment of the Court was as follows:—

This is an appeal from the decision of the learned Chief Justice of the Windward Islands and Leeward Islands by which he ordered that judgment be entered for the defendant, the respondent herein, with costs.

By his Statement of Claim, the Plaintiff, the appellant herein claimed damages for assault and false imprisonment against the respondent (Dr. Gentle) in the following circumstances.

On the night of the 5th January, 1939, the respondent was called in to attend the appellant at his residence, the latter being in a delirious condition.

The allegation is that the respondent assaulted the appellant by binding him and by causing him to be conveyed while so bound to the Mental Hospital and to be wrongfully imprisoned therein without lawful order.

The appellant also brought an action against Dr. Morgan the Superintendent of the Mental Hospital, for false imprisonment. Both actions were tried together and the learned trial Judge awarded £50 damages with costs in favour of the appellant against Dr. Morgan. Save in one respect, the facts as found by the tried Judge in the case against the respondent are not in dispute.

It is clear that on the respondent's arrival at the appellant's house, the latter was in a violent condition and was dangerous not only to himself but to others. It is conceded that some form of restraint was necessary.

In deciding what course he should adopt the respondent con-

suited Dr. Morgan to whom he gave a history of the case as it had been related to him at the appellant's home.

According to the respondent he was given no history of alcoholic excess in which, in fact, the appellant had been indulging on the same day. The trial Judge found on the evidence that this important information was not disclosed to the respondent as it should have been.

The information which was given to the respondent suggested that the appellant had experienced a recent disappointment in a love affair which had affected his normal behaviour and apparently had been followed by an attempt to take his life.

The respondent did not detect any odour of alcohol and came to the conclusion that the appellant was suffering from acute mania, a conclusion which he imparted to Dr. Morgan. The respondent says in his evidence that he made arrangements with Dr. Morgan for the appellant's admission to the Mental Hospital, Dr. Morgan having stated that he had authority to admit such patients. In the result an ambulance and some policemen with a restraining belt arrived at the appellant's home. The belt was applied to the appellant who was then carried to the ambulance and conveyed therein to the Mental Hospital into which he was admitted on the same night.

According to the respondent's evidence the appellant's father, acting on the suggestion of the respondent, gave his consent to his son's removal to the Mental Hospital. There is a conflict of evidence on the question of whether or not such consent was given which was resolved in favour of the respondent by the trial Judge.

This finding of the trial Judge is the subject of the first ground of appeal, but Counsel for the appellant in his argument in this Court did not press the point and no ground has been shown for disturbing the finding.

It will be convenient at this stage to mention the contentions raised in the Court below.

Reference to the judgment indicates that it was conceded by appellant's Counsel that restraint was necessary on the arrival of the respondent at the appellant's home, but it was submitted that when the restraining belt had been placed upon the appellant there was an end to the necessity for further action. It was further submitted that the restraining belt was put on with the intention of removing the appellant to the Mental Hospital and that such intention was formed after the consultation with Dr. Morgan.

On behalf of the respondent it was contended that the restraint used was not excessive and was reasonably proper in the circumstances and further that the appellant's father, as an agent of necessity, gave consent for his son's removal to the Mental Hospital.

The learned trial Judge accordingly directed his mind to the following issues:—

(1) was there any excuse for placing the appellant under restraint?
(2) was the restraint used reasonable and justified in the circumstances?
(3) was the prior consent of the father obtained for the removal of the appellant from the house to a place of safe custody?

Thereupon, the learned Judge made the following findings:—

> "Firstly there was no assault because the restraint used was reasonable and justified in the circumstances, and secondly there was no false imprisonment because in removing the patient the doctor acted with the consent and express authority of the father who in the circumstances disclosed, was the proper person to give or withhold such consent."

On the hearing of this appeal, Counsel for the appellant stated in answer to questions put by the Court:—

(*a*) that the restraint used at the appellant's house, including the application of the restraining belt, was justified,
(*b*) that the respondent's liability began when he manifested an intention to send to, and put the appellant in, the Mental Hospital,
(*c*) that the respondent's liability ended on appellant's admission to the Mental Hospital,
(*d*) that he would not go so far as to submit that the appellant's removal, irrespective of destination, was unjustified, but that which would have been justified became wholly unjustified when the destination was the Mental Hospital, as in the present case.

Accordingly the sole issue in this appeal is restricted to the correctness or otherwise of the second finding of the trial Judge, as set out earlier herein, which is confined to the removal of the appellant from his house and his conveyance to the Mental Hospital.

In regard to this finding, Counsel for the respondent has admitted in argument that the consent of the appellant's father would not justify the restraint imposed upon the appellant in the course of his removal and conveyance from his home to the Mental Hospital, if such restraint was, in itself, wrongful. He submitted, however, that the consent of the appellant's father was at the most evidence of the reasonableness of the respondent's acts.

This Court concurs in the view expressed by learned Counsel in regard to this aspect of the finding of the trial Judge which, we think, is founded erroneously in law.

In may be mentioned here that both Counsel have conceded that the appellant is of age and over.

It is difficult to conceive of an agent of necessity being created in the circumstances prevailing here. The difficulty of expanding the doctrine of agent of necessity has been experienced in a number of cases in which the agent of necessity is sought to be developed from circumstances where there is no original and subsisting agency, as in this case. The application of this doctrine becomes less difficult where there arise unforeseen events not provided for in a pre-existing contract. See *Jebara* v. *Ottoman Bank* (1927) 2 K.B. 254.

Counsel for the respondent has submitted however, that this Court should uphold the decision of the trial Judge on other grounds which will be dealt with later herein.

The issues which remain for consideration are contained in the second ground of appeal, paragraphs (*a*), (*c*), (*d*), (*e*) and (*f*), namely:—

(*a*) While the Appellant's condition admittedly necessitated restraint, such restraint was justifiable in law within the precincts of the Appellant's home only, and could not legally extend to the Mental Hospital.

(*c*) There was no authority in law for causing Appellant to be removed to the Mental Hospital for observation; and Respondent acted illegally and outside the scope of his duty, in causing Appellant to be conveyed to the Mental Hospital for any purpose.

(*d*) In accordance with the provisions of the Mental Hospitals Ordinance—Chapter 139 of the Laws of Grenada,—before a person could have been legally sent for reception or detention in the Mental Hospital—

(i) a medical officer in the service of the Government must first have given a certificate that such person was of unsound mind;

(ii) an enquiry must first have been held by a Magistrate, and

(iii) an adjudication must have been made by such Magistrate that the Appellant was a lunatic and a proper subject for confinement in that Institution.

(*e*) The evidence discloses that no such conditions precedent were observed by the Respondent before he caused the Appellant to be conveyed to the Mental Hospital for reception therein.

(f) The trial Judge held in the case of Sydney Lander (the present Appellant) *versus* Dr. Morgan (No. 8 of 1939) in which damages were claimed for illegal detention in the Mental Hospital (which case was heard together with the case under appeal) that Dr. Morgan was not justified in law in receiving and detaining the Appel-

> lant in that Institution; and it is contended that it was as illegal in principle for the Respondent to cause the Appellant to be conveyed to that Institution for reception and detention, as it was for Dr. Morgan to receive and detain the said Appellant in the said Mental Hospital.

It has been contended in this Court on behalf of the respondent that in taking the course which he did the respondent was acting within the rights conferred upon him by Common Law in circumstances which demanded the restraint of his patient elsewhere than in his home; that it would have been unjustifiable and inhumane to the appellant to have left him in his home confined in the restraining belt without proper supervision; that the respondent had no alternative but to remove him of necessity to a place of safety and that the only place available for that purpose happened to be the building, known as the Mental Hospital, somewhere in which he could be placed under proper care and observation; that the respondent was not sending the appellant to that institution for admission and detention as a lunatic but merely as a patient requiring observation, and that there are no provisions in "The Mental Hospitals Ordinance," Cap. 139, prohibiting the sending of a patient to the Mental Hospital for such purpose.

In the case against Dr. Morgan the trial Judge has however held that the admission of the appellant to the Mental Hospital for that purpose was unlawful, and the correctness of that decision has not, and we think could not, be called into question.

Much has been said by Counsel on the common Law right of restraint. To such right there must be and is a limit. In Clerk & Lindsell on Torts 9 Ed. P. 231 the law is stated thus—

> "There is no power at Common Law to apprehend or detain a lunatic simply because he is a lunatic. It has already been pointed out that it is always lawful to use such force as to prevent a deadly act of violence being done, and it seems to be simply an exemplification of this principle that a person whose state of mind is such from frenzy and delirium as to render him a standing danger to others and himself, may be subjected to such restraint as is necessary to prevent that danger."

In our view in the present case the limit of necessary restraint was reached on the application of the restraining belt. This view is supported by the evidence of the respondent himself where he states "If the restraining "belt had been used in the house it would have had the effect of keeping "plaintiff quiet. I did not ask if there was any place in Lander's house "where this might be done."

The position in regard to the respondent therefore resolves itself into this:—

(*a*) the respondent diagnosed the condition of the appellant

as being one of acute mania—in other words that he was a person of unsound mind and therefore a lunatic as defined in section 2 of the Ordinance;

(*b*) he formed the intention of sending the appellant to the Mental Hospital for observation, his admission into which has been held unlawful as previously mentioned;

(*c*) he carried that intention into effect by causing the appellant to be removed from his home and to be conveyed to the Mental Hospital as a lunatic, and was thus the direct cause of the appellant's admission therein.

It may be taken as a fact upon the evidence and upon the findings of the learned judge that in taking these steps the respondent was acting *bona fide* in what he conceived to be the discharge of a public duty and under the belief that the appellant was dangerous by reason of unsoundness of mind. In actual fact it subsequently transpired that the appellant's mental condition was of a transient nature only.

It is nevertheless clear that The respondent did not proceed or intend to proceed under "The Mental Hospitals Ordinance." Apart from that Ordinance, we know of no law which authorises a doctor in consequence of a *bona fide* belief that a person is dangerous by reason of actual lunacy to cause him to be conveyed whilst bound, to a Mental Hospital in order that he may be kept under observation until it is decided whether the person is certifiable as a lunatic or not.

The decision of the Judicial Committee of the Privy Council in the case of *Sinclair* v. *Broughton and the Government of India* (1882) XLVII. L.T. 170, although based on different facts, is, we think, applicable in principle to the present case.

In the result we are of the opinion that the respondent had no authority in law for causing the appellant to be removed from his home and conveyed under restraint to the Mental Hospital for admission for observation there as a mental subject.

For these reasons we have no alternative but to reverse the decision of the learned Chief Justice, not on any of his findings of fact, nor on his finding on the claim for assault, but on a point of law with respect only to his finding on the claim for false imprisonment which appears to have been argued before him on lines different from those adopted on appeal.

The appellant, we think, is entitled to judgment on the claim for false imprisonment, limited to the period occupied in conveyance from his house to the Mental Hospital and the only question remaining is as to the amount of damages which he should be awarded.

In consideration of all the facts in the case and their attendant circumstances, and having regard to the appellant's purpose in instituting these proceedings, we assess damages in the sum of £5. We therefore allow the appeal and direct that judgment be

entered for appellant for that sum with costs in this Court and in the Court below on the claim for false imprisonment; the respondent being entitled to his costs on the claim for assault both here and in the Court below upon which claim the appellant has not succeeded.

Appeal allowed.

T. E. N. SMITH *v.* L. CHARLES.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF GRENADA.

T. E. N. SMITH, Appellant (Plaintiff),

v.

LAWRENCE CHARLES, *et al*, Respondents (Defendants).

[1939. No. 1—GRENADA.]

Before SIR CHARLES C. GERAHTY (Chief Justice of Trinidad and Tobago), President; Mr. J. H. JARRETT (Chief Justice of the Windward Islands and Leeward Islands); and Mr. W. T. S. FRETZ (Acting Chief Justice of British Guiana).

1941. APRIL 10.

Estoppel—By record—Res judicata—Requisites—Everything in controversy in second suit as foundation of claim for relief—Also in controversy in first suit—Otherwise plea of res judicata cannot be maintained.

Trespass—To land—Action for—Founded on possession—Whether ownership of land decided in such action—Judgment in such action—Effect of—Affirmation of right of possession—At time of act of trespass.

The requisites of the rule of estoppel by *res judicata* are:—

(1) that the action is between the same parties or their privies as the previous action;
(2) that final judgment was given in the respondent's favour in the previous action;
(3) that that judgment was given by a Court of competent jurisdiction;
(4) that the subject matter in dispute was the same in both actions, that is to say, that everything that is in controversy in the second suit as the foundation of the claim for relief was also in controversy in the first suit.

Trespass to land is a possessory action, founded merely on possession, and it is not at all necessary that the right to the land should come in question. It only incidentally decides the question of ownership sometimes by granting a remedy, damages and an injunction, the result of which is to preclude further acts by the defendant of the same kind as those complained of.

A litigant may raise a question of ownership to land by an action to recover possession or for a declaration of title and of his right to possession if he cares to do so.

The judgment in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff *at the time of* the trespass committed.

T. E. N. SMITH *v.* L. CHARLES.

The whole area of certain lands at Pechier (including a garden) formerly belonged to S. who sold it to J. C. in 1916.

In 1932 J.C. appointed S. as his agent in possession of the whole area, and the agency ceased in 1933 when S. became the lessee of the land.

In June, 1935, J.C. died. By his will he appointed S. and M.C. his executors. No mention was made in the will that J.C. had given garden to L.C. in his life time.

The garden was, however, worked by L.C., both before and after the death of J.C.

In July, 1935, S. brought an action in the Magistrate's Court against L.C. for the recovery of rent of the garden, and judgment was given in his favour for £6. This judgment was reversed on the grounds that as there was no agreement to pay rent, no rent could be collected.

In January, 1937, M. C. as executor of J.C. brought a suit in the Supreme Court against L.C. for the recovery of the garden. In this suit judgment was entered for the respondent by default.

In April, 1937, the whole area of land at Pechier, including the garden, was purchased by S., with the consent of the Court, and was conveyed to Mm on April 24, 1937.

On May 29, 1937 S. filed a writ No. 44 of 1937 in the Supreme Court (Summary Jurisdiction) against L.C. in which he claimed to be in possession of a lot of land at Pechier, and he alleged trespass thereto on May 4, 1937. The area of land in dispute was undefined as to boundaries and extent; and there were no pleadings in the action. On August 20, 1937 L.C. gave notice that he intended to plead that he had acquired a statutory title to the lot of land the subject of the case. The evidence given by S. in that suit disclosed: (1) that the whole area of land at Pechier was conveyed to him by the executor of J. C., deceased with the authority of the Court; (2) that J.C. had told S. that he had given L.C. a garden; (3) that in 1932 when he, S., took possession of the land, he then got to know that L.C. had a garden; (4) that he, S., from 1932 had actual possession of the land, other than the garden. S. then purported to explain the object of the suit as being one to obtain possession of a row of nutmeg trees outside the garden, and that the rights in respect of the garden were not to be tried in that action.

The evidence called for the defence was largely directed not in support of L.C.'s statutory claim to the garden, but to the location of the row of nutmeg trees alleged by S. to be outside the garden, and to show that when L.C. was picking nutmegs, he was within the ancient limits of the garden.

The issue in suit No. 44 of 1937 was limited to the location of a row of nutmeg trees and trespass thereto and not the trespass to the garden, possession of which for the purposes of that suit, S. admitted to be in L.C.

The hearing of the action began in August, 1937, and was not finally decided until December 14, 1937.

The trial judge found as a fact that the acts complained of took place within the limits of the garden of L.C., the implication being that there was and could be no act of trespass on May 4, 1937, by L.C. in whose favour he gave judgment.

On August 24, 1937, S. by letter warned L.C., against trespassing on the land at Pechier which he had bought from the executor M.C. In this letter he purported to treat L.C. as a tenant at will of the land, presumably of the garden, and he further intimated that he proposed to exercise his full rights over the entire lot of land and to eject L.C., by force if he should be found thereon.

On September 20, 1937, S. and his servants entered and sought to eject L.C., and his servants from the garden.

On April 12, 1938, S. filed his writ in suit No. 57 of 1938 against L.C., alleging trespass to lands at Pechier on May 4, 1937, and September 20, 1937.

There was some evidence led to support the contention of S. that the acts of trespass on September 20, were not confined to the row of nutmeg trees as on May 4, but were of a more general character.

L.C., alleged that in 1917 his father J.C. gave him about an acre of the lands at Pechier, known as the garden. The appellant contended that L.C. only had exclusive possession of the garden as from August, 1925, as a tenant at Will at or about the time of his marriage, and that, prior to that, his possession was only that of a licensee.

It was found by the jury that L.C., had exclusive right to the garden from 1925 but only as a tenant and not as donee; that L.C. was a trespasser on September 29, 1937; and that S. was entitled to £1 damages.

The trial judge, however, entered judgment for L.C. on the ground of estoppel by *res judicata* in suit No. 44 of 1937. S. appealed.

Held (1) that, so far as the appellant was concerned, the right to possession of the garden, much less the ownership thereof, was not put in issue in suit No. 44 of 1937 because (*a*) on his own admission he was not in possession of the garden at the time of the trespass complained of, and (*b*) he did not allege trespass to the garden, but to a row of nutmeg trees alleged by him to be outside the garden;

(2) that the finding of the trial judge in that suit that the acts of trespass complained of took place within the limits of the garden of the respondent, could not possibly be deemed to be a final judgment as to the ownership of the garden;

(3) that as the appellant admitted that he was not in possession of the garden at the time of the alleged trespass on May 4, 1937, he could not have put the ownership of the garden in issue in an action for trespass to a portion of the land other than the garden, possession being the foundation of such an action;

(4) that the ownership of the garden for the purposes of suit No. 57 of 1938 was put in issue and decided in favour of the appellant inasmuch as the jury by their verdict affirmed the right of possession to the garden, as between the appellant and the respondent L.C., to be in the appellant on September 20, 1937, by virtue of his title, which was put in issue to controvert the respondent's claim to statutory possession under the Limitation of Actions Ordinance, a claim which the jury found to be unsubstantiated;

(5) that it could not be said that the subject matter in dispute was the same in both actions, that is to say, that everything that was in controversy in Suit No. 57 of 1938 as the foundation for relief was also in controversy in Suit No. 44 of 1937, and thus the respondent had failed to establish one of the requisites necessary to the application of the rule of estoppel by *res judicata*;

(6) that the appellant by his entry on September 20, 1937, had such possession of the garden as to found an action in trespass;

(7) that there was in fact such a change in circumstances between May 4 and September 20, as to defeat the application of the doctrine of *res judicata*; and

(8) that judgment should be entered for the appellant for damages, and an injunction.

The Judgment of the Court was as follows:—

This is an appeal from a decision of the then Chief Justice (Acting) of Grenada by which he ordered that Judgment be entered for the respondents herein, on the ground that the appellant herein was estopped by the judgment in Suit No. 44 of 1937 in Supreme Court (Summary Jurisdiction) from bringing the action now under appeal.

In order that the points raised may be properly understood it is necessary to give an historical survey of the events leading up to this appeal.

The respondents Lawrence Charles and Emanuel Charles are the sons of one Joseph Charles. Emanuel only appears in these proceedings in that he accompanied his brother Lawrence on the occasions on which trespass is alleged against the latter. Where-ever in this judgment we refer to the respondent in the singular, it has reference only to Lawrence Charles.

The whole area of land in question at Pechier including the garden, which figures prominently in this Suit, formerly belonged

to the appellant who sold it to Joseph Charles in 1916. In the following year the respondent alleges that his father Joseph gave him about an acre of this land for cultivation.

On the other hand the appellant contended in Suit No. 57 of 1938 that the respondent only had exclusive possession as from August, 1925, as a tenant at will at or about the time of his marriage, and that prior to that his possession was only that of a licensee.

In 1932, Joseph Charles appointed the appellant as his agent in possession of the whole area and it would appear that this agency ceased in 1933 when the appellant became the lessee of the land, Joseph being at that time advanced in age and apparently unable to work the land so remuneratively as to be able to pay off the appellant to whom he was indebted.

In June 1935, Joseph died and by his will appointed the appellant and one Matthew Charles, his executors. No mention is made in the will of the gift of any garden to the respondent. Nevertheless it would appear that the respondent both before and after that date worked the garden previously mentioned.

In July, 1935, the appellant brought an action in the Magistrate's Court against the respondent for the recovery of rent of the garden and judgment was given in his favour for £6. This judgment was reversed on appeal in Suit No. 93 of 1935 of the Supreme Court on the grounds that as there was no agreement to pay rent, no rent could be collected.

No further steps seem to have been taken to challenge the respondent's occupancy of the garden until January, 1937, when Matthew Charles one of the executors of Joseph Charles brought Suit No. 6 of 1937 in the Supreme Court against the respondent for the recovery of the garden.

The record of that case discloses that judgment was entered for the respondent by default.

In April, 1937, the whole area of land at Pechier, including the garden, was purchased by the appellant with the consent of the Court, and the conveyance to him, which forms part of this record, is dated 24th April, 1937.

On 29th May, 1937, the appellant filed a writ in Suit No. 44 of 1937 in the Supreme Court (Summary Jurisdiction) against the respondent and others for trespass to land at Pechier on 4th May, 1937. The hearing of this Suit began in August 1937 and was not finally decided until 14th December, 1937 when judgment was entered for the respondents with costs.

On 24th August, 1937, the appellant by letter warned the respondent against trespassing on the land at Pechier which he had bought from the executor, Matthew Charles. In this letter he purported to treat the respondent as a tenant at will of the land presumably of the garden, and he further intimated that he pro-

posed to exercise his full rights over the entire lot of land and to eject the respondent by force if he should be found thereon.

On 20th September, 1937, the appellant and his servants entered and sought to eject the respondent and his servants from the garden.

This incident of 20th September occurred while Suit No. 44 of 1937 was pending and *sub judice.*

On 12th April, 1938, the appellant filed his writ in Suit No. 57 of 1938, the subject of this appeal, against the respondents alleging trespass to lands at Pechier on the 4th May and the 20th September, 1937. The Suit was heard by Sir George Deane, Acting Chief Justice of Grenada, and the jury returned a verdict in favour of the appellant on the facts, assessing damages at £1. The learned Chief Justice, however, applied the doctrine of *res judicata* and entered judgment for the respondents with costs.

It should be recorded here that at the hearing of this appeal, Counsel for the appellant has stated that he relies solely on the acts of trespass on 20th September, 1937, and not on the trespass alleged on 4th May, 1937.

In the judgment under review, the trial Judge has set out the requisites of the rule of estoppel by *res judicata* in a manner in which is admittedly in conformity with the authorities on the subject and we reiterate them here:—

(1) that the action is between the same parties or their privies as the previous action;

(It is not disputed in this appeal that both such actions were between the same parties.)

(2) That final judgment was given in the respondent's favour in the previous action;

(3) that that judgment was given by a Court of Competent Jurisdiction;

(This also is admitted in this appeal.)

(4) that the subject matter in dispute was the same in both actions; that is to say that everything that is in controversy in the second suit as the foundation of the claim for relief was also in controversy in the first Suit. The learned Judge then points out that if the respondent fails to establish any one of these propositions there can be no estoppel.

It is to be observed that both Suits No. 44 of 1937 and No. 57 of 1938 are actions in trespass. As was said in *Lambert* v. *Stroother* (1940) Willes 218 trespass is a possessory action, founded merely on possession and it is not at all necessary that the right should come into question, and as the learned Judge puts it in his judgment herein "it has really to do with possession and it only incidentally decides the question of ownership sometimes by granting a remedy, damages and an injunction, the result of which is to preclude further acts by the defendant of the same kind as

those complained of. A litigant may raise a question of ownership to land by an action to recover possession or for a declaration of title and of his right to possession if he cares to do so."

It will be convenient at this stage to set out a summary of the findings of the special jury and the material findings of the Judge in Suit No. 57 of 1938, the grounds of appeal, and of the main contentions of Counsel for the appellant and respondents respectively.

Findings of the Jury:—

(*a*) that the respondent had exclusive right to the land from 1925 only as a tenant;

(*b*) that the row of nutmeg trees from which the respondents are said to have picked in this action is the same row of nutmeg trees as in No. 44 of 1937;

(*c*) that the respondents were trespassers;

(*d*) damages were assessed at £1.

Findings of the trial Judge:—

(*a*) that No. 44 of 1937 was an action for trespass to lands on which stood a row of nutmeg trees;

(*b*) that in Suit No. 57 of 1938, the jury having found that the same nutmeg trees were the subject of the trespass in Suit No. 44 of 1937, the site and subject matter of the trespass in both actions are identical;

(*c*) that the only way the jury can express their opinion as to the ownership of the garden is by finding whether or not the respondent trespassed on the 4th May and the 20th September, 1937;

(*d*) that since judgment was given in Suit No. 44 of 1937 there has been no change in circumstances to entitle the appellant now to ask the Court to find trespass when he was not entitled then to do so;

(*e*) that when the appellant brought his action for trespass on the 4th May he was as much in constructive possession through the clash between his servants and the respondent's when the appellant's servants went to pick nutmegs on the 4th May as he was later through a similar occurrence on the 20th of September;

(*f*) that the judgment in Suit No. 44 of 1937 still stands and the appellant cannot ask this Court to reverse its own decision after it had been found that the respondent was not a trespasser on the 4th May, to say now that he was on the 20th September;

(*g*) that in Suit No. 44 of 1937 the appellant's Counsel put the ownership in issue as did the respondent who pleaded the Limitation of Actions Ordinance, Cap. 122 of the Laws of Grenada, and that the Judge decided against the appellant on the ground that it would be unfair for him to decide that the respondent was a trespasser in view of what

the appellant had stated at the beginning of his case, and that the statement of the Judge in Suit No. 44 of 1937 that if the appellant wished to raise the question of ownership of the garden he must do so in a proper manner could not confer on the appellant any right to bring this action on the same facts; that an action for trespass is not in its essence an action about ownership and accordingly that the question of ownership has not been raised in a proper manner in this Suit;

(*h*) that on the form of action in Suit No. 44 of 1937 the Court had only one issue before it—trespass or no trespass. That issue was considered and decided. In the present case this Court has likewise only that issue before it; and finally

(*i*) that the appellant is estopped by the judgment in Suit No. 44 of 1937 from bringing this action.

Grounds of Appeal:—

That the judgment of the trial judge for the respondents in action No. 57 of 1938, notwithstanding the verdict of the jury therein for the appellant, is erroneous in law, in that

(*a*) the decision of the Chief Justice in action No. 44 of 1937 was limited to answering the question: Whether a certain row of nutmeg trees was (as respondents contended) or was not (as appellant contended) within the area described in that action and also in action No. 57 of 1938 as a garden, the ownership of which was claimed by both the appellant and the respondents. The said decision (No. 44 of 1937) was in the affirmative, upholding the contention of the respondents;

(*b*) the ownership of the said "garden" was not put in issue or decided in the action No. 44 of 1937, the judgment in that action expressly reserving for decision in a future action, the question of the ownership of the said "garden;"

(*c*) the question of the ownership of the said "garden," so reserved, was first pronounced upon in action No. 57 of 1938, wherein a special jury gave a majority verdict for the appellant;

(*d*) the grounds of the decision in action No. 44 of 1937 do not afford an answer of *res judicata* to the verdict in action No. 57 of 1938, the judgment in which is the subject of this appeal, nor do such grounds justify the judgment for the respondents in the said latter action;

(*e*) the appellant in action No. 57 of 1938, judgment wherein is the subject of this appeal, alleged trespasses on (among other days) the 4th day of May, 1937, and the 20th day of September, 1937, whereas the cause of action, in respect of which action 44 of 1937 was brought, was limited to

entry on the 4th day of May, 1937, (the said action having been filed on the 29th day of May, 1937, and the trial thereof begun prior to the said 20th day of September, 1937);

(*f*) to warrant the said judgment, the Acting Chief Justice, it is submitted, wrongly construed the written judgment delivered in action No. 44 of 1937, and he misdirected himself in holding that the said judgment precluded the appellant from bringing action No. 57 of 1938, judgment wherein is the subject of this appeal, and from having his claim of exclusive possession of the said "garden" determined therein.

In concise form, the contentions raised on behalf of the appellant at the hearing of this appeal are:—

(*a*) that it was common ground between the parties that the respondent was in possession of the garden on the 4th May, 1937;

(*b*) that such possession was by virtue of a tenancy at will;

(*c*) that by the letter from the appellant to the respondent dated the 24th August, 1937, the tenancy at will was terminated;

(*d*) alternatively, if the appellant was wrong in thinking that the respondent was a tenant at will, the appellant's actions on the 20th September in entering upon the garden area directly created the position that if the appellant had a right to possession he immediately became possessed of the right to maintain an action for trespass and that the question whether or not he had such a right to possession was answered by the jury in the affirmative;

(*e*) the question of the appellant's right to possession of the garden was not and could not have been in issue in Suit No. 44 of 1937 in view of the admitted fact that the respondent was in possession on that date;

(*f*) that the first time the question could come into issue in a trespass case was on the 26th August, if the respondent was a tenant at will, or on the 20th September, whatever the nature of the respondent's holding. Accordingly that it would not have been possible for judgment to have been given in the appellant's favour in Suit No. 44 of 1937;

(*g*) that the appellant has thus subsequent to the 4th May created conditions which enabled him to bring this action for trespass on the 20th September, and that it is on the latter date upon which the appellant relies and not on the incidents of the 4th May;

(*h*) that the acts of trespass alleged are not limited to the row of nutmeg trees but were of a general character.

The contentions raised on behalf of the respondent in argument were briefly these:—

(1) that on a comparison of the evidence in both Suits the ownership of the garden was put in issue;

(2) that the ownership of the garden was a fundamental issue in Suit No. 44 of 1937 and cannot be withdrawn and made the subject of fresh litigation, alternatively, that if the appellant did not put the ownership of the garden in issue he should have done so: *Ord* v. *Ord* (1923) 2 K.B. 432;

(3) that in suit No. 44 of 1937 the appellant admitted not only the respondent's possession of the garden but his right to possession for the statutory period. *Hoystead* v. *Commissioner of Taxation* (1926) A.C. 155 was cited on the effect of an admission on a fundamental fact.

(4) that the Judge in Suit No. 44 of 1937 was not giving leave to bring a second action and that if he did it was contrary to law, that when the Judge said "If the question of the first defendant's title to his garden is to be decided it must be raised in a proper manner" he was intimating that the appellant had brought the wrong form of action and that it "ought" to be brought in the proper manner;

(5) that there has been no change in circumstances between 4th May and 20th September, 1937; that there was no relationship of landlord and tenant between the parties and the letter of 24th August, 1937, was of no effect; that the respondent had never been a tenant at will of the appellant and that if he ever was a tenant at will it was terminated in 1932 when the appellant tried to get him out;

(6) that as it was decided in Suit No. 44 of 1937 that respondent was the owner of the garden the appellant cannot allege a second trespass thereto: *Outram* v. *Morewood* 7 Revised Reports 473.

As we see it, the questions for our consideration and decision resolve themselves into:—

(1) Was the ownership of the garden for the purposes of the Suit put in issue by the appellant and was such issue decided in Suit No. 44 of 1937? If not, should the appellant so have put it in issue?

(2) Was the ownership of the garden for the purposes of the Suit put in issue and decided by the jury in Suit No. 57 of 1938?

(3) What was the effect of the appellant's letter to the respondent of 24th August, 1937? and

(4) Did the alleged entry upon the garden area by the appellant and his servants on 20th September, create the right to maintain an action for trespass in respect thereof;

In considering the first of these questions it is necessary to have regard to the writ, the evidence and the judgment in Suit No. 44 of 1937 in order to ascertain what was in fact put in issue for the purposes of that case.

By the writ the appellant claimed to be in possession of a lot of land at Pechier and he alleged trespass to such lands on the 4th May and on other occasions.

It is to be noted here that the area of land in dispute is undefined as to boundaries and extent: and moreover there were no pleadings.

It is on record that on 20th August, 1937, the respondent gave notice that he intended to plead that he had acquired a statutory title to the lot of land the subject of the case.

On turning to the evidence, we find that the appellant stated in effect that the whole area of land at Pechier was conveyed to him by the executor of Joseph Charles (deceased) with the authority of the Court.

The said conveyance was put in evidence. He further said that Joseph Charles had told him that he had given respondent a garden and that in 1932 when he (the appellant) took possession of the land he then got to know that respondent had a garden. He said that from 1932 he had actual possession of the land, other than the garden.

He then purported to explain the object of this Suit as being one to obtain possession of a row of nutmeg trees outside the garden, and that the rights in respect of the garden were not to be tried in this action.

At this stage of our enquiry it would appear that so far as the appellant was concerned the right to possession of the garden, much less the ownership thereof, was not put in issue because—

(1) on his own admission he was not in possession of the garden; and

(2) he did not allege trespass to the garden but to a row of nutmeg trees which were outside the garden.

As we read his evidence, there is nothing to support any suggestion that the appellant had made any admission that the respondent had been in possession of the garden for the statutory period.

It must be mentioned here that the record of Suit No. 44 of 1937, which forms part of this appeal record, is incomplete in that it omits the evidence of some of the appellant's witnesses, the whole of the respondent's case and the submissions of Counsel. This was the subject of a preliminary objection by Counsel for the respondent who, while admitting that he was at fault in not seeing that such notes of evidence were placed before the trial Judge in Suit No. 57 of 1938, sought to ask this Court to compel the appellant to put the same in As such notes of evidence were not put in evidence in the lower Court, this Court held that rules

11 and 12 of the West Indian Court of Appeal (Amendment) Rules, 1930, did not apply and overruled the objection.

We will now consider the judgment of the learned Judge in Suit No. 44 of 1937.

It would appear from the judgment that the evidence called for the defence was largely directed not in support of the respondent's statutory claim to the garden but to the location of the row of nutmeg trees alleged by the appellant to be outside the garden.

Again it is stated that the defence produced a great deal of evidence to show that when the respondents were picking nutmegs they were within the ancient limits of the garden.

This is of considerable importance on the issue of whether or not the ownership of the garden was an issue in the case.

The real difficulty presented to this Court arises in the construction of the remaining passages in the judgment, which deal with certain submissions of Counsel for the appellant of which, as mentioned above, we have no record.

These submissions, it is stated, alleged that the appellant was entitled to the whole of the garden in any event and that wherever they were the respondents were trespassing.

It is patently clear that the Judge refused to entertain this issue on the grounds that:—

(1) it was inconsistent with the claim set up at the trial by the appellant; and

(2) that the issue was limited to that raised in the evidence, namely as to the location of the row of nutmeg trees and the allegation of trespass thereto.

The learned Judge found as a fact that the acts complained of took place within the limits of the garden of the respondent. The implication being that there was and could be no act of trespass on 4th May, 1937, by the respondents for whom he gave judgment.

This finding, we think, cannot possibly be deemed to be a final judgment as to the ownership of the garden.

As is said in *Outram* v. *Morewood* (1803) 7 Revised Reports at page 482 "The judgment in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed." The material date in Suit No. 44 of 1937 is 4th May, 1937, on which date the right of possession was affirmed as between the appellant and the respondent, to be in the latter.

There remains in this judgment the passage which has been the subject of much argument.

ownership of the garden for the purposes of the Suit was put in issue and decided by the jury in Suit No. 57 of 1938?

The answer is clearly in the affirmative—the questions put by the learned trial Judge to the jury and the answers of the jury

The passage is as follows:—

"If the question of the first defendant's title to his garden is to be decided it must be raised in a proper manner."

We make the following comments thereon. It can only have reference to the submission made by the appellant's Counsel in his closing speech upon which the Judge has refused to adjudicate.

The Judge, in our opinion, is intimating to Counsel that he cannot raise the issue of ownership of the garden in that Suit, because on the evidence, the issue is limited to the location of a row of nutmegs trees and trespass thereto, and not to trespass to the garden, possession of which for the purposes of that case he has admitted to be in the respondent.

In effect, we think, the learned Judge is saying that he has not, and could not, decide the ownership of the garden in that Suit, and that if the appellant wants that issue to be decided he must raise it by subsequent proceedings in the proper form, such as an action to recover possession or for a declaration of title and of his right to possession.

For these reasons we find ourselves unable to agree with the finding of the trial Judge in Suit No. 57 of 1938, set out in his finding (*g*) herein to the effect that the appellant's Counsel put the ownership of the garden in issue as did the respondent who pleaded the Limitation of Actions Ordinance, nor can we entirely agree with his paraphrase of the judgment of the Judge in Suit No. 44 of 1937.

To complete our enquiry into the first question to which we have directed our attention, we have to consider whether the wider principle covered by the plea of *res judicata*, "that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the Court in the earlier proceedings, and which he chose not to put forward," is applicable here. See *Ord* v. *Ord* (1923) 2 K.B. per Lush J. at page 439.

Now it would appear at first sight from a perusal of the Writ of Summons that the appellant could have put the question of the ownership of any part of the whole area of land in issue, but when the case came on for hearing and the appellant had to and did admit that he was not in the possession of the garden, it is, we think, clear that he could not have put the ownership of the garden in issue in an action for trespass to a portion of the land other than the garden, possession being the foundation of such an action. See *Lambert* v. *Strother* cited earlier herein.

For these reasons, we are of opinion, that the first to the fourth contentions of Counsel for the respondents as set out earlier herein cannot be supported.

This brings us to our second question as to whether the

thereto, namely that the respondent had exclusive right to the land, i.e. the garden, from 1925 only as tenant and not as donee, and that the respondents were trespassers, place the matter beyond dispute.

In effect, the jury by their verdict have affirmed the right of possession to the garden, as between the appellant and the respondent, to be in the former on 20th September by virtue of his title, which was put in issue to controvert the respondent's claim to statutory possession under the Limitation of Actions Ordinance, a claim which the majority of the jury have found to be unsubstantiated. To this extent the question of ownership may be said to have been decided for the purposes of this Suit.

In the result, it cannot be said, in our view, that the subject matter in dispute was the same in both actions, that is to say that everything that was in controversy in Suit No. 57 of 1938 as the foundation for relief was also in controversy in Suit No. 44 of 1937, thus the respondent has failed to establish one of the requisites necessary to the application of the rule of estoppel by *res judicata.*

On this ground alone the appellant is entitled to succeed. It may, however, be of assistance to the parties if we express our views shortly upon the remaining questions.

As to our third question, we hold that if the respondent had ever been a tenant at will of the appellant, such a relationship being of a personal nature was terminated by various acts of the appellant, as contended by Counsel for the respondent, long before the letter of 24th August, 1937, was written. This letter, we think, must be regarded as being an attempt by the appellant to set up a relationship which, if it ever existed, had previously been terminated.

In regard to our fourth question, the entry of the appellant on the 20th September, was admittedly made to create the position whereby he immediately became possessed of the right to maintain an action for trespass to the garden, a position which did not prevail on the 4th May, the material date in Suit No. 44 of 1937.

On 20th September, we think that the appellant by his entry had such possession of the garden as to found an action in trespass and his right to that possession was recognised by the jury in their findings. See *Jones* v. *Chapman* (1849) 76 Revised Reports per Maule, J., at page 799.

Moreover, we think that there is some evidence to support the contention of Counsel for the appellant that the acts of trespass on the 20th September, were not confined to the row of nutmeg trees as on the 4th May, but were of a more general character.

We agree, therefore, with Counsel for the appellant that there was in fact a change in circumstances between the 4th May

and 20th September such as to defeat the application of the doctrine of *res judicata*, and the finding (d), as set out herein, of the learned trial Judge in his judgment under appeal is inapposite.

For the reasons given herein, we are of opinion that the appeal must be allowed and the judgment entered in favour of the respondents set aside.

We direct that judgment be entered for the appellant for £1 damages in accordance with the verdict of the special jury and for an injunction with costs of the appeal.

Appeal allowed.

KISHUNPAUL, Appellant (Defendant),

v.

LACKEAH, Respondent (Complainant).

[1939. No. 358.—DEMERARA].

BEFORE FULL COURT: CAMACHO, C.J., FRETZ AND STUART, JJ.

1941. MAY 16, 30.

Evidence—Estate of deceased person—Claim against—Evidence in support—To be approached with suspicion—Corroboration—Not necessary.

In a claim against the estate of a deceased person, the evidence should be approached with suspicion, closely scrutinised and thoroughly sifted. If, however, the truthfulness of the witnesses is clear and apparent, and the tribunal believes them, there is no reason in law for demanding corroboration.

Appeal by the defendant from a decision of Mr. A. V. Crane, Senior Magistrate, Georgetown Judicial District.

A. J. Parkes, for appellant.

H. B. S. Bollers, for respondent.

On the conclusion of the argument for the appellant on May 16, 1941, the appeal was dismissed with costs.

The judgment of the Court was read by the Chief Justice on May 30, 1941, as follows:—

This is an appeal from the judgment of the Magistrate for the Georgetown Judicial District in the action brought by the respondent against the appellant as the executor of the executor of one Dansah, deceased, the parent of the respondent.

In the plaint, as amended, the respondent alleged that she did on May 19, 1936, lend to the original testator, Dansah, the sum of $100 and that on May 27, 1938, the said Dansah repaid to her the sum of $20, The action was brought for the balance of $80, remaining unpaid.

At the magisterial hearing the respondent stated that on May 19, 1936, she lent the money to Dansah at the Stabroek Market having previously that day withdrawn the sum from her account at the Royal Bank of Canada. Reference to her bank account supported the statement of the respondent. She further alleged that Dansah borrowed the money in order that he might purchase a partnership share in a passenger and freight carrying launch. The evidence of the appellant disclosed that Dansah did in fact on May 19, 1936, pay to the owner of the launch his share of the partnership contribution, and that Dansah drew from his bank account a portion only of the sum necessary to make up that share.

The magistrate accepted the statement by the respondent relating to part payment of the loan by Dansah. On May 27, 1938 Dansah gave to the respondent a promissory note for $80 “as

money lent to me." On this note inadmissible evidence was offered by one Westmaas to the effect that Dansah informed him that he made the note "for money to be lent to him." Apart from the inadmissibility of the evidence the statement is not borne out by the terms of the note.

The defence was (a) plea of the statute of limitations; (b) denial of the loan. As to (a) the part payment was acknowledgment, by an act, of a debt being due thereby taking the claim out of the statute. With regard to (h) the appellant urged that the evidence did not establish the loan and that the claim being one against the estate of a deceased person corroboration of the respondent's evidence was required by law.

In this Court attention was attracted to *In re Garnett* (1885) 31 Chancery Division p. 1. The authority cited does not assist the appellant, the law does not require corroboration in such a case as was plainly stated by the Master of the Rolls in his judgment. The law does require, where the claim is against the estate of a deceased person, that the evidence should be approached with suspicion, closely scrutinised and thoroughly sifted. If, however, the truthfulness of the witnesses is clear and apparent and the tribunal believes them, there is no reason in law for demanding corroboration.

The magistrate in his reasons for judgment stated that he paid due regard to the stated rule of prudence. The documents and surrounding circumstances, in the view of this Court, afford sufficient corroboration of the claim.

The appeal is dismissed. The appellant shall pay the costs.

Appeal dismissed.

MOTEE SAWH, Appellant (Defendant),
v.
RAMKARRAN, Respondent (Complainant).

[1940. No. 110.—DEMERARA.]

BEFORE FULL COURT: CAMACHO, C.J., FRETZ AND STUART, JJ.

1941. MAY 30; JUNE 6.

Detinue—Bailee—Goods entrusted to his care—Wrongfully disposed of by bailee—Action by bailor—Lies for detinue.

A bailee may not resist an action of detinue on the ground that he has wrongfully disposed of goods entrusted to his care.

An action for detinue of goods lies against a person who at some time had possession of the goods, but has improperly parted with the possession

F. E. Waldron, for appellant.

E. V. Luckhoo, for respondent.

On the conclusion of the argument for the appellant on May 30, 1941, the appeal was dismissed with costs.

The judgment of the Court was read by the Chief Justice on June 6, 1941, as follows:—

The respondent claimed from the appellant the return of 75 bags of paddy and 6 bags of rice previously delivered to the appellant, the paddy for milling, the rice for safe keeping. The appellant, on demand by the respondent, refused or failed to deliver the goods. The action, one in detinue, was tried by the Magistrate for the Berbice Judicial District, in the exercise of his Civil Jurisdiction, who ordered return of the chattels or payment of their value. At the magisterial hearing the respondent stated that he had been informed by a relative of the appellant that the appellant had disposed of the goods. This evidence was inadmissible and should not have been received. The appellant now submits that the Magistrate should have dismissed the suit for that on the respondent's statement the case was one of conversion and not of detinue, which latter form of action did not lie. For the purposes of this appeal the Court will assume the disposal of the goods as alleged. The submission that a bailee may wrongfully dispose of goods entrusted to his care and resist an action in detinue on the ground of his own wrong doing, although not novel, is not sound in law. The question was determined by Baron Parke in *Jones* v. *Dowle* (1841) 9 M. & W. 19 citing Comyns Digest, Detinue (A). The learned Baron added "Detinue does not lie against him who *never had* possession of the chattel, but it does against him who once had, but has improperly parted with the possession of it." *Reeve* v. *Palmer* (1858) 5 C.B. (N.S) 84 is to the same effect.

This Court holds that the action was properly brought in detinue. It might also have been properly brought in trover: *Bristol & West of England Bank* v. *Midland Railway Co.,* (1891) 2 Q.B. 661.

The appeal is dismissed with costs.

Appeal dismissed.

ALFRED RHODIUS, Appellant (Defendant),

v.

GERTRUDE RHODIUS, Respondent (Complainant).

[1940. No. 123.—DEMERARA.]

BEFORE FULL COURT: SIR MAURICE V. CAMACHO, C.J., AND STUART, J.

1941. JUNE 6; JULY 4.

Husband and wife—Home provided by husband—Duty of wife to live in—If suitable—Condition of life of parties and circumstances of husband—Regard to be made to.

Husband and wife—Matrimonial home—Departure of wife from—Husband makes it impossible for wife to remain—Desertion.

The obligation of a wife is to live with her husband in the home which he provides, subject to the qualification that it must be a suitable one, regard being had to the condition of life of the parties and the circumstances of the husband.

A husband deserts his wife although he does not dismiss her from his house, if he makes it impossible for her to remain with him and she in consequence departs from him.

Appeal by the defendant Alfred Rhodius from a decision of Mr. C. R. Browne, Magistrate, Georgetown Judicial District, finding that he had deserted his wife Gertrude Rhodius. The facts appear from the judgment.

G. V. Wight, for appellant.

J. L. Wills, for respondent.

On the conclusion of the argument for the appellant on June 6, 1941, the appeal was dismissed with costs.

The judgment of the Court was read by the Chief Justice on July 4, 1941 as follows:—

The respondent Gertrude Rhodius, charged her husband Alfred Rhodius, before the magistrate for the Georgetown Judicial District, with desertion contrary to section 41 (1) (*c*) of chapter 9 of the laws of the colony.

The magistrate found desertion and ordered the appellant to maintain the respondent in the sum of $2.50 per week.

From that finding and order the appellant appeals to this Court.

In 1938, the magistrate for the Georgetown Judicial District, on proceedings between the parties, made an order whereby the respondent was at liberty to live in Georgetown until the end of January, 1939. The appellant undertook to visit her and was ordered to discharge a certain debt and to make her an allowance. He undertook to provide a home at Wismar. The appellant did not visit the respondent and disobeyed the order for the payment of money. On the 27th of January, 1939, without previous intimation to her, the appellant requested the respondent to leave Georgetown immediately and to proceed to Wismar. The respondent journeyed to Wismar the following week. The house provided by the appellant at Wismar was in complete disrepair. The steps were dilapidated, the verandah full of holes, the verandah rails in a shaky condition, and the flooring of the house rotten and in a dangerous condition. There was no bathroom. Respondent refused to occupy the house and requested the appellant to provide more suitable accommodation. The appellant replied that the house was the one he provided and if it did not suit her, she could do as she pleased. He added that if the respondent did not want it she could go. He thereupon walked out of the house, locked it and departed.

On these facts the magistrate found desertion.

The obligation of a wife is to live with her husband in the home which he provides, subject to the qualification that it must be a suitable one, regard being had to the condition of life of the parties and the circumstances of the husband.

A husband deserts his wife although he does not dismiss her from his house, if he makes it impossible for her to remain with him and she in consequence departs from him.

The magistrate found as a fact that the provision by the appellant of a home at Wismar was a mere pretence and that by selecting the particular house when he could have procured more suitable accommodation, he intended to put an end to the matrimonial relationship by rendering it impossible for the respondent to reside with him.

This Court agrees with the magisterial conclusion as to the intention of the appellant disclosed by his conduct. On the evidence this Court is satisfied that the house was in a state of dilapidation and unfit for human habitation. In the absence of a bathroom the appellant presumably intended the respondent to perform her ablutions by the aid of a tub or other receptacle in the backyard under shelter of the welcome obscurity of night. The appeal is dismissed with costs.

Appeal Dismissed.

H. G. MATTHEWS *v.* P. HINDS.

HENRY G. MATTHEWS, Appellant (Defendant).
v.
PERCIVAL HINDS, C.S.M. of Police, Respondent (Complainant).

[1940. No. 125.—DEMERARA.]

BEFORE FULL COURT: SIR MAURICE V. CAMACHO, C.J., AND STUART, J.

1941. JUNE 6; JULY 4.

Criminal law and procedure—Practice medicine—Practice—What is—System or repeated acts in imitation of professional practice—Singular Transaction—Not constituted by—Colonial Medical Service (*Consolidation*) *Ordinance, cap. 186, s. 34* (*1*).

"Practice of medicine" under section 34 (1) of the Colonial Medical Service (Consolidation) Ordinance, chapter 186, is not constituted by a singular transaction, but must be proved by evidence which denotes a system or repeated acts.

It is sufficient to constitute "practice" within the meaning of the section where a person on three separate occasions performed acts in imitation, of professional practice of medicine.

Appeal by the defendant from a decision of Mr. C. R. Browne, Magistrate, Georgetown Judicial District, convicting him of practising medicine for gain contrary to section 34 (1) of the Colonial Medical Service (Consolidation) Ordinance, chapter 186, and fining him $100.

S. I. Cyrus, for appellant.

S. E. Gomes, Assistant Attorney-General, for respondent.

On the conclusion of the argument on June 6, 1941, the appeal against the conviction was dismissed, the fine imposed was reduced from $100 to $50, and no costs were awarded to either party.

The judgment of the Court was read by the Chief Justice on July 4, 1941, as follows:—

The appellant was charged and convicted before the magistrate for the Georgetown Judicial District for that he not being a registered medical practitioner did practise medicine for gain in a medical district in which a registered medical practitioner resides, contrary to section 34 (1) of chapter 186.

The magistrate imposed a penalty of $100 and costs. The appellant appeals against conviction and sentence.

The facts proved before the magistrate were:—

On the 1st and on the 9th December, 1938, the respondent employed two persons, Critchlow and Alice Hinds to visit the appellant who is a dispenser and sicknurse at Grove Village, East Bank. On the first of these dates Critchlow visited the appellant at his drug shop at Grove. The appellant took her behind a

show case in his shop, opened the door of the case so as to form a screen, and instructed her to remove portions of her clothing. He then applied his ear to her chest, told her to cough twice, which she did, and, having procured her to uplift her nether garments, posed a flat instrument on her back and again told her to cough. He diagnosed malaria, further questioned her and made an entry in an exercise book. For these valuable services Critchlow paid him a shilling. Appellant then filled two bottles with some mixture and gave them to Critchlow. On the same day Alice Hinds visited the appellant at his shop. She was also placed behind the glass case, and, complaining of feeling sick, backache and numbness of her fingers, the appellant requested her to loosen the front of her dress, applied his ear to her chest and told her to cough. He gave her two bottles of medicine, a powder and a dose of salts with instructions for use. She paid the appellant a shilling.

On the 6th of December, Albertha Dyals, another witness, visited the appellant at his shop at Grove. She informed him she was feeling sick and paid a shilling to the shop assistant. The appellant thereupon placed her behind the glass-case and enquired of her symptoms. She told him that she was suffering from pain in the head and in her sides and that she also had a cold. At his request Dyals unbuttoned her dress at the neck. He then struck her chest and told her to cough three times. He then struck her back with his fingers several times and told her to cough three times. He then diagnosed the headache as the result of a cold or high blood pressure, the pain in her sides as, probably, kidney trouble. He gave her two bottles of medicine.

On the 9th of December, Critchlow and Alice Hinds returned to the appellant and received more bottles of medicine. On the same day the appellant's premises were searched under a warrant and there were found, *inter alia,* two forceps and an injection tube.

The appellant in this Court objects that—

(1) there was no evidence to constitute the practice of medicine within the meaning of the Ordinance:

(2) there was no evidence of percussion;

(3) evidence was wrongly received inasmuch as the magistrate wrongly admitted in evidence the articles found on search under the warrant;

(4) no previous conviction was proved or admitted at the hearing.

The section provides that "no one shall for gain or reward at any time practice . . . . . medicine." While we agree that "practice" is not constituted by a singular transaction and must be proved by evidence which denotes a system or repeated acts, the evidence in this case discloses that the appellant on three separate occasions performed acts which, granted their imitation of professional practice, would be sufficient to constitute "prac-

tice" within the meaning of the section. It was, however, argued that, conceded the acts were performed on several and different occasions, they were not of the nature a medical practitioner would perform, and therefore the appellant was wrongly convicted under the section.

The Court is not in any doubt that the performance of the appellant on the examination of Critchlow, Alice Hinds and Dyals, constituted "practice" forbidden by the law to a person not registered as a medical practitioner. He subjected these persons to an auricular test of the pulmonary region; he palpated and percussed them, he diagnosed and he prescribed.

The appeal against conviction is dismissed. The magistrate, in passing sentence on the appellant, took into consideration two previous convictions recorded against him without formal proof thereof or admission by the appellant and imposed the maximum penalty. The penalty is for that reason reduced to $50.00, no costs to either party.

Appeal against conviction dismissed; penalty reduced.

A. CALLENDER *v.* C. CALLENDER.

ALEXANDER CALLENDER, Appellant (Defendant).
v.
CHRISTINA CALLENDER, Respondent (Complainant).

[1940. No. 128.—DEMERARA.]

BEFORE FULL COURT: SIR MAURICE V. CAMACHO, C.J., AND STUART, J.

1941. JUNE 6; JULY 4.

Husband and wife—Maintenance of wife—Order for means—Meaning of—Resources—Not confined to earned resources—Summary Jurisdiction (*Magistrates*) *Ordinance, cap. 9, s. 41* (*2*) (*c*).

The word "means" in section 41 (2) (c) of the Summary Jurisdiction (Magistrates) Ordinance, chapter 9, denotes resources, usually pecuniary resources, and is not confined to earned resources.

Appeal by the defendant Alexander Callender from a decision of Mr. C. R. Browne, Magistrate, Georgetown Judicial District from a decision finding him guilty of deserting his, wife Christina Callender, and ordering him to pay the sum of $1 a week to his wife for her maintenance.

H. B. S. Bollers, for appellant: The magistrate could not make a maintenance order in the absence of proof of possession by the husband of earned income. An order for maintenance may not be made unless it is shown that the person on whom the order is made is in receipt of wages or salary.

The respondent was not represented by counsel.

On the conclusion of the argument for the appellant on June 6, 1941, the appeal was dismissed with costs.

The judgment of the Court was read by the Chief Justice on July 4, 1941, as follows:—

The parties are husband and wife and were married in 1937.

On the 3rd of February, 1939, the appellant was admitted to the Public Hospital. On his departure for the hospital he omitted to make any provision for the maintenance of the respondent. On the 14th of April, an unnamed individual came to the home and attempted to remove the furniture. On being asked by the respondent for a statement of his reasons and intentions the appellant made no answer. The furniture was nevertheless taken to Brickdam Police station. On the 16th of April, 1939, the same individual returned to the house and packed for removal such articles as remained in the house, whereupon the respondent invoked the aid of the police. On that day the appellant went to live with one Sybil Devonish, has not returned to the home, has not since then maintained the respondent, and has sold the home over her head.

At the magisterial hearing the appellant asserted that the

respondent neglected him and was in the habit of returning late at night to the home. He admitted that he left the home and the respondent. The magistrate had before him evidence of the appellant's means. The appellant received $1,100 for one property sold by him. With a portion of this money he bought another property for $506 which he subsequently sold for $530. The appellant's story of neglect was supported by Sybil Devonish who appears to have acquired complete dominance over this husband and his finances. Devonish supplied to the magistrate a statement of the appellant's liabilities. She asserted that the respondent beat the appellant and wounded him, although the appellant did not complain of any such ill treatment.

The magistrate accepted the case for the respondent and rejected that of the appellant. He found as a fact that the respondent had not neglected the appellant nor had she omitted to perform her duties as a wife. He further found that Sybil Devonish encouraged the appellant to leave the respondent, that the appellant had no justification in law for his separation from the respondent and that he thereby deserted her. He made a maintenance order on the appellant for the payment of $1 a week to the respondent.

From the magistrate's decision this appeal is brought.

It is pressed on this Court that the decision was one which the magistrate, viewing the evidence reasonably, could not properly make. This Court considers that the magistrate's judgment was a reasonable and proper conclusion on the evidence. It is, however submitted that the magistrate could not make a maintenance order in the absence of proof of possession by the appellant of earned income. Learned counsel who appeared for the appellant went as far as to suggest that an order for maintenance may not be made unless it is shown that the person on whom the order is made is in receipt of wages or salary. Presumably a husband who derives considerable income from investment in gilt-edge securities or who profits from unearned increment would be exempt from a maintenance order as not possessing "means" derived from his work or labour. The proposition need only be stated to expose its fallacy. The term "means" denotes resources, usually pecuniary resources, and is not confined to earned resources.

In *Bonsor* v. *Bonsor,* (1897) Probate, 77, a husband was in receipt of a voluntary allowance from his brother so long as he remained out of England. The Court held that the voluntary allowance was properly included in the husband's income for the purpose of fixing the amount of maintenance for his wife. Again in *Clinton* v. *Clinton,* (1866) L.R. 1. P. & M. 215, the Court ordered and enforced payment of alimony where the only income of the husband was a rent charge in respect of which trustees had absolute discretion as to payment. Again in *Moss* v. *Moss* and

Bush, (1867) 15 W.R. 532, the Court ordered alimony though the husband's only income consisted of a voluntary allowance from his father which had in fact been stopped since the commencement of the suit.

The appeal is dismissed with costs.

Appeal dismissed.

CHUNG-A-THAM and HAROLD MENDONCA,
Appellants (Defendants),
v.
EDMOND ROSS, P.C. 3687, Respondent (Complainant).
[1940. No. 124.—DEMERARA.]
BEFORE FULL COURT: SIR MAURICE V. CAMACHO, C.J., FRETZ AND STUART, JJ.

1941. JUNE 13; JULY 9.

Evidence—Defence Regulations, 1939—Proof of—Not required by Law.
Criminal Law and Procedure—Defence Regulations, 1939. Reg. 44—Order Under—Complaint for Breach of—Order not proved by Prosecution—Case closed—Official copy of order produced—After close of case for Prosecution—Order admitted in Evidence—No irregularity committed.

Proof of the Defence Regulations, 1939 is not required by law.

Where proceedings are taken before a magistrate in respect of alleged offences against an order made under regulation 44 of the Defence Regulations, 1939, and the prosecution omits to prove the order, the magistrate acts properly, in allowing the prosecution to prove the order by producing the *Official Gazette*, containing a copy of it, even after the case for the prosecution has been closed.

Duffin v. *Markham et al* (1918) 88 L.J.K.B 581 applied.

Appeal by the defendants from a decision of Mr. C. R. Browne, Magistrate, Georgetown Judicial District. The facts appear from the judgment.

L. A. Hopkinson, for appellants.
S. E. Gomes, Assistant Attorney-General, for respondent.

On the conclusion of the argument for the appellants on June 13, 1941, the appeal was dismissed with costs.

The judgment of the Court was read by the Chief Justice on July 9, 1941, as follows:—

This is an appeal from the magistrate of the Georgetown Judicial District by the appellants against their conviction by him for having imposed a condition on the sale of a certain article contrary to the provisions of order No. 546 of the 7th of October, 1939, made under regulation 44 of the Defence Regulations 1939.

On October, 14th 1939, Joseph Greenidge entered the shop of the firstnamed appellant and requested sale to him of a tin of condensed milk. The tin containing the milk was exposed on the shelf of the shop. She said she would not sell the article and thereupon called the secondnamed appellant who informed Greenidge that the milk would not be sold to him unless he bought some other article. The respondent, a Police Constable, was called in aid by Greenidge and he also was informed by the secondnamed appellant of the appellants' refusal to sell the milk

unless Greenidge was prepared to buy another article as well. The price of the milk was tendered and was refused.

These facts are not in dispute. At the magisterial hearing the making or validity of the Defence Regulations under which the order was made was not formally proved.

This Court is of opinion that the magistrate properly took judicial notice of the regulations and that proof of them is not required by law. It is further objected, however, that the due making of order 546 under the regulations was not established.

From the magistrate's reasons for decision, as well as from statements made to this Court by learned Counsel for the appellants, it would appear that after the case for the respondent was closed a copy of the *Official Gazette* containing the order was handed to the magistrate.

The appellants object that the proof of the order came too late, that the respondent's case having been closed and the question not having arisen *ex improviso* the evidence of the making of the order was wrongly admitted and therefore the magistrate's decision was wrong in law.

The *ex improviso* rule is established, the Court apprehends, in order to arrive at finality of litigation and to preclude the prosecutor, after gaining knowledge of the defence, from calling rebutting evidence on issues he should have prevised. The proof of the order in this case was, however, a mere formality and *Duffin* v. *Markham and anor*, (1918) 88 L. J. K.B. 581, is authority for saying that although the prosecution was closed the magistrate properly admitted proof of the making of the order.

We appreciate the candour of learned Counsel for the appellants who brought *Duffin* v. *Markham* to the Court's attention.

The appeal is dismissed with costs.

Appeal dismissed

M. DE MENDONCA & CO., LTD. *v.* G. HIKEL.

M. DE MENDONCA & CO. LTD., Appellants (Applicants),
v.
GEORGE HIKEL *et al,* Respondents (Opposers).

[1940. No. 138.—DEMERARA.]

BEFORE FULL COURT: SIR MAURICE V. CAMACHO, C.J.,
FRETZ AND STUART, JJ.

1941. JUNE 13; JULY 9.

Appeal—From magistrate's decision—Meaning of "decision"—Adjudication in cause or matter—Meaning of cause or matter—Refusal of magistrate to grant music and dancing licence—Not an adjudication in a cause or matter—Not a decision—No right of appeal therefrom—Music and Dancing Licences Ordinance, cap. 106—Summary Jurisdiction (*Appeals*) *Ordinance, cap. 16, ss. 2, 3.*

The refusal of a magistrate to grant a licence under the Music and Dancing Licences Ordinance, chapter 106, is not a "decision" of the magistrate within the meaning of sections 2 and 3 of the Summary Jurisdiction (Appeals) Ordinance, chapter 16.

In exercising his discretion under the Music and Dancing Licences Ordinance, chapter 106, the magistrate is not adjudicating in a cause or matter. Consequently, there is no right of appeal under the Summary Jurisdiction (Appeals) Ordinance, chapter 16.

Meaning of "cause" and "matter" explained.

Appeal from the refusal of Mr. A. C. Brazao, Magistrate, Berbice Judicial District, to grant a licence under the Music and Dancing Licences Ordinance, chapter 106.

J. A. Luckhoo, K.C., for appellants.
S. L. van B. Stafford, K.C., for 4 of the respondents.
H. C. Humphrys, K.C., for 2 of the respondents.

Cur. adv. vult.

The judgment of the Court was read by the Chief Justice, as follows:—

The appellants applied to the Magistrate for the Berbice Judicial District under Chapter 106, for a music and dancing licence in respect of their building at Pitt Street and The Strand, New Amsterdam.

The respondents opposed the application and the magistrate refused the licence. Although a right of appeal is not expressly conferred by the law, the appellants have appealed. The respondents object that a magistrate, acting under the law, is exercising ministerial, not judicial, functions, and is merely a licensing authority from the exercise of whose discretion no appeal lies.

The appellants answer that the law appoints the magistrate, *qua* magistrate, the authority to grant or refuse licences and consequentially attaches to him in his licensing functions the jurisdiction, immunities, liabilities and other incidents of the

magisterial office, including a right of appeal from him; moreover although no express right of appeal is conferred on a dissatisfied applicant the omission is supplied by section 3 of chapter 16. The section declares that "unless the contrary is in any case expressly provided by Ordinance, anyone dissatisfied with a *decision of a magistrate* may appeal therefrom to the Court in the manner and subject to the conditions hereinafter mentioned." The manner and conditions are set forth in section 4 of the chapter. The right of appeal is, however, given only from a "decision". What then is a "decision"? According to section 2 of chapter 16 it means "any final adjudication of the magistrate in a *cause* or *matter* before him." What is a "cause" or "matter"? Prior to the (Imperial) Judicature Act of 1873 "cause" was a comprehensive label for all usual civil proceedings at law or in equity, including actions and suits, exclusive, however, of statutory proceedings commenced by petition, motion or summons which were, and are still, known as "matters". Section 100 of the Act defines "cause" to include any action, suit or original proceeding between a plaintiff and defendant and any criminal proceeding by the Crown. The term "cause", as shown, indicated, and indicates, proceedings between party and party or between the Crown and the subject. "Matter" is defined to include every proceeding in the Court not in a cause. It will thus be seen that among lawyers at all times the term "cause" and the term "matter" were used to denote proceedings of a well defined nature in a Court of law. These are the well known legal meanings of the terms.

In the opinion of this Court the words "cause" and "matter" occurring in section 2 of chapter 16 are technical words which used in the Statute must be taken in the technical sense unless it clearly appears from the context the words were intended to be applied differently from their legal acceptation.

The observations of Coleridge, C.J., in *Jay* v. *Johnstone* (1893), 1 Q.B. 28 are apt to the discussion. "There is a well known principle of construction, sanctioned, if sanction were necessary, by the decision of a court of appeal in *Greaves* v. *Tofield* that where the legislature uses in an act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted." A similar rule applies to words of well known legal meanings although those words may not have been the subject of judicial interpretation. In *R.* v. *Slator* (1881) 8 Q. B. D. 267, Denman J. said: It always requires the strong compulsion of other words in an Act to induce the Court to alter the well known meaning of a legal term.

The meanings which this Court assigns to "cause" "matter" are the well known legal meanings of these terms and it follows that in exercising his discretion under chapter 106 the magistrate is not adjudicating in a "cause" or "matter." Can it then be

said that the refusal of the magistrate to grant the licence to the appellants was a "decision" of the magistrate within the meaning of section 3 of chapter 16 as that word is defined in section 2 of the same law?

In the opinion of this Court the answer must be in the negative and there is therefore no right of appeal from the exercise of the magistrate's discretion under chapter 106. If support were needed for this view it is afforded by section 4 of chapter 16 which requires every notice of appeal to be given to, or served on, the opposite party. An opposer under chapter 106 is not a party. It would be difficult to know who would be named a respondent in any appeal under the law. Certainly not the magistrate. The prerogative writ of mandamus would appear to be the indicated remedy.

The appeal is dismissed with costs.

The Court would make this further observation. The reference "this section" which occurs in section 12 of chapter 106 is an error, due, apparently to copy, too faithfully made, of subsection 11 of section 51 of the (Imperial) Public Health Acts Amendment Act, 1890, of which our law is a reproduction.

Appeal dismissed.

G. FUNG *v.* M. MURRAY.

GEORGE FUNG, Appellant (Defendant).

v.

MARTIN MURRAY, Sgt. of Police 3076, Respondent (Complainant).

[1940. No. 147.—DEMERARA.]

BEFORE FULL COURT: SIR MAURICE V. CAMACHO, C.J., AND STUART, J.

1941. JULY 4, 9.

Criminal law and procedure—Spirits—Unlawful possession of bush rum—Complaint for—Accused a retailer of spirits—Knowledge in accused that substance was bush rum—Absence of evidence as to—Complaint not proved—Spirits Ordinance, cap. 110, ss. 93 (*1*), (*2*), (*5*)*—Ordinance No. 22 of 1931, s. 2* (*1*).

A complaint was brought for unlawful possession of spirits, to wit, the substance known as bush rum, contrary to section 93 (1) of the Spirits Ordinance, chapter 110, as re-enacted by section 2 (1) of Ordinance No. 22 of 1931. The accused was a retailer of spirits. There was no evidence showing knowledge in accused of the fact that the bush rum was bush rum. The magistrate convicted the appellant who appealed.

Held, that, in the absence of such evidence, the appeal must succeed.

Appeal by the defendant George Fung from a decision of Mr. C. R. Browne, Magistrate, East Demerara Judicial District, convicting him for unlawful possession of bush rum, contrary to section 93 (1) of the Spirits Ordinance, Chapter 110, as enacted by section 2 of Ordinance No. 22 of 1931.

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

S. E. Gomes, Assistant Attorney-General, for respondent.

On the conclusion of the argument on July 4, 1941, the appeal was dismissed with costs.

The judgment of the Court was read by Stuart, J., on July 9, 1941, as follows:—

This is a case in which Fung, the appellant, was convicted under chapter 110 section 93 subsection (1) of unlawful possession of "bush" rum.

Bush rum is rum not distilled by a licensed distiller, and the fact that it is bush rum is *prima facie* proved by the *ipse dixit* of the Government Analyst.

In this case the prosecution proved the factual actual possession of bush rum, but made no attempt to prove that the accused knew that the rum was "bush" rum.

How bush rum is tested remains to this Court a mystery, one into which they would appear to have no authority to probe.

It seems to us that the prosecution relied as far as proof of the offence was concerned upon a certain onus established by subsection (5) of section 93 aforesaid.

The accused was a 'retailer' of spirits and as such is referred to in subsection (2) of the section.

Subsections (1), (2) and (5) as far as relevant and as amended read:—

"(1) Every one who is in unlawful possession of spirits shall be liable to a penalty . . . ."

"(2) Every one possessing spirits . . . . shall be deemed to be in unlawful possession thereof unless—
(*a*) he is a . . . . retailer . . . ."

"(5) Every one possessing . . . . bush rum shall be deemed to be a person unlawfully possessing spirits . . . and a report . . . certifying . . . shall be *prima facie* evidence . . . . . thereupon the onus of proving that the substance is not bush rum shall be upon the defendant."

On the interpretation of these subsections there is material for uncertainty. Is the absence of knowledge that the "bush" rum was "bush" rum a permissible defence in any event? Or is the only defence available to an accused that the "bush" rum identified as such by the certificate is in fact not "bush" rum?

The former view held by three judges in this Full Court in the case of *Francois* v. *Ram* (1931-1937) L.R.B.G. 135 is binding upon this Court. In the absence of evidence either direct or elicited by effective cross-examination showing "knowledge" in accused of the fact that the "bush" rum was "bush" rum, the appeal must succeed.

If the judgment in *Francois* v. *Ram* creates uncertainty in the administration of the law, a case would seem to be made out for amendment of the law for removing any such uncertainty.

This appeal is allowed with costs.

Appeal allowed.

IN THE MATTER OF THE ESTATE OF SUSAN ELIZA HENERY, DECEASED,

MARY I. GONSALVES-SABOLA AND DANIEL J. HENERY,
Plaintiffs,
AND
FRANCIS L. HENERY AND GEORGINA JEMIMA AMOUR,
Defendants.

[1941. No. 100—DEMERARA.]
BEFORE STUART, J., IN CHAMBERS.
1941. MAY 31; JULY 14.

Will—Construction—"And elsewhere"—Meaning of—Construction to lean against a partial intestacy.

A residuary bequest of "the other portion of the dwelling house, all the furniture, and whatsoever else I may die possessed of in the said house, which is situate at No. 45 Farm aforesaid *and elsewhere*" includes, by virtue of the words "and elsewhere" all assets not particularly bequeathed.

Originating Summons taken out by Mary Isabella Gonsalves-Sabola and Daniel J, Henery, against Francis Lloyd Henery and Georgina Jemima Amour in the matter of the estate of Susan Eliza Henery, deceased.

Young Calmont Henery died on October 18, 1938. His mother Susan Eliza Henery was named by him as his beneficiary under a policy of assurance on his life. The amount of the policy was $3,000 and was payable to Susan Eliza Henery as follows: $300 upon his death, and the balance of the proceeds, $2,700 by monthly instalments of $125 each until the total sum was completely paid. Susan Eliza Henery received the first payment of $300, and the instalments of $125 each which fell due and payable up to November, 1939, and she died on December 8, 1939. After her death the sum of $2,155.96 was received by the executors in respect of the policy of insurance.

Susan Eliza Henery made a will on March 18, 1939, and probate thereof was granted by the Supreme Court of British Guiana on January 22, 1940 (No. 2 of 1940, Berbice) to the executors Francis Lloyd Henery and Georgina Jemina Amour. By that will, after making specific bequests to her children, Daniel James Henery and Mary Isabel Henery (subsequently married to Gonsalves-Sabola), the plaintiffs herein, and to Francis Lloyd Henery and Georgina Jemina Amour born Henery the defendants herein, and to Martha Clarabel Henery, Susan Catherine Henery and Millicent Henery, she made the following bequest: "I give and bequeath to my son Francis Lloyd Henery, two rooms in the dwelling house, all donkeys owned and possessed by me during my life time. The other children mentioned in this will shall have the use of any of the said donkeys

whenever they desire the use of them, but with his permission I also give and bequeath to my other children, viz; Georgina Jemima Amour (*nee* Henery), Martha Clarabel Henery, Susan Catherine Henery, and Millicent Henery the other portion of the dwelling house, all the furniture, and whatsoever else I may die possessed of in the said house, which is situate at No. 45 Farm, aforesaid *and elsewhere.*"

The question for determination was whether Susan Eliza Henery died intestate with respect to the moneys due to her under the life assurance policy at the time of her death, or whether those moneys passed to Georgina Jemima Amour, born Henery, Martha Clarabel Henery, Susan Catherine Henery and Millicent Henery under the above quoted clause in the will.

C. A. Burton, for plaintiffs, referred to *Byrom* v. *Brandreth* (1873) L.R. 16 Eq. 475.

H. C. Humphrys, K.C., for defendant Armour referred to *Hodgson* v. *Jex* (1876) L.R. 2 Ch. D. 122, *Fleming* v. *Burrows* (1826) 1 Russell 276, *In the goods of Scarborough* (1860) 30 L.J. P. 85, and *Earl of Jersey* v. *Guardians of Neath* (1889) 22 Q.B. D. 566.

A. Vanier, solicitor, for defendant Henery.

Cur. adv. vult.

STUART, J.: It is undesirable that any person should die partly testate and partly intestate: *Gibbs* v. *Laurence* (1860) 7 Jur. (N.S.) 137.

I am not satisfied that the monies due from the son of the testatrix were not acknowledged as at her disposal: *Byrom* v. *Brandreth* (1873) L.R. 16 Eq. 475.

Under the circumstances I am compelled by the cases *Hodgson* v. *Jex* (1876) L.R. 2 Ch. D 122, *Fleming* v. *Burrows* (1826) 1 Russell, 276, *In the goods of Scarborough* (1860) 30 L.J. P. 85, and *Earl of Jersey* v. *Guardians of Neath* (1889) 22 Q.B.D. 566, quoted by Mr. Humphrys, K.C., to hold with reluctance that Georgina Jemima Amour, Martha Clarabel Henery, Susan Catherine Henery and Millicent Henery are residuary heirs (of all assets not particularly bequeathed) by virtue of the words "and elsewhere".

All costs out of the estate for all parties concerned. Fit for Counsel.

Solicitors: *Carlos Gomes,* for plaintiffs;
Albert McLean Ogle, for defendant Amour.

R. ADOLPHUS & ANOR. *v.* F. DA SILVA.

REBECCA ADOLPHUS AND IRILLA HENRIETTA ADOLPHUS, Appellants (Applicants),

v.

FLAVIO DA SILVA, Respondent (Defendant),

[1940. No. 205—DEMERARA.]

BEFORE FULL COURT: FRETZ AND STUART, JJ.

1941. JULY 17, 24.

Workmen's compensation—Workman—Definition of—Exceptions—Person engaged in sinking shaft in construction of a gold mine—Employed in mining—Workmen's Compensation Ordinance, 1934 (*No. 7*), *s. 2* (*1*).

A person is employed in mining within the meaning of exception (h) to the definition of workman in section 2 (1) of the Workmen's Compensation Ordinance, 1934 (No. 7), where his work consisted in assisting in sinking a shaft in the construction of a gold mine, from which shaft it was intended that a tunnel would later be driven when gold-bearing ground was struck.

Appeal by Rebecca Adolphus and Irilla Henrietta Adolphus from a decision of Mr. J. H. S. McCowan, Magistrate, Georgetown Judicial District, dismissing a claim by them against Flavio da Silva for compensation under the Workmen's Compensation Ordinance, 1934, (No. 7).

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

L. M. F. Cabral, for respondent.

The judgment of the Court was read by Fretz, J., as follows:—

This is an appeal from the decision of the learned magistrate for the Georgetown Judicial District by which he found for the respondent in an application under the provisions of the Workmen's Compensation Ordinance, 1934.

The appellants are dependents of Frederick Adolphus, deceased, a workman who, whilst employed by the respondent, sustained personal injuries resulting in death on the 4th June, 1938.

The deceased on that day was employed in the erection and construction of a new mining shaft, and work incidental thereto including the pumping of water from the bottom of the shaft of approximately sixty-four feet deep. On ascending, by means of a ladder leading out of the pit, he fell and during the course of this fall sustained severe injuries to his head from which injuries be succumbed on the same day.

Certain questions under the provisions of the Ordinance were stated as follows for the determination of the Court:

(*a*) whether the deceased was a workman within the meaning of the Ordinance.

(*b*) whether the accident arose out of and in the course of the deceased's employment.

(*c*) whether the amount of compensation claimed is due or any part of the amount.

(*d*) whether the respondent is liable for such compensation.

(*e*) whether the applicants are dependents of the deceased.

(*f*) how the compensation, when deposited, should be distributed.

It was conceded by the learned magistrate that from the evidence, which he accepted, the accident would arise out of and in the course of the deceased's employment and further that his mother would be in part dependent on his wages, but not wholly.

The decision in the case, however, rested on the issue as to whether or not the deceased was a person employed in mining, such persons being excluded from the benefits of the Ordinance under section 2 (1) of the Workmen's Compensation Ordinance, 1934, which reads—

"Provided that the following persons shall not be regarded for the purposes in this Ordinance as workmen."

and under paragraph (*h*)—

"persons employed in mining, unless such employment be in connexion with any engine driven or machine worked by mechanical power."

The issue therefore is on a point of law, and, were this otherwise, the appeal would not lie by reason of section 34 of the Ordinance (No. 7 of 1934).

Counsel for appellants has forcefully argued that the words of the exception in section 2 (1), paragraph (*h*), of the Ordinance, excluding persons "employed in mining" from the operation of the Ordinance, do not apply under the circumstances of this case, to the deceased.

It is admitted that the nature of the deceased's work at the time of his death was assisting in sinking a shaft in the construction of a gold mine, from which shaft a tunnel would later be driven when gold bearing ground was struck, and though the law of British Guiana may not be precise on this point, we are unable to agree with counsel's argument that sinking of such a shaft would not come within the meaning of the term "employed in mining"; in our opinion it does lie within the meaning of that section and in support of this view (in the absence of any local precise definition) it may be observed that in the English law, in the Coal Mines Act of 1911, sinking a shaft is specifically included "for the purposes of that Act", in mining.

The exception in paragraph (f) of the same section 2 of the Ordinance refers to "persons employed in agriculture" and were similarly interpreted, as in this instance, to include preparatory work: see *In re Prior* (1927) 43 Times Law Reports, page 784.

The deceased, we consider, was employed in mining and, as such, was outside the purview of the Workmen's Compensation Ordinance, No. 7 of 1934.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

C. MAHADEO *v.* C. P. OUCKAMA.

CYRIL MAHADEO, Appellant (Defendant),

v.

C. P. OUCKAMA, Respondent (Complainant).

[1940. No. 47.—DEMERARA.]

Before Full Court: FRETZ, C.J., (Acting) and GOMES, J. (Acting).

1941. JANUARY 3; FEBRUARY 1.

Criminal law and procedure—Huckster—Trading without a licence—Offence—How created—Hucksters Licensing and Control Ordinance, 1936 (*No. 28*), *ss. 3, 7* (*1*).

Criminal law and procedure—Trading as huckster without licence—Conviction for—No power in magistrate to order licence to be taken out—Hucksters Licensing and Control Ordinance, 1930 (*No. 38*).

Criminal law and procedure—Conviction—No offence created by section of Ordinance as specified in complaint and conviction—Order to pay several sums of money—Imprisonment in default—No power to order one of the sums of money to be paid—Conviction bad.

The offence of trading as a huckster without having in force a proper licence is created by section 7 (1), and not by section 3, of the Hucksters Licensing and Control Ordinance, 1936 (No. 28).

On a conviction for trading as a huckster without having in force a proper licence, contrary to section 7 (i) of the Hucksters Licensing and Control Ordinance, 1936 (No. 28), the magistrate has no power to order the defendant to take out a licence.

In a complaint it was stated that the defendant had committed an offence contrary to section 3 (b) of the Hucksters Licensing and Control Ordinance No. 28 of 1936. That subsection did not create an offence; the offence charged was constituted by section 7 (1) of the Ordinance. The defendant was convicted, and the conviction, as drawn up, was for alleged contravention of section 3 (b) of the Ordinance. Further, in the conviction, the magistrate ordered the defendant to pay a fine of $20, the sum of $2.40 for costs, and to take out a licence for $24, and in default of payment of the sums $20, $2.40 and $24, he ordered that the defendant be imprisoned for one month with hard labour. The magistrate had no power to order the defendant to take out a licence for $24.

Held (1) that the Court cannot order simply that no effect be given to that part of the Magistrate's order which is bad, and allow the full term of imprisonment in default of payment to remain;

(2) That as the Court cannot split up a term of imprisonment imposed, the conviction was bad.

Appeal by the defendant Cyril Mahadeo from a decision of Mr. F. O. Low, Magistrate, West Demerara Judicial District, convicting him for trading as a huckster without having in force a proper licence contrary to section 3 (*b*) of the Hucksters Licensing and Control Ordinance, 1936 (No. 28). The defendant was ordered to pay a fine of $20 and costs $2.40 and further ordered to take out a licence for $24, and in default of payment of the said several sums it was ordered that the defendant be imprisoned for the term of one month.

E. V. Luckhoo, for appellant.

A. C. Brazao, Crown Counsel, for respondent.

The judgment of the Court was read by His Honour Mr. Justice Gomes, as follows:—

In this case the appellant was convicted on a complaint which alleged that he "did trade as a huckster without having in force a proper licence, contrary to section 3 (b) of The Hucksters Licensing and Control Ordinance, No. 28 of 1936."

For this offence he was ordered to pay a fine of $20 and costs $2.40 and further ordered to take out a licence for $24 before the 28th day of December, 1939, and in default of payment of the said several sums to be imprisoned for the term of one month.

One of the grounds of appeal is that the Magistrate's Court exceeded its jurisdiction in the matter—

(*a*) Because the conviction as drawn up is bad in law; and

(*b*) Because the magistrate did not have the power to order the appellant to take out a licence for $24.

Counsel for the appellant has submitted two reasons in support of his submission that the conviction as drawn up is bad in law. Firstly, he pointed out that the reference in the complaint to the section of the Ordinance creating the offence is incorrect, for the offence of trading as a huckster without having in force a proper licence is created by section 7 (1) of the Ordinance and not by section 3. On reference to the relevant sections of the Ordinance this defect is obvious and it appears that no attempt was made to remedy the defect during the proceedings in the magistrate's court for it also appears in the conviction.

Secondly, Counsel submitted that the magistrate did not have the power to order the appellant to take out a licence for $24. With this submission the Court is in agreement. Whilst it is true that section 11 of the Ordinance makes provision for the imposition of an additional penalty in certain cases (which additional penalty it would appear is to be equal to the amount of the duty of the appropriate licence) it is equally clear that the provisions of that section are not applicable to the facts of this case.

On behalf of the respondent it is submitted that these are matters which may be the subject of amendment or modification under the extensive powers conferred on this Court by virtue of section 28 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, and the case of *Chepstow Electric Light and Power Company* versus *Chepstow Gas and Coke Consumers Company, Limited,* (1905) 1 K.B. 198 is urged in support of that submission.

On a consideration of that case as well as the case of *Reg.* v. *Slade and ors.* (1895) 2 Q.B. 247 it appears to the Court that the question is whether these are matters which, either individually or cumulatively, affect the validity of the conviction. The Court considers that the order which was occasioned by

an excessive exercise of jurisdiction is a matter which does affect the validity of the conviction for in default of payment of the said several sums, one of which was payment of $24, the cost of the appropriate licence, the appellant was ordered to be imprisoned for a term of one month.

This is not a case where the two amounts, in default of payment are recoverable by distress, in which case it may have been possible for the Court to consider the making of an order that no effect be given to that part of the magistrate's order which is bad; but, as stated above, the defendant has been adjudged, in default of payment of both amounts, to suffer a specified term of imprisonment.

It is clear that the Court cannot order simply that no effect be given to that part of the magistrate's order which is bad and allow the full term of imprisonment in default of payment to remain but as the Court cannot split up a term of imprisonment imposed, the result is that the conviction is bad.

The appeal is therefore allowed with costs, including a fee of $20 to Counsel.

Appeal allowed.

ROBERT HARRY, Appellant (Defendant),
v.
R. BERAMSINGH, Sgt. of Police, No. 3630,
Respondent (Complainant).
[1940. No. 223.—DEMERARA.]
BEFORE FULL COURT: FRETZ AND STUART, JJ.
1941. JULY 17, 31.

Criminal law and procedure—Indictable offence—Tried summarily—Remains an indictable offence—Limitation of time for making complaint for summary conviction offence—Summary Jurisdiction (*Procedure*) *Ordinance, Cap. 14. s.* 7*—Not applicable to indictable offence tried summarily.*

Appeal—Indictable offence—Tried summarily by consent—Conviction—Omission in—Of statement of such consent—Summary Jurisdiction (*Procedure*) *Ordinance, Cap. 14, s. 64* (*e*) *as amended by Schedule to Ordinance No. 11 of 1931—Conviction—Amendment of—Summary Jurisdiction* (*Appeals*) *Ordinance, Cap. 16. s. 84.*

Criminal law and procedure—Larceny—Ownership of property—Laid in deceased person—Sufficient where no executor or administrator.

Where an indictable offence is tried summarily, the offence tried remains an indictable offence.

Section 7 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 14 (which provides that where no time is specially limited for making a complaint for a summary conviction offence in the statute relating to that offence, the complaint shall be made within six months from the time when the matter of the complaint arose, and not after) does not apply where a complaint for an indictable offence is tried summarily under the powers conferred by section 60 of cap. 14, as enacted by section 10 of Ord 21 of 1932.

A formal conviction did not, (as required by section 64 (*e*) of the Summary Jurisdiction (Procedure) Ordinance, cap. 14, as amended by Ord. No. 11 of 1931), contain a statement that the accused person consented to the indictable offence being dealt with summarily by the magistrate's court. The accused did in fact so consent.

Held, the conviction must be amended accordingly

In a complaint for larceny of a heifer, it was stated the heifer was the property of the estate of a deceased person. There was no executor or administrator.

Held, that as the property stolen was identified as having belonged to the deceased, no objection could be taken that there was no legal proof of ownership in anyone.

Appeal by the defendant from the decision of Mr. A. C. Brazao, Magistrate, Berbice Judicial District convicting him on a charge of larceny of a heifer contrary to section 176 of the Criminal Law (Offences) Ordinance, chapter 17. The facts appear from the judgment.

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

S. E. Gomes, Assistant Attorney-General, for respondent.

Cur. adv. vult.

The judgment of the Court was read by Fretz, J., as follows:—

This is an appeal from the decision of the learned magistrate for the Berbice Judicial District by which the appellant (defend-

ant) was convicted on a charge of the larceny of a heifer contrary to section 176 of the Criminal Law (Offences) Ordinance, Chapter 17.

The offence with which the appellant was charged is an indictable one but on the application of the prosecutor and with the consent of the appellant the charge was dealt with summarily. It was firstly argued by counsel for appellant that under section 7 of chapter 14 and section 10 of Ordinance No. 21 of 1932 the magistrate had no jurisdiction and further that the trial, summarily, was limited to within six months under section 7. It was also contended that where the magistrate amended the charge the amended charge became again indictable and as such would have to be submitted again for consent to summary trial.

As regards these submissions, however, it is clear that the magistrate's power to resume or take summary cognisance are derived from section 64 of Chapter 14. section 64 (*a*) of chapter 14 reads as follows:—

> "the procedure shall, until the Court assumes the power to deal with the offence summarily, be the same in all respects as if the offence were to be dealt with throughout as an indictable offence, but when and so soon as the Court assumes the power to deal with the offence summarily, the procedure shall be the same, from and after that period, as if the offence were a summary conviction offence and not an indictable offence, and the provisions of this Ordinance shall apply accordingly;
>
> "Provided that nothing herein contained shall be construed to prevent the Court from dealing thereafter with the offence as an indictable offence if it thinks fit to do so."

This section in our opinion controls the procedure after the Court has assumed the power to proceed summarily. The indictable offence remains an indictable offence by consent tried by summary procedure.

It was also argued by learned counsel for appellant that the absence in the conviction of the words referring to the consent, as required by section 64 (e) of chapter 14, constitutes a successful ground of appeal. In view, however, of section 24 of chapter 16 it becomes necessary for us to make this correction in the text of the conviction, which is done accordingly.

With reference to the contention that there was no legal proof of ownership established in any person of the subject matter of the alleged larceny, we consider that the learned magistrate was entirely justified in his finding that "there being no executor or administrator the Court was satisfied that the heifer Exhibit C was clearly identified as having belonged to the deceased."

We can find no reason to disturb the decision of the Court below and this appeal is accordingly dismissed with costs.

Appeal dismissed.

M. F. DASILVA *v.* R. A. DERUSHE.

MANOEL FERREIRA DASILVA, Appellant (Defendant),
v.
REGINALD AUGUSTUS DERUSHE, (Respondent) (Complainant).

[1940. No. 320.—DEMERARA.]
BEFORE FULL COURT: FRETZ AND STUART, JJ.
1941. JULY 24, 31.

Public health—Administrative district—Power to vary limits of—Cap. 85, s. 2 (3)—Applicable to rural sanitary district—Local Government Ordinance, cap. 84, s. 9 (1)—Cap. 36, s. 5 (1)—Ord. No. 31 of 1937, s. 5*—Ord. No. 16 of 1938, ss. 2, 3.*

Section 9 (1) of the Local Government Ordinance, chapter 84 as amended by section 5 of the District Administration (Transfer of Duties) Ordinance, 1937 (No. 31), and by sections 2 and 3 of the Fiscal Districts (Substitution) Ordinance, 1938 (No. 16) includes the power to vary the limits of a rural sanitary district for the purposes of the Local Government Ordinance.

Appeal by the defendant from a decision of Mr. J. A. Veerasawmy, Magistrate, Essequebo Judicial District.

S. L. van B. Stafford, K.C., for appellant.
S. E. Gomes. Assistant Attorney-General, for respondent.

Cur. adv. vult

The judgment of the Court was read by Stuart, J., as follows:—

In this case Manoel Ferreira da Silva erected without permission a building on a tract of land in what a certain de Rushe a Local Sanitary Inspector for the Essequebo Rural authority thought to be part of the area within the jurisdiction of that body within which the permission of this body was necessary.

Actually after conviction and noting of appeal the magistrate in his reasons stated that he had made a mistake in convicting as the land was actually in the West Demerara Rural Sanitary District.

Mr. van Batenburg Stafford for the appellant pointed out that the phraseology of section 9 (1) of chapter 84 was by no means clear, that he believed that the conviction was inaccurate but that Mr. Gomes for the Crown had doubts as to whether the original Rural Sanitary Districts could ever alter their shape.

This point requires clarification. It is interesting and well raised. Mr. Gomes' difficulty is that section 9 (1) of Chapter 84 defines these Rural Sanitary Districts as "districts established and does not say districts established from time to time," nor makes provision for variation.

In our opinion after following the process of legislation, crisscrossing as it does, we find that Mr. Gomes' suspicion is not well founded.

The process of reasoning is this:

1. Section 9 (1) already twice mentioned actually reads
   "district established under the Commissary Department Ordinance"
2. That Ordinance was Chapter 36 and included in section 5 (1) full power to alter the district limits from time to time.
3. Therefore section 9 (1) really included the power to vary because of the words referring back to Chapter 36.
4. Chapter 36 was repealed by Section 5 of Ordinance 31 of 1937, but this caused so much trouble that by Ordinance 16 of 1938 the various references in various Laws (including section 9 (1)) were brought alive again with the rider that references thereto should be treated as references to the District Government Ordinance, to wit, Chapter 85.
5. Chapter 85 contains a section, 2 (3), which has powers similar to those in section 5 (1) of Chapter 36.
6. Therefore section 9 (1) now includes the power to vary because the reference to Chapter 36 now means a reference to Chapter 85.

Now it is admitted that by virtue of a proclamation issued on the 7th March, 1939, *i.e*, after the above actions and reactions statutory had taken place, the districts including the land in question were removed, by virtue of the powers given in section 2 (3) of chapter 85, from the Rural Sanitary District of Essequibo to the Rural Sanitary District of West Demerara, and thereafter at all material times for the purposes of this case, the Sanitary Inspector of the Rural Sanitary District of Essequibo ceased to have any authority thereover.

Wherefore the appeal as laid must succeed with costs.

Appeal allowed.

G. NELSON *et al v.* J. CHARLES *et al.*

GEORGE NELSON, *et al,* Appellants (Complainants).

v.

JAMES CHARLES *et al,* Respondents (Defendants),

[1940. No, 348.—DEMERARA.]

BEFORE FULL COURT: FRETZ AND STUART, JJ.

1941. JULY 25, 31.

Appeal—Magistrate's Court—Appeal from—Three complaints—Arising out of same incident—Tried together by consent—Security for costs—Recognizance entered in sum of $25 *in respect of all three matters—Appeal cognizable by Full Court.*

Friendly societies—Dispute—Determination of—In manner directed by rules—Provision for arbitration in rules—Dispute as to validity of election of office-bearers—Property of society not delivered up by out-going officers—With-holding property of society—Complaint for—No jurisdiction in magistrate' court to entertain—Friendly Societies Ordinance, cap. 214, ss 31, 43.

Three complaints were brought by the same complainants against three different defendants. The matters in issue in each case arose out of the same dispute. The complaints, which were tried together, by consent, were dismissed. The complainants appealed. Only one recognizance, in the sum of $25, was entered into by the complainants with respect to the appeals in the three matters. On the hearing of the appeal, objection was taken by the respondents that the Court had no jurisdiction to hear the appeal in the manner in which it was filed, as there were three separate complaints, but only one recognizance in respect of all three matters in the sum of $25.

Held, that the objection must be dismissed as there was not sufficient material ground for it.

A dispute arose amongst the members of a friendly society, registered under the Friendly Societies Ordinance, chapter 214, concerning the validity of the election of new office-bearers, and certain members of the society, who were officers in the preceding years, refused to deliver over to the newly-elected officers of the society property of the society which was in their possession.

Complaints were brought under section 31 of the Friendly Societies Ordinance, chapter 214, by the newly-elected office-bearers against the office-ebearers for the previous years, for withholding the property of the society.

Section 43 of chapter 214 provides that "every dispute between a member, or a person claiming through a member or under the rules, of a registered society and the society or any officer thereof shall be decided in manner directed by the rules of the society, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of justice or restrainable by injunction". The rules of the society provided that "if any dispute should arise between a member or under the rules or any aggrieved person who has ceased to be a member or any person claiming through such person aggrieved, and the Society or any officer of the Society, it shall be decided by reference to arbitration".

Held, that the subject matter of the complaints fell within the scope of the rules of the society as to the determination of disputes, which rules render necessary a settlement by arbitration.

Appeal by the complainants from decisions of Mr. F. O. Low, Magistrate, West Demerara Judicial District. The facts appears from the judgment.

J. L. Wills, for appellants.

A. J. Parkes, for respondents.

Cur. adv. vult.

The judgment of the Court was read by Fretz. J., as follows:—

In this appeal objection was taken by Counsel for respondents on the ground that this Court has no jurisdiction to hear the appeal in the manner in which it has been filed, there being three separate appellants and three separate complainants. There are, it is true, three appellants, but it is clear that the matter in dispute arose out of the same incident. The complainants are all members of the same Friendly Society. There has been as in the words of Dalton, acting C. J., in *Malouf* v. *Atallah* (1920) L. R. B.G. at page 162: ". . . . .but one hearing, one decision, one record of Appeal" There is not, in our opinion, sufficient material ground for this objection which we dismiss: see *Alexander* v. *Glasgow* (1938) L.R.B.G. at page 206. *Williams & Ors* v. *John & Ors.* (1924,) L.R.B.G. at p. 161.

The appellants are Trustees of the Progressive Friendly Burial Society and alleged, by way of section 31 of the Friendly Societies Ordinance, Chapter 214, under which the Society was registered that the respondents were withholding certain property of the Society in their possession.

At a meeting of the Society on the 30th January, 1940, a dispute arose amongst the members concerning the election of new office bearers and it was found as a fact by the learned Magistrate that there was a *bona fide* dispute between the two factions as to the validity of that election.

On this point it may be observed that section 43 of the Friendly Societies Ordinance, Chapter 214, expressly states that the procedure by which disputes of this nature are to be decided shall be laid down by rules of the Society itself. Section 43 of Chapter 214 reads as follows:—

> "Every dispute between a member, or a person claiming through a member or under the rules, of a registered society and the society or any officer thereof, or between any registered branch under this Ordinance, or an officer thereof, of any registered society or registered branch, and the registered society or branch of which the other party to the dispute is a registered branch or an officer thereof, or between any two or more registered branches of any registered society or branch or any officers thereof, respectively, shall be decided in manner *directed by the rules of the society*, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of Justice or restrainable by injunction".

Rule 23 of the Progressive Friendly Burial Society in question expressly states that the procedure for settling disputes of this nature shall be by way of Arbitration and reads:—

> "If any dispute should arise between a member or person claiming through a member or under the rules or any

aggrieved person who has ceased to be a member, or any person claiming through such person aggrieved and the Society or any officer of the Society, it *shall* be decided by reference to Arbitration.

In our opinion, therefore, the subject matter of this appeal would fall within the scope of the Rules of the Progressive Friendly Society which rules render necessary a settlement by Arbitration. In addition, in any event we agree with the findings of fact of the Magistrate, *in toto.*

The appeal is accordingly dismissed with costs.

Appeal dismissed.

CHARLES RAMKISSOON JACOB, Appellant (Defendant),

v.

GORDON DANIELLS, A.S.P., Respondent (Complainant).

[1941. No. 65.—DEMERARA.]

BEFORE FULL COURT: SIR MAURICE V. CAMACHO, C.J., AND STUART, J.

1941. JULY 31; AUGUST 1, 8.

Criminal law and procedure—Motor vehicle—Driving without due care and attention—Motor Vehicles and Road Traffic Ordinance, 1940, s. 36 (1).

The appellant was driving his own motor car. Finding his way on his proper or left hand side blocked by a slow moving, but moving, donkey cart, he swung out to the right to cut around it. The road was crowded. Pedestrians were in some number on the appellant's extreme right. A motor car containing the complainant, an officer of the police force, was in its proper position on the left center, or left of the centre, of the road, coming in the opposite direction, but keeping reasonably clear of the pedestrians. Without warning, the appellant swung out; he over-swung, he became blinded by the lights, to the direct glare of which he had unnecessarily exposed himself, and he stopped dead. The other car also stopped dead. An accident was avoided but traffic was for the moment dislocated.

Held, that the appellant was driving without due care and attention.

Appeal by Charles Ramkissoon Jacob from a decision of Mr. V. C. Dias, Magistrate, Georgetown Judicial District, convicting him of driving a motor car on a road without due care and attention contrary to section 36 (1) of the Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22).

S. L. Van B. Stafford, K.C., for appellant.

S. E. Gomes, Assistant Attorney-General, for respondent.

On the conclusion of the argument for the appellant on August 1, 1941, the appeal was dismissed with costs, and the Chief Justice made the following observations, with which Stuart, J. concurred: "The appellant advanced the opinion in the Court below that he considered his prosecution frivolous. I am surprised that the Magistrate tolerated such an expression in his Court. It is impertinence and should not have been allowed."

C. R. JACOB *v.* G. DANIELLS.

The judgment of the Court was read by Stuart, J., on August 8, 1941, as follows:—

In this case the appellant was tried and convicted by the Magistrate for the Georgetown Judicial District of driving a Motor Car No. 4342 without due care and attention.

This conviction is now appealed against.

What happened is clear. The appellant driving his own car, finding his way on his proper or left hand side blocked by a slow moving, but moving, donkey cart, swung out to the right to cut round it: In an empty road this would be permissible.

Actually the road was crowded. Pedestrians were in some number on the appellant's extreme right, a car containing the complainant, an Officer of the Police, was in its proper position on the left centre, or left of the centre, one or the other, of the road, coming in the opposite direction, but keeping reasonably clear of the pedestrians.

Without warning, without right, the appellant swung out; he overswung; he became blinded by the lights, to the direct glare of which he had unnecessarily exposed himself, and he stopped dead. This last act was the first sign of reasserting reason. The other car then upon its lawful occasions fortunately also stopped dead: an accident was avoided: although traffic was for the moment dislocated.

Duly tried and properly convicted the appellant committed himself, *inter alia,* to the following statements on oath:—

1. "I was in 2nd. gear."
2. "There was not sufficient room between Durey's car and the cart for me to pass."
3. "My impression is that Durey's car was travelling on a portion of the eastern half of this road."
4. "*I am not certain whether* I blew my horn."
5. "Daniells never spoke to me at all."
6. "I stopped behind the donkey cart."
7. "I consider I am being prosecuted frivolously."

If 1 and 2 are correct, the appellant condemns his own actions out of his own mouth.

As to 3, 4, 5 and 6, not for one moment did the Magistrate believe the appellant where in conflict with the complainant-respondent Daniells, and neither do we.

If 6 were correct, the blockage of the road which clearly occurred never could have existed.

7 has already been dealt with by this Court.

Had there been no appeal this matter would have rested in decent obscurity, but the insistence on innocence in a case like this compels comment.

The appeal is dismissed with costs.

Appeal dismissed.

JAGLALOO, Appellant (Defendant),

v.

R. BERAMSINGH, Sergeant of Police, No. 3630 Respondent (Complainant).

[1941. NOS. 160 AND 161.—DEMERARA.]

BEFORE FULL COURT: FRETZ AND STUART, JJ.

1941. AUGUST 8, 14.

Criminal law and procedure—Spirits—Distillery apparatus and bush rum found at one and the same time—Distillery apparatus—Custody of—Spirits Ordinance, Cap, 110, s. 108 (*3*)*—Offence under—Conviction for—Bush rum—Unlawful possession of—Spirits Ordinance, Cap. 110, s. 93* (*1*)*; Ord. No. 22 of 1931, s. 2—Offence under—Conviction for—Quashed.*

The defendant was found, at one and the same time, in the possession of a distillery apparatus and of bush rum. He was charged and convicted for (1) being found in the custody of a distillery apparatus, and (2) of unlawful possession of bush rum. He appealed.

Held, that the conviction for the unlawful possession of bush rum must be set aside.

Appeal by the defendant Jaglaloo from two convictions by Mr. K. S. Stoby, Magistrate, Berbice Judicial District. On December 30, 1940, a party of policemen went to Ankerville, Corentyne. On arrival there, they saw, in operation, a distillery apparatus or still near which there was found a demijohn containing bush rum. There was a cart about 10 to 18 feet away from the distillery apparatus or still, and the defendant and two other men were standing between the cart and distillery apparatus. On the approach of the police the men ran, and the defendant was caught by the police. The defendant was charged and convicted for (1) being found in custody of a distillery apparatus for the manufacture of spirits contrary to section 108 (3) of the Spirits Ordinance, chapter 110, as amended by section 2 (*b*) of Ordinance No. 15 of 1940; and (2) unlawful possession of a quantity of spirits to wit, the substance known as bush rum contrary to section 93 (1) of the Spirits Ordinance, chapter 110, as enacted by section 2 (1) of Ordinance No. 22 of 1941. On the first charge, the defendant was fined $750 in default 8 months, imprisonment with hard labour; and on the second charge he was sentenced to 6 months' imprisonment with hard labour.

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

S. E. Gomes, Assistant Attorney-General, for respondent.

Cur. adv. vult.

The judgment of the Court was read by Fretz, J., as follows:—

This is an appeal from two convictions, the first conviction for being found in the custody of a distillery apparatus for the manufacture of spirits, the second for being in unlawful possession of bush rum at the same time and place as in the first charge.

The charges were consolidated both at the trial in the Court below and also for the purposes of this appeal.

With reference to the first ease 161/1941 it has been contended by Counsel for the appellant that the magistrate's conviction was not sufficiently supported or established by the evidence—By examination, however, it was seen that the appellant was one of the three men at and around a still which was in full blast. On becoming aware that the police were approaching all three ran away but the accused only was caught. We are of opinion that he was clearly guilty and support the magistrate's findings and conviction on this charge.

The second charge, however for being in possession of bush rum we consider to be part of the same transaction. The charge under section 108 (3) may lie both for "distillery apparatus" and "spirits." The prosecution elected to divide the charge and on the same evidence to charge the two counts as above set out. The point is a technical one and no extra costs have apparently been incurred. The order of this Court therefore is that the appeal in case 160/1941 be dismissed with costs and the appeal in case 161/1941 be allowed with no order as to costs thereon.

One Appeal dismissed; Other Appeal allowed.

CORENTYNE SUGAR COMPANY, LIMITED, (Appellants)

v.

COMMISSIONERS OF INCOME TAX, (Respondents.)

[1939. No. 105—DEMERARA.]

BEFORE FULL COURT: CAMACHO, C.J., FRETZ AND STUART, JJ.

1941. May 23; August 15.

Income tax—Expenditure—Capital or revenue—Lands in derelict condition—Not cultivable as sugar estate—Initial expenditure necessary for that purpose—To drain and empolder lands—Necessary to reconstruct lands as sugar estate—Before money could be expended on them to earn income—Initial expenditure large—Money spent once and for all—To produce asset or advantage of an enduring nature—Not for purpose of keeping the profit—yielding subject, in a profit—yielding condition—Nature of expenditure—Capital and not revenue—Income Tax Ordinance, Chapter 38, s. 10—Deduction not allowable under.

Income tax—Exhaustion of property—Deduction for—Property—Meaning of—Property capable of being physically exhausted in trade of person claiming deduction—Capital expended in making lands workable, not property—Exhaustion of property—Denotes an outworn physical asset—Lands leased to claimant with no compensation to him, on termination on lease, for improvements—Deprivation to lessee of benefit therefrom, caused by contract of lease itself—Moneys expended by lessee not property exhausted—Diminution every year in value of lease—Not exhaustion of property arising out of use or employment in trade of lessee.

Income tax—Exhaustion of property—Conditions for allowance of deduction for—Property to be physical property—Property is exhausted—Property is owned by claimant—Exhaustion caused by use or employment in his trade—Exhaustion occurred during the year immediately preceding the year of assessment—All elements to be present—Otherwise, no deduction allowable—Income Tax Ordinance, cap. 38, s. 11.

Words—Exhaustion of property—Property—Meaning—Income Tax Ordinance, cap. 38, s. 11.

In 1933 and 1935 the appellants, owners of sugar estates, acquired under leases expiring in 1950, certain lands for the purpose of extending their cane cultivation. In each case the lease contemplated substantial initial expenditure by the appellants to put the lands in cultivable condition, and, unless that expenditure had been incurred, the purpose for which the lands were acquired would have been completely frustrated. To render the lands capable of cultivation the appellants disbursed $16,672.28, $16,537.73 and $3,632.28 in the years 1935, 1936 and 1937, respectively, for empowering and drainage, that is to say, in constructing cross-canals, middle-walks, side-lines, bridges, aqueducts, fences and stop-offs, backing earth, digging drains and in making up dams. The undertaking of these works and consequent expenditure thereon were conditions precedent to cultivation of the lands which were in a derelict condition and in their then state incapable of yielding revenue. The lands had in fact to be fundamentally reconstructed as sugar estates, before money could be expended on them for the purpose of earning income.

It was a term of both leases that the appellants should have no claim against the lessor for compensation or otherwise for any alterations or improvements made to the premises leased, or for any expenses incurred in connection therewith or in respect thereof.

The appellants claimed that the sum of $3,632.28, the 1937 expenditure, was an outgoing or money laid out in acquiring the income, and as such should be allowed as a deduction under section 10 of the Income Tax Ordinance, Chapter 38: in the alternative, that $36,842.29 should be allowed

as a deduction by section 11 of the Ordinance for exhaustion of property in as much as on the termination of the leases in 1950 the property would be exhausted. The respondents submitted that no part of the aggregate sum of $36,842.29 should be allowed as a deduction under section 10, as the whole sum was capital expenditure: further that no physical property was being exhausted, and, consequently, section 11 had no application.

Held, (1) that the whole purpose of the appellants in disbursing the monies was to produce an asset or advantage of an enduring nature;

(2) that the disbursements were made in order to bring the leased lands to a stage where additional and separate expenditure could be incurred to render them profit-yielding, and not for the purpose of keeping the profit-yielding subject, in a profit-yielding condition;

(3) that, having regard to the amount, which was unusually large, and the nature, of the expenditure and its purpose, the expenditure was capital expenditure, and not expenditure earning income;

(4) that no deduction was therefore allowable to the appellants under section 10 of the Income Tax Ordinance, Chapter 38.

(5) that the word "property" in section 11 of the Income Tax Ordinance, Chapter 38, means property capable of being physically exhausted by user in the trade of the person claiming a deduction under that section;

(6) that the appellants own no "property" within the meaning of section 11 of the Income Tax Ordinance, Chapter 38, inasmuch as they own no physical property but only capital money expended on the lands to Tender them workable;

(7) that "property" in section 11 of the Income Tax Ordinance, Chapter 38, in relation to "exhaustion" has the same meaning as that term has in relation to "wear and tear", that is to say, it denotes an outworn physical asset;

(8) that the deprivation to the appellants, of any benefit, at the end of the terms demised, from the appellants' expenditure, would be brought about by their own agreement with the lessors, and was not exhaustion of property within the meaning of section 11 of Chapter 38;

(9) that the progressive diminution in the value of the leases cannot be regarded as exhaustion of property arising out of use or employment in the trade of the appellants; and

(10) that no deduction is allowable to the appellants under section 11 of the Income Tax Ordinance.

A person claiming a deduction under section 11 of the Income Tax Ordinance, Chapter 38, in respect of exhaustion must show; (*a*) that the property is physical property; (*b*) that the property is exhausted; (*c*) that the property is owned by him; (*d*) that exhaustion was caused by the use or employment in his trade; and (*e*) that exhaustion occurred during the year immediately preceding the year of assessment. All these elements must be present to enable the claimant to succeed.

Appeal by the Corentyne Sugar Company, Limited to the Full Court by way of ease stated by Langley, J., under section 45 (10) of the Income Tax Ordinance, Chapter 38.

The Corentyne Sugar Company, Limited had appealed to a Judge in chambers against the decision of the Commissioners of Income Tax, confirming an assessment made upon the company for the year of assessment 1938, upon the income derived by the company during 1937.

The grounds of appeal were as follows:—

1. The appellants are holding the following lands, namely:—

(*a*) Plantations lots numbers 28, 30, 32, 34, 36, 38 and 40, situate on the east sea coast canal, in the county of Berbice under lease from Edgar Evans Hicken for a period of 15 years from the 1st January, 1935, with a right of renewal for a similar period; and

(*b*) the triangular piece of land being the back part of Fyrish, on the Corentyne Coast, in the county of Berbice under lease from the Local Authority of the Fyrish Country District of the county of Berbice for a period 17 years from the 1st January, 1933.

2. It is provided by the lease with the said Edgar Evans Hicken, *inter alia,* as follows:—

"3. The lessee shall be at liberty at any time or times during the said term to construct and maintain a drainage canal in the east side line of Plantation Borlam with all such dams, sluices, stop-offs and kokers as they may consider expedient from time to time and to use and operate such drainage canal as they may deem beneficial and shall have all such rights of way and otherwise for themselves, their servants and agents as may be convenient for constructing, maintaining and operating such canal with such dams, sluices, stop-offs and kokers. If the lessor so requires it, the lessee shall put down at such point as the lessor may reasonably require a box koker not larger than 6 feet by 6 feet to connect the drainage of Plantation Borlam with the said canal but the lessee shall not be liable to repair such koker.

4. The lessee shall be at liberty at all times during the said term to use the east side line dam of Plantation Maryburg and the east sideline dam of Plantation Hammersmith as ways for themselves, their servants, agents and tenants to pass and re-pass between the public road and the said premises, with or without vehicles and with or without draught animals and beasts of burden or mechanical tractor or implements. The lessee shall during such term keep up and maintain such side line dam aforesaid.

5. The lessee shall make up all dams of the said premises to such a height as may be reasonably necessary to keep off the water of adjacent lots from flowing on the premises and will maintain such dams during the continuance of the said term.

6. The lessee shall be at liberty from time to time to place. maintain and remove all such stop-offs and kokers in and aqueducts under such part of the east sea coast canal aforesaid as ties to the north of the said premises and to put, maintain and remove such bridges across the same as they may deem reasonably necessary or convenient to connect the said premises with the side line dams of Plantation Maryburg and Hammersmith aforesaid.

7. The lessee shall be at liberty to alter and improve the premises from time to time but at the expiration of this lease the lessee shall have no claim against the lessor for compensation or otherwise for any alterations or improvements made to the premises or for any expenses incurred in connection therewith or in respect of the same.

8. The lessee shall not have the right to assign this lease with-

out the consent of the lessor in writing first had and obtained.

9. Should the lessor at any time during the existence of this agreement be desirous of selling the premises or any part thereof he shall be bound in the first instance to offer the same to the lessee for such similar consideration as he may have been *bona fide* offered by and be willing to accept from a third party and in the event of the acceptance by the lessee of such offer the lessor shall transport the premises to the lessee, the cost of such transport to be borne between the lessor and the lessee in equal shares."

3.It is provided by the lease with the said local Authority, *inter alia,* as follows:—

"2. The lessees shall be at liberty at any time or times during the said term of 17 years to construct and maintain drainage canals, with all such dams, sluices, stop-offs and kokers as they may consider expedient from time to time and to use and operate such drainage canals as they may deem beneficial and shall have all such rights of way and otherwise for themselves, their servants and agents as may be convenient for constructing, maintaining and operating such canals with such dams, sluices, stop-offs and kokers.

4. The lessees shall be at liberty to improve the said land from time to time, but at the expiration or determination of this lease the lessees shall have no claim against the lessors for compensation or otherwise for any improvements on or to the said land or for any expenses incurred in connection therewith.

5. The lessees shall not have the right to assign this lease without the consent of the lessors first had and obtained but such consent shall not be arbitrarily or unreasonably withheld.

11. The lessors shall not in any way be liable for any loss or damage which the lessees and/or their tenants may suffer through drought or flood or any imperfect drainage of the said land.

12. All buildings and erections and engines, machinery, plant and other appurtenances which the lessees may place and erect on the said land shall be and remain the property of the lessees and may be removed at any time."

4. The appellants during the year ending 31st December, 1937, expended the sum of $3,632.28 in empoldering, draining and improving the said lands.

5. The said assessment is erroneous because the said sum of $3,632.28 is an outgoing and expense incurred by the appellants in the production of their income and should have been allowed by the Commissioners as a deduction under section 10 of the said Ordinance.

6. The appellants during the years 1935, 1936 and 1937 expended in the aggregate including the said sum of $3,632.28 the sum of $36,842.29 as set out in the Schedule hereto in empoldering, draining and improving the said lands.

7. The said assessment is erroneous because inasmuch as the said leases will run out within 15 years from the date on which empoldering was first started and give no option to purchase the said lands, a proportion (based on the unexpired period of the said leases) of the said sum of $36,842.29 or of any increase thereof, should have been allowed as a deduction for the exhaustion in the year ending 31st December, 1937, of the property represented by the said sum $36,842.29 under section 11 of the said Ordinance.

8. The said assessment is also erroneous because the gains or profits from the appellants' business for the year ending 31st December, 1937, cannot be truly ascertained without allowing the said deductions, which are not deductions disallowed by section 12 of the said Ordinance.

The Schedule referred to in paragraph 6 of the grounds of appeal was as follows:—

Particulars of cost of empoldering, draining, etc.

	1935.	1936.	1937.
(1) Digging Cross canals	...2,016.08	3,640.68	747.20
(2) do. Middle walks	... 828.28		
(3) do. Side-lines	...2,357.16		
(4) do. Drains, fourfoots and Trackers	...4,805.62	5,760.88	1,853.00
(5) Backing Earth	...2,809.08	3,241.72	1,032.08
(6) Stop-offs	... 26.64		
(7) Bridges and Aqueducts	....3,309.81	3,894.45	
(8) Fencing	... 479.81		
(9) Making up Dams	... 39.80		
	$16,672.28	$16,537.73	$3,632.28

Cost in 1935—$16,672.28
Cost in 1936—$16.537.73
Cost in 1937—$ 3,632.28

$36,842.29

The statement by the Commissioners of Income Tax of the material facts upon every point specified in the summons as a ground of appeal together with the reasons in support, of the assessment was as follows:—

1. The appellants have been assessed to income tax for the year of assessment 1938 upon the income derived by the Appellants during the year 1937 from gains or profits arising mainly from the business of cultivating sugar cane and manufacturing and selling sugar carried on by the Appellants.

2. In ascertaining the chargeable income the Commissioners have disallowed as a deduction from the gains or profits the sum of $3,632.28 expended during the year 1937 by the Appellants on empoldering, draining and improving certain lands leased and used by the Appellants for the purposes of the Appellants' business.

3. The Appellants expended during the year 1935 and 1936 further sums as set out below on empoldering, draining, and improving the aforesaid lands:

1935	...	... $16,672.28
1936	...	... 16,537.73

the total sum so expended including the said sum of $3,632.28 expended in the year 1937 being $36,842.29. (In ascertaining the chargeable income for the years of assessment 1936 and 1937 the aforesaid sums expended in 1935 and 1936, respectively, were disallowed as deductions from the gains or profits).

4. The lease with Edgar Evans Hicken provides *inter alia*:—

"11. If the Lessee not less than six calendar months before

the expiration of the said term shall give to the Lessor or leave at his usual or last known place of abode in this Colony a notice in writing requesting a renewal of the said term for a further term of fifteen years from the 31st day of December, 1949, then and in such case the said term shall be renewed accordingly upon the same terms and subject to the same covenants, provisoes and conditions as herein contained and the Lessor shall, if the Lessee so requires, execute and do at the expense and cost of the Lessee all such acts, deeds and things as may be reasonably necessary to assure to the Lessee such renewal as aforesaid."

5. The other terms and conditions of the leases under which the lands are held by the Appellants are as stated in paragraphs 1, 2 and 3 of the grounds of appeal set out in the summons, the facts thereof being admitted by the Commissioners and not in dispute.

6. The Appellants contend—

(*a*) that the said sum of $3,632.28 is an outgoing or expense incurred by the appellants in the production of their income and should be allowed as a deduction in ascertaining the chargeable income under section 10 of the Ordinance.

(*b*) that the said sum of $3,632.28 is not a deduction disallowed by section 12 of the Ordinance.

Alternatively, (c) that the aforesaid aggregate amount of $36,842.29 has been expended by the appellants in acquiring property in respect of which there should under section 11 of the Ordinance be allowed as a deduction in ascertaining the chargeable income a reasonable amount for the exhaustion of the said property during the year 1937 on the ground that the said property will become exhausted on the termination of the period of the leases.

The Commissioners say,—

(*a*) that the said sum of $3,632.28 is not an expense wholly and exclusively incurred in the production of the income and is therefore not an allowable deduction under section 10 of the Ordinance.

(*b*) that the said sum of $3,632.28 is capital expended on improvements and no deduction in respect thereof can therefore be allowed in accordance with section 12 (d) of the Ordinance.

(*c*) that the sum of $3,632.28 is not a proper debit item to be charged against incomings of the appellants' business when computing the balance of profits of it.

(*d*) that no deduction for exhaustion of property under section 11 of the Ordinance can be allowed with respect to the property leased to the Appellants by reason of the aforesaid aggregate expenditure of $36,842.29 on empoldering, draining and improving the said lands because—

(1) there has in fact been no exhaustion of the property: the lands have been improved by the incurring of the expenditure;

(2) the lands are kept continually in being by annual expenditure on maintenance which is properly allowable as a deduction under section 10 of the Ordinance;

(3) the lands would not be exhausted by reason of the termination of the leases. With respect to paragraph 7 of the grounds of appeal, the facts are that the appellants have no right of renewal and no option to purchase with respect to the land leased from the Local Authority of the Fyrish Country District but that, with respect to the lands leased from Edgar Evans Hicken, the appellants have a right to renew the lease, and further a right to purchase, should the lessor at any time during the existence of the lease be desirous of selling;

(4) the lands alleged to be exhausted are not owned by the appellants.

(5) the alleged exhaustion is not exhaustion arising out of the use or employment of the property in the business of the appellants;

(6) The alleged exhaustion did not occur during the year immediately preceding the year of assessment.

The appeal was heard before Langley, J., in Chambers on the 19th and 26th days of June, 1939, and decision was given on the 16th February, 1940 dismissing the appeal. The learned judge held: (*a*) that the expenditure in issue must be regarded as capital expenditure, as the appellants had failed to prove that any part of it was revenue expenditure; and (*b*) that it was impossible owing to the ambiguous wording of section 11 of the Income Tax Ordinance, Chapter 38, to give any force to the word "exhaustion" or to ascertain precisely what property is included in the term "property." Costs against the Corentyne Sugar Company Limited were not awarded to the Commissioners

of Income Tax, as, in the opinion of the judge, the dispute in the matter had arisen by reason of section 11 of the Income Tax Ordinance, Chapter 38, not being clear and unambiguous. The judgment is reported at (1940) L.R.B.G. 22.

The case stated by the judge on April 26, 1940, was as follows:—

1. This is a special case stated pursuant to section 45 (10) of the Income Tax Ordinance, Chapter 38.

2. The facts are as follows:—

(1)—The Appellants leased certain lands in the County of Berbice from Edgar Evans Hicken for a period of 15 years from the 1st day of January, 1935, with a right of renewal for a similar period and from the Local Authority of the Fyrish Country District of the County of Berbice for a period of 17 years from the 1st January, 1933, for the purpose of planting cane.

(2)—The Appellants during the years 1935, 1936 and 1937 expended in the aggregate the sum of $36,842.29 as set out hereunder in empoldering, draining and improving the said lands:—

	1935	1936	1937
Digging Cross Canals	$ 2,061 08	$ 3,640 68	$ 747 20
Do. Middle Walks	828 28		
Do. Side-lines	2,357 16		
Do. Drains, Four-Foots and Trackers	4,805 62	5,760 88	1,853 00
Backing Earth	2,809 08	3,241 72	1,032 08
Stop-offs	26 64		
Bridges and Aqueducts	3,309 81	3,894 45	
Fencing	479 81		
Making up Dams	39 80		
	$ 16,672 28	$ 16,537 73	$ 3,632 28

Cost in 1935 = $16,672 28
Cost in 1936 = 16,537 73
Cost in 1937 = 3,632 28
$36,842 29

(3) The Appellants claimed that the sum of $3,632.28 expended during the year ending 31st December, 1937, was an outgoing and expense incurred by the Appellants in the production of their income and was deductible from their chargeable income for the year of Assessment ending 31st December, 1938, under section 10 of the said Ordinance.

(4) The Appellants further claimed that they should be allowed as a deduction for the exhaustion in the year ending 31st December, 1937, of the property represented by the said sum of $36,842.29 or so much thereof as is capital, a proportion thereof based on the unexpired period of the said leases;

(5) The Commissioners rejected the said claims on the grounds that the said sums were capital expenditure and that there had been no exhaustion of property within the meaning of section 11 of the said Ordinance.

3. I, the Judge who heard the appeal from the decision of the Commissioners, held—

(i) that the expenditure in issue must be regarded as capital expenditure as the appellants failed to prove that any part of it was revenue expenditure, and

(ii) that it was impossible owing to the ambiguous wording used in section 11 of the said Ordinance to give any force to the word "exhaustion" or to ascertain precisely what property is included in the term "property" and as more fully set out in my decision, and I accordingly confirmed the assessment.

4. The Appellants immediately upon the determination of the appeal applied to me to state a case and this case is stated accordingly.

5. The questions of law for the opinion of the Full Court are:—

(1) Whether the said sum of $3,632.28 or any part thereof is an outgoing and expense deductible under section 10 of the said Ordinance.

(2) Whether the said sum of $36,842.29 or any part thereof is property within the meaning of section 11 of the said Ordinance.

(3) Whether in the circumstances of this case there is an exhaustion of property within the meaning of section 11 of the said Ordinance—and

(4) if there is an exhaustion of property what is a reasonable amount to allow as a deduction in each year under the said section.

6. Copy of Judgment embodied in this case.

H. C. Humphrys, K.C., for the Appellants. The appellant company owns Plantation Albion, Corentyne where it carries on an extensive cane cultivation. In 1933 the company required more land for cane cultivation. It therefore acquired lands from the Fyrish Country District in 1933 on lease for 17 years, and other lands on lease from Edgar Hicken in 1935 on lease for 15 years. The lands held under the leases were of such a nature that they could not be used for cane cultivation unless drained and empoldered, and new dams put up. The company expended in 1935 the sum of $16,672.28, in 1936 the sum of $16,537.73, and in 1937 the sum of $3,632.28—amounting in the aggregate to the sum of $36,812.29—in draining and empoldering both areas. The Commissioners disallowed as deductions from the company's income for 1935 and 1936 the sums expended in those years, and they also disallowed as deductions from the company's income for 1937, the sum expended in 1937. The practice of the

Commissioners is that where there is a large revenue expenditure in any one year it is spread over a period of years fixed by the Commissioners. The Commissioners of Income Tax, however, say that the expenditure is capital, and not revenue, expenditure. The questions before the Court are: (*a*) Was the expenditure capital or revenue expenditure? If it was revenue expenditure, then it could be spread over a period of years; (*b*) If the expenditure was capital expenditure then the company contends that in the circumstances, property is exhausted each year, and the company should therefore be allowed a reasonable amount each year for exhaustion of property by virtue of section 11 of the Income Tax Ordinance, Chapter 38. A reasonable amount would be one-fifteenth of the aggregate expenditure in the years 1935, 1936 and 1937.

Whether the expenditure is income expenditure or capital expenditure is a question of fact for the Commissioners, or, to put it more accurately, a question of mixed law and fact.

The land was perfectly useless, and could not be used for cane cultivation if the expenditure had not been incurred, and no income could have been obtained from the land if the expenditure had not been made. The expenditure was a necessary expenditure in the production of income, and was an allowable deduction under section 10 (1) of the Income Tax Ordinance, Chapter 38.

In England no allowance can be made for an exhaustion of capital. He referred to *Knowles* v. *McAdam* (1877) L.R. 3 Ex. D. 23 and *Coltness Iron Company* v. *Black* (1881) L.R. 6. A.C. 315, 325.

The capital is being exhausted because the leases are running out. The lands do not belong to the sugar company. The appellant do not own the property, but they own the capital.

The exhaustion of the capital arises by reason of its use in the business.

There is nothing in section 11 of the Income Tax Ordinance to limit the meaning of the word “property” which embraces every kind and description of property which might be exhausted.

In England no deduction used to be allowed for wear and tear of machinery, but 41 and 42 Vict. c. 15, s. 12 remedied that.

Annuities are not allowed as a deduction in England, but they are allowed here under section 10 (1) (f) of the Income Tax Ordinance, Chapter 38.

There is no deduction allowable in England for exhaustion of property: *Gillatt and Watts* v. *Colquhoun* (1884) 2 Tax Cases 76, 83, 84, 33 W.R. 258, and *Alianza* v. *Bell* (1906) A.C. 18, 5 Tax Cases 69, 70. But in this Colony an allowance may be made under section 11 of chapter 38 in respect of such exhaustion, and effect should be given to the enactment.

The capital was not employed in improvements, it was employed in putting the land into a state fit for cultivation.

If the expenditure was revenue expenditure, a deduction should be allowed under section 10 of the Income Tax Ordinance, Chapter 38. If the expenditure was capital expenditure, a deduction should be allowed under section 11.

CHIEF JUSTICE: Mr. Duke, the Court does not wish to hear you on the first point, as we are of the opinion that the expenditure is capital, and not revenue, expenditure. We only desire to hear you on the second point, the construction of the words "exhaustion of property" in section 11 of the Income Tax Ordinance, Chapter 38.

E. M. Duke, acting Assistant Attorney-General, for the respondents. (1) The property owned and exhausted must be physical property like a gold mine, a coal mine, a timber forest, an oil well or a bauxite mine. "Property" is not notional like capital, and must be represented by physical assets. A company does not own the capital of the company. (2) The words used in section 11 of Chapter 38 are "exhaustion, wear and tear of property". The words "wear and tear" of property mean nothing more than the *physical* depreciation of the property: *Burnley Steamship Co.* v. *Aikin* (1894) 3 T. C. 277, 278, *per* Lord President and Lord McLaren. The words "exhaustion" and "wear and tear" occur in section 10 (c) of Chapter 30, and in that section the word "exhaustion" relates to a *physical* exhaustion, or to exhaustion of *physical* property. The word "exhaustion" in section 11 of Chapter 38 should be interpreted in a similar manner, especially as in section 10 (c) of the Ordinance, where the words "exhaustion" and "wear and tear" also occur, the word "exhaustion" clearly relates to a *physical* exhaustion. (3) Section 11 of the Income Tax Ordinance, Chapter 38, is in some respects similar to rule 6 of Schedule D (Cases I and II) to the Income Tax Act, 1918. But whereas in this Colony provision is only made for a deduction in the case of the exhaustion, wear and tear of property *owned* by the person engaged in a trade, business, profession or vocation, in England provision is also made for a deduction where the property is *not owned* by the person by whom the trade is carried on. (4) Section 12 of Chapter 38 corresponds with rule 3 of Schedule D (Cases I and II) to the Income Tax Act., 1918, and that rule has always been construed as enacting a prohibition. If the deduction is not allowable under section 12 of Chapter 38, then there is no necessity to enquire whether it is allowable under section 10 or under section 11: *Atherton* v. *British Insulated and Helsby Cables, Ltd.,* (1926) 10 T.C. 155, 191, *per* Viscount Cave, and *Morley* v. *Lawford & Co.* (1928) 14 T.C. 239, *per* Lord Hanworth, M.R.

The expenditure is capital expenditure, that is to say, it falls within the prohibition specified in section 12 (*b*) of the Ordinance.

It was also capital employed in improvements, that is to say, it falls within the prohibition specified in section 12 (d) of the Ordinance.

Further, in any event, no deduction is allowable under section 11 inasmuch as (*a*) there was no physical exhaustion of any property; (*b*) there was no exhaustion arising out of the use or employment of property in the business of the appellants. He relied on his argument before the judge in Chambers.

H. C. Humphrys. K.C., in reply.

The Chief Justice said that the appeal would be dismissed and that a written judgment would be delivered later, in which the question of costs would be dealt with.

The judgment of the Court was delivered by Sir Maurice Camacho, Kt., Chief Justice, on August 15, 1941 as follows:—

The appellants appealed to a Judge in chambers from the decision of the Commissioners for Income Tax confirming an assessment on them for the assessment year 1938 on their 1937 earned income. From the Judge this further appeal is brought.

In 1933 the appellants, owners of sugar estates, acquired from the Local Authority of the Fyrish Country District, certain lands, under a lease of seventeen years, for the purpose of extending their cane cultivation.

In 1935, the appellants, for a similar purpose, acquired from one Hicken, under a lease of fifteen years, other lands in the county of Berbice.

In each case the lease contemplated substantial initial expenditure by the appellants to put the lands in cultivable condition. From the admitted facts it is manifest that unless that expenditure had been incurred the purpose for which the lands were acquired would have been completely frustrated.

To render the lands capable of cultivation the appellants disbursed $16,672.28, $16,537.73 and $3,632.28 in the years 1935, 1936 and 1937, respectively, for empoldering and drainage.

The appellants now claim—

(1) that the sum of $3,632.28, the 1937 expenditure, is an outgoing or money laid out in acquiring the income and as such should be allowed under section 10 of the Income Tax Ordinance;

(2) that the aggregate sum of $36,842.29 is allowed as a deduction by section 11 of the Ordinance for exhaustion of property inasmuch as on the termination of the leases the property will be exhausted.

The first submission raises the question as to whether the 1937 disbursement is capital expenditure, or expenditure to acquire income. If the former the appellants would not be entitled to the deduction; if the latter their claim must succeed. The 1937 outlay, as well as the 1935 and 1936 outgoings, was expended in

constructing cross canals, middle-walks, side-lines, aqueducts, fences, and stop-offs, backing earth, digging drains and in making up dams. The undertaking of these works and consequent expenditure thereon were conditions precedent to cultivation of the lands which were obviously in derelict condition and in their then state incapable of yielding revenue. The properties had in fact to be fundamentally reconstructed as sugar estates, if the phrase is permissible in relation to land, before money could be expended on them for the purpose of earning income. There is here no question of maintenance or repair, the essential features of a British Guiana sugar estate were non-existent and had to be created. The expenditure once incurred ceased for all time, although the appellants will no doubt be called upon from time to time to disburse monies in maintenance costs.

Is this capital expenditure or expenditure earning income? To this question several criteria have been applied by the Courts.

In *Vallambrosa Rubber Company, Limited* v. *Farmer* (1910) 5 Tax Cases 529, "expenditure once and for all" was held a distinguishing feature of capital expenditure, expenditure earning income to be that which normally recurs each year. Although the test is not decisive it is a criterion emphasising an important factor in determining the question whether any particular disbursement is capital expenditure or expenditure earning income. Lord Johnston in the *Vallambrosa* case offered the opinion that money laid out to acquire land, to clear and drain it and to construct roads thereon, for the purpose of bringing it under cultivation, is capital expenditure. The expenditure by the appellants was incurred for identical purposes. Lord Cave in *Atherton* v. *British Insulated and Helsby Cables, Limited* (1925) 10 Tax Cases p. 192, considered that where expenditure is made once and for all for the purpose of creating an asset, or an advantage, for the enduring benefit of a trade, that expenditure is properly attributable to capital and not to revenue. Again in *Southwell* v. *Savill Bros. Ltd.*, (1901) 2 K. B. 349, money laid out to produce an asset of enduring nature, or an advantage of an enduring nature, which is of a capital nature, although unsuccessful, is capital expenditure. The whole purpose of the appellants in disbursing these monies was to produce an asset, or advantage, of an enduring nature.

According to Lord Blackburn's view, (*United Collieries Ltd.* v. *Income Tax Commissioners* (1929) 12 Tax Cases 1254) although the question into which category any particular expense must fall is always one of degree, any deduction to be allowed against revenue must bear some such relationship to the yearly profits on which the tax is laid as would arise from the fact that it was incurred for the purpose of keeping the profit-yielding subject in a profit-yielding condition during the year in which the tax was incurred. The expenditure by the appellants in 1937, or in

1935 or 1936, does not respond to this test. Their disbursements were made in order to bring the leased lands to a stage where additional and separate expenditure could be incurred to render them profit-yielding, and not, to repeat the words of Lord Blackburn, for the purpose of keeping the profit yielding subject in a profit-yielding condition. The expenditure, as indeed that of 1935 and of 1936, was a preliminary expense preceding any expenditure earning income, and was, in fact, a condition precedent to the laying out of any money to acquire the income. Moreover, the sum involved is unusually large, not a decisive test, but nevertheless a characteristic feature of capital expenditure, and it was made once and for all.

Having regard therefore to the amount and nature of the expenditure and its purpose, the Court holds it to be capital expenditure, and not expenditure earning income, and therefore confirms the decision of the Tax Commissioners and of the Judge, from whom the appeal is brought, on this question.

By the second submission the appellants claim deduction for exhaustion of their property.

The Court is pressed to say that the deduction of the aggregate sum expended in the three years is allowable, being a reasonable amount representing the exhaustion which will occur when the leases expire within the next fifteen years. The amount, in conformity with the practice of the Tax Commissioners, the appellants say, should be spread over the 15 year period and that in each year a deduction of 1/15th of the said sum should be allowed.

The English cases, it has been justly pointed out, offer no assistance, there being no provision in the English Income Tax Acts equivalent to that contained in section 11, chapter 38 of our laws. (*Alianza Company, Limited* v. *Bell,* 1905, 1 K.B. 184.) It is contended, in effect, that section 11 of the local Ordinance was designed to embrace a deduction for exhaustion of capital expenditure. The section directs that "in ascertaining the chargeable income of any one engaged in a trade . . . . . there shall be allowed as a deduction a reasonable amount for the exhaustion, wear and tear of property owned by him including plant and machinery, arising out of the use or employment of the property in the trade during the year immediately preceding the year of assessment."

Learned counsel for the appellants submitted that "property" is a comprehensive description, and enfolds every kind of property capable of exhaustion.

If the aggregate expenditure can be regarded as a premium for the leases the appellants would not be entitled to the deduction as being money laid out to acquire income, for a premium paid to acquire an asset is capital expenditure. Nor would the appellants be entitled to the deduction if the capital was employed in

improvement of the lands: see. 12 (*d*). Nor would the appellants be entitled to the deduction on the ground of capital expenditure, although the leases sink in value as every year passes, unless they can establish that their expenditure, or the benefit to be derived therefrom, is "property" within the meaning of section 11.

What then is the meaning of the word property in section 11? In the opinion of this Court "property" means property capable of being physically exhausted by user in the trade of the claimant.

Analysing the section the appellants must show—

(*a*) that the property is physical property;

(*b*) that the property is exhausted;

(*c*) that the property is owned by them;

(*d*) that exhaustion was caused by the use or employment in their trade and that exhaustion occurred during the year immediately preceding the year of assessment.

All these elements must be present to enable the appellants to succeed.

What is the property in respect of which the appellants allege exhaustion? Clearly not the land for that has been improved and not exhausted. Where is the property owned by them in respect of which the claim is made? They own no physical property and are possessed only of leases which by their own act and deed they have elected to hold for terms of fifteen and seventeen years. All the appellants "own" in relation to the claim is capital money dissipated on the land to render it workable. The progressive diminution in the value of the leases cannot be regarded as exhaustion of property arising out of use or employment in the trade. The appellants have spent a considerable sum of money which will not be refunded to them at the expiration of the leases and from which thereafter they will receive no benefit. The deprivation of any benefit from their expenditure at the end of the terms demised will be brought about by their own agreement with the lessors, and is not exhaustion of property within the meaning of the Ordinance. "Property" in section 11 in relation to "exhaustion" has the same meaning as that term has in relation to "wear and tear," that is to say, "property" means some physical asset. When the section speaks of "exhaustion of property," it denotes an outworn physical asset and not an agreed deprivation of a benefit which would otherwise be derived from expenditure.

The appeal is dismissed. The appellants will pay the costs both here and in the Court below. Fit for counsel on each appearance of counsel.

Appeal dismissed.

Solicitors: *J. E. de Freitas,* for appellants;

Percy W. King, Crown Solicitor, for respondents.

G. RALPH *v.* M. LAROC.

GERALD RALPH, Appellant (Defendant),
v.
MIRIAM LAROC, Respondent (Complainant).

[1940. No. 300.—DEMERARA.]

BEFORE FULL COURT: SIR MAURICE V. CAMACHO, C.J.,
FRETZ AND STUART, JJ.

1941. JULY 30; AUGUST 15.

Evidence—Bastardy—Child of complainant—Examination by magistrate—For physical resemblance between child and alleged parent—Not an irregularity.

A judicial officer does not commit an irregularity by examination of a child for the purpose of ascertaining whether there is physical resemblance between the child and the alleged parent.

Appeal by the defendant from the decision of Mr. A. V. Crane, Senior Magistrate, Georgetown Judicial District, adjudging him to be the putative father of the complainant's child.

L. A. Hopkinson, for appellant.

S. I. Cyrus, for respondent.

The judgment of the court was delivered by the Chief Justice, as follows:—

On the 27th September, 1940, the Magistrate for the Georgetown Judicial District, on a bastardy summons issued at the instance of the respondent, adjudged the appellant the putative father of the respondent's child and ordered the appellant to maintain the child in the sum of 84 cents per week. From that adjudication and order the appellant appeals to this Court. This Court is satisfied that on the evidence before him the Magistrate could not have arrived at any other conclusion.

The main ground of appeal is set out as ground 5 of the grounds of appeal and alleges that a specific illegality affecting the merits of the case was committed by the Magistrate in the course of the proceedings. In an affidavit in support of this ground of appeal the appellant avers that dining the hearing of the summons, and after the respondent had given her evidence, the Magistrate invited the appellant, his counsel and the respondent into his chambers. That the child was also brought there, and that the Magistrate invited one Rayman who was present to examine certain marks of family resemblance between the appellant and the child which were pointed out by the Magistrate, and that on leaving the Magistrate's chambers the Magistrate advised the appellant "go and support your child".

In a counter affidavit filed by the respondent, the respondent

denied that the Magistrate invited Rayman to examine the child, and she further deposed that she did not hear the Magistrate say to the appellant "go and support your child."

The Magistrate has supplied to this court an explanation of what actually occurred. It would appear from this statement that on the 27th of June, 1940, the respondent testified and was cross-examined. The case was adjourned. On the 1st September 1940, the respondent was further cross-examined, and a witness called on her behalf, gave evidence on that day. The hearing was then further adjourned. In an attempt to settle the dispute the Magistrate interviewed the parties in his chambers and the Magistrate observed to Rayman, who was present, "a remarkable resemblance". The Magistrate denies that he invited Rayman to examine the child, or that he remarked to the appellant "go and support your child". On resumption of the hearing no objection was raised to the Magistrate entertaining the case.

In the view of this Court a judicial officer does not commit an irregularity by examination of a child for the purpose of ascertaining whether there is physical resemblance between the child and the alleged parent, "The opinion of the learned judge himself on a question of family resemblance undoubtedly might carry weight:" *Slingsby* v. *Attorney-General* (1916) 33 T.L.R. 122. If, however, the Magistrate invited Rayman to examine the child and was influenced by the opinion of Rayman it would be an irregularity, especially in the circumstances in which that examination was alleged to have taken place.

The Court, however, accepts the Magistrate's explanation of the occurrence and rejects that of the appellant, and as there is no other substantial ground of appeal, the appeal is dismissed with costs.

Appeal dismissed.

L. RAFFERTY *v.* D. T. DENNY.

LEONARD RAFFERTY, Appellant (Plaintiff),
v.
D. T. DENNY, Respondent (Defendant).

[1941. No. 14.—DEMERARA.]

BEFORE FULL COURT: SIR MAURICE V. CAMACHO C.J.,
FRETZ AND STUART, JJ.

1941. JULY 30; AUGUST 15.

Landlord and tenant—Excessive distress—Action for—At common law—whether lies.
Landlord and tenant—Distress—Rent and Premises Recovery Ordinance, cap. 92—Governed by.
Landlord and tenant—Distress—Power of landlord—To distrain on sufficient goods of tenant to satisfy rent and costs—Duty of landlord—To take no more than reasonably necessary—Excessive distress—Meaning of—Liability of landlord for—Right of action of tenant for—Damages—Rent and Premises Recovery Ordinance, Cap, 92, ss. 5 (2), 10, 11.

Semble, that an action at common law for excessive distress was maintainable by an injured tenant.

Distress in this Colony is governed by the Rent and Premises Recovery Ordinance, chapter 92.

By section 5(2) of the Rent and Premises Recovery Ordinance, chapter 92, no more than a sufficiency of the tenant's goods shall be taken in distraint. A duty is thereby cast on the landlord to take no more than is reasonably necessary to satisfy his debt, and a liability is cast upon a landlord for excessive distress.

The Rent and Premises Recovery Ordinance, chapter 92, confers a right of action for excessive distress.

Whether in any particular case the distraint in excessive, is for the trial Court to decide, bearing in mind that "sufficient" distress means goods of such a value in the aggregate as may reasonably be estimated to be sufficient, when sold, to pay the rent due, together with all expenses of levy and sale, and that to be excessive, a distress must be obviously disproportioned to the rent.

Appeal by the plaintiff from a decision of Mr. C. R. Browne, Magistrate, Georgetown Judicial District, dismissing a claim for damages for excessive distress.

R. S. Miller, for appellant.
H. B. S. Bollers, for respondent.

Cur. adv. vult.

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

This is an appeal from judgment of non-suit entered by the Magistrate for the Georgetown Judicial District (Civil Jurisdiction) in an action brought by the appellant against the respondent for damages for excessive distress of the goods of the appellant.

At the magisterial hearing, counsel for the respondent

contended that the law of distress in this colony is governed by the Common Law of England, by virtue of the Civil Law of British Guiana, Chapter 7, section 3 (A), (B). He thereupon submitted that under the Common Law no action was maintainable and therefore the action does not lie here.

The submission is maintained in this Court and it therefore becomes necessary to discuss the question as to whether at Common Law there subsisted a remedy by action for damages by reason of excessive distress. It is serviceable to make a brief survey of the history of the law.

As pointed out by the learned *Woodfall* in his work on Landlord and Tenant, the power of distress is derived from the ancient feudal law and was substituted for a forfeiture of the tenant's estate. It enabled the landlord to detain the goods distrained until redeemed by the tenant by payment of the rent due. The first statutes affecting the power were enacted in the reign of Henry III. 51 Henry III statute 4 declared that all distresses must be "reasonable after the value of the debt or demand and not outrageous," and 52 Henry III c. 4 (known as the Statute of Marlbridge, 1267) prohibited excessive distress but did not provide any specific remedy.

In support of the submission the respondent relies on the Statute of Marlbridge, on *Lynne* v. *Moody*, 2 Strange Reports 851; *Hutchins* v. *Chambers* (1758) 1 Burrowes, 581, and *Phillips* v. *Berryman* (1783) 3 Douglas, 286. The Court proceeds to consider these cases.

Lynne v. *Moody,* an action in trespass for excessive distress, decided that trespass would not lie inasmuch as the entry was at first lawful and that the remedy ought to be by special action founded on the Statute of Marlbridge, "for at Common Law the party might take a distress of more value than the rent."

Hutchins v. *Chambers* was also an action in trespass for excessive distress. Lord Mansfield held, distinguishing *Mair* v. *Munday,* that trespass would not lie and that the action must be an action upon the statute.

Phillips v. *Berryman* decided that a recovery in replevin is a bar to an action on the Statute of Marlbridge for taking an excessive distress. Presumably this last mentioned case is cited to bring to notice the statement of Buller, J.:—"The Statute of Marlbridge meant to give a remedy where there was none before."

It is to be observed that in each of the two first mentioned cases the *ratio decidendi* was that the action must be founded on the statute. The observation by Buller, J. in *Phillips* v. *Berryman* and the statement in *Lynne* v. *Moody,* to the effect that at Common Law the party might take a distress of more value than the rent, would, moreover, seem to support the respondent's contention.

Although the judgments under review decided that after enactment of the Statute of Marlbridge any action brought for excessive distress must be brought on the statute, they were obtained when the form of action was of vital importance Indeed, until the Judicature Acts were passed, a wrongful and illegal distraint was only properly answered by an action in trespass, trover or detinue; an excessive distress, by an action on the case under the statute of Marlbridge, an irregular distress by an action on the case against the landlord, or trover against the purchaser of the goods. Since the introduction of modern pleadings the endorsement of the writ is the same in all cases whether the claim be for wrongful distress, illegal, excessive or irregular, provided the statement of claim shows a good cause of action in the plaintiff. The particularity which required an action for excessive distress to be in the form of an "action on the statute" has disappeared and no longer is it necessary to frame the claim on the statute.

An excessive distress is, however, wrongful both at Common Law and by the Statute of Marlbridge (*Halsbury,* Laws of England, Hailsham edition, volume 10, page 532). If this is an accurate statement of the law then notwithstanding the opinion to the contrary expressed in *Lynne* v. *Moody* and *Phillips* v. *Berryman* there must have existed a remedy at Common Law for there is no wrong without a remedy. This view is fortified by *Piggott* v. *Birtles* (1836) 1 M. and W., at page 447. Baron Parke leaves no doubt as to his opinion on the question. "The Common Law right of a landlord to distrain for rent service appears to be restricted at *Common Law* to the taking of a *reasonable distress.* So Lord Coke intimates in his reading on the Statute of Marlbridge c. 4, 2 Inst. 107, which statute, he there says, 'agreeth with the reason of the Common Law.' *But whether the duty to make a reasonable distress be created by the Common Law or by the statute, an action will equally lie, if there be a breath of that duty,* and damage thereby arises to the person on whose goods the distress is made. At Common Law, and when the Statute of Marlbridge passed, a distress could be made only upon movable chattels . . . . . and such as were capable, after they had been detained for an unlimited time as a pledge, of being restored in the same plight and condition to the distrainee; and the damage which was sustained by the latter, by an excessive distress was the loss of the use and enjoyment of the surplus of such goods, which were removed and impounded off his land, for such time as he was deprived of it; and if not restored before action brought, then probably he might claim the full value of such surplus."

According to Coke, approved by Parke, B., the Statute of Marlbridge is declaratory of the Common Law requiring the distress to be reasonable. The ruling of the Courts that the action

must be founded on the statute is referable to the principle of law that, on enactment of the Common Law, the Common Law merges in the enactment.

It is evident that in *Lynne* v. *Moody, Hutchins* v. *Chambers* and *Phillips* v. *Berryman,* Coke's dictum was not brought to the attention of the Court, and assuming distress in this colony to be governed by Common Law we would be inclined to hold that an action at Common Law for excessive distress was maintainable by an injured tenant. In our view, however, distress in this colony is governed by statute. Under chapter 92, section 5 (2), the Magistrate, where the tenant is in default for seven days after the rent has become due, and on the application of the landlord, issues a warrant authorising constable or bailiff to enter the demised premises, and in the presence of the landlord and under his direction, to distrain goods and chattels of the tenant *sufficient* to satisfy the amount due.

The Statute of Marlbridge provides that "distresses shall be reasonable and not too great; and he that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distresses." It is to be noted that the Statute first prohibits excessive distresses, and secondly provides for damages. If, however, the statute had enacted the prohibition only without provision for damages, an action would still, in our opinion, have been maintainable, and for reasons which subsequently appear.

This Court interprets subsection 5 (2) of chapter 92 to mean that no more than a sufficiency of the tenant's goods shall be taken in distraint. A duty is thereby cast on the landlord to take no more than is reasonably necessary to satisfy his debt, or, to put the obligation in another way, a liability is cast on a landlord for excessive distress. If he seizes more than is sufficient to satisfy the debt he commits a breach of the statutory prohibition, and although no remedy is expressly provided by the statute the tenant will still have his action, for where a statute creates a duty and no special remedy is prescribed for punishing its neglect the Courts will presume that the appropriate Common Law remedy was intended to apply. According to Lord Tenterden in the *Bishop of Rochester* v. *Bridges* (1831) 1 B. and Ad. 859 "if an obligation is created, but no mode of enforcing its performance is ordained, the Common Law may, in general, find a mode suited to the particular nature of the case." "The duty of taking a reasonable quantity, which the Law casts on the distrainor, cannot be varied by this extension of his powers; if he takes more, he exceeds his duty; and if damage is caused thereby to the distrainee, it seems to be inconsistent to say that he shall not have a remedy. If there be a breach of duty, and damage thereby, his case falls within the established principle": per Baron Parke in *Piggott* v. *Birtles,* at page 449.

The view that the tenant is entitled to remedy for excessive

distress is fortified by other provisions of chapter 92. The statute gives to the injured tenant an action of replevin (section 10), and an action for double value for distress when no rent is due (section 11). Subsection (4) of section 10 declares that no other cause of action shall be joined in an action for replevin, "but this shall not prevent the party aggrieved from pursuing his remedy under the next ensuing section of this Ordinance, (*i.e.*, action for double value); or *of making any claim for damage he deems fit.*" The concluding words of the subsection are sufficiently comprehensive to include a claim for damages by reason of excessive distress.

Irrespective of section 10 (4) the Court would hold an action maintainable under sec. 5 (2); combined with sec. 10 (4), no doubt is left in our minds that chapter 92 confers a right of action for excessive distress. The form of action is immaterial provided a good cause of action is disclosed by the statement of claim. A landlord may not disregard to any extent the limit set by the statute, sell the goods it may be, and then say to the tenant "you have no remedy". This is not the law as we apprehend it. Whether in any particular case the distraint is excessive is for the trial Court to decide, bearing in mind that "sufficient" distress means goods of such value in the aggregate as may reasonably be estimated to be sufficient when sold to pay the rent due together with all expenses of levy and sale, and that to be excessive a distress must be obviously disproportioned to the rent.

The appeal is allowed with costs. The Court returns the case to the Magistrate and directs him to try the issue raised.

Appeal allowed; case remitted to magistrate.

Solicitors: *H. C. B. Humphrys*, for appellant; *E. D. Clarke* for respondent.

J. MCDAVID *v.* R. N. MCDAVID.

JOSEPHINE MCDAVID, Petitioner,

v.

REGINALD NATHANIEL MCDAVID, Respondent,
and ENID ABBOT, Intervener,

[1940. No. 240.—DEMERARA.]

Before: GILCHRIST, J. (Acting).

1941. MARCH 21, 25.

Matrimonial causes—Jurisdiction of Court—How exercised—According to principles and rules of Probate, Divorce and Admiralty Jurisdiction—In force on December 30, 1916—Matrimonial Causes Ordinance, cap. 143, s. 2.

Matrimonial causes—Dissolution of marriage—Adultery of respondent—Discretionary statement filed by petitioner under seal—Leave given to respondent to inspect and lake notes.

The jurisdiction of the Supreme Court in respect of divorces and other matrimonial causes and disputes, and in respect of declarations as to the legitimacy of a child, and as to the validity of a marriage, in so far as such jurisdiction is exercised in accordance with the principles and rules of the Probate Divorce and Admiralty Division of the High Court of Justice in England, must be exercised in accordance with those principles and rules which were in force at the time, December 30, 1916, when the Matrimonial Causes Ordinance, chapter 143, was passed, and not in accordance with the principles and rules now in force.

Leave granted to respondent through his counsel and/or solicitor to inspect the statement lodged by the petitioner in respect of her prayer for the exercise in her favour of the discretion of the Court, with liberty to make notes as to its contents.

Wife's petition for dissolution of marriage on the ground of the husband's adultery with the intervener.

In her petition she stated no facts upon which the discretion of the Court was to be sought, but she filed a statement under seal, for the inspection only of the Court, in which she asked for the discretion of the Court to be exercised in her favour. The respondent claimed the right to inspect the statement so filed by the petitioner, and to make notes thereof.

S. L. van B. Stafford, K.C., H. B. S. Bollers with him, for petitioner.

J. A. Luckhoo, K.C., A. T. Peters with him, for respondent.

G. M. Farnum, for intervener.

Cur. adv. vult.

GILCHRIST, J. (Acting.): Section *2* of the Matrimonial Causes Ordinance, Chapter 143, with respect to divorces provides that jurisdiction shall as far as possible be exercised in the same manner and in accordance with the same principles and rules as jurisdiction in those matters is exercised by the Probate Divorce and Admiralty Jurisdiction of the High Court of Justice in England, subject to any rules of the Court made under this

Ordinance or the Supreme Court of Judicature Ordinance or any amending Ordinance.

This Ordinance, Chapter 143, was passed in 1916 (30th December, 1916). In 1921 Rules were made under the Ordinance. Nowhere in these rules is there any provision with respect to the lodgment of a statement making full disclosure of misconduct of any party to proceedings instituted for dissolution of marriage in which the discretion of the Court is prayed for to be exercised in their favour.

The important question, is, what principles and rules as exercised by the High Court of Justice in England apply. Is it the rules now in force with respect to such a matter or the rules in force at the time the Ordinance (Chapter 143) was passed? In my opinion it is the Rules that were in force at the time the said Ordinance was passed and not the rules now in force. Had the Legislature intended that the rules at present in force in England were to apply, then it could have made this clear by the use of such words as "for the time being in force" after the word "rules" in the 12th line of the said section.

Having come to this opinion the case of *Sifton* v. *Sifton* (1938) 1 All England Reports p. 109 cited by Mr. Stafford, Counsel for the Petitioner, does not apply to the question calling for determination in the case now before me.

In my opinion the submission on the part of Mr. Luckhoo, Counsel for the Respondent, is sound. I, therefore, grant leave to Respondent through his Counsel and/or Solicitor to inspect the Statement lodged by the Petitioner in respect of her prayer for the exercise in her favour of the discretion of the Court, with liberty to make notes as to its contents: see *Bevis* v. *Bevis* (1935 p. 86.

Solicitors: *R. G. Sharples,* for petitioner.
G. L. Bobb, for respondent.
H. C. B. Humphrys, for intervener.

A. HANIFF *v.* M. HANIFF.

AYESCHA HANIFF, Appellant (Plaintiff),
v.
M. HANIFF, Respondent (Defendant).

[1941. No. 15.—DEMERARA.]

BEFORE FULL COURT: SIR MAURICE V. CAMACHO, C.J.,
FRETZ AND STUART, JJ.

1941. JULY 30; AUGUST 15.

Contract—Loan for purpose of pledge—To redeem and return within reasonable time—Promise not fulfilled—Breach of contract—Damages—Recovery of.
Husband and wife—Action by wife against husband—In detinue—Maintainable.

The appellant lent the respondent, who was her husband, certain articles of jewellery to be pledged by him for his own benefit on a promise by the respondent that he would redeem and return the articles within a reasonable time. The respondent did not fulfil the terms of the agreement made between them. The appellant sued the respondent for damages for breach of contract.

Held (1) that the respondent's failure to redeem the articles constituted a breach of contract for which damages are an appropriate remedy; and

(2) that, assuming, that the facts disclose detinue rather than a breach of contract, detinue is maintainable by a married woman against her husband.

Appeal by the plaintiff from a decision of Mr. C. R. Browne, Magistrate, Georgetown Judicial District, dismissing a claim by her against her husband.

L. A. Hopkinson, for appellant.

E. W. Adams, for respondent.

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

The parties are husband and wife.

The appellant's case before the Magistrate for the Georgetown Judicial District (Civil Jurisdiction) was, in effect, that she lent the respondent certain articles of jewellery to be pledged by him for his own benefit on a promise by the respondent that he would redeem and return the articles to her within a reasonable time, and that the respondent did not fulfil the terms of the agreement made between them.

The Magistrate holding that the facts proved before him disclosed a tort and not a breach of contract, dismissed the claim on the ground that an action in tort is not maintainable by a wife against her husband.

In the view of this Court the action was properly brought for damages for breach of contract. The articles were loaned by the wife to the husband on an agreement that he would redeem them from pawn after he had pledged them. The respondent's failure

to redeem the articles constituted a breach of contract for which damages are an appropriate remedy. Assuming, however, that the facts disclose detinue rather than a breach of contract, detinue is maintainable by a married woman against her husband: *Larner* v. *Larner* (1905) 2 King's Bench 539.

The appeal is allowed with costs, and the respondent is hereby ordered to pay to the appellant the sum of $58.16 by way of damages.

Appeal allowed.

SANTOO, Appellant (Defendant),

v.

SURSATTIE, Respondent (Complainant).

[1941. No. 35.—DEMERARA..]

BEFORE FULL COURT: SIR MAURICE V. CAMACHO, C.J., FRETZ and STUART, JJ.

1941. JULY 30, 31; AUGUST 15.

Husband and wife—Desertion of wife—Complaint for—Subsequent cohabitation—Condonation—Desertion blotted out by—Subsequent desertion—Proceedings on complainant terminated by condonation.

A wife, alleging desertion, summoned her husband for maintenance. She then returned to her husband, lived with him as man and wife, and condoned the desertion. However, before the summons was heard, the husband again deserted the wife.

Held, that the condonation blotted out the desertion existing at the time of the summons, and put an end to the proceedings instituted by the summons.

Appeal by the defendant Santoo from a decision of Mr. C. R. Browne, Magistrate, East Demerara Judicial District, ordering him to pay a weekly sum to his wife, the complainant Sursattie, for her maintenance.

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

C. A. Burton, for respondent.

Cur. adv. vult.

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

The parties are husband and wife.

The respondent charged the appellant with desertion before the Magistrate of the East Demerara Judicial District.

At the trial the following facts were disclosed. The parties were married in July, 1939, and thereafter lived at Nabaclis with the parents of the appellant. On account of her ill-treatment by the appellant the respondent left him in December, 1939. Subse-

quently the respondent returned to the appellant and on the 8th of February, 1940, by reason of further illtreatment she again left him (in this judgment referred to as the first desertion). On the 28th of February, 1940, she summoned the appellant for desertion. After the issue of the summons and before the Magistrate adjudicated, the respondent returned to him and lived with him as man and wife. He again illtreated her and she left him (in this judgment referred to as the second desertion). The evidence of the respondent herself makes it abundantly clear that she condoned the first desertion.

It was argued by learned counsel for the respondent, that condonation of the first desertion did not put an end to the proceedings instituted by the summons in respect of that desertion inasmuch as the second desertion revived the first. Learned counsel referred the Court to *Houghton* v. *Houghton* (1903) P. 150 in which it was held that desertion after condonation of adultery revives the adultery, condonation being rightly regarded as conditional on future good behaviour.

This Court does not dispute the authority, or that desertion after condonation revives adultery. The reason of the decision is that in the case of adultery condonation being conditional the breach of the condition by desertion would deprive the injured spouse of his or her remedy for the adultery unless the desertion revived the adultery. In the case of desertion following condonation of a previous desertion different considerations apply. Every desertion gives rise to the same remedy and there would be no justification for, or point in, revival of desertion by desertion after condonation: *Williams* v. *Williams* (1904) P. 145. In this case the respondent condoned the desertion. She should have withdrawn her summons and issued another in respect of the second desertion.

In the view of this Court condonation in the circumstances mentioned blotted out the first desertion and put an end to the proceedings instituted by the summons.

The appeal is allowed without costs.

Appeal allowed.

MANGROO *v.* L. POLLYDORE.

MANGROO, Appellant (Defendant),
v.
L. POLLYDORE, P.C. 2696, Respondent (Complainant).

[1941. No. 36.—DEMERARA.]

BEFORE FULL COURT: SIR MAURICE V. CAMACHO, C.J., and STUART, J.

1941. AUGUST 1, 15.

Evidence—Distillery apparatus—Used or capable of being used for the manufacture of spirits—Evidence as—Expert evidence not required.

There is no rule of law, general or particular, which requires that, where a person is charged for being found in the custody of distillery apparatus for the manufacture of spirits, expert evidence should be called, on behalf of the prosecution, to depose as to whether the articles produced are articles used, or capable of being used, in the distillation of spirits.

Appeal by the defendant from a decision by Mr. L. M. F. Cabral, Magistrate, East Demerara Judicial District, convicting him of being found in the custody of distillery apparatus for the manufacture of spirits.

W. J. Gilchrist, for appellant.
S. E. Gomes, Assistant Attorney-General, for respondent.

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

The appellant was convicted by the Magistrate for the East Demerara Judicial District, of being found in custody of a quantity of distillery apparatus for the manufacture of spirits, contrary to section 108 of chapter 110.

On the 29th November, 1940, the respondent executed a search warrant at Veereniging at the premises of the appellant, and discovered under the bed in the house a coil, a retort, a rectifier and two pieces of brass piping, well greased, and concealed by rice sacks. In a ditch about 12 feet from the house, an empty drum, the underside blackened and charred as though it had been exposed to fire, was found.

The appellant claimed all the articles as his property. These articles are in evidence and when assembled together constitute without any shadow of doubt, an illicit still. The appellant appeals from his conviction,

The notice of grounds of appeal contains a number of objections to the conviction. In this Court, however, the appellant's

counsel relied upon one ground only. He submitted that there was no proof that the appellant had in his custody a distillery apparatus as defined by chapter 110 for the manufacture of spirits.

The respondent giving evidence in the magisterial court stated that in the course of his duties he had often dealt with apparatus for the distillery of spirits, and that the articles he found and produced in evidence "are articles used in the manufacture of spirits known as bush rum."

It was submitted by learned counsel for the appellant that the prosecution should have called expert evidence to depose as to whether the articles produced are articles used, or capable of being used, in the distillation of spirits; that the respondent is not an expert, that the best evidence was not called, and therefore the conviction should be quashed. There is no law, general or particular, which requires expert evidence on such a question. The respondent was speaking from his own knowledge, he was deposing as to fact, and not expressing an opinion. One glance at the articles assembled together would carry conviction to the mind of the least experienced that the articles are such as are used in the distillation of spirits. They could have no other purpose.

The appeal is dismissed with costs.

Appeal dismissed.

O. C. PROFEIRO *v.* T. A. MENTIS.

O. C. PROFEIRO, Appellant, (Defendant),
v.
T. A. MENTIS, L.S.M., Respondent (Complainant).

[1941. No. 59A—DEMERARA.]

BEFORE FULL COURT: SIR MAURICE V. CAMACHO, C.J., and STUART, J.

1941. JULY 31; AUGUST 15.

Criminal law and procedure—Explosives—In room where no access to public—Not publicly exposed for sale—Explosives Ordinance, cap. 74, s. 22.

Explosives were discovered on the premises in a room adjoining, but separated by a partition from, the shop. The only means of communication with the shop was a door which leads from the room to the shop. Members of the public frequenting the shop did not have access to the room in which the explosives were found.

Held, that, having regard to the place and manner in which the explosives were kept, they were not publicly exposed for sale within the meaning of section 22 of the Explosives Ordinance, chapter 74.

Appeal by the defendant from a decision of Mr. W. T. Lord, Magistrate, North West Judicial District, convicting her of an offence under section 22 (*b*) of the Explosives Ordinance, chapter 74. The facts appear from the judgment.

L. M. F. Cabral, for appellant.
S. E. Gomes, Assistant Attorney-General, for respondent.

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

The appellant was charged before the Magistrate for the North West Judicial District, for that being a retail dealer in explosives, she publicly exposed for sale a quantity of explosives in a package which did not have affixed the word "EXPLOSIVE" in conspicuous characters by means of a brand or securely attached label or other mark, contrary to section 22 of chapter 74.

On the 30th September, 1940, the appellant was the holder of a licence under section 16 of chapter 74 to sell, or expose for sale, by retail, explosives, and for which she had paid the licence duty of $4 as required by section 36 of Ordinance No. 48 of 1939. The licence refers to the "Arms and Ammunition Ordinance Chapter 75", manifestly a mistake in its intended reference to the Explosives Ordinance, Chapter 74, and we therefore do not attach any importance to the submission based on the error.

On the day mentioned the shop of the appellant at Morawhanna in the North West District was searched and here was

found a quantity of explosive substances contained in packages, the outer surface of which did not have the word “Explosive” affixed thereto.

It was not clear from the evidence adduced before the Magistrate precisely where on the premises the explosives were found. The evidence for the prosecution suggests that they were found in the shop portion of the premises. The Magistrate convicted the appellant who now appeals to this Court.

During the argument before this Court the learned Assistant Attorney-General, who appeared to support the conviction, admitted that the explosives were discovered on the premises in a room adjoining, but separated by a partition from, the shop, and that the only means of communication with the shop is a door which leads from the room to the shop. It was further admitted that the public frequenting the shop do not have access to the room in which the explosives were found.

The section under which the appellant was convicted requires the outermost package containing explosives to be conspicuously labelled when publicly exposed for sale or sold. It is not suggested that the explosives were sold, and this Court, having regard to the place and manner in which the explosives were kept, cannot agree that they were publicly exposed for sale within the meaning of section 22 of chapter 74.

The appeal is accordingly allowed and the conviction quashed, with costs.

Appeal allowed.

DEM. ELEC. CO., LTD. *v.* COM. OF INCOME TAX.

DEMERARA ELECTRIC CO. LTD., (Appellants),

v.

COMMISSIONERS OF INCOME TAX, (Respondent).

[1939. No. 106.—DEMERARA.]

BEFORE FULL COURT: CAMACHO, C.J., FRETZ AND STUART, JJ.

1941. MAY 30; AUGUST 29.

Income tax—Expenditure—Capital or revenue—Moneys expended—Once and for all—To acquire an asset, a right, of enduring nature to trade of electric company—To secure cancellation, sterilisation and extinguishment of scheme of Town Council to generate its own electricity—Consideration—Electric company to supply electricity to Council for 15 years—Company to re-imburse Council in respect of liabilities incurred through change of plan to generate its own electricity—Payments in connection therewith calculated by reference to value of works sterilised—Business of electric company expanded—Payments—Nature of Capital expenditure—Not expenditure earning income—Income Tax Ordinance, cap. 38, s. 10.

In 1899, the appellants, whose trade is to generate and supply electric power, obtained a franchise, under the Electric Lighting Ordinance, chapter 78, to supply electricity for a period of thirty years. Thereafter, they supplied the Georgetown Town Council with current for lighting of the city of Georgetown. In 1923 or 1924 the Council resolved to instal a sewerage system and to reconstruct its Water Works. Consequential on these projects, the Council entered into contracts with third parties for the supply of materials and equipment and for the construction of the undertakings. In connection with the schemes the Council decided to erect their own electrical plant to generate and supply power essential to the undertakings.

The currency of the appellants' franchise was due to terminate in the year 1930, but, in terms of the Ordinance, they might apply for extension of the period, or, if Government so decided, dispose of their undertaking to Government. In due time the appellants requested enlargements of their franchise, and negotiations thereupon ensued between them and the Town Council ending in an indenture of agreement dated 28th September, 1927, and expressed to be made between the Mayor and Town Council of Georgetown and the appellants.

The indenture witnessed that in consideration of the Council altering its original plans for sewerage and water works the appellants agreed:—

(*a*) to pay for all material and equipment ordered by the Council for the reconstruction of the water works, which consequent on the adoption of the new scheme could not he utilised, or which the Consulting Engineer decided would not be required:—

(*b*) to indemnify the Council against all damages and liabilities, present and future, which the Council had incurred, or might incur, in relation to the installation of the sewerage system or on account of the non-execution of work under the Main Drainage Contract or under any contract in connection with the original scheme for the reconstruction of the Water Works;

(*c*) to re-imburse the Council expenses and professional fees paid or payable to the Council's Consulting Engineer;

(*d*) to pay to the Council all monies payable by the Council to the contractors under the Main Drainage Contract.

In consideration of the appellant's obligations, the Council contracted to take electric power from the appellants for a period of 15 years for the purpose of operating the Sewerage System and Water Works and to pay for the power supplied on terms specified in clause 5 of the agreement.

Under the covenants of the agreement the appellants paid away in 1927 and 1930 sums of money aggregating $61,404.96, and proceeded to amortise the said sum over a period of 15 years, the currency of the contracts. In

1934 they wrote off, against profits of that year, $20,468.34 representing 5/15ths of their aggregate expenditure, and in each of the years 1934 to 1937 they wrote off, against the annual profits, the sum of $4,093.66 or 1/15th of the said expenditure. This method of dealing with the aggregate of their payments was only disclosed to the Commissioners of Income Tax in the appellants' accounts for the year ended 31st December, 1937, and was then questioned. The appellants thereupon claimed the disbursement to be expenditure earning income, and that, in accordance with the practice of the Commissioners, it should be spread over 15 years, the contract period, and that 1/15th of the amount, namely, $4,093.66, should be allowed as deduction in each year of assessment. Alternatively, they claimed that the aggregate sum would be exhausted at the expiration of the 15 year period, and that 1/15th part of the sum should in each year be deducted for exhaustion of their property. The Commissioners disallowed the claim. The appellants thereupon appealed to a judge in chambers, who held that the expenditure was revenue, and not capital expenditure, but that it could not be allowed as the claim was out of time. The appellants appealed, by way of case stated, to the Full Court. At the hearing before Full Court, the only question argued was whether the expenditure was capital, or revenue, expenditure.

Held, (1) that the moneys paid by the appellants to the Council were not expended in the production of electricity supplied or to be supplied to the Council;

(2) that the expenditure was not incurred for the purpose of keeping a profit-yielding subject, in a profit-yielding condition, during the year in respect of which the tax was chargeable;

(3) that exhausted expenditure cannot be brought in as a debit against the assets of the year;

(4) that the consideration received by the Council for abandoning their project to generate its own electricity for sewerage and water works purposes, was payment of their liabilities by the electric company; and the consideration received by the appellants was acquisition of unwanted material and equipment (subsequently re-sold by them), and the acquisition of the right to supply electricity to the Council, whereby the sale of the appellant's current would be promoted and increased;

(5) that the payment of the sum of $61,404.96 was made by the appellants to the Council—

(i) once and for all;

(ii) to acquire an asset, a right, of enduring benefit to the trade of the appellants;

(iii) to secure the cancellation, and sterilisation, by the Council of their scheme to generate electricity for the purpose of their sewerage and water undertakings, and to extinguish that scheme of the Council, in order that the appellants might supply electric power to the council for a period of 15 years;

(iv) to acquire rights enabling expansion of the appellants' business;

(v) to increase the total demand for electricity by the whole amount of the Council's requirements in connection with the sewerage and water works.

(6) that the payment to the Council brought into existence an enduring advantage for the benefit of the trade of the appellants;

(7) that the appellants acquired, as of right, by the payment and the agreement, the whole custom of the Council for 15 years;

(8) that the payments were calculated by reference to the value of the works sterilised, stated in terms of the price of unwanted equipment, and liabilities incurred by the Council;

(9) that every element of the transaction denoted expenditure by the appellants for the purpose of abrogating competition, of extending their business, and of acquiring the right to supply their commodity to the Council for a substantial number of years;

(10) that the appellants' expenditure was capital expenditure, a capital price paid to acquire rights of enduring nature, and not expenditure earning income.

Appeal by the Demerara Electric Company Limited by way of case stated under section 45 (10) of the Income Tax Ordinance, Chapter 38, from a decision of Langley, J.

The Demerara Electric Company, Limited had appealed to a judge in chambers against the decision of the Commissioners of Income Tax confirming an assessment made upon the company for the year of assessment 1938 upon the income derived by the company during 1937.

The grounds of appeal were as follows:—

1. The appellants for the purpose of obtaining a contract with the Mayor and Town Council of Georgetown for the supply of electric energy for a period of 15 years from the 28th day of September, 1927, paid out in the months of November and December, 1927, and in the month of November, 1930, the sum of $61,404.96 in the aggregate to the Crown Agents, the said Council and other parties by way of re-imbursement and indemnity to the said Council for and in respect of liabilities incurred by the said Council in connection with a plant which the said Council proposed to erect for generating electricity instead of obtaining such electricity from the appellants.

2. The appellants have amortized the said sum of $61,404.96 over a period of 15 years being the period of the said contract, and have charged the sum of $4,093.66, being one-fifteenth of the said sum of $61,404.96 as an expense of their business for the year ending 31st December, 1937.

3. The said assessment is erroneous because the said sum of $4,093.66 is an outgoing wholly and exclusively incurred during the year 1937 within the meaning of section 10 of the Income Tax Ordinance, Chapter 38, and within the principle of spreading expenditure recognized and adopted by the Commissioners, and should have been allowed by the Commissioners as a deduction under the said section.

4. In the alternative, the said assessment is erroneous because if the said sum of $61,404.96 is capital which is not admitted then the said capital is exhausted within 15 years and the sum of $4,093.66 is a reasonable amount to be deducted each year for the exhaustion of such property for the year and should have been allowed by the Commissioners as a deduction under section 11 of the said Ordinance.

5. The said assessment is also erroneous because the gains or profits from the appellants' business for the year 1937 cannot be truly ascertained without allowing the said deduction of $4,093.66 which is not a deduction disallowed by section 12 of the Ordinance.

The statement by the Commissioners of Income Tax of the material facts upon every point specified in the summons as a ground of appeal together with the reasons in support of the assessment was a follows:—

1. The appellants have been assessed to income tax for the year of assessment 1938 upon the income derived by the appel-

lants during the year 1937 from the gains or profits arising from the business of generating and supplying electricity.

2. In ascertaining the chargeable income the Commissioners have disallowed as a deduction from the gains or profits the sum of $4,093.66 being one-fifteenth part of a net sum of $61,404.96 expended by the appellants partly in the year 1927 and partly in the year 1930 in the circumstances hereinafter set out.

3. Under an indenture made on the 28th day of September, 1927, between the Mayor and Town Council of Georgetown on the one hand and the appellants on the other hand, the Town Council agreed—

(*a*) to cancel its original plan to instal an electric power generating plant and oil engines for the purpose of operating the pumps of the Water and Sewerage system of the City of Georgetown.

(*b*) to arrange instead for the supply of electric power by the appellants for the aforesaid purposes for a period of 15 years subject to the right of the Town Council to renew the contract for another period of 15 years or for any shorter period upon such terms as may be agreed upon between the parties.

4. In accordance with clause 2 of the said indenture the appellants partly in the year 1927 and partly in the year 1930 paid for the machinery referred to in sub-clause (A) and made payments under sub-clauses (B) to (D) in discharge of various liabilities which had been incurred by the Town Council in connection with its original plan.

5. The machinery paid for by the appellants in accordance with sub-clause (A) of clause 2 of the said Indenture was sold by the appellants and was never used by them in their business.

6. The net sum expended by the appellants under sub-clauses (A) to (D) of clause 2 of the said indenture (after deducting the sum realised by the sale of the machinery) was $61,404.96. This sum of $61,404.96 was originally charged by the appellants against the surplus account in the books of the appellants' head office in Canada, but in the year 1934 this sum was transferred to the debit of the account "Deferred Charges" in the books of the appellants in British Guiana. Of this sum the appellants wrote off against the operating profits of the year 1934:—

(1) 5/15 of $61,404.96 applicable to years ended 31st December 1933, viz.	... $ 20,468 34
(2) 1/15 of $61,404.96 charged to operating expenses 1934, viz.	4,093 66
	$24,562 00
leaving a balance at debit of "Deferred Charges" of	..36,842 96
	$61,404 96

7. Of this balance of $36,842.96 the appellants wrote off against the operating profits of each of the years 1935, 1936 and 1937 the sum of $4,093.66, that is to say, $12,280.98 altogether.

8. The Commissioners first became aware of these charges made by the appellants against operating profits when the accounts of the appellants for the year 1937 were being examined for the year of assessment 1938. Thereupon the Commissioners disallowed the sum of $4,093.66 as a deduction in ascertaining the income of the appellants for the year of assessment 1938, and acting under the provisions of section 41 of the Income Tax Ordinance, made additional assessments upon the appellants for the years of assessment 1936 and 1937 in respect of similar sums written off by the appellants against profits in their accounts for the years 1935 and 1936, respectively, but on account of the time limit imposed by section 41 of the Income Tax Ordinance the Commissioners were unable to make additional assessments upon the appellants for the year of assessment 1935 in respect of the sum of $24,562 written off by the appellants against operating profits in the year 1934 as explained in paragraph 6 hereof.

9. The appellants contend—

(*a*) that the said sum of $4,093.66 is an outgoing wholly and exclusively incurred during the year 1937 and should be allowed as a deduction in ascertaining the chargeable income under section 10 of the Ordinance.

(*b*) alternatively, that the said sum of $4,093.66 is a reasonable amount to be allowed as a deduction under section 11 of the Ordinance for the exhaustion of the property acquired by the appellants by reason of the aforesaid expenditure of $61,404.96 incurred by the appellants in the years 1927 and 1930 in terms of the indenture of the 28th September, 1927.

10. The Commissioners say—

(*a*) that the said sum of $4,093.66 is not an expense wholly and exclusively incurred during the year of assessment in the production of the income assessable to tax within the meaning of section 10 (1) of the Ordinance.

(*b*) that the said sum of $4,093.66 (or any other sum) cannot be allowed as a deduction for exhaustion of property with respect to the aforesaid expenditure of $61,404.96, because—

(i) there has not been in fact any exhaustion of any property owned by the appellants;

(ii) there has not been in fact any exhaustion of property acquired and owned by the appellants by reason of the said expenditure;

(iii) the alleged exhaustion did not arise—

(A) out of the use or employment of the property in the appellants' business: or

(B) during the year immediately preceding the year of assessment,

11. There is annexed hereto (reproduced so far as is material) as part of this statement a copy of the indenture made on the 28th September, 1927, between the appellants and the Mayor and Town Council of Georgetown.

The indenture, so far as its terms are material to the present case, was as follows:—

This indenture made on this 28th day of September, in the year One Thousand Nine Hundred and Twenty-seven, at the Town Hall, in the City of Georgetown in the County of Demerara, in the Colony of British Guiana, Between the Mayor and Town Council of Georgetown incorporated by the Georgetown Town Council Ordinance 1918 (hereinafter called "The Council") of the one part and the Demerara Electric Company Limited incorporated by the Demerara Electric Company Ordinance 1899, having an office at Company Path, South Cummingsburg in the City of Georgetown aforesaid (hereinafter called "The Company") of the other part.

Whereas the Council is effecting certain City Improvement Works including the installation of a Sewerage System and the re-construction of its Water Works and requires a suitable supply of electric power for the purpose of operating the pumps of the said Sewerage System and of the said Water Works

And whereas the Council had commenced the execution of the said works on a plan designed by Howard Humphreys & Sons of London, England, where-under the Council had proposed to install an electric power generating plant for the purpose of operating the pumps of the said Sewerage System and water pumps driven by oil engines at the said Water Works.

And whereas the Company has proposed to the Council an alteration of its original plan and the entering into a contract with the Company for the supply of all the electric power required for the purpose of operating the said sewerage pumps as well as its water pumping plant by electric power to be supplied by the Company upon certain terms, agreements, conditions and stipulations.

And whereas the Council has agreed to alter its original plan upon certain indemnities to be given by the Company to the Council and upon the terms agreements, conditions and stipulations hereinafter set forth, and on the twenty-first day of August, 1925 entered into provisional agreement with the Company providing for the supply of electric power for the purpose aforesaid.

NOW THEREFORE THIS INDENTURE WITNESSETH AS FOLLOWS:—

1. *Interpretation of terms.*—(A) The words terms and expressions "The Company," "The Council," "City," "The appointed day," "Water Works," "Sewerage System," shall have the meanings assigned to them by Section 2 of the Georgetown Electric Supply and Tramways Ordinance, 1926, or any amendant thereof.

(B) The following words and expressions shall have the meanings hereby assigned to them:—

"New Scheme" means the scheme which cancels the proposal to install an electric power generating plant for the purpose of operating the pumps of the sewerage system and which proposes the installation of a number of electrically driven water pumps at the Water Works substituted in place of the oil engine driven pumps originally proposed to be installed by the Council in pursuance of a report by Howard Humphreys & Sons dated the twenty-first day of July, 1923.

"Government" means the Government of the Colony of British Guiana.

"Main Drainage Contract" means the contract for the installation of a sewerage system in the City executed between His Excellency Sir Graeme Thomson on behalf of the Colony of British Guiana and the Council of the one part and J. L. Wild & Company, Limited, of the other part dated the tenth day of July, 1923.

"The contract period" means a term of fifteen years certain commencing from the appointed day [that is to say, the 29th September, 1928.]

"Resident Engineer" means the engineer for the time being appointed by Government and/or the Council to supervise the installation of the Sewerage System.

"Consulting Engineer for the Water Works" means the engineer for the time being appointed by the Council to supervise the re-construction of the Water Works.

2. *Covenants by Company to purchase unwanted machinery and to indemnify Council.*— In consideration of the Council altering its original plan for operating the pumps of the Sewerage System and of the Water Works and also in consideration of the mutual covenants and agreements hereinafter contained the Company hereby agrees with the Council as follows:—

(A) To take delivery in England and elsewhere and to pay for at cost all material comprising oil engines and all machinery, accessories buildings and erections therewith connected already ordered from or manufactured by any contractor or sub-contractor in connection with the original plan of the Council for the reconstruction of the Water Works which said material has not been utilised by the Council in consequence of the adoption of the new scheme or which in the opinion of the Consulting Engineer for the Water Works will not be required at the Water Works in consequence of the adoption of the new scheme. The material which the Company may be liable to purchase in pursuance of this sub-clause is hereby limited to the material listed in the schedule annexed to and bound up with these presents.

(B) To pay to the Council all damages and liabilities which the Council has incurred or which may be incurred by the Council solely or by the Council and Government jointly as co-parties to the installation of the Sewerage System or which may be lawfully claimed or assessed against the Council solely or against the Council and Government jointly on account of the non-execution of any work under the Main Drainage Contract by reason of the adoption of the new scheme or on account of the non-performance by the Council of any obligation under any contract with Worthington Simpson Limited in connection with the original plan of the Council for reconstruction of the Water Works in consequence of the adoption of the new scheme including all reasonable law costs, charges and expenses incidental thereto which the Council solely or the Council and Government jointly have paid or are liable or may become liable to pay.

(C) To reimburse and repay to the Council all reasonable testing and other charges or professional fees paid or payable by the Council solely or by the Council and Government jointly to Howard Humphreys & Sons in respect of their examination and report upon any machinery already ordered for the reconstruction of the Water Works and upon the proposal to provide a suitable supply of electric power under this contract and to the Resident Engineer in respect of similar work done by him in the City and also to Howard Humphreys & Sons and/or to the Consulting Engineer for the Water Works in respect of all additional work performed in consequence of the adoption of the new scheme. The charges and professional fees which the Company may be liable to reimburse and repay to the Council in pursuance of this sub-clause are hereby limited to those sums which may be in excess of the liability of the Council to Howard Humphreys & Sons and to the Resident Engineer under the original plan of the Council to install an electric power generating plant for the purpose of operating the pumps of the sewerage system and water pumps driven by oil engines at the Water Works.

(D) To pay to the Council all sums of money payable by the Council solely or by the Council and Government jointly to J. L. Wild & Company Limited, or to any assignee of the Main Drainage Contract or to any contractor or sub-contractor from whom any plant or machinery in connection with the original plan of the Council for the reconstruction of the Water Works may have been ordered as, and, for interest on purchase money, insurance, storage, or other charges arising out of delay on the part of the Council solely or the Council and Government jointly to take delivery of any such machinery or part thereof at the time when any such contractor or sub-contractor was ready to deliver the same. Provided that all claims end demands in respect of any such interest, insurance, storage, or other charges which may be made by any such contractor or sub-contractor after the execution of this contract shall be submitted by the Council to the Company before payment is made, and the Council shall be entitled in its own judgment to pay the same unless the Company shall within thirty days from the date of the notification by the Council of such claim or demand request the Council to contest any such claim or

demand in which case the Council shall be obliged at the cost and expense of the Company to contest such claim or demand according to law.

(E) The liability of the Company under subclause (A) of this Clause shall not exceed in the aggregate the sum of seventy-four thousand dollars ($74,000) current money of the Colony and under sub-clauses (B), (C), (D) of this Clause the sum of twenty-six thousand dollars ($26,000).

4. *Supply of power during the contract period.* The Council hereby covenants and agrees to take, and the Company hereby covenants and agrees to supply to the Council daring the contract period all the electric power required by the Council for the purpose of operating the electrically driven pumps of the sewerage system and of the Water Works and for illuminating and ventilating the several pumping stations of the said Sewerage System and the said Water Works and for all other purposes connected with the operation of the sewerage system and/or of the water works and for the Council's workshop at the Water Works and if the Council shall hereafter install any surface drainage pump or pumps for the purpose of disposing of surface waters and of "efficiently draining the City and shall require a suitable supply of electric power for the purpose of operating any such surface drainage pumps the Company shall upon the requisition of the Council and upon such terms as may be agreed between the parties, supply all the electric power required for the purpose of operating the electric motors or any such surface drainage pumps and for all purposes connected with their operations. The Council hereby further agrees that no motive power other than electric power supplied by the Company shall be utilised for the purpose of operating any of the pumps of the Sewerage System or of the Water Works except in the event of default in the supply of electric power and then only for the duration of any such fault.

21. *Council's right to renew contract.* Upon the expiration of the contract period the Council shall have the right to renew this contract on a notice in writing of its intention given by the Council to the Company six months prior to such expiration requiring the Company to supply electric power for the purposes aforesaid for another period of fifteen years or for any shorter period upon such covenants, terms, agreement or stipulations as may be then mutually agreed upon by and between the parties.

The appeal was heard before Langley, J., in Chambers on the 26th day of June, 1939, and decision was given on the 16th February, 1940, dismissing the appeal with costs. The Judgment is reported at (1940) L.R.B.G. 49.

The case stated by the judge on April 26, 1940 was as follows:—

1. This is a special case stated pursuant to section 45 (10) of the Income Tax Ordinance, Chapter 38.

2. The facts are as follows:—

(1) The Appellants for the purpose of obtaining a Contract with the Mayor and Town Council of Georgetown for the supply of Electric Energy for a period of 15 years from the 28th day of September, 1927, paid out in the months of November and December, 1927, and in the month of November, 1930, the sum of $61,404.96 in the aggregate to the Crown Agents, the said Council and other parties, by way of reimbursement and indemnity to the said Council for and in respect of liabilities incurred by the said Council in connection with a plant which the said Council proposed to erect for generating electricity instead of obtaining such electricity from the Appellants.

(2) The Appellants decided to amortize the said sum of $61,404.96 over a period of 15 years being the period of the said contract, and charged the sum of $4,093.66, being one-fifteenth of the said sum of $61,404.96 as an expense of their business in

each year commencing from the year 1934, and did so for the year ending 31st December, 1937.

(3) The Commissioners only became aware of the charge of $4,093.66 in the annual operating expenses of the Appellants when examining their returns for the year ending 31st December, 1937.

(4) The Appellants claimed that the said sum of $4,093.66 was an outgoing wholly and exclusively incurred during the year 1937 within the meaning of section 10 of the said Ordinance and within the principle of spreading expenditure recognised and adopted by the Commissioners and was deductible under the said section from the chargeable income of the Appellants for the year of assessment ending 31st December, 1938.

(5) The Appellants further claimed in the alternative that the said sum of $61,404.96 would be exhausted within 15 years and that the said sum of $4,093.66 was a reasonable amount to be deducted each year for the exhaustion of such property and should be allowed as a deduction under section 11 of the said Ordinance,

(6) The Commissioners rejected the said claims on the ground that the said sums of $4,093.66 and $61,404.96 were capital expenditure, alternatively, that there had been no exhaustion of property within the meaning of section 11 of the said Ordinance.

3. I, the Judge who heard the appeal from the decision of the Commissioners, held—

(i) that the claim of the appellants was out of date;

(ii) that had the above items of expenditure been entered punctually in the accounts of the appellants as trade expenses when they were incurred, they would have been proper charges under the Ordinance; and

(iii) that section 11 was not in any case applicable to the claim and as more fully set out in my decision, and I accordingly confirmed the assessment.

4. The Appellants on the 22nd February, 1940, applied to have a case stated and this case is stated accordingly.

5. The questions of law for the opinion of the Full Court are as follows:—

(1) Whether the claim of the Appellants is out of time, and

(2) Whether the said sum of $4,093.66 can be properly allowed as a deduction from the chargeable income of the appellants for the year of assessment ending 31st December, 1938, either as an outgoing under section 10 or as allowance in respect of the exhaustion of property under section 11 of the said Ordinance.

6. Copy of judgment embodied in this case.

H. C. Humphrys, K.C., for appellant company. The appeal raises two questions, but in view of the decision of the Court on

on May 23, 1941, in the appeal *Corentyne Sugar Company, Limited* v. *Commissioners of Income Tax* (1941) L.R.B.G, *supra* on the question of exhaustion of property, that point will not be argued. The argument will be confined to the question as to whether the expenditure is capital or revenue expenditure.

In 1899 the appellant company obtained a franchise for the supply of electricity for 30 years. By virtue thereof electricity was supplied to the Mayor and Town Council of Georgetown for the lighting of the town up to the time of the contract in this case

In 1923 the Council decided to instal a sewerage system in the city of Georgetown. At that time the company was generating electricity for private and public purposes. The council decided that they would generate their own electricity with their own plant for their sewerage system.

The company's franchise was due, in the ordinary course of events, to expire in 1930. The company decided to apply for a new Electric Lighting and Supply Order, it proceeded to negotiate for about 3 years with the Council, and eventually terms were arrived at.

The Council said to Company "we have incurred expenditure with respect to the plans which we had to generate our own electricity, and we have committed ourselves to certain expenditure." After much discussion, agreement was reached and the terms are set out in paragraph 2 of the contract made on the 28th day of September, 1927, between the Mayor and Town Council of Georgetown and the Demerara Electric Company, Limited. The company agreed to take over the obligations of the Council arising out of orders in England and elsewhere given by the Council. The machinery not used by the Council in British Guiana was sold by the Council, and the purchase price credited to the Company.

The only business of the company was to supply electricity.

The expenditure was expenditure solely incurred in the business of the company, and was entirely revenue, and not capital expenditure. It was incurred in 1927 and in 1930.

The total amount which the company had to pay (after deducting the moneys realised from sale of the machinery already ordered by the Council) was $61,404.96.

The company charged this amount of $61,404.96 against the surplus account in the books of the company's head office in Canada, In 1934 the company transferred the said sum to the debit of the account "Deferred Charges" in the books of the company in British Guiana. In 1934 the company wrote off 5/15 of $61,404.96 or $20,468.34 for the 5 years ending December 31 1933, at the rate of $4,093.66 per annum: the company also wrote off 1/15 of $61,404.96 or $4,093.66 for the year 1934.

Income Tax was first paid in the Colony in 1929 in respect of income earned in 1928.

The sums written off in 1934 were not challenged by the Commissioners at the time.

Mr. Justice Langley held that the expenditure was revenue expenditure and his decision on that point was correct.

The company was not commencing business, the contract with the Council merely augmented and enhanced the business of the electric company. The company acquired a contractual right which brought in revenue. The acquisition of the contract with the Mayor and Town Council of Georgetown, was merely an incident in the business. The business of the company could still be carried out if the contract had not been obtained. The expenditure was not for the initiation of the business, or for the extension of a business, it was only for the enhancement of a business. He referred to section 5 (e) of the Electric Lighting Ordinance, Chapter, 78, and to the following cases: *Commissioners of Inland Revenue* v. *Adams* (1928) 14 Tax Cases 34, 40, *per* Lord President Clyde; *Morley* v. *Lawford* (1928) 14 Tax Cases 229, 240; *Stott* v. *Hoddinott* (1916) 7 T.C. 90; *Commissioners of Inland Revenue* v. *Granite City Steamship Company* (1927) 13 Tax Cases 1, 14, 15, *per* Lord Sands; *Marsden and Sons, Ltd.* v. *Commissioners of Inland Revenue* (1919) 12 T.C. 217; *Anglo-Persian Oil Co. Ltd.* v. *Dale* (1932) 145 L.T. 529, 532 534.

E. M. Duke, acting Assistant Attorney-General, for the respondent. The expenditure in question was capital and not revenue expenditure. Where money has been expended for the purpose of securing a contract, such money has been utilised for capital expenditure: *Stott* v. *Hoddinott* (1916) 7 Tax Cases 85, *per* Atkin, J. In *Morley* v. *Lawford & Co.* (1928) 14 Tax Cases 229, 238, 241, 242, moneys were paid in the hope that a contract might result, and the Court of Appeal decided that in such a case it was primarily a question of fact for the Commissioners as to whether the money was expended wholly and exclusively for the purpose of trade. In *Commissioners of Inland Revenue* v. *Hagart and Burn-Murdoch* (1929) 14 Tax Cases 427, 442, Lord Buckmaster pointed out that *Morley* v. *Lawford,* where moneys paid under a guarantee given for the express purposes of obtaining trade were held properly deducted, depended largely upon the very express findings of fact of the Commissioners that the monies were expended "wholly and exclusively for the purposes of trade."

The company expended the sum of $61,460.96 in order to secure a 15-year contract for the supply of electric energy and power; that is to say, the money was expended once and for all, and in order to secure an advantage for the enduring benefit of a trade. When an expenditure is made, not only once and for all, but with a view to bringing into existence an advantage for

the enduring benefit of a trade, there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital: *Atherton* v. *British Insulated and Helsby Cables, Limited,* (1925) 10 T.C. 155, 192, *per* Viscount Cave, and *Collins* v. *Adamson* (1937) 21 T.C. 400, 406, 407, 408.

The sum of $61,460.96 was expended by the company for the purpose of the initiation of a business, namely, that of supplying the Town Council with electric energy and power for their water and sewerage undertakings for a period of 15 years. Broadly speaking, outlay is deemed to be capital when it is made for the initiation of a business, for the extension of a business, or for a substantial replacement of equipment: *Commissioners of Inland Revenue* v. *Granite City Steamship Company, Limited* (1927) 13 T.C. 14, 15, *per* Lord Sands.

The electric company could not begin the business of supplying the Town Council with electric energy and power for its water and sewerage undertakings unless and until the Town Council had agreed to cancel its original plan to generate such electricity itself, and in order to secure such cancellation the company had to agree to re-imburse the Town Council to the extent of $61,460.96. A premium paid for premises or permanent rights without which you cannot begin business is capital expenditure: *Green* v. *Favourite Cinemas, Limited* (1930) 15 T.C. 394, *per* Rowlatt, J.

The Town Council had commenced the execution of the installation of a sewerage system and the reconstruction of its Water Works on a plan whereunder the Council had proposed to instal an electric power generating plant for the purpose of operating the pumps of the said sewerage system and water pumps driven by oil engines at the Water Works. The Council, in consideration of payment of compensation for loss suffered, agreed to abandon its project, and to sterilise the idea, of generating its own power for the sewerage and water undertakings. Compensation paid for the sterilisation of a capital asset is capital expenditure: *Collins* v *Adamson & Co.* (1937) 21 T. C. 400, 407, 408, *per* Lawrence, J., *Union Cold Storage Company, Limited* v. *Ellerker* (1938) 22 T.C. 547, 548, 564, 565, 567, and *United Steel Companies Limited* v. *Cullington* (1939) 23 T.C. 71, 80, 86. He referred to the Income Tax Appeal Rules, 1929, rule 15 (3) (c).

H. C. Humphrys, K.C., in reply.

The judgment of the Court was delivered by Sir Maurice V. Camacho, Kt., Chief Justice, on August 29, 1941, as follows:—

Appeal from the decision of the Commissioners of Income Tax and from that of a Judge in Chambers confirming the assessment on the appellants for the assessment year 1938 on their 1937 earned income.

In 1899, the Appellants, whose trade is to generate and supply electric power, obtained a franchise, under ch. 78, to supply electricity for a period of thirty years. Thereafter, they supplied the Georgetown Town Council with current for the lighting of the city of Georgetown. In 1923 or 1924 the Council resolved to instal a sewerage system and to reconstruct its Water Works. Consequential on these projects the Council entered into contracts with third parties for the supply of materials and equipment and for the construction of the undertakings, In connection with the schemes the Council decided to erect their own electrical plant to generate and supply power essential to the undertakings.

The currency of the Appellants' franchise was due to terminate in the year 1930, but, in terms of the Ordinance, they might apply for extension of the period or, if Government so decided, dispose of their undertaking to Government. In due time the Appellants requested enlargement of their franchise, and negotiations thereupon ensued between them and the Town Council ending in an indenture of agreement dated 28th September, 1927, and expressed to be made between the Mayor and Town Council of Georgetown and the Appellants.

The question raised by this appeal hinges on that agreement. The document witnesses that in consideration of the Council altering its original plans for sewerage and water works the Appellants agreed—

(*a*) to pay for all material and equipment ordered by the Council for the reconstruction of the water works, which, consequent on the adoption of the new scheme could not be utilised, or which the Consulting Engineer decided would not be required;

(*b*) to indemnify the Council against all damages and liabilities, present and future, which the Council had incurred, or might incur, in relation to the installation of the sewerage system or on account of the non-execution of work under the Main Drainage Contract or under any contract in connection with the original scheme for the reconstruction of the Water Works;

(*c*) to re-imburse the Council expenses and professional fees paid or payable to the Council's Consulting Engineers;

(*d*) to pay to the Council all monies payable by the Council to the contractors under the Main Drainage Contract.

In consideration of the Appellant's obligations, the Council contracted to take power from the Appellants for a period of 15 years for the purpose of operating the Sewerage System and Water Works and to pay for the power supplied on terms specified in Clause 5 of the Agreement,

Under the covenants of the Agreement the Appellants paid away in 1927 and 1930 sums of money aggregating $61,404.96

and proceeded to amortise the said sum over a period of 15 years, the currency of the contract. In 1934 they wrote off, against profits of that year, $20,468.34 representing 5/15ths of their aggregate expenditure and in each of the years 1934—1937 they wrote off against the annual profits, the sum of $4,093.66 or 1/15th of the said expenditure. This method of dealing with the aggregate of their payments was only disclosed to the Commissioners in the Appellants' accounts for the year ended 31st December, 1937, and was then questioned. The Appellants thereupon claimed the disbursement to be expenditure earning income, and that, in accordance with the practice of the Commissioners, it should be spread over 15 years, the contract period, and that 1/15th of the amount, namely, $4,093.66, should be allowed as a deduction in each year of assessment. Alternatively, they claimed that the aggregate sum would be exhausted at the expiration of the 15 year period and that 1/15th part of the sum should in each year be deducted for exhaustion of their property. The Commissioners disallowed the claims.

The questions of law submitted to this Court are—

(1) Are the claims out of time?

(2) Is the claim for deduction, annually, of the sum of $4,093.66 allowable under section 10 of the Income Tax Ordinance as expenditure earning income?

(3) Is the claim for deduction, annually, of the said sum of $4,093.66 allowable for exhaustion of property under section 11 of the Ordinance?

As far as can be ascertained from the judgment of the learned judge from whom this appeal, finally, is brought, the question was decided by him on the time factor. He ruled the claims too stale to be entertained and referred to s. 55 (2), ch. 38. The point was not, however, argued before him, and in this Court the parties do not raise it. Learned Counsel for the Appellants having abandoned the third submission, this Court will address its attention to the second submission only, notwithstanding the learned Judge was of opinion that the expenditure "formed an integral part of the contract transaction, and, as such, outgoings wholly incurred in the production of the Company's income."

Is this expenditure, capital expenditure or, as held by the learned Judge, expenditure earning income? The Appellants rely on the submission that the money was paid by them for the sole purpose of earning profits or, in the alternative, that the money was disbursed by way of premium to secure the contract.

The Court proceeds to examine the submission and the relevant authorities cited in support.

Knowles v. *McAdam* (1877) L.E. 3 Ex. D. 23 would lend weight to the Appellants' argument except that in *Coltness Iron Company* v. *Black* (1881) 6 A. C. 339 it was held to have been wrongly decided. The *Coltness* case itself affords no assistance

Watney & Company v. *Musgrave* (1880) L.R. 5 Ex. D. 241 was an unsuccessful claim by brewers to deduct premiums paid for leases of tied houses. The claim was rejected on the ground that the premiums were expenses incurred and money disbursed to promote and increase sale of the article *after it had been produced.* Referring to the incidence of Income taxation, Kelly, C.B. said: "the deductions are confined entirely and exclusively to the costs and expenses incurred in the production of the article." The monies paid by the Appellants to the Council were not expended in production of electricity supplied, or to be supplied, to the Council. The monies were disbursed to secure a contract whereby the sale of the Appellants' current would be promoted and increased.

Gillatt and Watts v. *Colquhoun* (1884) 33 W. R. 258 does not assist the Appellants, for it was there held that a premium paid did not give rise to a deduction in respect of income tax, that the premium was to be regarded as capital expenditure and not expenditure earning income. A. L. Smith, J., said: "you cannot bring in either diminishing *or exhausted expenditure* as a debit against the assets of the year." Precisely the claims made by the Appellants in this appeal.

Earl of Derby v. *Aylmer* (1915) 3 K. B. 374 has no application to the circumstances of this case.

In *Commissioners of Inland Revenue* v. *Adams* (1928) 14 Tax Cases 34, the claimant asserted that yearly payments to a landowner *for the right* to deposit material on land were an expense of his business, he being a carting contractor, and should be deducted in computing his assessable income. The Court, however, held that the expenditure was in payment for the capital asset, and the deduction was allowed.

Lord Clyde, in *Robert Addie & Sons Collieries, Limited,* v. *Commissioners of Inland Revenue* (1924) 8 Tax Cases 671, stated the true issue to be "are the sums in question part of the trader's *working expenses,* are they expenditure laid out *as part of the process of profit earning*; or, are they capital outlays, are the *expenditure necessary for the acquisition of property or rights of permanent character the possession of which is a condition of carrying on the trade at all*". The Council had resolved to generate their own electricity for the sewerage and water works purposes and by virtue of agreement with the Appellants abandoned the project. The consideration received by the Council was payment of their liabilities by the Appellants, the consideration received by the Appellants was acquisition of unwanted material and equipment, subsequently resold by them, and of the right to supply current to the Council. Can the payment be regarded as part of the process of profit earning, or a payment necessary for the acquisition of a right of a permanent character the possession of which is a condition of carrying on the trade?

Unless the right had been acquired the Appellants could not carry on their business, or that substantial part of it which consists of supplying power to the Council, Moreover, payment was made once and for all and thus falls under the head of "capital expenditure", as that expression is defined in *Vallambrosa Rubber Company, Limited,* v. *Farmer* (1910) 5 Tax Cases 536. The object and effect of the payment was the acquisition of an asset, of a right, of enduring benefit to the trade: *Atherton* v. *British Insulated and Helsby Cables, Limited,* (1925) 10 Tax Cases, p. 182. The expenditure was not incurred for the purpose of keeping a profit yielding subject, in a profit yielding condition during the year in respect of which the tax was chargeable: *United Collieries, Limited* v. *Commissioners of Inland Revenue* (1929) 12 Tax Cases, 1254.

Morley v. *Lawford & Company* (1928) 14 Tax Cases, p. 229 appears, on first impression, to be an authority in point favouring the Appellants' contention. It was held by the Commissioners that money paid under a guarantee given with the sole object of obtaining a contract was money expended wholly and exclusively for the purpose of the trade, and should be allowed as a deduction from profits for Income Tax purposes. When, however, the judgment of the Court is closely examined the reason for the decision is clear. It was put on the ground that the question being primarily one of fact and the Commissioners not having erred in law there were no grounds for disturbing their decision. This Court is not prepared to follow *Morley* v. *Lawford.*

The *Morley* case was decided by the Court of Appeal. It was subsequently discussed in the House of Lords in *Commissioners of Inland Revenue* v. *Hagart and Burn-Murdoch* (1929) 14 Tax Cases, 442, 443, where Lord Buckmaster, referring to the decision in the former case, pointed out that the judgment "depended largely on the very express findings of fact of the Commissioners that the monies were expended wholly and exclusively for the purposes of the trade" and significantly added "it is unnecessary therefore to express any opinion as to the correctness of that decision." The language of Lord Buckmaster indicates his disagreement with the decision handed down by the Court of Appeal. In the instant case we have the express finding of fact by the Commissioners that the monies disbursed by the Appellants was capital expenditure, and not expenditure earning income.

Lord Sands in *Commissioners of Inland Revenue* v. *Granite City Steamship Company* (1927) 13 Tax Cases, p. 14, laid down the proposition that broadly speaking, outlay is deemed to be capital when it is made for the initiation of a business, for *extension of a business* or for a substantial replacement of equipment." For what purpose were these monies paid by the Appellants if not for the purpose of extending their business?

Can it be said that the Appellants ventured the sum in question as a trade expenditure of the year in respect of which they are claiming the deduction? In the opinion of this Court the sum of $4,093.66 forms part of the capital price paid by the Appellants to acquire rights enabling expansion of their business.

Anglo-Persian Oil Company Limited v. *Dale* (1932) 1 K.B. 124 decided that money paid to terminate an agency was a revenue payment and was deductible by the Company in ascertaining its net profits, on the ground, however, that the payment did not create an asset or bring into existence an advantage for the benefit of the Company's trade. The Appellants' payment to the Council did bring into existence an enduring advantage for the benefit of their trade.

In *Collins* v. *Adamson & Company* (1937) 21 Tax Cases 400, payments made to remove a trade competitor or to prevent competition were held to be capital expenditure inasmuch as the payments resulted in an advantage of an enduring nature to the trade. Payments by the Appellants for similar purpose had similar result. Again, in *Union Cold Storage Company*, v. *Ellerker* (1938) 22 Tax Cases p. 547, money paid to secure the cancellation of a lease was held capital expense, and not an allowable deduction for Income Tax purposes. The Appellants paid the Council to cancel their Sewerage and reconstruction of Water Works schemes in order that they might supply power to the Council.

United Steel Companies Limited v. *Cullington* (1939) 23 Tax Cases, p. 71, has an important bearing on this question The Appellant company and another company, manufacturers of steel, agreed with a Railway Company that the Railway Company, in consideration of a certain sum of money paid by the Steel companies in monthly instalments over a period of ten years, should close down its steel works and purchase steel from the steel companies. The Court held that the instalments of the said sum of money proportioned to the appellant company, and paid by them to the Railway Company, were capital payments and were not deductible for Income Tax purposes. Lawrence, J. said: "In my opinion such a payment as that which was calculated by reference to the value of the works which were to be closed down and which was paid to secure a customer such as the Railway Company for a period of ten years is not a proper debit against the annual profits and gains of the Steel Companies' business. It is, in my opinion, of a capital and not of a revenue nature. I agree that each instalment of the £180,000 (the contracted payment) was a capital payment for two broad reasons. The first is that the extinction of the Railway's own manufacturing works was in itself a capital advantage to the Steel Companies, because it increased the total demand in the market generally

by the whole amount of the Railway's requirements, and because it enabled them by the agreement to acquire the right to the whole custom of, the railway for the ten years . . . . If the lump sum would have been a capital expenditure the mere fact that it was to have been paid in instalments did not in law alter the fundamental character of the expenditure."

The *United Steel* case is as close as possible to the instant case. The appellants made these lump sum payments in order to extinguish the proposed projects of the Council, to increase the total demand by the whole amount of the Council's requirements in connection with sewerage and water works, and by these payments and agreement they acquired, as of right, the whole custom of the Council for 15 years. Moreover, the payments were calculated by reference to the value of the works sterilised, stated in terms of the price of unwanted equipment and liabilities incurred by the Council.

Since the argument closed, the Appellants' solicitors have attracted our attention to the case of *Ogden* v. *Medway Cinemas, Limited*, (1934) 18 Tax Cases, p. 691, where it was held that a payment of £500 per annum provided for by a deed supplemental to an underlease by which was granted the goodwill of a Cinema business, was an admissible deduction for purposes of Income Tax. The *ratio decidendi* of the case was that the payment was a fixed annual payment of £500 per annum, and that the Commissioners had held that the fixed annual payment was not the payment of a capital sum or a distribution of profits by way of an annual sum, but a necessary revenue expense of the company. Those were the facts found by the Commissioners in that case.

In this case the payment was a lump sum payment and the Commissioners have found the expenditure to be capital expenditure. The Court finds no ground of disagreement with the Commissioners, indeed it finds that every element of the transaction denotes expenditure by the Appellants for the purpose of abrogating competition, of extending their business and of acquiring the right to supply their commodity to the Council for a substantial number of years. We entertain no doubt that the Appellants' expenditure is capital expenditure, a capital price paid to acquire rights of enduring nature, not expenditure earning income, and that the Appellants' claims were properly rejected.

The appeal is dismissed with costs here and in the Court below. Fit for Counsel on every appearance of Counsel.

Appeal dismissed.

Solicitors: *J. E. deFreitas,* for the appellants;
Percy W. King, Crown Solicitor, for the respondents.

JOSEPHINE MCDAVID, Petitioner,
v.
REGINALD NATHANIEL MCDAVID, Respondent
and ENID ABBOTT, Intervener.

[1940. No. 240.—DEMERARA.]
BEFORE GILCHRIST, J. (Acting).
1941. MARCH 21, 25, 26, 27, 28; APRIL 1, 2, 3, 4, 5, 7, 8, 9.

Evidence—Adultery—Proof of—Intimate association and mutual passion—Combined with opportunity.

Costs—Matrimonial causes—Petition of wife for divorce dismissed—Answer of husband proved—Decree nisi of divorce granted to him—Costs of wife and incidental to hearing—Husband not to pay.

The mere fact of being thrown together in an environment which lends itself to the commission of adultery is not enough evidence of adultery unless it can be shown by documents, *e.g.*, letters and diaries, or antecedent conduct, that the association of the parties was so intimate and their mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence.

From opportunities alone no inference of adultery can fairly be drawn, unless the conduct of the parties prior, contemporaneous, or subsequent, justifies the inference that such feelings existed between the parties that opportunities, if given, would be used for committing adultery.

Where a wife's petition for a divorce on the ground of the adultery of her husband was dismissed, and the husband's prayer contained in his answer, for divorce on the ground of the malicious desertion and adultery of his wife was granted, the respondent's conduct not having conduced or tended to conduce to the petitioner's adultery, the Court disallowed costs to the petitioner of and incidental to the hearing of the suit.

Petition by Josephine McDavid for a decree of dissolution of her marriage to the respondent Reginald Nathaniel McDavid on the ground of his adultery with Enid Abbott who intervened in the cause. In his answer the respondent denied that he committed adultery, alleged that the petitioner had committed adultery with Jim Parris and with Cecil Small, and had maliciously deserted him, and asked the Court for a decree of dissolution of the marriage. Jim Parris and Cecil Small were cited, but neither entered appearance.

S. L. Van B. Stafford, K.C., H. B. S. Bollers with him, for petitioner Josephine McDavid.

J. A. Luckhoo K.C., A. T. Peters with him, for respondent Reginald Nathaniel McDavid.

G. M. Farnum, for intervener Enid Abbott.

Cur. adv. vult.

GILCHRIST, J. (Acting.): [After having rejected the plea of the petitioner that the respondent's conduct conduced or tended to conduce to her adultery with Parris and Small, the learned trial judge continued as follows:] In *Ross* v. *Ross* 141 Law

Times Reports, House of Lords, at page 668, Lord Buckmaster says: 'Adultery is essentially an act which can rarely be proved by direct evidence. It is a matter of inference and circumstances. It is easy to suggest conditions which can leave no doubt that adultery has been committed, but the mere fact of being thrown together in an environment which lends itself to the commission of the offence is not enough unless it can be shown by documents, *e.g.* letters and diaries, or antecedent conduct that the association of the parties was so intimate, and their mutual passion so clear, that adultery might reasonably be assumed as the result of an opportunity for its occurrence.' At page 673, Lord Atkin says: 'But from opportunities alone no inference of misconduct can fairly be drawn unless the conduct of the parties prior, contemporaneous, or subsequent justifies the inference that such feelings existed between the parties that opportunities if given would be used for misconduct.'

[His Honour considered the evidence, and found that the respondent had not committed adultery with the intervener and he therefore dismissed the suit of the petitioner with costs to the intervener. He then found that the plea of the respondent, that the petitioner maliciously deserted him on the 4th March, 1940, and has since continued to do so, proved. He then considered the evidence of adultery on the part of the petitioner, found that the petitioner had committed adultery in Barbados in January, 1938, with Jim Parris but having regard to the fact that the petitioner returned home to the respondent on November 13, 1939, and his receiving her, he held that the respondent had condoned the petitioner's adultery with Parris. The learned trial judge continued as follows:] Bearing in mind the aforesaid statements of Lord Buckmaster and of Lord Atkin in Ross v. Ross as guidance, I conclude, having regard to the antecedent conduct and mutual passion of the petitioner and Small that it is reasonable to assume that petitioner committed adultery with Small on the 17th October, 1940. In the result, I grant the respondent a decree *nisi* for the dissolution of his marriage with the petitioner on the ground of malicious desertion and adultery.

Having regard to the submissions of Mr. Luckhoo and the admission of Mr. Stafford and to my finding that the respondent's conduct did not conduce to or tend to conduce to the petitioner's adultery, I disallow costs to the petitioner of and incidental to the hearing of this suit.

Petition dismissed.
Respondent granted decree nisi.

Solicitors: *R. G. Sharples,* for petitioner;
G. L. Bobb, for respondent;
H. C. B. Humphrys, for intervener.

J. W. D. FERDINAND *v.* M. HUNTER.

J. W. D. FERDINAND, Appellant (Defendant),
v.
M. HUNTER, Respondent (Plaintiff).
[1941. No. 165.—DEMERARA.]
BEFORE FULL COURT: FRETZ AND STUART, JJ.
1941. AUGUST 13, 30.

Landlord and tenant—Rent—Claim for—Defence—Entry by landlord on premises—To repair—After delivery of keys—Agreement to waive rent if tenant obtained—Implied consent for landlord to enter premises to repair—No breach of warranty for quiet possession—Right to recover rent not suspended.

On May 15, 1940, the appellant, who was a monthly tenant, gave notice to his landlord, the respondent, that, on July 15, 1940, he would give up possession of the cottage rented by him. The notice was accepted, and agreed to, by the respondent.

The appellant paid the rent for May, 1940. He left the cottage prior to June 15, and he handed the keys to the agent of the respondent, stating that he would return in a week's time to have the place cleaned. The appellant's agent subsequently fetched the key, the appellant's remaining effects were removed, and a verbal agreement was arrived at between the appellant and the respondent that if the landlord obtained a tenant from July 1, 1940, the appellant would not have to pay rent from July 1 to July 15.

The respondent sent in painters on June 28. The appellant then claimed that he should only pay rent up to that day. The respondent did not agree, and she sued for rent from June 1 to July 15, and obtained judgment therefor. On appeal,

Held, (1) that there was at least an implied consent to the respondent's entering the leased premises to prepare the property for a possible new lease to the mutual advantage of the appellant and of the defendant;

(2) that there was no breach of warranty for quiet possession, that the right of the respondent to recover rent was not suspended by reason of her entry on the premises, and that the appellant was liable for rent up to July 15, 1940.

Appeal by the defendant from a decision of the Magistrate, Georgetown Judicial District, on a claim by the plaintiff for rent. The facts appear from the judgment.

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

A. G. King, solicitor, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by Stuart, J., as follows:—

On the 15th May, 1940, Appellant as a monthly tenant gave notice to his landlady the Respondent as follows:—

"Madam,

I hereby give you one month's notice from the 15th June to the 15th July, 1940, to give up the quiet and peaceful possession of cottage rented by me from you—

Yours truly,
J. W. Ferdinand."

This document produced was annotated in the corner "Agreed. M. Hunter."

In all probability the human angle that prompted M. Hunter to accept the embarrassment of a term expiring in the middle of the month would have continued uninterrupted but for the mischief-making litigiousness of Ferdinand's agent, one de Souza.

At the end of May, Ferdinand paid the rent for May.

About the middle of June Ferdinand, who, for reasons no doubt excellent, but undisclosed at the trial, left the cottage prior to the 15th June, handed the keys to plaintiff's agent, saying that he would come back "in a week's time to have the place cleaned." De Souza later fetched this key, Ferdinand's remaining effects were removed, the cottage was cleaned, and a verbal agreement was come to between the parties in person. Mrs. Hunter agreed that if she could obtain a lease from the 1st of July she would let off Ferdinand the rent from 1st July to 15th July. Obviously this empowered Mrs. Hunter to do everything in her power to lease the property.

Intelligently dealing with the proposition Mrs. Hunter sent in painters on the 28th June. De Souza with a pettifogging optimism assumed that this was a breach of the warranty of quiet possession, and Ferdinand on his advice very injudiciously offered to pay rent for June only up to the 28th. Mrs. Hunter properly refused this and eventually sued for rent from 1st June to 15th July and recovered this with costs in the lower Court.

Counsel for Appellant has argued that the entry on the 28th June was made with consent of Appellant and in spite of and in defiance of the protest of De Souza and that therefore a surrender took place by operation of law suspending forthwith the right to rent.

We are of opinion that on the facts there was at least an implied consent to entry to prepare the property for a possible new lease to mutual advantage, and that Respondent rightly disregarded the protesting De Souza.

Counsel however has quoted a string of cases.

Goodier v. *Cooke* (1940) All England Reps. p. 533 is of interest. Here the tenant handed in his key to the landlord, and a dispute arose as to whether this meant that the property became decontrolled or not. The Court found that the landlord had come into actual possession of the house. This if applied here might indicate that when the key was handed to Mrs. Hunter's agent in the middle of June, with a reservation re-cleaning and apparently, storage, the Appellant, *sub conditions*, gave up possession, and that by the 28th June, when the condition had been operated upon and discharged, *i.e.*, when the house was empty and clean, the possession was no longer conditional but absolute in the hands of the "landlady". Her agent, it is true, said that appellant did not give up possession in the middle of

June. But this may well be his method of dealing in phrase with a conditional giving up of possession.

Now such a giving up, particularly when coupled with a verbal agreement to try and save joint loss by getting a tenant for July, in no way freed Appellant from the obligation to pay rent to 15th July if no such tenant was obtained.

In *Holt* v. *Dawson* (1939) All England R. p. 638, Scott L.J., says, *inter alia* "handing over a key is a symbolic act, which at common law carries with it possession of that to which the key is the means of access."

In our opinion on that quite recent case, the Respondent could have began interior painting in the middle of June. Then why not on the 28th.

The remaining cases quoted by counsel to the effect that landlord's entry without tenant's authority may relieve the tenant from payment of rent are of course correct, but quite inapplicable.

It is clear that the Common Law applies here as the only portion of the law of Landlord and Tenant which is statutory in this Colony is Chapter 92 which does not cover the subject matter of this case even indirectly.

In the result the appeal must be dismissed with costs.

Appeal dismissed.

REPORTS OF DECISIONS

OF

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1941

AND IN

THE WEST INDIAN COURT OF APPEAL

[1939 AND 1941.]

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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1942.

JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1941.

SIR MAURICE VIVIAN CAMACHO, KT. (*a*)	...Chief Justice. (January 1 to October 10).
WILMOT THEODORE STUART FRETZ	...First Puisne Judge. Acted as Chief Justice from October 6.
WILLIAM HEMMING STUART (*b*)	...Second Puisne Judge. Acted as First Puisne Judge from October 11 to December 7.
STANLEY EUGENE GOMES	...Acting Puisne Judge. (From January 1 to February 21).
WILLIAM JAMES GILCHRIST	...Acting Puisne Judge. (From February 1 to April 10.
JOSEPH ALEXANDER LUCKHOO, K.C.	...Acting Puisne Judge. (From December 8).
SIDNEY LYONS VAN BATENBURG-STAFFORD, K.C.	...Acting Puisne Judge. (From December 8).

(*a*) Died October 10, 1941.

(*b*) Appointed from October 30, 1940. Assumed duty on February 21, 1941.

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 a re included in the British Guiana Law Reports.

METHOD OF CITATION.

These reports will be cited as (1941) L.R.B.G.

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