

INDEX.

PAGE.

ABORIGINAL INDIAN—

Aboriginal Indians Protection Ordinance, Cap. 262, Part V. ss. 27 to 35, formerly Aboriginal Indians (Intoxicating Liquors) Ordinance, 1908 (No. 10)—Governing principle of—Intoxicating liquor not to be consumed by Aboriginal Indians.

Correia v. Jacobs.....342

Owner of timber cutting tracts—Contract by trader to advance goods to her—To enable her to operate tracts—Intoxicating liquor part of goods supplied—No evidence of consumption by any Aboriginal Indian—Action to recover price of intoxicating liquor—Maintainable.

Correia v. Jacobs.....342

ADMIRALTY—

Seaman's wages—Action for—Defence—Desertion of ship—What constitutes—Abandonment of duty—Without justification—Quitting ship—Without intention of returning.

Carvalho v. "Prinz Andre"1

APPEAL—

West Indian Court of Appeal—Rules of 1920 as amended in 1930—Jurisdiction delegated to Supreme Court—Order made by virtue of—Not made in exercise of civil jurisdiction of Supreme Court—No appeal therefrom to Full Court—Supreme Court of Judicature Ordinance, Cap. 10, s. 89.

Boodhoo and Tetry v. Din74

West Indian Court of Appeal—Extension of time—Motion for—To bring appeal—West Indian Court of Appeal Rules, rule 6(1); West Indian Court of Appeal (Amendment) Rules, 1930, rule 2—Discretion of Court—Perfectly free—Question for consideration—Whether upon facts of particular case discretion should be exercised.

Chung Tiam Fook v. Hussain & Choong296

West Indian Court of Appeal—Poor person—Application to prose cute appeal as—Refused on merits—West Indian Court of Appeal Rules, rule 18 (1) (b); West Indian Court of Appeal (Amendment) Rules, 1930, rule 5.

Chung Tiam Fook v. Hussain & Choong404

APPEAL contd.—

- Security for costs—Motion for—Affidavit in support—No special circumstances disclosed—Motion refused—Rules of the Supreme Court (Appeals), 1924, rule 4 (1).
Young v. Wolfe337
- Question of fact—Finding of trial judge on—Against weight of evidence—Reversed by Court of Appeal.
Dem., Co., Ltd. v. Douglas426
- From magistrate's court—Special leave to appeal—Application for—To be made to Full Court—Not to a judge of the Supreme Court—Summary Jurisdiction (Appeals) Ordinance, cap. 16, ss. 2, 14 (1)—Rules of Supreme Court (Appeals) 1924, rule 25 (1)—Inoperative in respect of tribunal to which application is to be made—Since Magistrates' Decisions (Appeals) Ordinance, 1893 (No. 13) as amended by Appeals Regulation Ordinance, 1922 (No. 33) was repealed by Ordinance No. 6 of 1929, now cap. 16.
Bhagwandin v. Fernandes402
- From Magistrate's Court—Extension of time—Motion for—To file additional copies of record for use of Court—No jurisdiction to grant—If copies not lodged within statutory time—Default in due prosecution of appeal—Summary Jurisdiction (Appeals) Ordinance, cap. 16, ss. 13 (2), 16 (1).
Slater v. Wieting & Richter, Ltd420
- From magistrate's court—Hearing—No appearance of appellant—Appeal struck out—Motion to re-instate appeal to list—Jurisdiction of Full Court to hear and determine—Summary jurisdiction (Appeals) Ordinance, cap. 16.
Derek v. D'Andrade319
- From magistrate's court—From decision of—Not from reasons for decision—Decision correct—Reasons wrong—Decision affirmed.
Doobay v. Moulai411
- From magistrate's court—Reasons for decision—Evidence of police spy—Not necessary for magistrate to state he viewed it with care.
Ferroze v. James72
- District licensing board—Ground of appeal—Extraneous matter taken into consideration—Specific instances to be given—Intoxicating Liquor Licensing Ordinance, cap. 107, s. 25.
Chin Shing et al v. Choo Kang76

APPEAL contd.—

Appellant properly convicted—Wrong subsection—Quoted in charge and conviction—Conviction amended—By appeal Court—Summary Jurisdiction (Offences) Ordinance, cap. 13, ss. 80 (1) (a), 80 (2).

Glasgow v. Deygoo78

ARBITRATION—

Insurance policy—Risk Insured against—Loss or damage by fire—Notice of accident with particulars of loss—Claim by insured—Rejection by insurer—Disclaimer of liability—Difference—Between insured and insurer.

Rahaman v. Motor Union Insurance Co., Ltd...... 125

Insurance policy—Arbitration clause—Claim to be referred to arbitration within specified time after disclaimer of liability by insurer—Otherwise claim by insured deemed to be abandoned—Duty of claimant to initiate arbitration proceedings to enforce claim—No evidence that, if initiated, insurer would have refused to arbitrate—Refusal by insured after lapse of specified time—Not repudiation of contract by insurer—Claim by insured deemed to be abandoned—Irrecoverable.

Rahaman v. Motor Union Ins., Co., Ltd 125

Contract—Repudiation by one party—Action by other party—On contract and not for damages—Repudiation not accepted by party suing—Arbitration clause in contract—Plaintiff suing on contract which requires arbitration—Defendant entitled to set up arbitration clause.

Rahaman v. Motor Union Ins., Co., Ltd 125

Insurance policy—Arbitration clause in—Reliance upon—By insurer—Not repudiation of contract.

Rahaman v. Motor Union Ins., Co., Ltd 125

ASSIGNMENT—

Debt—Equitable assignment—Intention, not form, the deciding factor—How constituted—Debtor given to understand—That debt made over by creditor to some third person.

Correia v. Jacobs.....342

Debt—Promissory note for—In favour of third person—Made by debtor at request of creditor—Equitable assignment of debt.

Correia v. Jacobs.....342

COMPANY—

Voluntary winding up—Stay of all proceedings in—With a view to reconstruction of company—Consent of only creditor filed—Just and beneficial—Companies (Consolidation) Ordinance, cap. 178, ss. 134, 185.

Re Plantation Maryville Ests., Ltd.....226

CONSTRUCTION—

Shall become due and payable—Shall be levied—To be interpreted in futuro—Circumstances arising after execution of document—Only applicable to.

Nascimento v. Blenman.....205

Ordinances and local Rules—In same terms as Imperial Statutes and English Rules of Court which have been authoritatively construed by Court of Appeal in England—Such construction to be adopted by Courts of Colony.

Nascimento v. Blenman.....205

Mourat v. Tahal215

Luke v. Luke.....203

CONTRACT—

Sale of land—Consideration for—Past debt—Due by vendor to purchaser—Valuable consideration.

Mahastesingh v. Maharaj & Poonwassia (W.I.C.A.).....435

Consideration—Marriage as valuable consideration—Sufficient to support ante-nuptial promises—Whether made by parties to marriage or by third persons.

Surejpaal v. Ramdeya & Sarju309

Agreement in consideration of marriage—Meaning of “marriage”—Marriage valid according to laws of colony—Does not include a Hindu marriage, which is not capable of being registered, contracted between immigrants—Immigration Ordinance, cap. 208, ss. 147, 131, 233, 142 (1) proviso.

Surejpaal v. Ramdeya & Sarju309

Agreement in consideration of marriage—No action to be brought—Unless agreement in writing—Civil Law of British Guiana Ordinance, cap. 7, s. 20—Written agreement after marriage—In pursuance of parol agreement before marriage and referring thereto—Case taken out of statute.

Surejpaal v. Ramdeya & Sarju309

CONTRACT contd—

Consideration—Relief from liability to maintain daughter—
 Father not legally liable to maintain child of 17 years—
 Maintenance Ordinance, cap. 145, ss. 2, 7—Assumption of
 liability to maintain daughter—Man married by Hindu rites
 not legally liable to maintain the woman.

Surejpaul v. Ramdeya & Sarju309

Repairs and works required by local authority—Cost of—One
 party to pay other party—No notice given by second
 party—As to repairs or works or their cost—No breach of
 agreement to pay cost.

Nascimento v. Blenman205

COSTS—

Administrator—Action against—Ought not to have been de-
 fended—Costs of action—Payable by administrator—Out
 of his own property.

J. P. Santos & Co. Ltd. v. Tiam Fook228

Executor—Originating summons by—Claiming right of indem-
 nity—Dismissed—Costs—To be paid by executor—Out of
 own property.

Re Dhunawo; ex parte Haniff273

Application made on two grounds—Fails on one ground—Costs
 of trial—Increased be issue on which applicant loses—No
 trial necessary on other issue—How costs to be borne—By
 parties who respectively incurred them.

Luke v. Luke280

Plaintiff successful—Litigation occasioned by his own act—No
 order as to costs.

Hookumchand v. Hookumchand138

Ali v. Sam157

Sookea v. Chung Tiam Fook165

Husband and wife—Alimony pendente lite—Petition for—
 Proceedings not reasonably continued—No order as to
 costs.

Langford v. Langford198

Discretion of Court—Not exercised on wrong principle—Appeal
 from Order of Court as to costs—Order not interfered with.

Antar v. Valverde (W.I.C.A.)442

COSTS contd.—

Thrown away—By default of attorney—In not informing Court of facts—Attorney personally liable to pay.

Wong v. Leandro217

Defendant partly successful—Each party to bear own costs.

Carvalho v. “Prinz Andre”6

Husband and wife—Application by wife for maintenance—Order made by magistrate—Appeal therefrom by husband—Successful—Wife ordered to pay husband’s costs of appeal.

Barrak-Odi v. Barrak-Odi124

Judgment set aside—Costs thrown away—Person responsible—Ordered to pay costs.

Wong v. Leandro217

Action against administrator—Should not be defended—Administrator to pay plaintiff’s costs out of his own pocket—Costs of defence—No right of indemnity therefor—Out of estate of deceased.

J. P. Santos & Co., Ltd. v. Chung Tiam Fook245

Re Dhunawo; ex parte Haniff279

CRIMINAL LAW AND PROCEDURE—

Larceny at common law—Things attached to soil—Abandonment after severance from realty—Common law doctrine as to—Not applicable to statutory thefts—Summary Jurisdiction (Offences) Ordinance, cap, 13, s. 80.

Glasgow v. Deygoo78

River navigation—Boat—Certificate of Inspection—Licensed as a cargo boat—Subsequently licensed as passenger boat—First certificate not revoked—Second certificate valid—Whether first certificate revoked by implication.

Harris v. Forbes106

Customs—In any way knowingly concerned in any fraudulent evasion of customs duties—That person charged fraudulently evaded duties of customs—Not necessary to prove—In any way knowingly concerned—Construction of—Customs Ordinance, cap. 33, s. 168 (*i*).

Rahaman et al v. Chapman397

CRIMINAL LAW AND PROCEDURE contd.—

- Fraudulent conversion—General deficiency extending over a period of time—No duty in accused, on the date specified, to hand over the lump sum received—Conviction quashed.
William Graham v. The King430
- Complaint—Essential fact in support of—Not proved by prosecution—Proved by defendant—To be considered by magistrate—Not open to defendant to say on appeal that fact not proved.
Harris v. Forbes106
- Police trap—Detection of offences by—Agent of police—Evidence of—Corroboration—Not required in law.
Chung Tiam Fook v. Slater.....415
Ferroze v. James72
- Offence—Particulars of offence—Amendment of—Criminal Justice Ordinance, 1932 (No. 21), s. 7—Summary Jurisdiction (Procedure) Ordinance, cap. 14, s. 94 (2)—Conviction for offence as described in particulars—Appeal—Particulars held not proved —Conviction set aside.
Chung Tiam Fook v. Slater.....415
- Complaint—Conviction on—Appeal—Particulars of complaint—Amendment of—Application for—At hearing defendant never required to answer charge as amended—Embarrassment of defendant—Application refused.
Barrak-Odi v. Barrak-Odi.....121
 and see *Chung Tiam Fook v. Slater*.....415
- Conviction—Sentence—Consecutive terms of imprisonment—Undergoing imprisonment for another offence—Meaning of—Person liable to arrest but not arrested under section 31 (2) of Summary Jurisdiction (Appeal) Ordinance, cap. 16—Not undergoing imprisonment—Summary Jurisdiction (Offences) Ordinance, cap. 13, 8, 22; Summary Jurisdiction (Offences) (Amendment) Ordinance, 1937 (No. 6) s. 2.
Kissoon v. Kingston253
- Summary conviction offence—Complaint; for—Form and substance—Criminal Justice Ordinance, 1932, (No. 21), s. 7—Matters to be proved at hearing, and form of conviction—Not affected thereby.
Bagado v. Welcome.....293

DEFENCE REGULATIONS—

Price control order—Made under—Sale of price controlled article by employee—Within scope of authority—Price charged by employee in excess of that allowed by order—Liability of employer for act of employee.	
Garnett & Co., Ltd. v. Slater.....	354
Booker Bros. McConnell & Co., Ltd. v. Slater.....	354
Wieting & Richter, Ltd. v. Slater.....	354
Competent authority—Commodity Control Board—Order made by competent authority at Commodity Control Office—Name of competent authority not mentioned in order—Order signed by controller of commodities—Controller duly authorised to sign on behalf of Board—Ample proof—That order made by competent authority.	
Garnett & Co., Ltd. v. Slater.....	354
Booker Bros. Mo Connell & Co., Ltd. v. Slater	354
Wieting & Richter, Ltd. v. Slater.....	354
Price control order—Made under—Maximum price—“At the rate of”—Meaning of—Standard of calculation—For all quantities of price controlled article—Whether greater or lesser than quantity specified in rate prescribed.	
Garnett & Co., Ltd. v. Slater.....	354
Booker Bros. Mc Connell & Co., Ltd. v. Slater.....	354
Wieting & Richter, Ltd. v. Slater.....	354
Price control order made under—Form of sale in breach thereof—Real effect in conformity therewith—Price charged in excess of that allowed by order—Discount allowed—Price actually received by seller—Not in excess of the maximum price fixed by order—No offence committed by seller.	
J. P. Santos & Co., Ltd. v. Slater	359
Price control order made under—Form of sale devised to bring it within—Real effect to overcharge buyer—Offence committed.	
J. P. Santos & Co., Ltd. v. Slater	359

DEFENCE REGULATIONS contd.—

Price control order made under—Order 636 B dated 14th May, 1942—Wholesale transaction—If sale covered by definition of “wholesale”—Buyer need not be a retailer as defined by order—Purchase from wholesaler need not be carried out in person by licensee—Price controlled articles—Sold to individual who sold goods in a market—Under licence issued in his wife’s name—Articles purchased for sale there—Actual business in market that of husband—Wholesale transaction.

Resaul Maraj & Co., Ltd. v. Slater362

Price control order—Price controlled articles—Sale of, retail or wholesale—At a price, exceeding that prescribed—Absolute prohibition.

Resaul Maraj & Co., Ltd. v. Slater362

Price control orders—“Sell”—How to be construed—Not with reference to niceties of law of contract of sale, or to distinction between sale and agreement to sell, or to question as to whether property in goods has passed—To be construed in a popular sense—Purchase oil Price controlled articles—Payment therefor in full—Articles not then in stock—Vendor to make delivery within a few days—Sale transaction constituted.

Ho & Luck v. Octive384

Price control order—Order 636 B of 14th May, 1942, paragraph 11—Only offence thereunder in so far as selling is concerned—Selling a price controlled article at a price exceeding the maximum price prescribed by the Order.

Chung Tiam Fook v. Slater.....415

Price control order—Retail transaction—Sale of 200 pounds fine salt—Not sale by retail—Order 636 B of 14th May, 1942.

Chung Tiam Fook v. Slater.....415

EQUITY—

Maxims of—Equity does not act in vain—When a court of equity refuses to act—Merely to show nature or extent of powers of a court of equity—Where remedy applied for would be useless to applicant.

Hussain & Choong v. Tiam Fook172

EQUITY contd.—

Maxims of—He who seeks equity must do equity—Contract—
 Delay of one party in executing—Pecuniary loss suffered by
 other party from—No offer by first party to make restitution
 for—Specific performance—Against party suffering loss—
 Not entertained.

Hussain & Choong v. Tiam Fook172

Equitable defences—Laches and acquiescence—Person in pos-
 session of trust property from time trust arose—Seeking to
 acquire legal title thereto—Defence of laches not applica-
 ble.

Sooknannan v. Sunichery260

EVIDENCE—

Article—Placed in proper police custody—No evidence that it
 was tampered with—While in such custody—
 Presumption—That it remained unchanged.

Ferroze v. James72

Analyst—Report of—Admissible in evidence—For any of pur-
 poses—Named in Evidence Ordinance, cap. 25, s. 44 (1)—
 General law modified to that extent.

Ferroze v. James72

Persons employed by police to detect commission of offence—
 Testimony to be viewed with caution—Does not require
 corroboration.

Ferroze v. James72

Chung Tiam Fook v. Slater.....415

Claim licence—Ownership of—Proof of—Publication in *Ga-
 zette* of list of claim licences in existence—Extract from
Gazette—Inadmissible in evidence.

Glasgow v. Deygoo78

Ownership—Need not always be strictly proved—Possession—
 Evidence of ownership.

Glasgow v. Deygoo.....78

Right of way—Action claiming—Whether *prima facie* case made
 out.

Din v. Boodhoo & Tetry (W.I.C.A.).....425

Unregistered money-lender—Defence of—Onus of proof—That
 plaintiff carrying on business as money-lender—On defen-
 dant.

Munroe v. Dias (W.I.C.A.).....428

EXECUTION—

Sale at—Purchase at sale—Substitution by Marshal of another person as purchaser at request of original purchaser—Not assignment of contract between Marshal and original purchaser.

Hookumchand v. Hookumchand134

Warrant of distress—For recovery of village rates—Not “levying execution”—Meaning in document,

Nascimento v. Blenman.....205

EXECUTOR AND ADMINISTRATOR—

Deceased Persons Estates’ Administration Ordinance, cap. 149, s. 34—Actions under—Admission of assets—Personal liability of executor—Actions against executor or administrator—Based on admission of assets—Special promise by executor or administrator—To answer damages out of his own estate—To be in writing—Civil Law of British Guiana Ordinance, cap 7, s. 20—Not applicable to those actions.

Booker Bros., McConnell & Co., Ltd. v. Tiam Fook246

Deceased Persons Estates’ Administration Ordinance, cap. 149, s. 40—After inquiry—Meaning of—Whether before or after grant of probate or letters of administration.

Booker Bros., McConnell & Co., Ltd. v. Tiam Fook246

Admission of assets—What amounts to.

Booker Bros., McConnell & Co., Ltd. v. Tiam Fook246

Estate duty declaration and inventory—Under Estate Duty Ordinance, cap. 44, s. 13—Deceased Persons Estates’ Administration Ordinance, cap. 149, s. 32—Inventory under.

Booker Bros. McConnell & Co., Ltd. v. Tiam Fook246

Promissory notes—Property of estate of deceased—Payment received by executor or administrator—Notes administered by him—“Unduly administered”—Administered without being contained in an inventory—Deceased Persons Estates’ Administration Ordinance, cap. 149, s. 34—Estate Duty Ordinance, cap. 44, s. 13; cap. 149, s. 32—Value of property unduly administered—Not less than amount of debt—Executor or administrator—Personal liability of—For debt due by deceased.

Booker Bros. McConnell & Co., Ltd. v. Tiam Fook246

EXECUTOR AND ADMINISTRATOR contd.—

- Deceased Persons Estates Administration Ordinance, cap. 149, s. 34 —Application of—Not restricted to administration actions— Purpose of section—To provide a simple remedy to creditors of deceased person—Where assets omitted from inventory filed.
- [Booker Bros. McConnell & Co., Ltd. v. Tiam Fook](#)246
- Furniture and other household effects of deceased—Sale of—By administrator to himself—Without leave of Court—Sale not cancelled—If leave applied for, price which court would have approved—Treated as a sale at that price.
- [J. P. Santos & Co., Ltd. v. Tiam Fook](#)228
- Movable property of deceased—Sale of—By private treaty— Without leave of Registrar—Deceased Persons Estates' Administration Ordinance, cap. 149, s. 41, proviso (a)—If price fair and reasonable. Court will confirm sale—If price not fair and reasonable—Sale deemed to have been effected at fair and reasonable price—In special cases sale will be cancelled—If circumstances so warrant.
- [J. P. Santos & Co., Ltd. v. Tiam Fook](#)228
- Debt of deceased—Action for—Defence—*Plene administravit*—Movable property sold—Without leave of Registrar or at under-value—Evidence—Admissibility of.
- [J. P. Santos & Co., Ltd. v. Tiam Fook](#)228
- Right of indemnity—Against assets of estate—Residuary estate to be first exhausted—Before recourse can be had to assets specifically bequeathed.
- [Re Dhunawo; ex parte Haniff](#)273
- Property of deceased person—Sale by private treaty— Application to Registrar of Supreme Court for—To be made with utmost good faith—Order made by Registrar—Failure to disclose material facts to him—Order of Registrar set aside.
- [Mark v. Fausett and Ross](#)320
- Executor—Executors of executor of proving executor of deceased person—Legal personal representatives of that person.
- [Mark v. Fausett and Ross](#)320
- Executor—Grant of probate—Date of death of deceased— Executorship relates back to.
- [Mark v. Fausett and Ross](#)320

EXECUTOR AND ADMINISTRATOR contd.—

Two executors—Probate granted to one—Not applied for by other—Immovable property—Sale by non-proving executor—Executors of executor of proving executor not joining in sale—Probate subsequently granted to executor who effected sale—Sale fit to be carried into effect—Sanctioned and confirmed as from date of agreement of sale—Deemed to have been made by all the legal personal representatives.

Mark v. Fausett and Ross.....320

Action against—Costs—Executor entitled to—Against plaintiff—Rules of Court, 1900, Order 24, rules 1 and 4—Costs recoverable—Right to costs—Waived by executor—Without leave of Court or Judge—Assets of estate—Not recoverable against.

Re Dhunawo; ex parte Haniff273

FRIENDLY SOCIETY—

Officer—Removal from office—Rules of society—By resolution—Meeting specially summoned for purpose—All members to be summoned—In notice convening meeting, object to be stated with sufficient particularity—Otherwise proceedings at meeting null and void.

Rose v. B. G. Nurses Assn.....7

Disputes—Rules of society—To be referred to arbitration—Procedure in rules—For electing arbitrators and conducting arbitration—To be followed in matters of substance—Otherwise, arbitration ineffective—Rules of society—Arbitrators to be appointed by society—Arbitrators appointed by president—Decision of arbitrators on dispute—Null and void.

Rose v. B. G. Nurses Assn.....7

Determination of disputes—Rules of society—Dispute not determinable by arbitration—Under Friendly Societies Ordinance, Cap. 214 or under rules of society—No jurisdiction in arbitrators to hear—Even where parties consent.

Rose v. B. G. Nurses Assn.....7

Determination of disputes—Dispute—Meaning of—Dispute between Treasurer and society—Whether a dispute—Claim by society against treasurer for misappropriation and withholding property of society—Whether a dispute—Friendly Societies Ordinance, cap. 214, s. 43.

Rose v. B. G. Nurses Assn.....7

GIFT—

- Immovable property—Not perfected by transport—Incomplete.
Surejpaul v. Ramdeya & Sarju309
- How effected—By conveyance or assignment of property—By declaration of trust thereof.
Surejpaul v. Ramdeya & Sarju309
- Intended to take effect—By transfer of property—Transfer incomplete—Does not operate as a declaration of trust.
Surejpaul v. Ramdeya & Sarju309
- Immovable property—Sale at execution of—Contract for purchase—Made by father on behalf of minor son—Purchase price paid by instalments—Purchase money property of father—Judicial sale transport not passed—No completed gift—Transport to be passed in favour of father.
Hookumchand v. Hookumchand134

HUSBAND AND WIFE—

- Ante-nuptial contract—On deposit in Deeds Registry—Effectual as from date of marriage—Even if contract deposited subsequent to death of one of parties thereto—Deeds Registry Ordinance, cap. 177, s. 16.
Fisher v. Fraser114
- Ante-nuptial contract—Election of wife—Under contract—Right may be exercised by heirs of wife.
Fisher v. Fraser114
- Divorce—Domicile—Of origin—Abandonment of—Domicile of choice—Evidence of.
Branker v. Branker365
- Divorce—Evidence of petitioner—Of non-access—Child born alive—Date of conception during alleged period of non-access—Evidence of non-access—Admissible with respect to period prior to occasion of conception—Not admissible with respect to occasion of conception—Admissible with respect to period subsequent to occasion of conception.
Branker v. Branker365

HUSBAND AND WIFE contd.—

Divorce—Adultery—Condonation—Conditional re-instatement of guilty spouse—Implied condition—No further matrimonial offence to be committed—Spouse condoning adultery—Must be substantially aware of matrimonial sin committed—Otherwise no condonation—Effect of condonation—Offence obscured but not obliterated—Condoned adultery—Revived by malicious desertion on the part of guilty spouse.

Branker v. Branker365

Divorce—Adultery—Evidence of—Married woman pregnant, or delivered of a child—Acts and conduct of—Evidencing doubt in her mind as to whether pregnant for husband, or whether child born of her body is for her husband.

Branker v. Branker365

Divorce—Adultery—Rule in *Russell v. Russell*—No foundation for application of—Until birth to wife of living child proved—Pregnancy of wife—No evidence that it resulted in birth of a living child—Evidence of non-access by husband—Admissible—Adultery—Evidence of.

Branker v. Branker365

Divorce—Husband's petition for—Husband's petition for—Wife unsuccessful—Costs of and incidental to hearing—Wife not entitled to—Against husband—Where no order made at hearing as to costs—Rules of Court (Matrimonial Causes), 1921, rule 64.

Mittelholzer v. Mittelholzer138

Maintenance and non-cohabitation—Complaint for—Grounds of—Desertion and persistent cruelty—Complaint still pending—Fresh complaint filed—Ground of—Desertion only—Date of commencement alleged—Subsequent to filing of first complaint—Order made on second complaint—First complaint still pending—No resumption of cohabitation since filing of first complaint—Desertion could not have commenced on a date subsequent to filing of first complaint—Order set aside—Application for amendment—To make date of desertion same as on first complaint—Refused.

Barrak-Odi v. Barrak-Odi121

HUSBAND AND WIFE contd.—

Matrimonial causes—Dissolution of marriage or judicial separation—Petit on for—Main object of—Alimony pendente lite—Petition for—Not to be subordinate to—Where dominant object of originating petition—To obtain alimony pendente lite—Abuse of process of Court.

Langford v. Langford194

Dissolution of marriage—Permanent maintenance of wife—Application for—When it may be made—After *decree nisi* up to within a month after *decree absolute*—With leave of Court, if made subsequently—When leave of Court may be granted—If in circumstances, reason and good sense so require—How application made—In a separate petition—Meaning of—Separate petition in original cause—Rules of Court (Matrimonial Causes) 1921, rule 43 (1), (2)—Matrimonial Causes Ordinance, cap. 143, s. 14 (1).

Luke v. Luke.....198

Dissolution of marriage—Permanent maintenance of wife—Petition for—Fortune of wife—Jewellery and earnings—Whether fortune—Matrimonial Causes Ordinance, cap. 143, sec. 14 (i)—Order under—For security only—If no security cannot be ordered, application fails.

Luke v. Luke.....280

Dissolution of marriage—Permanent maintenance—Petition for—Monthly or weekly payments—Order for—No matrimonial offence committed by wife—*Dum casta* clause not to be inserted in order—*Dum sola* clause inserted.—Petition filed after *decree absolute*—Order not to relate back to date of decree—Matrimonial Causes Ordinance, cap. 143, s. 14 (2).

Luke v. Luke.....280

Matrimonial causes—Dissolution of marriage—Decree *nisi*—No appearance by respondent to petition—Intervention by respondent after decree *nisi*—Not permitted—Matrimonial Causes Ordinance, cap. 143, s. 12; Rules of Court (Matrimonial Causes), 1921, r. 31 (1).

Roberts v. Roberts289

Dissolution of marriage—Petition for—Decree *nisi*—Application by respondent for rehearing—no appearance by her to petition—Whether rehearing essential to attain the ends of justice.

Roberts v. Roberts289

IMMIGRATION—

Immigrants—Division of property—Order for—Immigration Ordinance, cap. 208, s. 147 (1)—Refusal or neglect to comply with terms of order—Complaint for—Cap. 208, s. 147 (2)—Lawful excuse a defence—What may be a lawful excuse.

Hardyah v. Calica140

IMMOVABLE PROPERTY—

House—Owner of—Also owner by transport of land on which house stands—Whether house immovable property—Gift of house—Whether could be completed otherwise than by transport.

Surejpaul v. Ramdeya & Sarju309

Transfer of—Can only take place if perfected by transport.

Surejpaul v. Ramdeya & Sarju309

Full and absolute title to—Does not extinguish trusts—Title for benefit of cestuis que trust—Deeds Registry Ordinance, cap. 177, s. (21) (2).

Sooknannan v. Sunichery260

INFANT—

Immovable property—Property of infant—Sale of—Contract for—Sanctioned and confirmed by Court—After infant attained majority—In proceedings instituted, before infant became of age, to enforce contract.

Mark v. Fausett & Ross320

JUDGMENTS AND ORDERS—

Decree for specific performance—Against company—Default in compliance—Subsequent thereto—Action for liquidated demand by chairman of company—Against company—Judgment obtained—Levy on property subject of decree for specific performance—Chairman of company restrained from proceeding with levy—In suit in which specific performance decreed—In order to give effect to the decree,

Dem., Storage Co., Ltd. v. Dem., Wharf & Storage Co., Ltd......306

LANDLORD AND TENANT—

Boarding house business—Nature of—Conducted by tenant—
Utterly inconsistent with use of demised premises by any
respectable person as a dwelling house for a family with
children—Termination by landlord of tenancy forthwith by
landlord—Justified.

Pereira v. Weekes388

Rent restriction—Recovery of possession—Premises let as a
dwelling house—Sub-let as furnished apartments—Status of
premises when recovery sought—Regard to be had to—
Premises not within protection of Rent Restriction Ordinance,
1941—Ordinance No. 23 of 1941, sections 3 (1), (3),
(5), (6), 7 (1), 11.

Heirs of De Freitas, Ltd. v. Fernandes31

Rent restriction—Recovery of possession—Real main and sub-
stantial purpose for which tenant hired premises—Boarding
house, not dwelling house—Carried on as a business—Rent
Restriction Ordinance, 1941—No application to premises or
to tenancy.

Pereira v. Weekes388

Rent restriction—Standard rent—Permitted increase—In respect
of rates and taxes—Dwelling house—No increase since
they were first payable—Rent may not be increased by
amount of rates—Rent Restriction Ordinance, 1941 (No.
23), s. 6 (1) (b).

de Sousa v. Ewing257

LIBEL AND SLANDER—

Libel—Plaintiff found not guilty of burglary—Report of trial in
newspaper—Allegation that jury gave plaintiff benefit of
doubt—Defamatory.

Bedford v. Daily Chronicle, Ltd. et al118

Libel—Action tried by judge without jury—Judge able to ex-
press disapproval of libel in terms of judgment—Taken into
consideration by trial judge—In assessing damages.

Bedford v. Daily Chronicle, Ltd. et al. 118

Unincorporate body with limited number of members—
Criticism of—If defamatory—Right of action in each mem-
ber.

Parkes v. Argosy, Co., Ltd., et al......143

LIBEL AND SLANDER contd.—

Reasonably capable of defamatory meaning—Whether defamatory—Public interest—Sport—Intention of defendant—When relevant—Fair comment and damages—Fair comment—Meaning of—Express malice—What is—Damages—Action tried before judge without jury—No pecuniary loss suffered by plaintiff—Expression of disapproval of libel in judgment—Heavy damages not awarded.

Parkes v. Argosy, Co., Ltd., et al......143

LIMITATION OF ACTION—

Advertisement of transport by registered owner—Action to oppose transport—By person in possession—Not an action to recover immovable property—Civil Law of British Guiana Ordinance, cap. 7, s. 4 (2).

Sooknannan v. Sunichery260

LOCAL GOVERNMENT—

Village or country district—Rates—When levied—On date of publication in *Gazette* of approval of estimate—Local Government Ordinance cap. 84, s. 117 (1); Ordinance No. 12 of 1937, s. 10 (2); Ordinance No. 20 of 1937, s. 3—When rates for whole year due, owing and recoverable—May the first.

Nascimento v. Blenman.....205

MONEY-LENDER—

“Holding out”—Meaning of—Representation, canvassing or the like of—Willingness to lend money as a business—Money-lenders Ordinance, cap. 68, s. 2.

Munroe v. Dias (W.I.C.A.).....428

Money-lending—Mortgage transactions—Not evidence of—Unless taken in course of business as money-lender—Transfer of mortgage—Not in itself a loan transaction—System, repetition and continuity of dealings—Before person can be deemed a moneylender,

Munroe v. Dias (W.I.C.A.).....428

Money-lending—Business of Investment of capital in mortgages—Whether money-lending—System, repetition or continuity of money-lending transactions—Evidence of.

Dem., Storage Co. Ltd. v. Dem., Wharf & Storage Co. Ltd......82

MORTGAGE—

Amount acknowledged in mortgage bond as due to mortgage—
Willing and voluntary condemnation therefor—Whether
judgment by consent—Whether *res judicata* until revoked,
rescinded, set aside or annulled.

<i>Dem., Storage Co. Ltd. v. Dem., Wharf & Storage Co., Ltd</i>	82
<i>Munroe v. Dias</i>	428

MOTOR VEHICLES—

Driving of—Disqualification from—Purpose of—To keep off
road a person not fit to drive upon it—For a period which
may give him an opportunity so to reconsider his ways as to
be no longer a menace to the lives of his fellowmen.

<i>Kissoon v. Kingston</i>	253
----------------------------------	-----

Dangerous driving—Motor Vehicles and Road Traffic Ordi-
nance, 1940 (No. 22) s. 35 (1)—Essence of offence—
Danger to the public—No reference thereto—In complaint,
magistrate's reasons for decision, or in conviction as drawn
up by magistrate—Conviction quashed.

<i>Bagado v. Welcome</i>	293
--------------------------------	-----

MOVABLE PROPERTY—

House—Upper and lower flats—Two rooms as lower flat—One
unoccupied—Notice by owner of house—Served on tenant
of room on lower flat—To pay rent to another person who is
now owner and landlord—Not a delivery of house.

<i>Surejpaul v. Ramdeya & Sarju</i>	309
---	-----

House—Transfer of—Whether by bill of sale—Bills of Sale Or-
dinance, cap. 67, Part I.

<i>Surejpaul v. Ramdeya & Sarju</i>	309
---	-----

OPPOSITION TO TRANSPORT OR MORTGAGE—

Grounds of—Since 1893—Right to or in property—Liquidated
demand.

<i>Da Silva v. Sukhraj</i>	43
----------------------------------	----

Right to oppose—Principles—As laid down in 1892 and 1893—
Whether those principles should have been judicially de-
clared as the law.

<i>Da Silva v. Sukhraj</i>	43
----------------------------------	----

OPPOSITION TO TRANSPORT OR MORTGAGE contd.—

Grounds of—Thirty years' continuous possession—Right to oppose.

Sooklall v. Gaurisankar & Lachu56

Sooknannan v. Sunichery260

Bequest of immovable property—Sale by legatee—Contract for—Title not yet vested in him by executor—Transport advertised by executor in favour of another person—Opposition by purchaser.

Mark v. Fausett & Ross320

Rules of the Supreme Court (Deeds Registry), 1921, rule 5—Application of—Not where one mortgage is opposed—By one person in respect of two causes of action.

Sookea v. Tiam Fook.....163

Action to enforce—Reasons for opposition—No amendment without leave—Rules of the Supreme Court (Deeds Registry), 1921, rule 9 (1).

da Silva v. Sukhraj.....158

Claim for unliquidated damages—Not good ground for opposition.

da Silva v. Sukhraj.....158

Opposition suit—Relief claimable in—Joinder with other causes of action—Prohibited—Application to strike out other causes of action—Not subject to objections of waiver and delay.

da Silva v. Sukhraj.....158

Statement of claim—Amendment of indorsement of writ in—Rules of Court, 1900, Order 18, rule 2—Basic principle of opposition actions—Not to offend against.

Sookea v. Tiam Fook.....163

Action to enforce—Not pursued to finality—Transport not passed—Advertisement withdrawn or abandoned—Advertisement in favour of another person—Opposition to—By original opposer—In order—Rules of Supreme Court (Deeds Registry), 1921 rule 7.

Sooklall v. Gaurisankar & Lachu56

OPPOSITION TO TRANSPORT OR MORTGAGE contd.—

Reasons for opposition—Amendment—Application for—By way of summons—Rules of Supreme Court (Deeds Registry), 1921, rule 9—Measurements of land opposed—Not reasons for opposition.

Sooklall v. Gaurisankar & Lachu56

Reasons for—Claim on express contract—Trial of action—Claim on *quantum meruit*—Opponent cannot rely upon—Rules of Supreme Court (Deeds Registry), 1921, rule 9.

Blackett v. Pollard & Hinds62

Writ of summons to enforce—Indorsement—To restrain passing, and for declaration that opposition just, legal and well founded—Rules of the Supreme Court (Deeds Registry), 1921, rule 7 (1)—Generally indorsed writ—Application to set aside writ—Statement of claim not yet filed—Power of plaintiff to extend indorsement of claim—In statement of claim—To include claim for judgment in respect of cause of action—Application premature—Not granted.

Sookea v. Tiam Fook163

PRACTICE—

Rules of Court 1900, Order 1, & 1—These rules—Meaning of—Whether they include amending and additional rules.

da Silva v. Sukhraj158

Trial of action—Rulings made during—Application to trial judge, before determination of action, for leave to appeal against—Cannot be entertained—Application to trial judge for adjournment of hearing pending determination of motion to Full Court for leave to appeal—Cannot be entertained.

Dem., Storage Co., Ltd. v. Dem., Wharf & Storage Co., Ltd.82

Trial of action—No oral evidence led by defence—Documents produced while cross-examining witnesses for plaintiff—Evidence adduced by defendant—No right of reply in defendant.

Dem., Storage Co., Ltd. v. Dem., Wharf & Storage Co., Ltd.82

Writ served on attorney—Whether defendant alive—At time of service—Considerable doubt—Judgment—In default of appearance—Set aside.

Wong v. Leandro217

PRACTICE contd.—

- Joinder of causes of action—Rules of Court, 1900, Order 16 as enacted in 1932—Supreme Court of Judicature Ordinance, Cap. 10, s. 33—Opposition to transport or mortgage—Action to enforce—Independent causes of action may be joined with—Subject to power of Court to order separate trials where necessary.
- Da Silva v. Sukhraj, Stafford, J. (Ag)*.....43
- Joinder of parties—Action by purchaser for specific performance—Claim by vendor against mortgagee for accounts—Application by defendant to join mortgagee as defendant—Purchaser not concerned with vendor’s claim against mortgagee—Application refused.
- Dem., Storage Co. Ltd. v. Dem., Wharf & Storage Co., Ltd.*.....82
- Joinder of causes of action—Opposition to transport or mortgage—Action to enforce—Relief claimable in—Joinder with other causes of action—Prohibited—Application to strike out other causes of action—Not made until hearing of action—Not subject to objections of waiver and delay.
- da Silva v. Sukhraj, Verity, C.J*158
- Independent cause of action joined with opposition action—Trial of—Relief or remedies granted—Only such as appropriate to each cause.
- Da Silva v. Sukhraj*.....43
- Particulars—Allegation of undue influence—Substance of case—Already contained in statement of claim—Particulars not ordered.
- Lovell v. Marcus*.....166
- Defence—Application to strike out—Granted where paragraphs constitute no defence to action—Refused where a point of law, which may or may not be substantial, is raised.
- Dem., Storage, Co., Ltd. v. Dem., Wharf & Storage, Co., Ltd.*.....82
- Statement of claim—Application to strike out—Should be made by way of summons—Not at trial of action—Except in special circumstances.
- Blackett v. Jeboo*392

PRACTICE contd.—

- Trial of action—Application made at—Refused—Judge vacates office—Trial before that judge terminated—Action set down for hearing before another judge—Application renewed before him —Matter not *res judicata*.
daSilva v. Sukhraj.....158
- Statement of claim—Striking out—Application for—Main object of action—Setting aside deed of transfer—Undue influence—False representations—May be acts in exercise of undue influence—Sole point for determination—Whether mind of plaintiff accorded with her act—When she executed deed of transfer—Allegations in respect of undue influence—Not definitely separated from those in respect of false representation—Statement of claim not struck out.
Lovell v. Marcus.....166
- Interim injunction—Application for—On affidavit filed—Writ of summons not filed—Writ not prepared—No evidence that not possible to file writ before filing of affidavit—Application refused.
Sewdin & Barron v. Edun, Griffith, et al.....400
- Execution—Discovery in aid of—Examination of person other than judgment debtor—Order for—Cannot be made—Rules of Court 1900, Order 36, rule 29.
Mourat v. Tahal215
- Receiver and manager—Appointment of—When refused—Principles on which Court acts.
Singh v. Jaundoo221
- Action—Discontinuance—Before defence—Undertaking by defendant—Not to recover costs against plaintiff—Discontinuance filed on faith of undertaking—Rules of Court, 1900, Order 24, rules 1 and 4—Originating summons—To compel plaintiff to pay costs—Not entertained.
Re Dhunawo; ex parte Haniff273
- Application—Under Companies (Consolidation) Ordinance, cap. 178, s.s. 134, 185—Should be made by way of summons.
Re Plantation Maryville Estates, Ltd226

PRINCIPAL AND AGENT—

House agent—Mere introduction of one who offers to purchase at specified or minimum price—Commission to agent for—Agree-merit by property owner to pay—Clear and unequivocal language required.

Blackett v. Jeboo392

House agent—For sale of property—Commission—For introducing purchaser—Not earned—Unless agent *causa causans* of sale going through.

Blackett v. Pollard & Hinds62

House agent—Nature of agency—To find a purchaser—Meaning of—To find a person who at least enters into a binding contract to purchase.

Blackett v. Jeboo392

House agent—Nature of agency—To find a purchaser—Introduction by agent to principal—Of person ready, willing and able to purchase at price assented to by principal—Not implied term of contract of agency—That principal shall enter into a contract with that person to sell at the agreed price—If principal refuses to enter into contract—Agent not entitled to commission or damages.

Blackett v. Jeboo392

Commission agency—For sale of property subject to contract—Person able and willing to purchase—Introduced by agent—Contract not signed by intended purchaser—Through advice of agent—Agent's services terminated by principal—Sale effected by principal to person introduced by former agent—Purchaser signs contract—Agent not entitled to commission.

Blackett v. Edghill338

Commission Agent—Finding a purchaser—Meaning of—Finding a person who enters into a contract of purchase and not merely a person willing and able to purchase—Contract may however provide otherwise—But clear and unequivocal language must be used—Where agent not entitled to commission on contract—Agent not entitled to damages because owner refuses to sell—Agent not entitled to claim on a *quantum meruit*—Risk natural to business of commission agent—That he receive no recompense for expenditure of time and energy, if sale not effected.

Sattaur v. Schroeder299

PROMISSORY NOTE—

On demand—Consideration—Illegality—Indorsement by payee—Whether indorsee holder in due course—Holder in due course—Meaning of—Whether holder took note in good faith without notice of any defect—In good faith—Meaning of—Note tainted with illegality—General notice that.

Ali v. Sam.....156

Consideration—Note made by debtor—In favour of payee at request of creditor—Antecedent debt or liability—Bills of Exchange Ordinance, cap. 56, s. 28 (1) (b)

Correia v. Jacobs.....342

Consideration—Part valid, part illegal—Illegal part severable from valid part—Action by payee—Amount of note recoverable—In so far as it relates to valid part of consideration—Not in so far as it relates to illegal part.

Correia v. Jacobs.....342

PUBLIC HEALTH—

Offensive manufacture—Declared to be—That process, or any part, offensive—Proof not required—Manufacture—Includes any stage in process—Establishes—Whether connotes permanence or stability—Public Health Ordinance, 1934 (No. 15), s. 95.

Martin v. Dookwah.....303

RES JUDICATA—

Trial of action—Application made at—Refused—Judge vacates office—Trial before that judge terminated—Action set down for hearing before another judge—Matter not res judicata.

da Silva v. Sukhraj.....158

RIVER NAVIGATION—

River Navigation Regulations, 1924, regs. 18, 22—No uncertainty in reg. 22—As to printing on boat number of persona boat licensed to carry.

Harris v. Forbes106

SALE OF GOODS—

Contract for—Payment on account of purchase price—At time of contract—As guarantee of due performance on part of purchaser—Paid by way of deposit—Contract repudiated by purchaser—Amount paid forfeited to vendor—In absence of express agreement to contrary.

Antar v. Valverde (W.I.C.A.)442

Contract for—Purchase price—Payment on account—At time of conclusion of contract—Guarantee of due performance on part of purchaser—By way of deposit—Contract repudiated by purchaser—Deposit remains property of vendor—Irrecoverable.

Doobay v. Moulai411

SALE OF LAND—

Contract for—Breach by vendor—No good title in him—Unwillingness of vendor to remedy defect in title—Damages for loss of bargain—Awarded to purchaser—Where possible to remedy defect in title, and reap benefits of a future sale.

Waldron v. Clarke111

SOLICITOR—

Moneys deposited in joint names of two solicitors—To abide event—On happening of event—Moneys payable to one solicitor as agent for his client—Other solicitor refuses to concur in withdrawal of money—Order on solicitor therefor—Application for—Power of Court to grant.

Mittelholzer v. Mittelholzer138

SPECIFIC PERFORMANCE—

Action for—By purchaser—Mortgagee not a necessary party thereto.

Dem., Storage Co., Ltd. v. Dem., Wharf & Storage Co., Ltd.82

Contract—Relating to immovable property—Made without consideration—No question of part performance.

Surejpaul v. Ramdeya & Sarju309

Not decreed—Where at time of trial title of vendor not good.

Waldron v. Clarke111

SPECIFIC PERFORMANCE contd.—

Sale of land—Contract for—Immovable property bequeathed to vendor—Title not vested in him by executor—Transport advertised by executor in favour of another person—Opposition by purchaser—Executor directed to pass transport in his favour.

Mark v. Fausett & Ross320

Contract of sale—Purchase money not at disposal of purchaser—Specific performance decreed.

Hussain & Choong v. Tiam Fook172

For the execution of a bilateral deed—Party applying unable to comply with terms of deed—Deed prejudicial to interests of other party—First party did not execute deed within the time agreed upon—Specific performance refused.

Hussain & Choong v. Tiam Fook172

Against a person who has agreed to lend money—Will not be decreed—Exception—Contract with a company to take up and pay for debentures—Companies (Consolidation) Ordinance, cap. 178, s. 103.

Hussain & Choong v. Tiam Fook172

Decree for—Default in compliance—Subsequent thereto—Levy on property subject of decree for specific performance—Restrained—In suit in which specific performance decreed—In order to give effect to decree.

Dem., Storage Co., Ltd, v. Dem., Wharf & Storage Co., Ltd306

TRUST AND TRUSTEE—

Trust—Declaration of—Settler's property—Intention to become a trustee—Expression of.

Surejpaul v. Ramdeya & Sarju309

Immovable property—Full and absolute title to—Does not extinguish trusts—Title for benefit of cestuis que trust—Deeds Registry Ordinance, cap. 177, s. 21 (2).

Sooknannan v. Sunichery260

In English meaning—Familiar in legal practice in the Colony—When Roman Dutch law was common law.

Sooknannan v. Sunichery260

TRUST AND TRUSTEE contd.—

Trust—Declaration or creation of—Required to be in writing—
 Not where cestui que trust has been in possession of trust
 property from inception of trust—Civil Law of British
 Guiana Ordinance, Cap. 7, section 3, proviso (*d*).

Sooknannan v. Sunichery260

UNDUE INFLUENCE—

By child on parent—What is not undue influence.

Mahastesingh v. Maharaj & Poonwassie (W.I.C.A.).....435

Grantor of deed—Old and infirm—In impecunious circum-
 stances—Without professional advice—No imposition prac-
 tised upon grantor of deed—Deed will not be set aside—
 Consideration inadequate—But that wanted by grantor—
 Deed will not be set aside.

Mahastesingh v. Maharaj & Poonwassie (W.I.C.A.).....435

WORDS—

“Creditor”—Meaning in document—Does not include village
 council in respect of rates.

Nascimento v. Blenman.....205

CASES

DETERMINED IN THE
SUPREME COURT OF BRITISH GUIANA.

ARTHUR CARLOS CARVALHO, Plaintiff,
OWNERS OF SHIP "PRINZ ANDRE" Defendants.

[1941. No. 260.—DEMERARA.]

BEFORE LUCKHOO, J. (ACTING).

1941. DECEMBER 29, 30; 1942, JANUARY 2.

Admiralty—Seaman's wages—Action for—Defence—Desertion of ship—What constitutes—Abandonment of duty—Without justification—Quitting ship—Without intention of returning.

To constitute desertion by a seaman of his ship, there must be a complete abandonment of duty without justification, and such abandonment must be by quitting the ship.

If there be an absence from the ship with an *animus revertendi*, it is not desertion which would cause a forfeiture of the whole of the wages.

Action by the plaintiff for wages as a seaman. The necessary facts appear from the judgment.

G. M. Farnum, for plaintiff.

H. C. Humphrys, K.C., for defendants.

Cur. adv. vult.

LUCKHOO, J. (Acting): The plaintiff is a seaman, a native of Portugal. The steamship "Prinz Andre" is registered at Dubrovnik, Yugoslavia, and at the material times for decision in this action was under the command of one Vlaho Simicic.

In the month of August, 1940, whilst the ship was lying in the harbour off Lisbon, the plaintiff and two young men of Spanish nationality and apparently of an adventurous type stowed away on board this ship. After being two days out at sea they were discovered by the captain then in command. The ship proceeded on her way to Newport, to Boston and finally to New York. At New York the plaintiff obtained a certificate from the Portuguese consul, and the captain agreed to sign him on as one of the crew.

From the records kept by the ship the plaintiff was first employed as a deck boy, and later as a trimmer. The salary paid to the plaintiff from time to time is fully set out in Ex. "D," a true copy of the entries in Ex. C3, which by consent of counsel for the plaintiff and the defendants at the *de bene esse* examination was allowed to be returned to the ship. Two entries on Ex "D" were made for the convenience of counsel for the

A. C. CARVALHO v. OWNER OF "PRINZ ANDRE."

defendants, and they are not taken into consideration in deciding the issues raised in this case.

Sometime after the ship was at New York a voyage to the Pacific was undertaken, and the "Prinz Andre" with plaintiff on board as a deck boy passed through the Panama Canal on her way to Japan, and then to India in the Far East. At both these places the plaintiff received payment on account of his wages (in yens at Japan, and in rupees at Calcutta).

From Calcutta the ship went by way of the South Atlantic round the Cape of Good Hope and then up north to Baltimore, U.S.A. She had steamed round the earth.

At Baltimore, Vlaho Simicic took over the command of the ship, and plaintiff was assigned to work of a trimmer at \$87 per month, American Currency less \$2 for war tax.

One voyage to British Guiana was made in the month of April, 1941, with a stop at St. Thomas, one of the Virgin Islands. The "Prinz Andre" then returned north to Canada—Port Sydney and Port Alfred being the ports of call.

It was on the second voyage to British Guiana in the month of June that certain circumstances arose which gave rise to the present suit, in which the plaintiff claims from the defendants the sum of \$525.50 being the balance due to him as wages. The defendants at the trial and at the *de bene esse* examination held at the Victoria Law Courts on the 1st day of October, 1941, before the special examiner appointed by commission in this action dated the 30th day of September, 1941, at which the Captain Vlaho Simicic and the chief officer of the "Prinz Andre" Mato Mitoslavic were examined, put in issue the claim of the plaintiff on the following grounds.

(1) The defendants are not indebted to the plaintiff in any sum of money. There is no balance for wages payable to the plaintiff as he had been paid up to the 16th day of June, 1941, when he ceased to be employed by the defendants.

(2) Plaintiff left the ship at the port of Georgetown without permission on the 12th June, 1941, and deserted the same.

(3) On the 16th June, 1941, after the ship's return from McKenzie City, plaintiff called for his papers stating he had found a job ashore.

(4) On the 31st July, 1941, when plaintiff rejoined the ship at the port of Georgetown after she had made another voyage to Port Alfred, he refused to work on deck.

(5) Plaintiff escaped from the ship at St. Thomas on her voyage northwards and went ashore against orders and returned to ship a few minutes before she left.

(6) On his return to British Guiana on board the said ship, on the evening of the 6th September, 1941, plaintiff left the ship against the orders of the captain and swam ashore. He never returned to the ship and deserted the same.

A. C. CARVALHO v. OWNER OF "PRINZ ANDRE"

On the first ground, I am satisfied from the evidence of the captain and the chief officer and from the records produced bearing the signature of the plaintiff that he was paid his salary up to the 16th day of June. This fact Mr. Farnum admits can no longer be contested by him.

From the evidence of the plaintiff and that of the chief officer, I cannot find that the plaintiff deserted the ship on the 12th day of June, 1941. It is clear from the evidence of the chief officer that the police brought permits—little red tickets—for every member of the crew, and that he distributed them to the crew, including the plaintiff. Whilst that witness further states each member would still have to ask his permission to go ashore, and the plaintiff did not ask for such permission, it is highly probable that the plaintiff was under the genuine impression that he could leave the ship, more especially as other members of the crew did.

On the following morning the ship steamed up river to McKenzie City without the plaintiff on board. The plaintiff states that he was left behind and immediately reported to Sproston, the agents of the owners of the steamship, that he had missed the ship, and that they told him to await her return. He did so, but when he went on board on the ship's return to the port of Georgetown, the captain told him to get out of the ship and that he did not want him any more. The captain took his papers, and said he would give them to the police.

I am unable to find that the plaintiff wilfully left the ship on the 12th June, 1941, without permission from the chief officer. If such permission was never in fact granted, the plaintiff was tinder the honest belief that it was, in view of what I have stated above. His neglect to return in time, (and on his own showing plaintiff had dissipated about \$70:—in one evening ashore and time passed on without comprehension on his part), to join the ship for Mackenzie City, although it might subject him to a fine or a deduction of wages which the defendants did in preparing plaintiff's final account, could not amount in law to desertion, unless I came to the conclusion that the plaintiff, on his return to the ship on the 16th day of June, demanded his papers with no intention of rejoining same. Even if the plaintiff went ashore without leave but intending to rejoin his ship would this fact constitute desertion in the legal acceptation of the term?

To constitute desertion, there must be a complete abandonment of duty without justification, and such abandonment must be by quitting the ship. If there be an absence from the ship with an *animus revertendi*, it is not desertion which would cause a forfeiture of the whole of the wages. See the case of *The Two Sisters* (1843) 2 Wm. Rob. 125.

As a matter of fact the defendants themselves calculated the wages earned by the plaintiff to the 16th day of June, 1941, deducting therefrom wages for 6 days—one at Port Sydney and

A. C. CARVALHO v. OWNER OF "PRINZ ANDRE."

five days for being absent whilst in British Guiana, on and between the 12th and 16th days of June, 1941, clearly indicating that they never treated plaintiff's absence as one of desertion. These circumstances, and those following, justify me in finding against desertion.

It is unfortunate in this case that I have not had the opportunity of hearing and seeing the witnesses upon whom the defendants rely to establish the fact that the plaintiff went aboard the ship on the 16th June, asked for his papers, saying he was not staying on board the ship and he had found a job ashore. Evidence is on record only.

Bearing in mind that desertion has to be established on clear evidence, the *onus probandi* being on the defendants and on consideration of the relevant authorities on the point to one of which I have already referred, I have come to the conclusion not without some hesitation that the plaintiff's version is the more likely one. This is what the plaintiff states:—

"After ship came into the harbour in British Guiana, I came ashore. This was in June, 1941. I left the ship and came ashore for one evening. The next morning the ship sailed for the Bauxite Company up the Demerara River. I was left behind I went to Sprostons and I told them I had missed the ship. They said to wait until the ship returned. A few clays later the ship returned to the port of Georgetown. I went aboard. The captain told me to get out of the ship, he did not want me any more. He took my papers and said he would give them to the police. The launch by which I went to the ship brought me back to land."

Plaintiff is an alien and was a stranger in these parts. Would he have given up his job as a trimmer from which he earned 4,675 Dinars per month, 55 Dinars being the equivalent of \$1 American Currency?

This works out at \$85 per month. Would he have incurred the forfeiture of wages he had already earned? or was it not the fact that the captain had already engaged a trimmer for the trip up north and could not displace that person? The captain and chief officer were probably annoyed with the plaintiff for not rejoining the ship in time before it steamed up river to Mackenzie

This is what the chief officer said in examination-in-chief (*de bene esse* examination)

"In June after plaintiff left the ship the captain took on three men at Georgetown before we left for Mackenzie two as deck hands, and one as trimmer. The three men left the Colony with the ship (June 1941).

"Before the plaintiff left the ship he was working as a trimmer. *We engaged a trimmer in his place.*"

The plaintiff went aboard in a launch. According to the

A. C. CARVALHO v. OWNER OF "PRINZ ANDRE."

evidence of the captain it was the launch by which the pilot also went to the ship. It would have been more satisfactory to me to decide the issue on this point, had the pilot, an independent person, been placed in the witness box to give his version of what occurred. It must also be noted that the defendants offered the plaintiff work when he rejoined the ship on the 31st July. They permitted him to return to work and cannot now rely upon the ground of desertion, even if there were proof of it.

Taking all the circumstances into consideration I find against the defendants on grounds No. 2 and No. 3.

What then is the right of the plaintiff to recover wages from that date 16th June to the 31st July when he was permitted to return on board and given work to do.

No written contract has been produced in this case. There seems to have been no fixed period of employment whether by time or by voyage. The accounts produced show payment from month to month.

Having found that the plaintiff was refused permission to continue his services as trimmer, and in the absence of any ship's articles by which the plaintiff agreed to a forfeiture of wages if he should absent himself from the ship, the plaintiff would have earned, had he been taken aboard and allowed to perform his calling as a trimmer, \$127.50 (one and a half months' wages) up to the time he was retaken on board the ship on the 31st day of July.

I accept the evidence of the master and chief officer that when the plaintiff was allowed to rejoin the ship on the 31st day of July, he refused to carry out the lawful orders given to him to work on deck. At St. Thomas he was told that the immigration authorities said he was not to go ashore. He however, escaped from the ship, went ashore, and rejoined it just before it sailed.

I do not hold that this act of the plaintiff amounted to desertion. It was at most a wilful disobedience on his part and subjected him to imprisonment under the Merchant Shipping Act and instant dismissal even if he had entered upon a new month's work with the defendants, which I do not find he did.

His evidence, and that of the witness Rowe, does not convince me that he performed any work on deck as a sailor. His place as a trimmer had been filled. He did not like to work on deck. He had to be fed during the voyage up north and back again to British Guiana. He took his meals alone, not with the other sailors, and on arriving back at the port of Georgetown, he deserted the ship, and swam ashore, with an intention not to return to her. In answer to the court, the plaintiff said "I was not willing to return to the same boat."

His act in leaving the ship on the 6th September, 1941 in the manner he did, and his intention not to return, satisfies the legal

A. C. CARVALHO v. OWNER OF "PRINZ ANDRE."

definition of desertion, the abandonment of the ship *sine animo revertendi* which would result in a forfeiture of any wage he might have earned as from the 31st day of July.

I however find as a fact for the reasons which I have given above that he had not earned anything. On the contrary, he was a burden upon the owners.

The defendants had no choice but to keep him on board and give him food until such time as the "Prinz Andre" might call at Lisbon where the plaintiff had surreptitiously joined the ship on the 17th day of August, 1940.

Having found that the plaintiff deserted the ship, the last point raised by Mr. Farnum, repatriation, does not arise for consideration.

There must be judgment for the plaintiff for the sum of \$127.50 being wages legally payable to him from the 16th day of June to the 31st day of July, 1941.

The defendants were fully justified in defending the suit and have succeeded to a great extent.

In those circumstances I make no order as to costs.

Judgment for plaintiff.

Solicitors: *R. G. Sharples; A. G. King.*

THOMAS C. HARRIS, Appellant (Defendant),
 v.
 LUDOVICUS FORBES, Respondent (Complainant).

[1941. No. 370.—DEMERARA.]

BEFORE FULL COURT: VERITY, C. J., FRETZ, J. AND LUCKHOO, J. (Acting).

1942. MARCH 27; APRIL 17.

Criminal law and procedure—Complaint—Essential fact in support of—Not proved by prosecution—Proved by defendant—To be considered by magistrate—Not open to defendant to say on appeal that fact not proved.

Regulations—River Navigation Regulations 1924, regs. 18, 22—No uncertainty in reg. 22—As to printing on boat number of persons boat licensed to carry.

Criminal law and procedure—River navigation—Boat—Certificate of inspection—Licensed as cargo boat—Subsequently incensed as passenger boat—First certificate not revoked—Second certificate valid—Whether first certificate revoked by implication—River Navigation Regulations, 1924, regs. 18, 20, 22.

Where the prosecution has failed to prove an essential fact, but the defendant has proved it, the defendant cannot, on appeal, be heard to say that it is not a fact, or that it is not proved.

There is no uncertainty in regulation 22 of the River Navigation Regulations, 1924, which requires to be printed upon the boat the number of persons the boat is licensed to carry.

On the 22nd April, 1941, a certificate of inspection was issued, under the River Navigation Regulations, 1924, licensing a boat as a cargo boat to carry 30 persons when no cargo was carried. On the 6th May, 1941, the appellant requested the deputy navigation officer to inspect the boat so that he might obtain a certificate as a passenger boat. This inspection was made, and a fresh certificate issued whereby the boat was licensed as a passenger boat to carry 16 passengers. On the 5th July, 1941, the boat was seen on the Essequibo River at Bartica without the number of this second certificate marked thereon, nor the number of persons which it was licensed to carry by that certificate. The appellant was convicted, under regulation 22 of the River Navigation Regulations, 1924, for failing to have the number of the certificate of inspection of the boat, as a passenger boat, and the

T. C. HARRIS v. L. FORBES.

number of persons it was licensed to carry, legibly printed on the boat in the prescribed manner.

On appeal, it was argued that in spite of the appellant's request that the boat should be licensed as a passenger boat so that it might be enabled to carry persons other than farmers or their labourers to and from their farms, and in spite of the fitness of the boat for this purpose and the issue of such a certificate to the appellant, yet by reason of the absence of some formal revocation of the certificate to the 22nd April, 1941, as a cargo boat, the certificate of the 5th July, 1941, as a passenger boat is a nullity, and the appellant is debarred from carrying out the project which he desired and for which at his request the certificate of inspection licensing the boat as a passenger boat was issued.

Held (1) that this was not the intention nor the effect of the River Navigation Regulations, 1924;

(2) that whether, after the issue of the certificate of inspection of the 6th May 1941, the boat assumed the dual nature of a cargo boat (licensed to carry persons to the number of 30, including the crew, such persons, other than the crew, being confined to farmers or their labourers and their journey confined to that to or from their farms) and of a passenger boat (licensed to carry persons other than farmers or their labourers on any journey to the number of 16), or whether the boat ceased to be licensed as a cargo boat, was immaterial, as in either case the boat would be required to bear the markings prescribed by regulation 22 which include the number of persons it was licensed to carry as a passenger boat, and failure to mark this number in either case constitutes an offence.

Quære: whether a certificate of inspection, issued under the River Navigation Regulations, 1924, licensing a boat as a cargo boat is impliedly revoked by the subsequent issue of a certificate of inspection licensing the boat as a passenger boat.

Appeal by the defendant from a decision of Mr. J. A. Veerasawmy, Magistrate, Essequebo Judicial District, convicting him of an offence under the River Navigation Regulations, 1924. The necessary facts and arguments appear from the judgment.

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

S. E. Gomes, Assistant Attorney-General, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by the Chief Justice, as follows:

This is an appeal from a conviction under regulation 22 of the River Navigation Regulations, 1924, the appellant having been charged with failing to have the number of the certificate of inspection of his boat "Bravo No. 1" and the number of persons it was licensed to carry legibly printed on the said boat in the prescribed manner.

It appears that this boat was duly inspected and a certificate of inspection issued on 22nd April, 1941, and that by this certificate which is in the form prescribed by the Schedule to the Regulations, the boat was licensed as a cargo boat to carry thirty persons when no cargo was carried. On 6th May, 1941, the appellant requested the deputy navigation officer to inspect the boat so that he might obtain a certificate as a passenger boat. This inspection was made, and a fresh certificate issued whereby the boat was licensed as a passenger boat to carry

T. C. HARRIS v. L. FORBES.

sixteen passengers. On the 5th July, 1941, the boat was seen on the Esse-
quibo River at Bartica without the number of this second certificate marked
thereon nor the number of persons which it was licensed to carry by that
certificate. Upon these facts the learned magistrate convicted the appellant,
and imposed a fine of \$5 and costs.

The grounds of appeal argued may be summarized as:

1. that the certificate of 6th May, 1941 did not state the number of persons the boat was licensed to carry; or alternatively
2. that there is no proof that this certificate stated the number of persons the boat was licensed to carry;
3. that this Certificate is a nullity for the reason set out in (1) or alternatively because the certificate of the 22nd April not having been revoked it was not competent for the deputy officer to issue a second certificate on 6th May while the former remained effective.
4. That the regulation under which the appellant was convicted is void for uncertainty having regard to the terms of Regulation 18.

In regard to the first of these grounds counsel for appellant was misled as was I myself in the first instance by the terms of Exhibit "C" which purports to disclose the contents of the Certificate of the 6th May whereas in fact it is not required so to do nor in fact does so, being merely an extract from the Register of Certificates kept under Regulation 13. It does not follow because the number of persons to be carried is not stated in the Register that it is not stated in the Certificate. In regard to the second submission it is true that the documentary evidence Exhibit "C" does not show the number of persons for which the boat was licensed as a passenger boat and that the best evidence of this fact, the Certificate itself, was not tendered in evidence. Had this point been taken at the close of the case for the prosecution and had the appellant rested on that, I think that his contention would have been sound, and that the conviction would have been bad, for the oral evidence given by the complainant of the contents of the document was inadmissible. The appellant did not follow this course, however, but gave evidence in which he himself averred that the certificate issued to him on 6th May stated the number of passengers he was licensed to carry as sixteen. Having admitted this fact in his own testimony he cannot now be heard to say that it is not a fact or that it is not proved. Although the prosecution failed to prove this essential fact the appellant did not choose to avail himself of this failure but by his own evidence filled the gap, and of this the Court below was entitled to take cognizance in considering the whole of the evidence before it.

It will be convenient to deal next with the fourth submission regarding the terms of Regulation 18 and its effect upon the cer-

T. C. HARRIS v. L. FORBES.

tainty of Regulation 22. It is true that did the officer depart from the usual method of measuring ships and boats and utilize some unaccustomed standard of measurement he might arrive at astonishing results. It is clear that in the present case he did not do so, however, and in spite of the absence from the Regulations of a precise standard of measurement of length, breadth and draft it would be difficult to attack the certificate on this ground. The certificate issued by a deputy officer unless suspended, cancelled, modified or revoked by the officer appears moreover to be final and not subject to challenge, although no doubt the officer would modify any certificate if it was brought to his notice that the standard of measurement adopted by his deputy was unreasonable or improper. While it remains in force and without modification it determines the number of persons the boat is licensed to carry and there is no uncertainty in the regulation which requires that number to be printed upon the boat.

Finally, there is the third ground with the first part of which I have already dealt. The second part dealing with the submission that the certificate of the 6th May was a nullity because that of the 22nd April was still in effect remains to be considered. It is perhaps at first difficult to conceive that there can be two valid certificates in force so that the boat is at one and the same time a cargo boat licensed to carry thirty persons when it has no cargo, and a passenger boat licensed to carry only sixteen persons. The regulations although they certainly cannot be considered free from defect or difficulty, make a clear distinction between passenger boats and other boats designated in Form 1 of the Schedule as "cargo boats" and the difficulty which is superficially apparent in distinguishing between the persons which a cargo boat may carry and those which a passenger boat may carry appears to be resolved by reference to Regulation 20, where reference is made to those persons who may be carried by a boat other than a passenger boat, that is to say farmers or their labourers carried to or from their farms. From this it would appear that if the owner of a boat carries persons outside these categories his boat is to be considered a passenger boat, requires a licence as such and is subject to the restrictions and provisions of Part III of the Regulations, It is this course which the appellant desired to pursue and for that reason applied for a new inspection and certificate licensing the boat to carry persons as a passenger boat.

Upon the issue of this second certificate the following alternatives appear to arise: that the boat then assumed a dual nature by means of which it became licensed (*a*) in its capacity as a cargo boat to carry persons to the number of thirty (including the crew) such persons (other than the crew) being confined to farmers or their labourers and their journey confined

T. C. HARRIS v. L. FORBES.

to that to or from their farms, and also, (b) in its capacity as a passenger boat, to carry persons other than farmers or their labourers on any journey to the number of sixteen. Or as a second alternative having acquired the character of a passenger boat it lost that of a cargo boat notwithstanding the original Certificate of Inspection and could only carry the limited number of persons for which it was licensed in its new capacity. In either of these cases it would be required to bear the markings prescribed by Regulation 22 which would include the number of persons it was licensed to carry as a passenger boat. Failure to mark this number in either case constitutes an offence.

The third alternative is that which was urged upon us by counsel for the appellant; that in spite of the appellant's request that it should be licensed as a passenger boat so that it might be enabled to carry persons other than farmers or their labourers to and from their farms, and in spite of the fitness of the boat for this purpose and the issue of such a certificate to the appellant, yet by reason of the absence of some formal revocation of the original certificate the second certificate is a nullity and the appellant debarred from carrying out the project he desired and for which at his request the second

Certificate was issued. I can see no reason to conclude that this was the intention or is the effect of the Regulations but only in such case would the appellant be freed of his obligation to mark his boat with the number of persons the boat was licensed to carry as a passenger boat. It being my view that the Regulations do not so operate it appears that the appellant's boat comes under either of the first or second alternatives to which I have referred. In either case, as I have said, he has failed to exhibit the proper markings and has been guilty of an offence, and therefore it is not necessary for the purposes of this appeal to determine which of these two alternatives represents the true position. It might be necessary so to determine in the event, for instance, of the owner of a boat in like case carrying thirty persons including the crew, those other than the crew being farmers or their labourers and being prosecuted for carrying a larger number of persons than the boat was licensed to carry as a passenger boat. Such a question would not be without interest and might well be argued on both sides.

In the present case, however, I am of opinion that this question does not arise, that the appellant has been properly convicted and that this appeal should be dismissed with costs.

Appeal dismissed.

D. WALDRON v. J. E. CLARKE

DELCINA WALDRON, Plaintiff,

v.

JAMES E. CLARKE, Defendant.

[1941. No. 171.—DEMERARA]

BEFORE VERITY, C.J.: 1942. MARCH 31; APRIL 1, 27.

Specific performance—Not decreed—Where at time of trial of action title of vender not good.

Sale of land—Contract for—Breach by vendor—No good title in him—Unwillingness of vendor to remedy defect in title—Damages for loss of bargain—Awarded to purchaser—Where possible to remedy defect in title, and reap benefits of a future sale.

The rule in *Bain v. Fothergill* 7 H. L. 158 (which provides that upon a contract for the sale of immovable property, when the vendor, without his default, is unable to make good a title, the purchaser is not by law entitled to recover damages for the loss of his bargain) can have no application where the failure to make out title arises not from the inability of the vendor, but from his unwillingness to remedy a defect in the title. The word "default" in the rule not only includes fraud, but also failure on the part of the vendor to take such steps as might be open to him for the cure of any defect which had arisen in his title.

In order to bring himself within the rule in *Bain v. Fothergill* 7 H.L. 158, it is essential that the defendant should establish two things: first, that he is unable to make out title, and secondly, that this inability does not arise from his own default. Unless he can establish these essentials, the ordinary law of damages for breach prevails and the purchaser is entitled to recover in respect of loss of bargain. It is not sufficient that the defendant should raise a doubt as to his ability, no matter how well-founded the doubt may appear. It is his duty to take such steps as will place the matter beyond doubt, and it is within his power to do so.

While it would be improper for the Court to order specific performance by a vendor of a contract for the sale of immovable property, where there is a possibility that its order cannot be carried into effect, it would be unjust to the purchaser to deprive him of damages for loss of his bargain when there is a possibility that the defendant may yet remedy the defect in his title and himself reap the benefits of a future sale.

L. A. Hopkinson, for the plaintiff.

S. I. Cyrus, for the defendant.

Cur. adv. vult.

VERITY, C.J.: In this case the plaintiff seeks an order for the specific performance of a contract for the sale of land described as the East half lot 121, Third Street, Alberttown. The defendant admits the agreement but pleads that performance is impossible on the ground that further investigation disclosed a fatal defect in the title of the deceased person of whose will he is the executor and also that he is unable to secure the leave of the Registrar to sell by private treaty under section 41 of the Deceased Persons' Estates Administration Ordinance, Chapter 149. If either of these contentions be established the Court must refuse the order prayed.

In regard to the first, the history of the lot from 1842 to the present day in so far as disclosed by the evidence shows that the testator has not valid legal title to the whole of the East half of

the lot in question, the south half only having been conveyed to his predecessor in title in 1861. It is clear therefore that the defendant cannot now transport the parcel he has agreed to sell.

It is submitted on behalf of the plaintiff, however, that the defendant can secure title in one of four ways: by allowing the parcel to be put up at execution sale for non-payment of rates and buying it in on behalf of the estate; by applying for a rectification of the transport of 1861 under section 22 of the Deeds Registry Ordinance (Chapter 177); by applying for transport under section 28 of that Ordinance; or by applying for a declaration of prescriptive title under section 4 (1) of the Civil Law Ordinance, Chapter 7. While any one of these may be open to the defendant any or all of them may be defeated. The point is therefore not that the defendant can acquire title but merely that he might be able to do so, and there is no such certainty as would justify the court in ordering specific performance. Moreover, were the defendant to succeed in overcoming his difficulty as to title there would still remain to him the obstacle of obtaining leave from the Registrar to effect this sale by private treaty and in view of the circumstances in this case and the opposition of at least one of the persons interested it is open to grave doubt whether he would succeed in doing so, at any rate in respect of the present agreement at the price agreed.

The Court in exercise of its discretion therefore will make no order for specific performance which in the event may prove barren by reason of the defendant's inability to obey.

There remains the question of damages. That the plaintiff is entitled to compensation is not disputed and the *quantum* alone is to be determined. It is submitted on behalf of the defendant that the plaintiff is entitled to no damages in respect of loss of his bargain but merely to a return of the amount paid to the defendant together with any expense incurred by him in investigating title of which in the present case there is no evidence. He bases this submission on the case of *Bain v. Fothergill* (1873)

L.R. 7 H. L. p. 158, affirming the decision in *Flureau v. Thornhill* a hundred years earlier. The rule then laid down was expressed in the following terms: "upon a contract for the sale of real estate when the vendor without his default, is unable to make good a title, the purchaser is not by law entitled to recover damages for the loss of his bargain." This rule of the Common Law qualifying as it does the more general principle upon which are assessed damages for breach of contract requires care that its application is not unduly extended to cases which do not fall within its terms, and the important qualification to be borne in mind is expressed in the words "without his default, unable to make good title." It is clear from the answers returned by the learned Judges to questions put to them by their Lordships that default not only included fraud but also failure on the part of the vendor to take such steps as might be open to him for the

D. WALDRON v. J. E. CLARKE.

cure of any defect which had arisen in his title, Baron Pollock specifically drawing attention to the dictum in *Engell v. Fitch* (1869) L.R. 4 Q.B. 659: “the rule in *Flureau v. Thornhill* can have no application where the failure to make out title arises not from the inability of the vendor “but from his unwillingness to remedy a defect in the title.”

I think therefore that in order to bring himself within the rule in *Bain v. Fothergill* it is essential that the defendant should establish two things: first, that he is unable to make out title, and secondly, that his inability does not arise from his own default. Unless he can establish these essentials the ordinary law of damages for breach prevails and the plaintiff is entitled to recover in respect of loss of bargain. It is not sufficient that the defendant should raise a doubt as to his ability no matter how well founded the doubt may appear. It is his duty to take such steps as will place the matter beyond doubt and it is within his power to do so. While it would be improper for the Court to order specific performance when there is a possibility that its order cannot be carried into effect, it would be unjust to the plaintiff to deprive him of damages for loss of his bargain when there is a possibility that the defendant may yet remedy the defect in his title and himself reap the benefits of a future sale.

In such circumstances the present case lies and I find the plaintiff not only entitled to the return of his deposit but also to reasonable damages in respect of his loss of bargain. It appears from the uncontradicted evidence of the property agent called by the plaintiff that the value of the property has been enhanced since the agreement for sale, and that in the event of resale the plaintiff would have made some profit, although I am not prepared to accept his precise figures. In this respect I assess the damages at \$300 and judgment will be entered for the plaintiff for \$400 with costs to be taxed. Certified fit for Counsel.

Solicitors: *W. D. Dinally; E. D. Clarke.*

OLIVE FISHER v. H. D. FRASER.

OLIVE FISHER, Plaintiff,

v.

HUBERT DARCY FRASER, Defendant.

[1941. No. 264—DEMERARA.]

BEFORE VERITY, C. J.: IN CHAMBERS.

1942. MARCH 16; APRIL 27.

Husband and wife—Ante-nuptial contract—On deposit in Deeds Registry—Effectual as from date of marriage—Even if contract deposited subsequent to death of one of parties thereto—Deeds Registry Ordinance, cap. 177, s.16.

Husband and wife—Ante-nuptial contract—Election of wife—Under contract—Right may be exercised by heirs of wife.

An ante-nuptial contract, upon its being proved and filed as of record in the Deeds Registry, becomes effectual under section 16 of the Deeds Registry Ordinance, Cap. 177, as from the date of the marriage. This rule applies even if the contract is deposited in the Deeds Registry subsequent to the death of one of the parties thereto.

Quaere: whether the above rule would apply if proof of the contents of the contract, and not the contract itself, were deposited.

Re Barnes, L.J. 5.12.1901, considered.

Where a wife was entitled to a right of election under an ante-nuptial contract, the heirs of the wife are entitled to exercise that right.

Originating summons taken out by Olive Fisher against Hubert Darcy Fraser in which the plaintiff sought answers to certain questions relating to the administration of the estate of a deceased person.

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

Lionel A. Luckhoo, for the defendant.

Cur. adv. vult.

VERITY, C.J.: This is an originating summons in which the plaintiff seeks answers to certain questions relating to the administration of the estate of a deceased married woman, who was married on the 1st August, 1903, and died on the 26th August, 1941. The answers to these questions depend in the first instance upon a determination as to what effect (if any) is to be given to a certain ante-nuptial contract entered into between the deceased and the person to whom she was subsequently married. This instrument was duly executed on the first day of August, 1903, but was not deposited in the Deeds Registry under section 16 of the Deeds Registry Ordinance (Cap. 177) until 11th September, 1941, some weeks after the death of the wife who was party thereto.

It appears to be common ground, that the instrument falls within the provisions of the section to which I have referred and I so find. By that section it is provided that no such instrument “shall be good, valid and effectual in law . . . until the instrument . . . is duly proved and filed as of record in the registry.” It would follow therefore that when so filed it is, if properly executed, good valid and effectual, no matter when so filed, for there is in this

OLIVE FISHER v. H. D. FRASER.

statute no such limitation upon the time within which such instruments are to be filed as appears in certain analogous enactments elsewhere. The question is: if effectual, from what date is it to be made effective, and to what extent. Little assistance can be secured from the authorities cited by either party in this respect, for while in accordance with the fundamental principles of Roman Dutch Law there are no restrictions upon the validity of unregistered contracts of this nature, the authorities referred to have dealt in each case with restrictions imposed by enactments which differ materially from the provisions of the Deeds Registry Ordinance, and the principles laid down by jurists and the rulings followed in cases cited are conditioned by the terms of those enactments. For example, in a passage cited by Counsel for the defendant from Lee's Introduction to Roman Dutch Law (3rd edition) p. 73 it is stated "the absence of registration only affects the validity of an ante-nuptial contract as regards creditors . . . As regards the parties, however, and persons claiming through them . . . the contract holds good in the absence of registration . . ." We find the learned author quoting Van der Linden as saying "registration in Court is not required, since the law on this point enacted by the placat of July 30, 1624, has never been observed in practice" and he then proceeds to make reference to an Act of Cape Colony in 1875 and the Union Deeds Registration Act of 1918, which superseded earlier legislation in Provinces of the Union, and having set out the text of this last Act proceeds to deduce the principle first above quoted, from the words of the enactment which are indeed clear enough: "an ante-nuptial contract . . . shall be of no power and effect . . . as against the creditor in insolvency of either spouse unless it is registered in a deeds registry within the time prescribed." Here then is what I may term the natural effect of the contract restricted by specific enactment to an extent perhaps even more limited than the learned author appears to contemplate. The statutory restriction having reference only to the interest of creditors in insolvency the natural effect of the contract to bind all other persons, including of course the parties themselves, is left untouched. Before any attempt can be made to co-relate this authority with the present case it must be observed that the Deeds Registry Ordinance imposes an absolute restriction with no such limitation or indeed any limitation whatever either as to the parties affected or the time within which the instrument shall be registered. Like considerations apply to other authorities cited and the utmost caution must be observed in adopting the principle there laid down to the circumstances of the present case. There is little guidance indeed to be obtained therefrom in view of the wide differences which appear to exist between the terms of our Ordinance and those of the enactments referred to by the authorities. It is clear, however,

that fundamentally the proposed spouses were at liberty to enter into such contract which became effective from the commencement of the marriage and that when by legislation the effectiveness of such a contract is restricted the statute will be interpreted in accordance with the well-established rule that the common law rights of the parties are to be curtailed so far as and only so far as the terms of the statute require.

In regard to the effect of the local statute certain authorities in the Courts of this Colony were cited by Counsel, perhaps the most illuminating of which is that of the application of the Administrator General in *re the estate of Barnes*, (L.J., 7.12.01). In that matter it appeared that an antenuptial contract had been entered into but not deposited and was subsequently lost. There was no evidence of its terms. The Court held that in such circumstances the estate must be administered as if there had been no such contract, but in the course of his judgment Lucie-Smith, J. observed: "It might possibly be that if trustworthy evidence of the contents of the contract were forthcoming that such contents might be reduced into writing and be duly deposited." It was not necessary to decide this point but it is clear that the learned Judge had in contemplation that if reduced to writing and deposited even though after the death of one of the parties it might be effectual in the administration of the deceased party's estate.

No other case directly bearing upon this point was cited before me nor have I been able to refer to any, and before accepting the possibility indicated by Lucie-Smith, J. which would carry the matter further than is required by this case, it is desirable that the precise terms of the statute should be elucidated.

The section provides that no such contract shall be good, valid or effectual *until* duly deposited in the registry, that is to say, its effect is not abrogated, it is merely postponed, and upon being so deposited it becomes good, valid and effectual without any restriction. Now it is possible that were the effect of a document to be the transfer of property the postponement by statute of that effect until registration would postpone the transfer so that the property would not pass until registration. But the purpose of the present contract is not to pass property from one party to another but to regulate the conditions under which the parties shall hold their property during the continuance of their married life. The contract itself provides that the marriage then shortly to be solemnized should be subject to the conditions and stipulations for the regulation of the same contained therein. It provides that for the support of the marriage certain property shall be brought in, that there shall be no community of property between the parties nor joint liability for debts due before or incurred during the marriage, and in conclusion the parties declare their intention to enter into the marriage upon these Covenants, conditions and stipulations. Clearly these conditions

OLIVE FISHER v. H. D. FRASER.

were those which formed the basis of the marriage in regard to the matters to which they refer, and but for statutory restrictions became binding on both parties from the moment the marriage was solemnized. By statute, however, the contract was never-the-less not valid or effectual until recorded. Upon being duly recorded it became effectual and its whole purport and effect being to regulate the conditions of the marriage of the parties it can only be made effectual by the application of its provisions to the parties or from the date of the commencement of the marriage. While I might not be prepared to go so far as the learned judge indicated in *Barnes'* case, for the statute appears to require that the document itself and not mere proof of its contents shall be filed in the registry, yet I am of the opinion that upon the document being so filed it becomes effectual and that to be effectual it must be given effect as from the date of the marriage.

It was further argued, however, that if it is to be made effectual at all it must be so made during the continuance of the marriage or at least during the life of both parties thereto. It is submitted that through failure to deposit this contract, the parties entered into the marriage and continued throughout until its dissolution by the death of the wife under conditions unaffected by the terms of the contract which were of no effect and that after the termination of the marriage its state can not be conditioned retrospectively by a contract which had no validity during its continuance. From the point of view of logic this argument has much to commend it though it lacks somewhat in weight from the point of view of practical application and does not take sufficient account of what I have termed the common law rights of the parties and the extent to which their rights have been limited by statute. It is difficult to believe that the parties having entered into the contract and being aware, as they must be presumed to have been aware, that at any moment during the continuance of the marriage the contract could be made effectual by the mere act of deposit, nevertheless lived their lives and conducted their business and made dispositions of their property as if their contract did not exist. It is difficult to read into the statute any provision that unless the document be recorded during the continuance of the marriage or during the lifetime of the parties it can never be recorded or made effectual.

I am satisfied therefore that the ante-nuptial contract in the present case, upon being deposited, became effectual as from the date of the commencement of the marriage and that the estate of the deceased spouse is therefore to be administered in accordance with the provisions of the contract.

The answer to both parts of question (1) is therefore in the negative. The answer to the first part of question (2) is in the negative and to the second part the answer is that upon

OLIVE FISHER v. H. D. FRASER

registration the ante-nuptial contract became effectual as from the date of the marriage.

In regard to questions (3) and (3a) upon the evidence presently before me it is neither desirable nor possible for me to determine the precise rights or obligations of the parties in the particular circumstances that have arisen. There is one question of law, however, arising from these questions to which it is possible and perhaps will prove convenient to answer. Authority was cited by counsel for the defendant to the end that the plaintiff is not and was not at any time entitled to make the election conferred upon her mother exclusively by clause 4 of the contract. The matter is discussed at length in Voet's Commentaries Book 23, title 4, s. 54 (*Krause's translation*, 1921, p. 217), and I have reached the conclusion that the better view is that the heirs of the wife are so entitled. Questions (3) and (3a) will therefore for the present be answered only in the sense that the defendant is under the same obligation towards the heirs of his deceased wife as he would have been to his wife under the terms of the contract before her death, and that the plaintiff as an heir of the deceased wife had at the date of her mother's death all those rights of election under clause 4 of the contract as were her mother's before death. In the administration of the estate, therefore, the parties will be so guided.

As to costs, the plaintiff has failed in her contention that the estate is not to be administered in accordance with the terms of the ante-nuptial contract, while the defendant has failed in his contention that the plaintiff was at no time entitled to election under the said terms. Each party will therefore bear his own costs.

Solicitors: *M. S. Fitzpatrick; E. D. Clarke.*

CLARENCE BEDFORD, Plaintiff,
v.
DAILY CHRONICLE, LTD. *et al*, Defendants.
[1941, No. 241.—DEMERARA].
BEFORE VERITY, C. J.
1942. APRIL 28.

Libel—Plaintiff found not guilty of burglary—Report of trial in newspaper—Allegation that jury gave plaintiff benefit of doubt—Defamatory.

Libel—Action tried by Judge without jury—Judge able to express disapproval of libel in terms of judgment—Taken into consideration by trial judge—In assessing damages.

The plaintiff was tried for burglary before a jury, and he was found not guilty. The defendants published in their newspaper a report of the trial in which there appeared the headlines "Jury give Clarence Bedford benefit of doubt".

Held, that the words were defamatory, as they led the public to believe

C. BEDFORD v. DAILY CHRONICLE, LTD.

that the acquittal expressed not a definite finding of the innocence of the plaintiff, but merely a doubt as to his guilt.

In an action for libel tried before a judge without a jury, the judge is able to express disapproval of the libel by the terms of his judgment. He will therefore take that fact into consideration when he is assessing the damages which the defendants should be ordered to pay.

ACTION by the plaintiff Clarence Bedford against the Daily Chronicle Limited, Hilton B. Harewood and Charles Noel Delph for libel. The facts appear from the judgment.

C. A. Burton, for the plaintiff.

C. V. Wight, for the defendant.

Cur. adv. vult.

VERITY, C. J.: In this action the Plaintiff seeks to recover damages in respect of an alleged libel published in the columns of the Daily Chronicle newspaper. The words complained of appeared as headlines in a report of a trial which resulted in the acquittal of the plaintiff on a charge of burglary. The defendants plead that in so far as the publication consists of statements of fact it is a fair and accurate report of the proceedings, and in so far as it consists of expressions of opinion it is fair and honest comment. It is also pleaded that the words are not in themselves defamatory and are incapable of the defamatory meaning placed upon them by the plaintiff.

In the first place I am unable to find in either the headlines or the report any expression of opinion on the part of the writer recognisable as such. The words particularly complained of, the headlines, purport to be nothing more nor less than simple statements of fact. The defence of fair comment is not therefore open to the defendants.

In the second place the second of these headlines "Jury give Clarence Bedford Benefit of Doubt" could only be included in a fair and accurate report of the proceedings if at the public trial the jury indicated that it was pursuing this course or if there were circumstances of some kind in the course of the actual proceedings from which it could be legitimately inferred that the verdict of the jury was based on the alleged consideration and nothing else. There is nothing in the pleading or in the evidence to suggest any such thing. The defence of privilege must therefore also fail, and the defendants must fall back upon the words themselves. There has been no plea of justification and no attempt therefore made to prove that the statement was true as distinct from being an accurate report of what occurred in the course of the proceedings.

The sole question that remains is therefore: are the words defamatory? If they are, the plaintiff is entitled to damages. If they are not, his action fails.

It is submitted on behalf of the defendants that the words in their ordinary sense would be taken to mean that there was a doubt as to the plaintiff's guilt or innocence whereas the verdict

C. BEDFORD v. DAILY CHRONICLE, LTD.

of the jury finally pronounced him to be innocent. It is argued on behalf of the defendants that the words mean and would be taken by any reasonable person to mean no more than that the plaintiff had been found not guilty and are not therefore defamatory.

Reference was made to a submission of Counsel at the Criminal trial that if the jury were in doubt they should give the accused the benefit of that doubt and to the common direction of a judge to the effect that if the jury have a reasonable doubt as to the guilt of the accused he should receive the benefit of it and be declared not guilty. It is submitted that the words complained of go no further and cannot be defamatory. The distinction is, however, clear enough. The words of counsel or of judge do no more than indicate one method whereby a jury may arrive at its conclusion in certain circumstances. These circumstances are known only to the jury being within their own minds, and they are not allowed to indicate whether or not in fact they exist, for to do so would convert the straightforward verdict of not guilty into one approximating that of "not proven" which is unknown to our law and leaves without doubt a certain stigma on the character of the accused. Our law is careful to require that no matter what may be their processes of thought the jury shall so state their conclusions that there is no doubt as to their finding that the accused is not guilty of the offence. It is clear from the report published by the defendants themselves that the jury in this case acted in accordance with the law. The defendants by their headlines, however, saw fit to detract from the effect of this unqualified pronouncement by introducing into their report the unfounded statement that as a matter of fact there was a doubt in the mind of the jurors of which doubt they gave the plaintiff the benefit. In doing so there is no doubt in my mind that they led the public to believe that the acquittal expressed not a definite finding of the prisoner's innocence, but merely a doubt as to his guilt. By doing so they have done injury to the plaintiff's reputation—an injury which our system of law is particularly designed to avoid. If a man were charged with murdering his wife by diabolical means and the jury returned their verdict that they found him not guilty because they had a reasonable doubt as to his guilt, can it be doubted that such a man would go through his life bearing the stigma of one who had not been found innocent of so atrocious a crime? In the present case the injury differs in degree rather than in kind, and it is an injury in respect of which he is entitled to recover damages for his reputation has been defamed.

On the question of damages there are various considerations to be borne in mind. The press has a valuable duty to perform in the reporting of judicial proceedings and it is a duty which in this colony is for the most part performed with care and skill. In the present instance the defendants have erred but it is an error I feel

C. BEDFORD v. DAILY CHRONICLE, LTD.

assured not inspired by actual malice or born of any desire to give pain. At the same time it would have been well had the defendants accepted the early opportunity afforded them for making amends. On the other hand the plaintiff has suffered no actual pecuniary loss, nor is there evidence to show to what extent he may have suffered ridicule or contempt. He is nevertheless presumed to have suffered damage from the publication of the libel and is entitled to a sum which should not in the circumstances be deemed contemptuous or nominal. Were the case tried with a jury they would no doubt assess the damages at a substantial sum to indicate the measure of their disapproval. I am able to express my disapproval by the terms of my judgment and may take this fact into consideration in assessing the amount which the defendants should pay. I assess damages in this instance at \$50 and enter judgment against the defendants for that sum with costs to be taxed.

Judgment for plaintiff.

Solicitors for defendants: *A. G. King.*

ROMALO BARRAK-ODI, Appellant (Defendant),

v.

OLGA BARRAK-ODI, Respondent (Complainant).

[1942. No. 45.—DEMERARA]

BEFORE FULL COURT: VERITY, C.J. and LUCKHOO, J. (Ag.)

1942. APRIL 17, 24, 30.

Husband and wife—Maintenance and non-cohabitation—Complaint for—Grounds of—Desertion and persistent cruelty—Complaint still pending—Fresh complaint filed—Ground of—Desertion only—Date of commencement alleged—Subsequent to filing of first complaint—Order made on second complaint—First complaint still pending—No resumption of cohabitation since filing of first complaint—Desertion could not have commenced on a date subsequent to filing of first complaint—Order set aside—Application for amendment—To make date of desertion same as on first complaint—Refused.

On the 1st November, 1938, the respondent instituted proceedings in the magistrate's court in which she sought an order for maintenance and for non-cohabitation on the ground of alleged desertion by the appellant on the 26th October, 1938, or alternatively, on the ground of persistent cruelty between the months of April and October, 1938. These proceedings are still pending in that they have not been determined either by order or by formal withdrawals.

On the 1st May, 1941, the respondent commenced the present proceedings praying an order for non-cohabitation and maintenance on the ground solely of desertion "since 1939 and up to the present time". The magistrate found that the appellant deserted his wife by causing her to leave the matrimonial home by violence and threats of further violence on the 26th October, 1938, and that between that date and the 1st May, 1941, he did nothing to remove the reasonable impression that he did not intend to live with her any longer. The magistrate made an order on the complaint of the 1st May 1941.

Held (1) that cohabitation had ceased on the 26th October 1938 and had never been resumed, and that, in such circumstances, desertion "since 1939" had become impossible to either spouse;

R. BARRAK-ODI v. O. BARRAK-ODI

(2) that no order could be made upon the particulars contained in the complaint of the 1st May, 1941;

(3) that the complaint of the 1st May, 1941 could not be amended so that it may contain the particulars contained in the complaint of the 1st November, 1938, inasmuch as difficulties would be raised by creating an order based upon a charge identical with that which was laid on the 1st November, 1938 and which has not yet been determined, and the amendment, on the hearing of the appeal, would embarrass the appellant by imposing upon him an order based upon a charge which at the hearing of these particular proceedings he was not required to answer; and

(4) that the appeal must be allowed, and the complaint of the 1st May, 1941 be dismissed, but the order of the Court was in no sense a judgment of the issues raised by the complaint of the 1st November, 1938.

Appeal by the defendant from an order made against the appellant in proceedings brought by his wife in respect of alleged desertion by him since 1939.

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

S. I. Cyrus, for the respondent.

Cur. adv. vult.

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

This is an appeal from an order made against the appellant in proceedings brought by his wife in respect of alleged desertion by him since 1939. It is desirable in the first place to relate the history of these proceedings and of the parties in so far as it is revealed by the record before us. It appears that on the 1st November, 1938, the respondent instituted proceedings in the Magistrate's Court in which she sought an order for maintenance and for non-cohabitation on the ground of alleged desertion by the appellant on the 26th October, 1938, or alternatively on the ground of persistent cruelty between the months of April and October, 1938. These proceedings are still pending in that they have not been determined either by order or by formal withdrawals. The evidence goes to show that at the same time the respondent commenced proceedings against the appellant for an aggravated assault. During the hearing of the assault proceedings the Magistrate is stated to have asked the appellant whether he was willing to have the respondent back. To this the appellant replied "yes" but it is admitted by the respondent that she did not believe the appellant was sincere and expressed herself as not being desirous of returning to him on account of the beating he was alleged to have given her. The magistrate convicted the appellant of an aggravated assault but on the 2nd February, 1940, the Full Court on appeal varied the conviction to one of common assault. In March, 1940, the respondent sent her mother to the appellant to ask him whether he did not intend to send her any support. The appellant is alleged to have replied with abuse but the learned magistrate has made no finding of fact in this regard. On 1st May, 1941, the respondent commenced the present proceedings praying an order for non-cohabitation and for maintenance on the ground solely of desertion "since 1939."

R. BARRAK-ODI v. O. BARRAK-ODI

It is to be observed that the Court was not by the present proceedings invited to find that the appellant had deserted his wife in October, 1938, and that this desertion had continued down to the present time, but was asked to find that the appellant "did . . . since 1939 and up to the present time unlawfully desert" the respondent. Nevertheless, the learned magistrate appears to have found as a fact that the appellant deserted his wife by causing her to leave the matrimonial home by violence and threats of further violence on the 26th October, 1938, and that between that date and 1st May, 1941, he did nothing to remove the reasonable impression that he did not intend to live with her any longer. In other words the learned magistrate does not appear to have addressed his mind to the particulars of the charge then before him but to have found desertion since 26th October, 1938, and not upon any date since 1939 as charged.

In these circumstances the appellant asks that the order be set aside on the ground that the previous proceedings were still pending and, as argued by counsel for the appellant, no desertion could have its inception while such proceedings praying non-cohabitation on the ground of persistent cruelty were pending and in effect keeping the husband away.

A number of authorities were cited, but the most important of these is the recent case of *Cohen v. Cohen* (109 L. J. R. (P & D) p. 53) decided in 1940 by the House of Lords in which the law on this aspect of the subject is reviewed by Lord Romer, with whom their Lordships expressed unanimous agreement.

It may be not without significance, in determining how far the principle embodied in that case is applicable to the present circumstances, that in none of the cases referred to therein does there appear the element of alleged persistent cruelty which formed the alternative ground for the original proceedings brought by the respondent. It is also to be observed that in none of such cases does it appear that desertion was charged as having its inception during pending proceedings, the question having been whether or not desertion continued during such pendency.

The principle laid down in *Cohen v. Cohen* is a negative principle and Lord Romer expressly stated that he deprecated attempts to lay down any general principle applicable to all cases. What he did lay down is that "the question whether a deserting spouse has reasonable cause for not trying to bring the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period must always be questions of fact and the determination must depend upon the circumstances of the particular case."

I have rehearsed the history of this case and made reference to the decision in *Cohen v. Cohen* for the reason that it may serve a useful purpose if attention is drawn thereto and to the possibility of the principle there laid down being considered in relation to the facts of this case. For reasons which will immedi-

ately appear, however, I shall not attempt to express any view on how such questions as are suggested by Lord Romer should be answered in this particular case.

If the learned magistrate had been entitled in this case to determine, as he appears in fact to have determined, that desertion commenced, on the 26th October, 1938, and continued until the date of his order then the question would arise whether he had rightly so determined in the light of *Cohen v. Cohen*. But this is not the case. What he was entitled to determine and what he refrained from determining is whether desertion commenced "since 1939", at a time when there was no existing state of cohabitation. It is clear from the learned magistrate's findings of fact that cohabitation had ceased on 26th October, 1938, and had never been resumed. On the authority of *Fitzgerald v. Fitzgerald* (1869) 1 P. & D. p. 694 in such circumstances desertion "since 1939" had become impossible to either spouse. Had he applied his mind to the particulars of the charge before him the learned magistrate could not have found these particulars to have been proved. He has not so found, but has found as proved one alternative of the charge upon which the previous proceedings were based,

Counsel for the respondent has invited this Court to solve the difficulty by amending the complaint so that it shall contain, not the particulars which it does contain and upon which no order could be made, but the particulars which it does not contain and which in fact are contained in the other proceedings still pending.

This course does not commend itself to me. Not only would it raise difficulties by creating an order based upon a charge identical with that which was laid in November 1938 and which has not yet been determined, but it would also embarrass the appellant by imposing upon him an order based upon a charge which at the hearing of these particular proceedings he was not required to answer.

For the foregoing reasons we are of the opinion that the appeal must be allowed with costs, the magistrate's order set aside and the complaint of the 1st May 1941 be dismissed.

We would take care to observe, however, that such dismissal is specifically directed to the particulars of this complaint and is in no sense a judgment of the issues raised by the complaint of the 1st November, 1938.

Appeal allowed.

Solicitor for appellant: *R. G. Sharples.*

A. RAHAMAN v. MOTOR UNION INS. CO., LTD.
 ABDOOL RAHAMAN, Plaintiff,

v.

MOTOR UNION INSURANCE Co. LTD., Defendants.

[1940. No. 54.—BERRICE].

BEFORE VERITY, C.J.

1942. MARCH 24, 25. MAY 15.

Arbitration—Insurance policy—Risk insured against—Loss or damage by fire—Notice of accident with particulars of loss—Claim by insured—Rejection by insurer—Disclaimer of liability—Difference—Between insured and insurer.

Arbitration—Insurance policy—Arbitration clause in—Reliance upon—By insurer—Not repudiation of contract.

Arbitration—Insurance policy—Arbitration clause—Claim to be referred to arbitration within specified time after disclaimer of liability by insurer—Otherwise claim by insured deemed to be abandoned—Duty of claimant to initiate arbitration proceedings to enforce claim—No evidence that, if initiated, insurer would have refused to arbitrate—Refusal by insured after lapse of specified time—Not repudiation of contract by insurer—Claim by insured deemed to be abandoned—Irrecoverable.

Arbitration—Contract—Repudiation by one party—Action by other party—On contract and not for damages—Repudiation not accepted by party suing—Arbitration clause in contract—Plaintiff suing on contract which requires arbitration—Defendant entitled to set up arbitration clause.

In or about the month of April, 1939 the plaintiff made a proposal to the defendants for the insurance against loss or damage, by fire, to a motor car of which he represented himself to be both the owner and the person in whose name the car was registered. The proposal was accepted, and a policy was issued.

Condition 5, (so far as material), and conditions 8, 9 and 10 of the policy were as follows:—

5. In the event of any accident or breakdown such motor car shall not be left unattended without proper precautions being taken to prevent further damage or loss.

8. All differences arising out of this Policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the arbitrators do not agree of an Umpire appointed in writing by the arbitrators before entering upon the reference. The Umpire shall sit with the arbitrators and preside at their meetings and the making of an Award shall be a condition precedent to any right of action against the company. If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

9. The due observance and fulfilment of the terms and conditions of this Policy is so far as they relate to anything to be done or complied with by the insured shall subject to the provisions of any enactment relating thereto be conditions precedent to any liability of the company to make any payment under the policy.

10. The truth of the statements and answers in the said proposal shall be a condition precedent to any liability of the company to make any payment under this policy.

Condition 1 required the insured to give notice of the occurrence of an accident.

In November, 1939 the motor car was destroyed by fire after being left by the roadside subsequent to a mechanical breakdown.

A. RAHAMAN v. MOTOR UNION INS. CO., LTD.

On the 25th November, 1939 the plaintiff supplied the defendants with a completed document headed "particulars of motor accident," the form of which was supplied to him by the defendants' agent, and upon which the particulars were entered and signed by the plaintiff.

On the 27th November, 1939 the defendants' agents wrote to the plaintiff acknowledging the receipt of what they described as "your claim form"; they referred to the leaving of the car unattended pending repairs, and they drew attention to clause 5 of the policy of insurance which provided *inter alia*, that "in the event of accident or breakdown such motor car shall not be left unattended without proper precaution being taken to prevent further damage or loss" and the agents added that, in view of this, they could not entertain the plaintiff's claim.

Five weeks after the loss of the car, the plaintiff was charged by the police with setting fire to the car himself, and only in July, 1940 was he acquitted at the Berbice Assizes.

On the 20th July, 1940 he wrote to the defendants' agents forwarding a further set of particulars, heading his claim "*Re* claim on policy 318252—\$450", and concluding "Thanking you for an early settlement of my claim."

On the 22nd July, 1940 the agents replied, referring the plaintiff to their letter of the 27th November, 1939, and again to clause 5 of the policy.

On the 22nd August, 1940 the plaintiff's solicitor wrote to the defendants' agents making demand for payment.

On the 20th September, 1940 the solicitors for the defendants' agents replied that their clients could see no reason for altering their previous decision of the 27th November, 1939. They added: "we take this opportunity of pointing out that your client in the proposal for insurance dated 1st April, 1939, stated that he was the owner of the car when in truth and in fact one Sheik Hallim was the owner thereof", and concluded "for the reasons stated above and others, our clients cannot entertain your client's claim."

The plaintiff thereupon issued the writ in the action, and he filed his statement of claim on the 16th November, 1940. The defendants filed their statement or defence on the 24th December, 1940, including, a plea that no right of action had accrued owing to failure to submit to arbitration.

On the 24th January, 1941, the plaintiff's solicitor wrote the defendants' solicitors; "Condition 8 in the said policy is not unilateral. Your clients themselves waived that condition inasmuch as they never suggested reference of any differences arising out of the policy to an arbitrator, or asked that one should be appointed by both parties. It is not too late for the parties still to carry out the provisions contained in the said condition as my client's claim to be paid the amount of the insurance was made in writing on the 20th day of July, 1940."

To this the defendants' solicitor replied: "Counsel has advised that there has been no waiver of Condition 8 or any other condition of the policy by my clients". He then controverted the plaintiff's contention that his claim was made on the 20th July 1940, and that it was not then too late to refer the matter to arbitration. The solicitor concluded: "I am afraid that your client's further attempt in July last to obtain payment does not alter the fact that his claim was made and was rejected in November, 1939."

On the 25th October 1941 the defendants' solicitor wrote giving notice that when this action came on for hearing, counsel proposed to apply for dismissal of the action on the ground that the condition precedent to bring the action namely, submission to arbitration, had not been complied with.

Held (1) that by the notice of accident and particulars of loss (in the present case combined in one document) the company was fully informed of the nature of the liability alleged to have arisen, and such notice appeared to be all that was necessary on the part of the insured to put forward his claim; that on the 25th November, 1939 the defendants were in full possession of all the information necessary for them to decide whether to admit or to disclaim liability; and that the particulars then furnished by the plaintiff to the defendants constituted such a claim as entitled the defendants either to admit or to disclaim liability;

(2) that the disclaimer of liability by the defendants on the 27th November, 1939, was a valid disclaimer within the terms of Condition 8 of the policy of insurance;

(3) that while, in the present case, there was no evidence of readiness on

A. RAHAMAN v. MOTOR UNION INS. CO., LTD.

the part of the defendants to arbitrate, there was equally no evidence of unreadiness or refusal, had the plaintiff suggested this course before (as the defendants contended) it was too late;

(4) that, in so contending, the defendants did not repudiate, but relied upon, the contract;

(5) that, after disclaimer of liability by the insurers, it was for the claimant to initiate arbitration proceedings to enforce his claim, and it would not only be natural but wise for the insurers to await such action on his part;

(6) that the failure to refer the difference to arbitration could not therefore be ascribed to any repudiation of the contract on the part of the defendants, and the refusal in January 1941, on the grounds put forward by them was certainly no such repudiation;

(7) that, as at the time when then the plaintiff for the first time suggested reference to arbitration (that is to say, on the 24th January 1941,) the period of 12 months provided by Condition 8 of the policy for referring the difference to arbitration had elapsed, his claim was deemed to have been abandoned and was not therefore recoverable; and

(8) that the act of the defendants in then refusing to refer the difference to arbitration was within their right under the terms of the policy, and could not be construed as a repudiation of the policy, as a waiver of arbitration, as conduct indicating to the plaintiff that arbitration was unnecessary, nor as such conduct rendering arbitration impossible as would justify the plaintiff in proceeding by action;

(9) that, assuming that the contract of insurance was repudiated by the insurers, the insured by suing on the contract and not for damages had refused to accept such repudiation, and therefore he could not be heard to say that the insurers, by their repudiation, had done away with the need for arbitration, while at the same time the insured was setting up the contract which required it;

(10) that, at the time when the writ in this action was filed, the plaintiff had no cause of action, as the condition precedent under Condition 8 of the policy had not then been fulfilled; and

(11) that, as the time for referring the difference to arbitration had expired, the Court would not stay the proceedings in order that reference to arbitration might now be made.

Action by the plaintiff Abdool Rahaman claiming the sum of \$450 from the Motor Union Insurance Co., Ltd., on a policy of insurance. The facts and arguments appear from the judgment.

Lionel A. Luckhoo, for the plaintiff.

H. C. Humphrys, K.C., for the defendants.

Cur. adv. vult.

VERITY C. J.: In this case the plaintiff seeks to recover a sum alleged to be due under a Policy of Insurance whereby the defendants insured the plaintiff against loss or damage by fire to a motor car and its accessories of which the plaintiff claims to be the owner.

The defendants plead (*inter alia*) by way of defence that by the policy it was provided that all differences arising out of the policy should be referred to arbitration and that, a difference having arisen and the plaintiff not having referred the matter to arbitration, no cause of action has accrued.

To this aspect of the defence the plaintiff replies that the defendants waived or excused reference to arbitration in that they themselves took no steps to refer nor made any offer to refer the difference to arbitration but that on the contrary by

their conduct and correspondence they induced the plaintiff to believe that it was not necessary to carry out the provisions of that condition of the policy which related to arbitration.

The plaintiff's reply is not drawn with any very great precision in this regard but it appeared from the argument of counsel that the plaintiff means further that the defendants having by their conduct and letters repudiated liability on grounds which go to the root of the contract and challenge its existence the plaintiff was absolved from the effect of the arbitration clause. It was on this basis that the trial of this issue proceeded.

It is convenient in the first place to set out such of the facts as are relevant to this particular aspect of the case. It appears that in April, 1939 the plaintiff made a proposal to the defendants for the insurance against loss or damage to a motor car of which he represented himself to be both the owner and the person in whose name the car was registered. The proposal was accepted and a policy issued which contained, in addition to the arbitration clause, a further condition which provided that "the truth of the statements and answers in the said proposal shall be a condition precedent to any liability of the Company to make any payment under this policy." In November, 1939 the motor car was destroyed by fire after being left by the roadside subsequent to a mechanical breakdown. On 25th November the plaintiff supplied the defendants with a completed document headed "particulars of Motor Accident" the form of which was supplied to him by the defendants' agent and upon which the particulars were entered and signed by the plaintiff. On 27th November the defendants' agents wrote to the plaintiff acknowledging the receipt of what they describe as "your claim form." The letter proceeds to refer to the leaving of the car unattended pending repairs, and draws attention to clause 5 of the policy which provides (*inter alia*) that "in the event of accident or breakdown such motor car shall not be left unattended without proper precaution being taken to prevent further damage or loss." The agents added that in view of this they could not entertain the plaintiff's "claim." To this letter the plaintiff appears to have made no reply, but five weeks after the Joss of the car he was charged by the police with setting fire to the car himself, and only in July of the following year was he acquitted at the Berbice Assizes. On 20th July, he wrote to the defendants' agents forwarding a further set of particulars, heading his letter "Re claim on Policy No. 318252—\$450" and concluding "Thanking you for an early settlement of my claim." To this the agents replied on 22nd July referring the plaintiff to their previous letter and again to clause 5 of the policy. It is to be observed that up to this date a breach of clause 5 of the policy was the only reason assigned for refusal to entertain

A. RAHAMAN v. MOTOR UNION INS. CO., LTD.

the claim. On the 22nd August counsel, acting as solicitor for the plaintiff, wrote to the defendants' agents making demand for payment and on 20th September the solicitors for the defendants' agents replied that their clients could see no reason for altering their previous decision. They added "we take this opportunity of pointing out that your client in the proposal for insurance dated 1st April, 1939, stated that he was the owner of the car when in truth and in fact one Sheik Hallim was the owner thereof, and concluded for the reasons stated above and others, our clients cannot entertain your client's claim". The plaintiff thereupon issued a writ and filed his statement of claim on 16th November, 1940. The defendants filed their statement of defence on 24th December, 1940, including a plea that no right of action had accrued owing to failure to submit to arbitration. On 24th January, 1941, counsel acting as solicitor for the plaintiff wrote to the defendants' Solicitors "Condition 8 in the said policy is not unilateral. Your clients themselves waived that condition inasmuch as they never suggested reference of any differences arising out of the policy to an arbitrator or asked that one should be appointed by both parties. It is not too late for the parties still to carry out the provisions contained in the said condition as my client's claim to be paid the amount of the insurance was made in writing on the 20th day of July, 1940."

To this the defendants' solicitor replied ". . . Counsel has advised that there has been no waiver of Condition 8 or any other condition of the policy by my clients." He proceeded to refer to paragraph 5 of the Statement of Defence and to paragraph 4 of the Statement of Claim for the purpose it would appear of controverting the plaintiff's contention that his claim was made on 20th July, 1940, and that it was not then on 24th January, 1941, too late to refer the matter to arbitration, and the solicitor concludes "I am afraid that your client's further attempt in July last to obtain payment does not alter the fact that his claim was made and was rejected in November, 1939." Nothing further appears to have transpired between the parties until 25th October, 1941, when, the time during which the matter might have been referred to arbitration had finally expired even if the plaintiff's contention as to the date of his claim was correct, the defendants' solicitor wrote giving notice that when this action came on for hearing counsel proposed to apply for dismissal of the action on the ground that the condition precedent to bring action namely, submission to arbitration had not been complied with.

It is in these circumstances that the plaintiff submits that the defendants by their conduct waived their right to arbitration, or led the plaintiff to believe that it was not necessary to refer the matter to arbitration or as the argument developed, had repudiated the contract so as to make the condition requiring arbitration of no effect.

A. RAHAMAN v. MOTOR UNION INS. CO., LTD.

I can find nothing in the defendants' conduct and correspondence to support the view that they had either waived arbitration or led the plaintiff to believe that it was not necessary, if one places a literal and restricted meaning upon those words. At the moment it is immaterial at what time the defendants may be deemed to have disclaimed liability for the claim; the fact remains that they made disclaimer on 27th November, 1939, and again on 22nd July, 1940. Clearly if the plaintiff persisted in his demand for payment in the face of such disclaimer a difference arising out of the policy had arisen, and at that time a difference based as it would appear on Condition 5 of the Policy only One would expect the plaintiff in such case to reiterate his claim, as in fact he did by his lawyer's letter of 23rd August and intimate his intention to proceed to the appointment of an arbitrator, which he did not either at that time or at any time thereafter until the defendants had pleaded by way of defence that there had been no such reference as required by Condition 8. The letter of the defendants' solicitor of the 20th September did no more than reiterate their refusal to entertain the claim, save that it added a ground upon which the plaintiff now seeks to establish his contention that they repudiated the policy, but at no time did they indicate in any way that they were unwilling to go to arbitration on that or any other ground and at no time until after action was brought did the plaintiff make any attempt to refer the matter to arbitration. In such circumstances I can find no waiver nor any such conduct as could reasonably have led the plaintiff to conclude that arbitration was unnecessary, unless it be shown that the letter of the 20th September was such a repudiation of the whole contract as to render untenable any claim by the defendants to any benefit thereunder including the benefit of arbitration. If that is the effect of their letter then in a sense it might be said that they led the plaintiff to believe that arbitration was unnecessary.

In this regard a number of authorities were cited on both sides, the plaintiff relying largely on *Jureidini v. National British & Irish Millers' Insurance Co. Ltd.*, (1915) A.C. p. 499, and the defendants upon such cases as *Stebbing v. Liverpool and London and Globe Insurance Co.* (1917) 2 K.B. p. 433 and *Woodall v. Pearl Assurance Co.* (1919) 1 K.B. 593. Counsel for both sides referred also to *Stevens & Sons v. Timber General & Mutual Accident Insurance Association Ltd.* (1933) 102 L.J., (K.B.) p. 337) a case indeed in which the position of both parties in a position not altogether dissimilar to the present was critically examined.

While there is something to be said for an endeavour to identify the present case with *Jureidini's* case there is also much to be said on the side of identifying it rather with *Stebbing's* and *Woodall's* cases from which it may be distinguished in perhaps

A. RAHAMAN v. MOTOR UNION INS. CO., LTD.

only one element. In *Jureidini's* case there was repudiation on the ground of fraud and arson and although there appears to have been a condition of the contract providing that in such case all benefits under the policy should be forfeited at the same time the decision of the House of Lords seems to have been based not upon this condition but rather upon the ground that the repudiation sprung from matters which apart altogether from the terms of the contract rendered it void and of no effect. In the later cases of both *Stebbing and Woodall* this was the distinction drawn. In each of these cases the repudiation of liability was based upon a term of the contract. The insurers were not seeking to avoid the policy on grounds lying outside it, but were invoking a condition of the policy itself in order to repudiate liability thereunder. The defendants in the present case submit that in so far as their disclaimer of all liability is concerned (as distinct from their disclaimer in this particular instance under clause 5) it is based upon a term of the contract itself, clause 10, and not upon any ground outside its terms. They argue that they are in no sense seeking to avoid the contract but are on the contrary calling its terms in aid. In this respect I would agree that the case falls within the rule in *Stebbing's* case and in *Woodall's* case rather than within that of *Jureidini's* case. I have said that there appears to be one element of distinction and it remains to be seen whether this will take the case out of the rule. In both the cases to which I have referred there was evidence of readiness on the part of the insurers to go to arbitration. In *Stebbing's* case it was in fact in the course of the arbitration proceedings that the point arose for decision. In *Woodall's* case the company's representative was insisting that in any event the differences would have to be referred to arbitration (I am quoting the words used by Lord Justice Warrington).

In the present case there is no such element. The defendants at no time expressed themselves as ready to arbitrate and when in January 1941 the plaintiff's counsel acting as solicitor at last suggested arbitration the defendants refused. It must be borne in mind, however, that the plaintiff had never until then taken any steps to refer the matter to arbitration and had at no time suggested that course although it was at all times open to him to do so if he desired, and that the refusal of the defendants in January 1941 in no sense arose from any suggested repudiation of the contract as a whole but appears from their reference to rejection of the plaintiff's claim in 1939 to have been itself based upon that term of the contract which provided that if the claim shall not have been referred to arbitration within twelve months of its rejection it shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable.

In such circumstances I am unable to find that the apparent

distinction is such as it render *Stebbing's* case or more particularly *Woodall's* case inapplicable, for while in the present case there is no evidence of readiness on the part of the defendants to arbitrate there is equally no evidence of unreadiness or refusal had the plaintiff suggested this course until, as they contend, it was too late. In so contending they did not repudiate but relied upon the contract. It appears obvious that after disclaimer it was for the claimant to initiate arbitration proceedings to enforce his claim and it would not only be natural but wise for the insurers to await such action on his part. The failure to refer cannot therefore be ascribed to any repudiation of the contract on the part of the defendants and refusal in January, 1941 on the grounds put forward was certainly no such repudiation.

It would appear, moreover, from *Stevens & Son's* case to which I have already referred (and I would now refer more particularly to the judgment of Lord Justice Romer) that the plaintiff by suing on the contract and not for damages has refused to accept repudiation and that he cannot be heard to say that the defendants by repudiation have done away with the need for arbitration while at the same time setting up the contract which requires it.

At the time this action was brought therefore it appears that the plaintiff had no cause of action, the condition precedent under condition 8 of the contract not having been fulfilled, but the letter of the 24th January, 1941 appears to suggest that even at that stage and after a statement of defence had been filed it was not too late; that proceedings might then have been stayed and a reference made to arbitration.

Before entering upon consideration of the possibility of such a course being open to the parties it will be convenient to decide whether or not it fell within the terms of the contract for the plaintiff then to suggest a reference or whether the defendants were within their rights under the contract in refusing to accede thereto.

The plaintiff's contention is that the document forwarded by him to the defendants on the 25th November, 1939 was not a claim but merely a report of particulars of the accident; that the defendants' disclaimer of the 27th November, was premature; that he first made a claim on 20th July, 1940 and that the company first disclaimed liability to the Insurer for any claim (to use the words of condition 8 of the contract) on 22nd July, 1940; on 24th January, 1941, therefore, twelve months had not expired from the date of the disclaimer and it was still open to the plaintiff to seek reference to arbitration. On the other hand the defendants contend that their disclaimer of the 27th November, 1939 was that from which the time ran; that more than twelve months had expired from the date thereof when the plaintiff made his suggestion in January, 1941, that the claim was by then deemed to be

A. RAHAMAN v. MOTOR UNION INS. CO., LTD.

abandoned and irrecoverable and that there was then nothing to go to arbitration.

The question depends therefore upon whether the letter of 27th November 1939 was a disclaimer within the meaning of condition 8 of the policy. The plaintiff contends that the document delivered by him on 25th November was not a "claim" but merely a report of particulars of the accident. It appears from the policy that while no report of particulars of loss is required condition, does require the Insured to give notice of the occurrence of an accident. This he appears to have done by means of the document of 25th November. The policy does not require him to do anything more. It requires no formal claim as apparently envisaged by the plaintiff in the form of a demand for payment or settlement of claim. I have been able to refer to no case in which any such formal claim is required and the learned author of Wilford's Accident Insurance makes no reference to any such "claim". By the notice of accident and particulars of loss (in the present case combined in one document) the company is fully informed of the nature of the liability alleged to have arisen and such notice appears to be all that is necessary on the part of the Insured in order to put forward his claim. In the present case it is not suggested that anything more was necessary save some form of demand or claim for payment, and in his letter of 20th July, 1940, the plaintiff appears to have given nothing further. On 25th November, 1939, the defendants were in full possession of all the information necessary for them to decide whether to admit or disclaim liability. No further formality was required of the plaintiff in order to complete his claim and the defendants were then entitled, if they so decided, to disclaim liability. This they did on grounds revealed by the plaintiff's particulars, that is, an alleged breach of condition 5 of the policy. The plaintiff was then at liberty to take steps to press his claim by reference to arbitration, but he did not do so. This may well be accounted for by the fact of his prosecution although it is to be observed that the ground of disclaimer was altogether different and apart from the prosecution and by no means depended on the result thereof. Upon his acquittal there remained no reason why he should not have proceeded to arbitration but this he failed to do. He repeated his claim and pressed for settlement. This was again declined by the defendants on the same ground as before, but still the plaintiff took no steps to refer the matter. I cannot hold otherwise than that the particulars furnished by the plaintiff on 25th November, 1939, constituted such a claim as entitled the defendants to either admit or disclaim liability, that their disclaimer of the 27th November, 1939, was a valid disclaimer within the terms of condition 8 of the policy, and that at the time when the plaintiff for the first time suggested reference to arbitration on 24th January, 1941, the period of twelve months pro-

vided by that condition had elapsed, his claim was deemed abandoned and was not therefore recoverable. The action of the defendants in refusing then to refer the matter was within their right under the term of the policy and cannot be construed as a repudiation of the policy, as a waiver of arbitration, as conduct indicating to the plaintiff that arbitration was unnecessary, nor as such conduct rendering arbitration impossible as would justify the plaintiff in proceeding by action.

It follows therefore that while at the date of the writ the plaintiff's cause of action had not accrued owing to non-fulfilment of the condition precedent requiring reference to arbitration, at the time of the offer to arbitrate his claim had expired by the operation of clause 8 of the policy. Counsel for the plaintiff suggests that this Court should in any event stay the proceedings in order that reference to arbitration should now be made, but in the circumstances the Court following the case of *Young v. Buckett* (1882) 51 L.J. Ch. p. 504 will not do so when the time for referring has expired. It may be that the plaintiff had at the beginning a good claim against the defendants which might have succeeded before the arbitrator. He received ample notice of disclaimer within two days of making his claim; he had several months after his acquittal before time expired in which to take steps to refer the matter to an arbitrator. He omitted to take such steps and commenced these proceedings instead. For the results, however regrettable, he has only himself to blame. It is unnecessary to decide the several questions which would otherwise have arisen and which were argued in this case, and judgment must be entered for the defendants with costs. Certified tit for counsel.

Judgment for defendant.

Solicitors: *E. A. Luckhoo, O.B.E.; J. E. deFreitas.*

CHRISTMAS HOOKUMCHAND, Plaintiff,

v.

NARINE HOOKUMCHAND, Defendant.

[1941. No. 173.—DEMERARA.]

BEFORE VERITY, C.J.

1942. MAY 11, 12, 15.

Gift—Immovable Property—Sale at execution of—Contract for purchase—Made by father on behalf of minor son—Purchase price paid by instalments—Purchase money property of father—Judicial sale transport not passed—No completed gift—Transport to be passed in favour of father.

Execution—Sale at—Purchaser at sale—Substitution by marshal of another person as purchaser at request of original purchaser—Not assignment of contract between marshal and original purchaser.

On the 17th February, 1938 the plaintiff was the highest bidder, at execution sale, for certain immovable property. He paid the marshal a deposit

C. HOOKUMCHAND v. N. HOOKUMCHAND

on account of the purchase price, his name was entered as purchaser, a receipt for the amount paid was issued in his name, and he signed the conditions of sale which constituted the contract.

Shortly afterwards on the same day, at the request of the plaintiff the marshal altered the receipt and the contract by substituting his son's name, and adding the words "father and guardian" after the plaintiff's signature to the contract. The plaintiff completed payment of the purchase money in July, 1938.

In 1941 he instituted proceedings against his son for an order that judicial sale transport should be passed in his favour and not in favour of the defendant. The defendant claimed that the entering of his name in the contract constituted a completed gift by the plaintiff to him of all rights thereunder by way of assignment, and that each payment on account of purchase money was a completed gift of the sum of money so paid. He submitted that these gifts were irrevocable, and that the plaintiff is therefore not entitled to transport in his own name.

Held (1) that the substitution of the son's name for that of the father did not constitute an assignment of the contract, and that when the marshal consented to strike out the plaintiff's name, he put an end to the original contract, and constituted a new contract by which the plaintiff purported to have made an agreement in the name of his minor son, the defendant;

(2) that the contractual rights created by the plaintiff on the 17th February, 1938 by the substituted contract were rights dependent solely upon the fulfilment of certain obligations which were not binding upon the defendant who could not then or at any time be bound thereby, for apart from the voidability of such a contract if entered into by the infant himself, it was not competent for the plaintiff to bind the infant in any way thereby.

(3) that the contract as finally entered into by the plaintiff (that is to say the substituted contract which he purported to make with the Registrar in the name of his minor son, the defendant) remained a contract between himself and the Registrar, and while by the introduction of his son's name the plaintiff may have expressed an intention to confer a future benefit upon his son, the contract in fact conferred no present benefit;

(4) that the payments on account of purchase money were in no sense payments to a third party on behalf of the minor son, who was under no obligation to make any such payments, but that they were payments by the plaintiff on his own behalf in discharge of his obligations under the contract:

(5) that neither at the moment of the making of the contract nor upon the completion of the payment of the purchase money was there any benefit immediately recoverable by the minor son of the plaintiff, and in such circumstances there could have been no completed gift; and

(6) that there being no completed gift, the defendant has no interest in the property, and the plaintiff is entitled to have transport passed in his name notwithstanding the inclusion of the defendant's name in the contract of sale.

Action by the plaintiff Christmas Hookumchand for an order directing the Registrar of Deeds to pass transport of Plantation Hope, also called De Hoop, West Coast, Berbice in his favour. The facts and arguments appear from the judgment.

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

S. L. Van B. Stafford, K.C., for the defendant.

Cur. adv. vult.

VERITY, C.J.: In this case the plaintiff seeks an order for the transport to him of certain property purchased at execution sale. The defendant tendered no evidence and from the uncontradicted testimony adduced by the plaintiff it appears that in February, 1938, he purchased this property, without premeditation, to oblige

C. HOOKUMCHAND v. N. HOOKUMCHAND

a friend. In the first instance he received a receipt for the deposit in his own name, his name was entered as purchaser and he signed the conditions of sale which constituted the contract. Shortly afterwards on the same day it was suggested to him that he should enter the defendant's name as purchaser with a view to making a gift of the property to the defendant who is his son, should the boy's conduct warrant such a course. With this suggestion he concurred and at his request the Marshal altered the receipt and the contract by substituting the son's name and adding the words "father and guardian" after the plaintiff's signature to the contract. The plaintiff completed payment of the purchase money in July, 1938 but did not obtain transport. Subsequently he had reason to complain of the conduct of the defendant who finally left their home in 1940. In April, 1941, the plaintiff applied to the Registrar for transport. This he did not obtain and in June, 1941 he commenced these proceedings.

He contends that his intention was to make a gift of this property to his minor son in the event of the boys conduct proving satisfactory between the date of the contract of sale and the passing of transport: that the entering of his name in the contract was no more than a step towards this end; that his son's conduct was not satisfactory and that the gift of the property was never completed.

The defendant contends that the entering of the son's name in the contract constituted a completed gift to the son of all rights thereunder by way of assignment and that each payment on account of purchase money was a completed gift of the sum of money so paid. He submits that these gifts are irrevocable and that the plaintiff is not therefore entitled to transport in his own name. This is an ingenious but somewhat artificial view and in such circumstances the precise nature of the acts of the plaintiff must receive careful consideration before it can be held that in fact and in law the plaintiff did that which at the time, as appears from the evidence, he had no intention of doing.

In the first place the substitution of the minor son's name for that of the father does not constitute an assignment of the contract. When the Marshal consented to strike out the plaintiff's name he put an end to the original contract. When he inserted the name of the minor in its place and added the words "father and guardian" after the plaintiff's signature there was constituted a new contract and it is the nature and effect of this new contract which determines the rights of the parties.

By this act the plaintiff purported to have entered into a contract in the name of his minor son for the purchase of this property and the question is whether in so doing he conferred upon his son any such irrevocable benefit as amounts to a completed gift. The test would appear to be whether at that moment there passed to the son any right or benefit which he could legally have maintained either against the Registrar or against the plaintiff.

C. HOOKUMCHAND v. N. HOOKUMCHAND

Unless there was some such right or benefit then there was no gift. It appears that at the most there might have been a right to possession, but the contract by its terms confers no such right and actual possession was delivered to and taken by the plaintiff and has remained in him ever since. Otherwise I can find in the transaction no such right or benefit. Had the plaintiff elected to make default in the payment of any instalment of purchase money I am at a loss to see by what means the defendant could have compelled him to make payment. Had the Registrar repudiated the contract the minor son could not have taken any steps to enforce it for the contract was not between himself and the Registrar and even had it been so he could not have obtained an order for specific performance there being no mutuality in such a contract.

Neither at the moment of the making of the contract nor upon the completion of the payment of the purchase money was there, it would appear, any right or benefit immediately recoverable by the defendant and in such circumstances there could have been no completed gift. The contractual rights created by the plaintiff on the 17th February, 1938, were rights dependent solely upon the fulfilment of certain obligations which were not binding upon the defendant who could not then or at any time be bound thereby, for apart from the voidability of such a contract if entered into by the infant himself it was not competent for the plaintiff to bind the infant in any way thereby. The contract as finally entered into by the plaintiff remained a contract between himself and the Registrar and while by the introduction of his son's name the plaintiff may have expressed an intention to confer a future benefit upon his son, the contract in fact conferred no present benefit.

It is to be remembered that the defendant's contention rests not upon any intention on the part of the plaintiff to make an immediate gift for this is negated by the evidence of the plaintiff's contemporaneous expression of intention, by his retention of possession of the property to which the contract relates and by his continued user thereof as his own property. It rests upon what I have described as an artificial conception that contrary to his expressed intention he had by his act made a completed gift to his son on the 17th February of rights which disentitle him now to the property in question. If, as I have held, the plaintiff did not in fact even unwittingly confer any immediate benefit upon his son there could have been then no completed gift and this Court cannot now compel the plaintiff to complete it.

In the same way I am satisfied that the payments on account of purchase money were in no sense payments to a third party on behalf of the son, who was under no obligation to make any such payments, but that they were payments by the plaintiff on his own behalf in discharge of his obligations under the contract.

There being no completed gift the defendant has no interest in the property and the plaintiff is entitled to have transport passed

C. HOOKUMCHAND v. N. HOOKUMCHAND

in his name notwithstanding the inclusion of the defendant's name in the contract of sale.

It is perhaps unnecessary to point to the difficulties which have arisen from the peculiar methods adopted by the plaintiff in this case and their acceptance by the Marshal. A clear distinction should be drawn between the execution of the contract by one person duly authorised on behalf of another, or by a trustee or guardian on behalf of an infant's estate from the funds of that estate, and what purports to be, as in the present case, an attempt to bind a third party, whether minor or major, by a contract of purchase without legal right or authority so to do. Those responsible for the conduct of such sales should exercise caution in the acceptance of any person as purchaser other than the person who in fact made the purchase and should in every such case seek due authority therefor.

There will be judgment for the plaintiff with an order as prayed but the plaintiff having by his own act occasioned this litigation there will be no order as to costs.

Judgment for plaintiff.

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

ALEXANDER MITTELHOLZER, Appellant,

v.

BAGGIE MITTELHOLZER, Respondent.

[1942. No, 112.—DEMERARA].

BEFORE FULL COURT: VERITY, C.J., FRETZ, J. and DUKE, J. (Ag.)

1942. MAY 1; JUNE 19.

Matrimonial Causes—Dissolution of marriage—Husband's petition for—Wife unsuccessful—Costs of and incidental to hearing—Wife not entitled to—Against husband—Where no order made at hearing as to costs—Rules of Court (Matrimonial Causes), 1921, rule 64.

Solicitor—Moneys deposited in joint names of two solicitors—To abide event—On happening of event—Moneys payable to one solicitor as agent for his client—Other solicitor refuses to concur in withdrawal of money—Order on solicitor therefor—Application for—Power of Court to grant.

A husband filed a petition against his wife for dissolution of marriage. The sum of \$100 was lodged by the husband, to abide the wife's costs of the hearing, in a bank in a joint account in the names of the solicitors for the husband and for the wife. The husband obtained a decree of dissolution against the wife, and the trial judge made no order as to costs. By rule 64 of the Rules of Court (Matrimonial Causes), 1921, it is provided that "when on the hearing of a cause the decision is against the wife, no costs of the wife of and incidental to that hearing shall be allowed against the husband except those applied for, and ordered to be allowed by the court, at the time of the hearing". The solicitor for the husband claimed that the money-deposited, now belonged to the husband, and asked the solicitor for the wife to join with him in withdrawing the money, but the latter refused. Thereupon, the husband's solicitor applied to a judge in chambers for an order on the solicitor accordingly. The judge refused to make any order, and the

A. MITTELHOLZER v. B. MITTELHOLZER

husband appealed. In the proceedings on the appeal, the wife's solicitor had due notice of the order prayed.

Held (1) that under rule 64 of the Rules of Court (Matrimonial Causes), 1921 the wife, being unsuccessful in the divorce proceedings, was not entitled, as against her husband, to any costs of and incidental to the hearing, as no such order had been made by the judge at the time of the hearing;

(2) that the husband was clearly entitled to receive back the moneys lodged to abide the wife's costs;

(3) that the judge had power to make the order asked for, and that the Full Court, on appeal, also had the power.

Appeal from an order of Stuart, J. made in Chambers.

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

The respondent was in default of appearance.

Cur. adv. vult.

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

This is an appeal from the refusal by a Judge in Chambers of an application for an order requiring the respondent's solicitor to join in the withdrawal from a joint account in the name of himself and the appellant's solicitor of a sum of money lodged therein by the appellant admittedly to abide the respondent's costs in a divorce suit brought against her by the appellant her husband. In this suit the decision was against the wife and the trial judge made no order as to costs. By virtue of rule 64 of the Rules of Court (Matrimonial Causes) 1921 no costs of the wife of and incidental to the hearing could in such circumstances be allowed against the husband, and the appellant is clearly entitled to receive back the moneys lodged by him to abide his wife's costs. In the application the solicitor appeared to contend that the respondent would be entitled to these costs or to this sum in any event. She is clearly not so entitled under the rules and any suggestion that the appellant intended, or agreed, that she was to receive this sum in any event whether ordered by the Court or not is entirely negated by the lodgement in the name of the solicitors of both parties "to abide the wife's costs." These words can only in such circumstances mean to abide any order the Court might make awarding her costs, and the Court made no such order.

The only other question which remains is whether the learned Judge should have made the order applied for and whether this Court should now make such an order. We are satisfied that the learned Judge had power to make such an order and that in the present proceedings the solicitor had due notice of the nature of the order prayed and that this Court has power now to make the order.

There is, however, nothing in the record to lead us to believe that the solicitor is contumacious or that he desired at any time to do other than to protect himself from any subsequent claims by his client. It would no doubt have been more in accordance

A. MITTELHOLZER v. B. MITTELHOLZER

with the dictates of courtesy had he in such circumstances appeared and submitted himself to the order of this Court. Nevertheless we propose in the first place to content ourselves with a declaration, that the appellant is entitled to receive the sum so lodged, feeling assured that the solicitor will await no formal order but will readily join in the withdrawal and refund to the appellant of these moneys. Liberty will be reserved to the appellant to apply for such an order if, as we do not however anticipate, the necessity should arise.

The appeal is allowed with costs. The question of the costs of any further application will be for consideration should such application come to be made.

Appeal Allowed.

Solicitor: *R. G. Sharples.*

HARDYAH, Appellant (Complainant),
 v.
 CALICA, Respondent (Defendant).

[1942. No, 106.—DEMERARA.]

BEFORE FULL COURT: VERITY, C. J., FRETZ, J. AND DUKE, J. (Acting).

1942. MAY 1; JUNE 19.

Immigration—Immigrants—Division of property—Order for—Immigration Ordinance, cap. 208, s. 147 (1)—Refusal or neglect to comply with terms of order—Complaint for—Cap. 208, s. 147 (2)—Lawful excuse a defence—What may be a lawful excuse.

Mere non-compliance with the terms of an order made by a magistrate under section 147 (1) of the Immigration Ordinance, cap. 208, for division of property is not in itself such neglect or refusal as will constitute an offence punishable under section 147 (2) with imprisonment.

Neglect or refusal within the meaning of section 147 (2) of the Immigration Ordinance, cap. 208, is unlawful neglect or refusal, or neglect or refusal without lawful excuse.

There is no neglect or refusal within the meaning of section 147 (2) of the Immigration Ordinance, cap. 208, where compliance with the terms of an order made by a magistrate under section 147 (1) is rendered impossible by loss or destruction of the property by causes beyond the control of the defendant.

The fact that a defendant, at the date of an order made under section 147 (1) of the immigration Ordinance, cap. 208 for a division of property, had no means to comply with it, may be a lawful excuse for non-compliance. Such an excuse should, however, be carefully weighed, where the defendant, after the commencement of proceedings under section 147 (1), has disposed of the property and of the means received therefrom. Further, the excuse that the absence of means to comply with the order was due to the necessity for disposing of the property in order that the defendant might sustain himself during sickness, must be scrutinised with the greatest care and accepted with the utmost reluctance.

HARDYAH v. CALICA

Appeal by the complainant from a decision of the magistrate of the East Demerara Judicial District dismissing a complaint brought under section 147 (2) of the Immigration Ordinance, cap. 208.

D. P. Debidin, solicitor, for the appellant.

The respondent was in default of appearance.

Cur. adv. vult.

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

In this appeal the main ground taken is that the learned magistrate erred in his conclusion that he was not bound to commit the respondent to prison on proof that he had in fact neglected or refused to comply with an order made under section 147 (1) of the Immigration Ordinance (Cap. 208). It was argued that mere non-compliance is in itself such neglect or refusal as to be an offence punishable with imprisonment and that it is not open to the defendant to excuse or explain non-compliance nor for the magistrate to decline to commit to prison.

This objection is in our view not well-founded. The subsection under which the respondent was charged is a penal one and there is nothing in the section so absolute in terms as to preclude the application of the doctrine of *mens rea*. Neglect or refusal must be therefore unlawful neglect or refusal, or neglect or refusal without lawful excuse. As was pointed out in the course of the hearing should compliance with the order be rendered impossible by loss or destruction of the property by causes beyond the control of the defendant clearly there could be no such neglect or refusal as is contemplated or as should merit committal to prison.

The magistrate has therefore to determine the nature of the neglect or refusal and to satisfy himself as to whether or not non-compliance was lawfully justified by the circumstances. In this case he has done so and the only question is as to whether he was right in his conclusion. The respondent was at the date of the original application in possession of the property subsequently ordered to be delivered by him to the appellant. After notice of the application the respondent disposed of the property by sale. An order was made by the magistrate, who had no knowledge of this disposition, for delivery of the property or its value. The respondent did not comply with this order and in excuse of non-compliance set up that he no longer had either the property or the money received by him as the result of its sale.

It would indeed be dangerous to hold that these facts in themselves constituted lawful excuse for non-compliance, for this would enable any person in regard to whose property such an application was made to dispose of the property forthwith, spend

HARDYAH v. CALICA

the money and set up that an order of division could neither be made nor enforced. It is true that there is nothing in the statute by which such an application operates as an attachment of the property precluding its disposal pending hearing but nor is there anything to justify the conclusion that disposal by a party with notice shall preclude division or payment of the value of property ordered to be delivered when such property is no longer in the possession of the defendant.

In this case, however, the learned magistrate has found that there was no fraud (by which we take him to mean that the sale by the respondent was not deliberately for the purpose of defeating any order in the proceedings), and that the sale was for the purpose of providing himself with sustenance during an illness which prevented him from earning his living and to obtain the help of counsel.

The magistrate having found no fraud in the disposition the only question remaining is whether the fact that the respondent had no means at the date of the order to comply therewith is a lawful excuse for non-compliance. It appears to us that this is a matter for consideration in the particular circumstances of each case and such an excuse should be the more carefully weighed where the defendant has disposed of the property and of the moneys received therefrom after the commencement of proceedings. In this case the learned magistrate has found that the absence of means to comply with the order was due to the necessity for disposing of the property in order that the respondent might sustain himself during sickness. This is an excuse which must be scrutinized with the greatest care and accepted with the utmost reluctance. The learned magistrate in this case accepted it after careful consideration of the evidence and we cannot say that he was wrong.

The appeal is therefore dismissed but there will be no order as to costs.

Appeal dismissed.

A. J. PARKES v. ARGOSY Co., LTD., AND OTHERS.

ALBERT JAMES PARKES, Plaintiff,

v.

ARGOSY COMPANY, LIMITED, L. EVELYN-MOE,
RICHARD SYDNEY ROSS AND C. A. GOMES, Defendants.

[1940. No. 106.—DEMERARA]

BEFORE VERITY, C.J.:

1942. APRIL 13, 14, 15, 20, 21; JUNE 22.

Libel—Unincorporate body with limited number of members—Criticism of—If defamatory—Right of action in each member.

Libel—Reasonably capable of defamatory meaning—Whether defamatory—Public interest—Sport—Intention of defendant—When relevant—Fair comment and damages—Fair comment—Meaning of—Express malice—What is—Damages—Action tried before judge without jury—No pecuniary loss suffered by plaintiff—Expression of disapproval of libel in judgment—Heavy damages not awarded.

The plaintiff was a member, and secretary, of the British Guiana Boxing Board of Control, a clearly identified body, unincorporated, and consisting of a limited number of members. The Board had organised a boxing contest in aid of charity. On the direction of the Board, the plaintiff requested the first, second and third named defendants to publish in their newspaper a statement purporting to show the receipts and expenditure, as they existed at the date of the statement, relating to the boxing contest. The statement showed that there had been a loss of \$77.04. The statement was published in the newspaper, and in the same issue of the newspaper there was published an article written by the fourth named defendant which was directed exclusively to criticism of the statement. The writer described as “alarming” the statement of receipts and expenditure, and not the state of affairs disclosed thereby; he stated that there was an omission from the statement of a sum “collected by somebody” the inclusion of which might have helped the receipts; that his curiosity was raised by the inclusion of items of expenditure for advertisements which the writer thought were “lent”; that, if the writer were permitted to examine the receipts, the statement might be given a better appearance; that it was the statement given them with which the public must be content; and that it was with the statement that the writer was even more dissatisfied than usual.

Held (1) that any criticism of the statement issued by the Secretary on the authority of the Board is criticism of the Board, and of every member of the Board including the plaintiff, the responsibility of the members being both joint and several;

(2) that if such criticism is defamatory, then every member of the Board, including the plaintiff, is defamed, and has a right of action;

(3) that the article was reasonably capable of a defamatory meaning;

(4) that it was defamatory of the plaintiff in that it ascribed to the plaintiff deceit or dishonesty or at the best incompetency, in accordance with the degree of charity within the mind of the individual reader; that although it did not necessarily or even reasonably imply that the plaintiff enriched himself at the expense of the funds, the article without doubt represents that either of deliberation or incapacity the plaintiff failed to disclose to the public in a statement purporting so to do the actual receipts and payments relating to the boxing contest; and that in neither case, would the plaintiff be a fit person to occupy such a position of trust as secretary of the Board;

(5) that the matter was one of public interest.

In an action for libel, the intention of the defendant is neither material nor relevant in considering whether or not the words are defamatory, or capable of bearing a defamatory meaning. It is, however, material and relevant in relation firstly to the defence of fair comment which may be destroyed by evidence of malicious intention, and secondly to the question of damage which may be mitigated by innocent intent, or inflamed by the reverse.

A. J. PARKES v. ARGOSY Co., LTD., AND OTHERS

No comment can be fair unless it be based upon matters which are in truth matters of fact. No one can comment fairly upon the character of another if his comment be based upon a false statement of that other's conduct. No one can comment fairly upon a matter of public interest if his comment be based upon a false statement of the circumstances.

Meaning of express malice considered.

Where an action for damages for libel is tried before a judge without a jury, the judge is able to express disapproval of the libel in the terms of his judgment. Consequently, in such case, when there is no evidence of the financial extent of the injury suffered by a plaintiff, the plaintiff need not look to the rehabilitation of his character by any very considerable pecuniary solace.

Action by the plaintiff Albert James Parkes against The Argosy Company, Limited, L. Evelyn Moe, Richard Sydney Ross and C. A. Gomes for damages for libel.

S. I. Cyrus, (G. M. Farnum with him), for the plaintiff.

E. G. Woolford, K.C., (C. V. Wight with him), for the defendants.

Cur. adv. vult.

VERITY, C. J.: In this case the plaintiff seeks to recover damages in respect of an alleged libel contained in an article written by the fourth named defendant and published in the "Daily Argosy" newspaper of which the defendant Company are the proprietors, the second named defendant the editor and the third named defendant the printer and publisher.

The plaintiff who is by profession a barrister practising in this colony, is also a member and the Honorary Secretary of the British Guiana Boxing Board of Control. I shall refer to this body hereafter in the course of this judgment as "the Board".

It appears that in the year 1940 the Board organised a boxing contest in aid of charity and that this contest was held on the 1st April, 1940. On the 12th of that month the plaintiff as Secretary of the Board requested the second named defendant to publish in the "Daily Argosy" a statement purporting to show the receipts and expenditure relating to this contest. This statement disclosed that there had at that date been a loss of \$77.04. It appears that certain inconsiderable sums have since been received by which the amount of the loss has been reduced. The statement appeared in the issue of the newspaper of the 14th April and in that same issue appeared also a statement written by the fourth named defendant above the signature "Simon Peter" to the effect that he had been informed that the contest had resulted in a loss and added "I propose to throw a few bouquets at the Board in my next contribution". It may here be noted that the fourth named defendant was at that time a regular contributor to the newspaper over the pseudonym "Simon Peter". On the 21st April there appeared an article by this writer under the title "Think it Over. The truth and nothing but the truth", and with the sub-heading "The Board's Bouquet". It is of this article that the plaintiff complains. In this article after referring to the loss sustained by the Board as shown by their statement and expressing in extravagant but no doubt humorous terms the writer's feelings in regard thereto, he

A. J. PARKES v. ARGOSY Co., LTD., AND OTHERS

proceeded that there was a number of things which suggested that the Board might find that “it was really in the black on the books instead of so deeply down to the ankles in the red”. It appears to be agreed that these last words mean a profit instead of a loss. The article then proceeds:

“As for instance:

“Isn’t there an outstanding omission of \$40—receipts for advertising in “the little typewritten programme done on a duplicating machine for distribution at the Bouts?

“I know that one advertiser was charged \$10 for coverage of one page—and unless the other three were given space gratuitously—then \$40 “was collected by somebody.

“Would the inclusion of this have helped the receipts any?”

The article then proceeds:

“Then the question of the Board’s advertisements.

“Weren’t the spaces used by the Board in the daily papers ‘lent’ by “Bookers Garage?

“I thought I saw a line in italics which mentioned the fact beneath each “advertisement that the Board occupied for its Charity Bouts.

“If this is not the advertising referred to in the entry: ‘Advertising and “Printing—\$45.74,’ then I should be glad to learn in which other medium “the Board advertised.”

The writer then referred to the possibility of securing a refund from the Police in view of alleged lack of protection, adding “this might further assist us in turning the scales over on the “right side,” and proceeded

“I am sure that there are few other likely avenues for frisking up the “accounts to give the general statement a better appearance—and a better “balance—if I could only be permitted a peek at the receipts.

“But then the Board mightn’t like me to do that.

“For who am I, anyway.

“So the public must be content once more with what the Board has “given them—and the poor Charities—and the British soldiers with what “the Board has not.

“As for myself—well, I’m never satisfied—and by this statement even “more than usual.”

Now the plaintiff complains that this article from which I have extracted those passages which appear material, was falsely and maliciously published of him and of him in the way of his position as a member and as Secretary of the Board and he further alleges that the article meant and was understood to mean that the plaintiff alone or together with other members of the Board has been deceitful, fraudulent and dishonest and was unfit to occupy a position of trust. A detailed innuendo follows into which it is not necessary for the moment to enter.

Publication is admitted by the defendants but it is set up in their behalf that no right of action in the plaintiff is disclosed,

that the words are incapable of bearing the meaning alleged or any other defamatory meaning with reference to the plaintiff as secretary of the Board or at all; that the plaintiff has suffered no damage and that in so far as the words consist of statements of fact they are true, and in so far as they consist of expressions of opinion they are fair comment on a matter of public interest.

It will be convenient to deal first with the right of action. It was submitted by junior counsel for the defendant that in order to establish a cause of action in the plaintiff the pleadings must disclose first the identity of the person alleged to have been defamed and secondly the certainty of that identity, and he submitted in the present case there is no such certainty in view of the frequently repeated alternatives appearing in the statement of claim and more particularly in the innuendo. It is to be observed that the article in question is directed exclusively to criticism of the statement published at the request of the plaintiff as Secretary of the Board on the direction of the Board of which he is a member as well as Secretary. The Board is a clearly identified body unincorporated and consisting of a limited number of members of whom the plaintiff admittedly is one. Any criticism of the statement issued by the Secretary on the authority of the Board is criticism of the Board and of every member of the Board including the plaintiff, the responsibility of the members being both joint and several. If such criticism is defamatory then every member of the Board is defamed, including the plaintiff. If he is defamed then he has a right of action. The identity is clear. As to the degree of certainty or uncertainty disclosed by the pleadings this raises no difficulty. Paragraph 6 of the Statement of Claim alleges unequivocally that the alleged libel was published of the plaintiff and of him in the way of his position as a member and as Secretary of the Board. Paragraph 7 alleges that the defendants meant that "the plaintiff had been deceitful fraudulent and dishonest and was unfit to occupy a position of trust." The fact that it is there alleged also that the defendants meant him "alone or together with the other members" raises no uncertainty. If the words used by the defendants meant that the plaintiff himself and as a member and Secretary of the Board was dishonest, it does not matter whether they meant that he alone was dishonest or that other members were dishonest also. There is in my view no room for doubt that criticism of the statement was criticism of the Board and therefore criticism of the plaintiff who was a member of the Board and more particularly the member who signed the statement as secretary. If the criticism is defamatory then the plaintiff is defamed and a right of action lies in him.

I come next to the question as to whether the words used by the defendants are capable of bearing the meaning ascribed to them by the plaintiff or any defamatory meaning and it is well

A. J. PARKES v. ARGOSY Co., LTD., AND OTHERS

here to observe the phraseology of this part of the Statement of Defence which is advisedly accurate in its bearing upon this question. It is not as to what meaning the defendants intended to convey but what meaning the words they used were capable of bearing and what meaning they would reasonably convey and do in fact convey to the mind of the average reader. It was submitted by leading counsel for the defendants that the intention of the writer is a material and relevant issue—and so it is, but it is material and relevant in relation firstly to the defence of fair comment which may be destroyed by evidence of malicious intention, and secondly to the question of damages which may be mitigated by innocent intent or inflamed by the reverse. Intention is neither material or relevant in considering whether or not the words are defamatory or capable of bearing a defamatory meaning.

Turning then, to this question I must consider the words used, must determine whether they are capable of bearing the meaning alleged by the plaintiff or of any defamatory meaning, and whether they are in fact defamatory in that they do convey such a meaning to the mind of that class of person who has been referred to as the average reader, of which class I as a Judge sitting without jury must deem myself to be a member. In determining this question I may take into consideration not only the words of the article but also the evidence which relates to the effect which the article in fact produced upon the minds of the witnesses who testified on either side, although this evidence must be carefully weighed and is not in itself conclusive, for individuals may and very frequently do read into the written word a meaning which in fact it does not bear and is incapable of bearing—an experience common to all writers and shared even by those who in a judicial capacity endeavour to express themselves with that precision which should characterize the written judgment.

The main exceptions taken to the article by the plaintiff have reference to the words used in the tenth to the sixteenth paragraphs of the article in question, words which relate to what is described as “an outstanding omission of \$40” and to “the question of the Board’s advertisements.” As pointed out by junior counsel for the plaintiff, with an apt illustration drawn from the first verse of the 53rd Psalm, it would not be proper to take isolated sentences or paragraphs, divorce them from their context and so ascribe to them a defamatory meaning. Nevertheless it is permissible and convenient to consider those passages to which objection is most seriously taken and having arrived at their meaning then take into consideration the context, for it may be that words which by themselves convey a sinister import may be proved from their context to be innocent in their meaning, or on the contrary words which by themselves

are devoid of offence may acquire a defamatory meaning when read in their proper context.

It will, however, be convenient to preface my examination of these passages by an expression of my view that the article as a whole is critical of the statement issued by the plaintiff as a member and on behalf of the Board, and of the conduct of the Board and therefore of the plaintiff in regard to that statement, rather than in relation to the promotion of the Boxing contest itself. There is little or nothing in the article to suggest criticism of the efficiency of the Board in organizing or promoting the contest. It is the statement of receipts and expenditure, and not the state of affairs disclosed thereby, which the writer describes as "alarming," it is an omission from a statement of a sum "collected by somebody" the inclusion of which might have helped the receipts; it is the inclusion of items of expenditure for advertisements which the writer thought were "lent" which raises his curiosity; it is the Statement which might be given a better appearance if the writer were permitted to examine the receipts; it is the Statement given them with which the public must be content; and it is with the Statement that the writer is even more dissatisfied than usual.

Dealing firstly with the passages commencing "Isn't there an outstanding omission" and concluding "then \$40 was collected by somebody" the writer has stated that he intended to convey that someone other than a member of the Board had received moneys for these advertisements on behalf of the Board, and had not paid them over and that the only criticism directed at the Board in this connection was for failure to recover these sums, or if they were not entitled to them for having entered into such an arrangement as deprived the contest of this source of revenue. Granting that the author has in these articles adopted a style directed at attracting attention by the peculiarities of its phraseology but which at times may result in the bewilderment of those who are accustomed to a more orthodox use of the English language, it still appears to me that if this is what the writer meant, he might well have couched his meaning in more revealing terms. If he meant that some person other than the Board had collected this sum why did he not say so? The use of the little word "else" might have been sufficient to make at least part of his meaning clear without any very great damage being done to that brevity which has been described as the soul of wit. If, however, I assume that by "somebody" the writer meant and could have been understood to mean somebody other than the plaintiff or the Board, this could hardly appear consistent with the rest of the paragraph and with the general purpose of the article, a critical examination of the statement of receipts and expenditure. The burden of the paragraph is that from the published statement the plaintiff omitted a sum of \$40 represented by receipts for advertising space in the programmes

A. J. PARKES v. ARGOSY Co., LTD., AND OTHERS.

distributed, and I doubt very much whether any reasonable person would conclude from the words used that the writer was criticizing the Board for omitting from their statement of receipts a sum which they had not in fact received and could never receive. I do not think that the average reader would believe that even a writer who is never satisfied would expect the Board to indulge in quite such unorthodox methods in dealing with a statement which purported to show their actual receipts and payments. By alleging that the absence from the statement of the sum of \$40 was an outstanding omission of receipts for advertising collected by somebody, I think there can be no doubt that the passage taken by itself would lead the public to believe that this item was in fact an item of receipt by the Board which had been omitted by the plaintiff from his statement.

Passing from this passage to the next there can be even less doubt to its meaning. The writer has characterised his references to the advertising alleged to have been paid for by the Board as "an innocent enquiry." It was described by the Chairman of the Board as "an interrogative innuendo." In my view the latter is the more apt designation. The words without doubt imply that the plaintiff had included in the item "Advertising and Printing" a charge which in fact the Board had not paid. The reference to space 'lent' by Bookers Garage, and to the writer thinking that he saw the mention of this fact beneath each advertisement place upon the inquiry with which the passage closes no more innocent meaning than might be conveyed by the statement "if Cain did not kill Abel I should be glad to learn who did." This passage in itself clearly represents that the plaintiff in his statement had included as an item of payments a sum which the Board had not in fact paid.

Looking now more closely to the context in which these two passages appear I can find nothing which deprives them of what I have held to be their primary meaning. They form items in the sum total of things which suggest that the Board might find themselves with a profit rather than the loss which their statement discloses, items which might assist "in turning the scales over on the right side." They are examples of "likely avenues for frisking up the accounts to give the general statement a better appearance and a better balance." Now what does all this mean? It clearly does not mean that the Board was unwise or incompetent in its organisation of the contest or that it entered into unprofitable contracts or failed to exercise due diligence in collecting sums to which it was entitled. No amount of wisdom, efficiency or skill can convert a true statement of an unprofitable transaction into a true statement disclosing a profit. No amount of "peeking at receipts" can discover "avenues for frisking up accounts" of receipts and payments so as to show a better balance if the statement of these accounts in fact shows all that has actually been received and what has really been paid. Such a

statement could only be given a better appearance and a better balance if as published it omitted actual receipts or included fictitious payments so that a searching of the accounts (which is what the writer states is the meaning of that intriguing phrase "frisking up the accounts") would reveal the true state of affairs which the published statement by wrongful omission and wrongful inclusion in fact concealed. I am satisfied that the average reader would reasonably gather from the article taken as a whole that the statement as published by the plaintiff was inaccurate and did not disclose the true facts, that it omitted an item of receipts amounting to \$40, that it included items of expense in fact unexpended as to some part at least of a further sum of \$45.74, that there were other such errors or omissions as if brought to light by an examination of the accounts, would show that instead of sustaining a loss as represented by the statement the Board had in fact made a profit available for distribution amongst the Charities concerned.

The next question is whether such allegations defame the plaintiff: do they represent the plaintiff as having been deceitful, fraudulent and dishonest and unfit to occupy a position of trust? And do they mean as suggested in the fourth paragraph of the innuendo that the plaintiff had enriched himself at the expense of the Charities intended to have been benefited.

I think that the plaintiff has by his innuendo attached greater weight to the words than their nature and quality justify. I doubt whether any reasonable average reader would have reached or did in fact reach the somewhat extravagant conclusion that the worthy Secretary of the Board either alone or together with its other very respectable members, had really taken money which they knew should go to war charities and British soldiers and placed it in his own or their own pockets and thus enriched themselves to the extent of perhaps a few dollars apiece. What the allegations do represent is, however, that the plaintiff published an inaccurate statement of the receipts and expenditure of the Board in relation to this contest, that the Board having invited the public to pay money in connection with a contest the profits of which were to go to charity, failed by this statement to disclose to the public the real outcome of the venture, Unless the article made it clear that this failure arose from facts not within the knowledge of the plaintiff then it represented the statement as deceitful at the best and dishonest at the worst. Or unless the article made it clear that not only were these facts not known to the plaintiff but could not have been known to him had he discharged properly his duties as Secretary, then it represented him at the best as incompetent. In either case it would not be unreasonable if the average reader concluded that the plaintiff was unfit to occupy such a position of trust as that of Secretary of a Board which undertook as on this occasion to handle public moneys in the

A. J. PARKES v. ARGOSY Co., LTD., AND OTHERS.

interest of charity. The writer in his article, however, allows to the plaintiff no such saving grace of ignorance for his words imply that the information which would disclose the inaccuracy of the statement is in the possession of the Board of which the plaintiff is Secretary, that the writer would discover it if allowed even a "peek" at the accounts, and further that the Board would not like at any rate the writer himself to make such an examination.

I am satisfied therefore that the words used are defamatory in that they ascribe to the plaintiff deceit or dishonesty or at the best incompetency in accordance with the degree of charity within the mind of the individual reader. They do not necessarily or even reasonably imply that the plaintiff enriched himself at the expense of the funds but they do without doubt represent that either of deliberation or incapacity he failed to disclose to the public in a statement purporting so to do the actual receipts and payments relating to this matter. In neither case would he be a fit person to occupy such a position of trust as that of Secretary to the Board.

Though the words be defamatory of the plaintiff as I have found he will still not be entitled to damages if, as is pleaded by the defendant, in so far as they consist of statements of fact they are true and in so far as they consist of expressions of opinion they are fair comment. The whole of this plea depends in the first instance upon the success with which the first part of the plea can be established for no comment can be fair unless it be based upon matters which are in truth matters of fact. No man can comment fairly upon the character of another if his comment be based upon a false statement of that other's conduct. No one can comment fairly upon a matter of public interest if his comment be based upon a false statement of the circumstances. In the present case there is no doubt that the matter is one of public interest, but in so far as the article in question purports to state facts there is little to be said in its favour. The comments are few: the writer expresses himself as "awfully sick over the affair," he finds the statement "alarming," and he sums up the matter by saying that while the public, the poor charities and the British soldiers must be content he is even more dissatisfied than appears to be his perpetual condition. The bases of his sickness, his alarm, and his dissatisfaction are to be found in the statements of alleged fact. Which of these statements is true in substance and in fact? The item of \$40 for advertising space on the programmes was not an item of receipt which the plaintiff could properly have included in the statement and so have helped the receipts, for not only was it not received but also the Board was not entitled to receive it under the terms of their agreement with the printer of the programmes. The item for "Advertising and Printing" did not contain any sum alleged to have been paid for advertising which in fact the

A. J. PARKES v. ARGOSY Co., LTD., AND OTHER.

Board obtained free of charge for the Board had paid \$23.64 for advertising in the very papers to which the article refers. The defendants have failed to establish by evidence that there were in fact any other items which an examination of the accounts would disclose should have been included in the statement and if so included would have given it a better balance. The statements therefore upon which the writer based his sickness, alarm and dissatisfaction were not statements of fact, Perhaps they were indeed as the writer at one point appears to aver the imaginings of "all sorts of crazy things" which went to the "ridiculous limit" of suggesting opinions which cannot however in such circumstances be deemed fair comment.

There being no fair comment the question of good faith or malice does not arise in this connection but it brings me to the last question which is that of damages.

I have found that the words published by the defendants are defamatory of the plaintiff and their manner of publication entitles the plaintiff to damages whether he has proved actual loss or not. In assessing the amount of damages which the defendants should be called upon to pay I take into consideration not only the grossness or otherwise of the libel, the position of the plaintiff and the nature and extent of the injury to his reputation which is presumed to flow from this defamation, but also the motives and intentions of the defendants and their conduct throughout, up to and including the trial of the action.

It is submitted on behalf of the plaintiff that the writer of this particular article has written in the past and the other defendants have published or allowed to be published other articles the nature and effect of which tend to show that the writer was inspired by actual malice, desire to injure or other indirect motive when he wrote the libel to which this action refers. There is also evidence of an occasion upon which the fourth named defendant is alleged to have threatened the plaintiff with such an attack as that now complained of, and another occasion on which he is alleged to have referred to the members of the Board as "a lot of crooks."

A letter written by the plaintiff to the manager of the defendant company indicates that the fourth named defendant had written on 23rd April, 1939, an article making reference to another organization with which the plaintiff was connected to the terms of which the plaintiff took exception. The article in question was not produced in evidence and I have no means of judging therefore the accuracy of the plaintiff's view as to its purport. The plaintiff appears to have seen some relation between that article and a Dr. Nichols who was President General of the organization referred to, He appears to have been little concerned however at any possibility of this gentleman being libelled provided that the organization as such was not brought into disrepute. The plaintiff avers that subsequent to the writing

A. J. PARKES v. ARGOSY Co., LTD., AND OTHERS.

of his letter he saw the fourthnamed defendant who said to him "so you are protecting Dr. Nichols—look out." In the absence of any precise evidence as to the nature of the criticism of Dr. Nichols in relation to the organization with which the plaintiff was also connected, I am unable to see in this statement evidence of any actual personal malice on the part of the fourth named defendant. If Dr. Nichols had laid himself open to criticism (and I cannot say whether he had or not) and if the plaintiff had by his letter indicated any intention to defend him then it might be no more than natural for the critic to warn him that he was laying himself open to such criticism also.

In regard to the series of articles between October, 1939 and April, 1940, there can be no doubt that the defendants during that period subjected the Board to severe and continued criticism in regard to more than one aspect of the Board's activities. There can be no doubt that in at least one instance (that of the award of a certain challenge cup) the criticisms were not justified by the facts, but I do not find in this course of conduct even though it might be termed a sustained attack upon the Board and even if it were not at all times or even at any time fully justified, evidence in itself of any personal or actual malice directed against the plaintiff. The Press rightly considers that it is entitled, indeed that it is in duty bound, to observe, record, and if necessary criticize the actions of any public body, or any body, the activities of which bring its conduct within the realm of public interest, and it appears that in a world where few things arouse such eager interest as sport no organization is more keenly watched nor more vigorously criticized than those whose function it is to further or control sports which have a wide popular appeal. The Boxing Board of Control is not immune and I have no doubt does not wish to be immune from such criticism, which must however be restrained within the bounds of lawful propriety. When any organ of the Press has believed it to be its duty to conduct what is sometimes described as a campaign against any such organization or against any particular failings which the newspaper believes it has observed in the dealings or activities of such an organization it would be unduly embarrassed in the discharge of what it may rightly deem its duty if, in the event of its having overstepped the boundary of its legal rights on one occasion, the precursors of the offending article were to be deemed in themselves evidence of actual malice. The plaintiff would have to go further and show that the articles or a substantial number of them were so ill-founded, so unfair, so devoid of justification as to lead to an irresistible conclusion that nothing short of malice in its ordinary meaning could have inspired them. Were it not so the perils of the Press would be more obvious than its cherished freedom.

I see no such evidence in the present case derivable from the series of articles in question. The writer was evidently engaged

A. J. PARKES v. ARGOSY CO., LTD., AND OTHERS.

in a campaign regarding certain aspects of the Board's conduct of affairs. He expresses himself not only with a certain peculiarity of style but also no doubt with vigour. The combination is one which no doubt lays him open not only to the admiration of those whose views coincide with his own and to perhaps a measure of dislike from those whose views do not or whose conduct is criticised, but also to the danger of being himself entrapped in an unwary moment by his own exuberance. Licence to expound one's views anonymously in public criticism of the failings of others may readily lead to over indulgence, the consequences of which are usually as inescapable as they are unpleasant. The manager of the defendant company has stated that as a humorous writer the fourth defendant should not be taken too seriously by his readers, but one must remember that even the "Family Fool" or Jester of an earlier day, no matter how pungent his wit, knew there was a point at which he must draw the line. It may be that the Jester has given way to the humorous "feature writer" of the modern press who pokes fun at the failings of a larger family, but Mr. Gomes will forgive me if I remind him

"There are one or two rules—
Half a dozen may be
That all Family Fools
Of whatever degree
Must observe—if they love their profession."

He will readily appreciate that the use of the word "Fool" is no reflection on his intelligence.

In the present case therefore while I have found that the defendants have broken one of the rules with which the freedom of the Press is restrained from developing into that licence which might convert a virtue into a vice, I find no actual malice and even should Mr. Smith's recollection of his heated interview be accurate I remain of the same view, Nevertheless the plaintiff is entitled to damages and such damages in view of the entirely unjustified nature of the libel should not be of so small a sum as to indicate any measure of agreement on the part of this Court with the statements of which the plaintiff complains nor should they be such as to leave any doubts in the mind of the public as to the integrity and capacity of the plaintiff. Although I would not venture to dictate any rule of ethics by which an anonymous writer employed by the press should be guided, I cannot help feeling that in the present case insufficient care was taken to ascertain the real facts before the article was written, which it might have been better for the defendants as it would have been more considerate of the feelings and reputation of the plaintiff had the defendants, once those facts were ascertained, unreservedly withdrawn the statements contained in the article and based upon misapprehension and misunderstanding.

A. J. PARKES v. ARGOSY Co., LTD., AND OTHERS.

On the question of damages the plaintiff followed the somewhat unusual course of informing me from the witness box of the precise pecuniary value placed by him upon the injury to his reputation, that is to say \$5,000 the amount claimed in the writ. Since the decision in *Rook v. Fairrie* (1941) 57 T. L. E. p. 297, plaintiffs need not look to the rehabilitation of their character by any very considerable pecuniary solace when there is no evidence of the financial extent of their injury and the case being tried before a Judge alone he is able to express his disapproval of the libel in the terms of his judgment. The plaintiff has entirely cleared himself of any imputations against his character, his honesty, and his capability and it is unnecessary that I should indicate my view of the libel by assessing the damages at a sum at which no doubt a jury might arrive in an attempt to express their view in terms of money. In the case to which I have just referred a particularly gross libel upon a man holding public office was adequately compensated by a verdict for £500. I do not think that the plaintiff upon consideration would suggest that the circumstances of this case warrant even one half of that sum.

I assess the damages at \$500, a higher figure than I should have thought adequate had the defendants not persisted in their defence on the ground of the truth of their statements and the fairness of their comment.

There will be judgment for the plaintiff therefore for that sum against the defendants jointly and severally together with an order for costs. I certify the action as fit for two Counsel.

Judgment for Plaintiff.

Solicitors: *W. D. Dinally; A. G. King.*

H. ALI v. F. SAM.
 HASSAN ALI, Plaintiff,
 v.
 FRANCIS SAM, Defendant.
 [1940. No. 88.—DEMERARA.]
 BEFORE VERITY, C.J.
 1942. JUNE 22, 23, 29.

Promissory note—On demand—Consideration—Illegality—Indorsement by payee—Whether indorsee holder in due course—Holder in due course—Meaning of—Whether holder took note in good faith without notice of any defect—In good faith—Meaning of—Note tainted with illegality—General notice that.

A holder in due course of a promissory note must have become holder before it was overdue and without notice of dishonour, and he must also have taken the note in good faith without notice of any defect.

Where an indorsee knew or believed that there was something wrong with a promissory note for \$2,000 made on demand, and thought that if he purchased it for not more than half its face value he could, by concealing his suspicion and refraining from asking too many questions, make a profit of \$1,000 on the transaction, the Court held that the indorsee had not made an honest deal but had made a speculation to which it would be impossible to apply the term "in good faith."

Where an indorsee had general notice that a promissory note was tainted with illegality, it was held that he could not recover on the promissory note.

ACTION by the plaintiff on a demand promissory note made by the defendant in favour of Ivy Lam on the 2nd November, 1938, and indorsed by her in favour of the plaintiff. The defendant pleaded that the note was given for an illegal consideration; and, further, that the plaintiff bought it when overdue and was not a holder in due course. The plaintiff did not contest, at the trial, that the note had in fact been given for an illegal consideration.

H. C. Humphrys, K.C., for the plaintiff.

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

Cur. adv. vult.

VERITY, C.J.: In this case the plaintiff seeks to recover a sum alleged to be due on a promissory note made by the defendant and endorsed to him by the payee. The defendant sets up that the note was given for an illegal consideration and further that the plaintiff bought it when overdue and is not a holder in due course. The illegality of the consideration as violating the rules of morality is not contested and the main issue is whether the plaintiff is a holder in due course. To be such a holder he must have become holder before it was overdue and without notice of dishonour, and he must also have taken the note in good faith without notice of any defect.

Viewing all the evidence and the circumstances disclosed thereby I find myself unable to come to the conclusion that the plaintiff acted in good faith and without such notice as is sufficient to warrant the inference that he knew that the note was tainted

H. ALI v. P. SAM.

with illegality. The plaintiff whose demeanour was both truculent and evasive did not impress me as a witness of truth. It became only too plain as his evidence proceeded that he desired to conceal material facts from the Court, but even upon his own showing the circumstances in which he came by this note were such as would lead one to the conclusion that he made no inquiry into the history of the note and the nature of the consideration either because he already knew or because he suspected and did not want to know the facts. The woman brought him the note which was payable on demand some sixteen months after its date. He knew the drawer to be a merchant and money lender. He was told that the payee had made several calls upon the drawer to collect on the note and had been put off on each occasion. He knew that the payee could not recover without suit and that she was seeking to dispose of the note in order to avoid bringing suit. He knew that she would accept half its face value. Yet in these circumstances he accepts without any verification her explanation that she would not sue because the drawer was related to her and her mother would not like her to sue and refrains from any enquiry as to the reason why it should be necessary to sue on the note, as to the history and the original transaction or the nature of the consideration which urged a merchant and money lender to give a promissory note for the substantial sum of two thousand dollars to this woman whose word alone he had for a family relationship which does not in fact exist. When this plaintiff tells me that he acted thus in the ordinary course of business and that he neither knew nor thought that the transaction was tainted with any illegality I simply do not believe him. I am satisfied from all the circumstances that he knew or believed that there was something wrong with the note and thought that if he purchased it for not more than half its face value (although I am not satisfied that he paid even that much for it) he could, by concealing his suspicion and refraining from asking too many questions, make a profit of \$1,000 on the transaction. This was in my view no honest deal but a speculation to which it would be impossible to apply the term "in good faith."

I am satisfied that from the circumstances the inference can fairly be drawn that the plaintiff had general notice that the note was tainted with illegality and he cannot recover. Judgment will therefore be entered for the defendant, but in the particular circumstances of this case, in which the defendant has brought the litigation upon himself by issuing an instrument negotiable upon the face of it, knowing that it was founded upon an illegal consideration and with the preconceived determination not to honour it, I allow him no costs.

Judgment for Defendant,

Solicitors: *A. G. King; P. M. Burch-Smith.*

E. T. DA SILVA v. SUKHRAJ.

EVA T. DA SILVA, Plaintiff,

v.

SUKHRAJ, Defendant.

[1940. No. 73—DEMERARA.]

BEFORE VERITY, C.J.,

1942. APRIL 23; JUNE 29.

Opposition—To transport or mortgage—Action to enforce—Seasons for opposition—No amendment without leave—Rules of the Supreme Court (Deeds Registry), 1921, r. 9 (1)—Unliquidated damages—Claim for—Not good ground for opposition—Opposition suit—Relief claimable in—Joinder with other causes of action—Prohibited—Application to strike out other causes of action—Not made until hearing of action—Not subject to objections of waiver and delay.

Practice—Trial of action—Application made at—Refused—Judge vacates office—Termination of trial before that judge—Action set down for hearing before another judge—Application renewed before him—Matter not res judicata.

On an action coming on for hearing, the defendant made an application that part of the statement of claim he struck out. The application was dismissed by the trial judge, but the hearing of the action before that judge was brought to an end by the termination of that judge's period of office. The action was set down for hearing before another judge, and the defendant again applied, that part of the statement of claim be struck out. The plaintiff contended that the matter was *res judicata*.

Held, that the whole of the proceedings at the un concluded hearing became a nullity, that no part of them could be brought in aid at the present trial, and that the question raised by the defendant's application could not be considered as *res judicata*.

The plaintiff in an opposition suit cannot, without leave, allege any reason for opposition other than those contained in the statement filed in the registry: rule 9 (1) of the Rules of the Supreme Court (Deeds Registry), 1921.

A claim for unliquidated damages can in no case constitute good ground for opposition.

The words "these Rules" in Order 1, rule 1 of the Rules of Court, 1900 include additional and amending Rules.

Notwithstanding the general terms of Order 16 of the Rules of Court, 1900 (as enacted in 1932), the joinder in an opposition suit of a variety of causes of action unconnected with the special relief sought in an opposition suit is neither contemplated nor allowed by the Rules of the Supreme Court (Deeds Registry), 1921.

Any attempt so to join other causes or to seek other relief amounts to the "constitution of the suit in a way not authorised by law and the rules applicable to procedure," and is not therefore subject to the doctrines of waiver or delay.

In an opposition suit, the Court ordered that such part of the plaintiff's statement of claim as referred to any cause of action other than that upon which his opposition was founded, must be struck out, so that the plaintiff's claim is confined to the special relief prescribed on the special grounds allowed together with substantive relief in respect of the cause of action arising from the amount of the liquidated debt alleged to have accrued due at the date of opposition or, under rule 7 (2) of the Rules of the Supreme Court (Deeds Registry), 1921 after opposition entered and before the issue of the writ.

ACTION by the plaintiff to restrain the passing of a transport. In his statement of claim the plaintiff included a claim for damages. At the trial of the action the defendant made application to strike out so much of the statement of claim as sought to set up any claim for damages, so as to leave the substantive claim one for rent only. A similar application had been made on the

E. T. DASILVA v. SUKHLAJ.

8th, 15th and 16th December, 1941, when the action had come on for trial before Stafford, J. (Acting); decision was delivered on the 20th February, 1942, refusing the application, but the hearing of the action before Stafford, J., (Acting) was brought to an end by reason of the termination of that judge's period of office on the 21st February, 1942.

A. J. Parkes, for the defendant.

L. M. F. Cabral, for the plaintiff.

Cur. adv. vult.

VERITY C.J.: Upon this case coming on for hearing counsel for the defendant made application to strike out so much of the statement of claim as sought to set up any claim for damages, so as to leave the substantive claim one for rent only. Counsel for the plaintiff took objection to the right of the defendant to be heard on such an application on the ground of *res judicata*.

It appears that a similar application was made, and a ruling given, at an abortive hearing commenced before Mr. Justice Stafford. This hearing was brought to an end by the termination of that Judge's period of office, and the action, not having been heard, was set down for hearing before me. In these unfortunate, but unusual, circumstances the whole of the proceedings at the uncompleted hearing became a nullity, and no part of them can be brought in aid at the present trial. The question raised by the defendant's application cannot be considered as *res judicata*, and I therefore heard argument thereon.

It is desirable, however, to express the view that had the application been made, as it should have been made, at the earliest possible time and in the usual way by an application to a judge in Chambers on summons the present situation should not have occurred. The order of the Judge would have been valid, subject to the right of appeal, no matter what the succeeding events. The course adopted by the defendant not only has given rise to much inconvenience but is such as would in a suitable case enable the opposite party to raise the question of waiver and invoke Order LI, rule 2. Indeed, before it can be held that there has not been such waiver and that the application should not be dismissed as too late, it is necessary to consider whether the objection is to a mere irregularity or whether as *Smurthwaite v. Hannay* (1894) A. C. p. 494 it is so much more than an irregularity that it is as Lord Russell of Killowen said "within the competence of this Court to restrain and to prevent an abuse of its powers." If there has been a misjoinder of causes of action still if it amounts to a mere irregularity then the defendant must be deemed to have waived it by the steps he has taken subsequent to its discovery, for not only does he wait until the statement of claim is filed although a claim for damages is mentioned in the writ, but he subsequently files a statement of defence in which

while taking exception to the claim as containing grounds other than those set out in the notice of opposition and also as not conferring a right to oppose he proceeds with his defence thereto and sets up a counter claim by which he himself seeks damages in respect of the agreement in regard to which he contends the plaintiff is debarred from seeking similar relief in this action. It is in these circumstances and only when the case comes to trial that he seeks to strike out for misjoinder. He can only succeed if again to quote Lord Russell of Killowen the misjoinder amounts to a "constitution of the suit in a way not authorized by law and the rules applicable to procedure." It is just this however, that the defendant now contends. Paragraph 2 of his statement of defence appears based upon a misconception of the nature and effect of the plaintiff's claim. It is not contended by the plaintiff, as I understand, that the claim for damages for breach of contract is a ground of opposition, or that the relief claimed by way of declaration and injunction can flow therefrom. The claim for damages is additional or alternative relief in which, should he prove successful, the plaintiff can obtain nothing more than damages and even if he succeeds in this part of his claim yet if he fails in the rest his opposition cannot be declared well-founded nor can transport by the defendant be restrained.

The defendant now contends, however, that this joinder is improper on the ground that what is known as an "opposition action" is a special form of action in which may be sought that relief only which is appropriate to oppositions and that there can be joined therewith in the same action no claim for damages.

It appears to be recognised by the plaintiff not only that in this action he cannot without leave allege any reason for opposition other than those contained in the statement filed in the registry (Rule 9 (1) of the Rules of the Supreme Court (Deeds Registry) 1921) but also that a claim for unliquidated damages can in no case constitute good ground for opposition, at least since the decision of the West Indian Court of Appeal in *Ferreira v. Cabral* (1923 L.R.B.G. p. 133), where it is stated "no action in opposition can succeed which is not founded on a liquidated claim." The plaintiff contends, however, that by reason of Order XVI of the Rules of Court as amended in 1932 there is no longer any Order which precludes the plaintiff from uniting in the same action, whatever its nature, several causes of action. In support of the provisions of this Order in their applicability to an "opposition action" he refers to Order I r. 1, which provides that subject to the succeeding Rules which have no special application to the present question "all proceedings in the civil or appellate jurisdiction of the Supreme Court save and except so far as special provision is made by any Ordinance shall be regulated by these rules and not otherwise." This rule will be of no avail however if by the words "these Rules" is meant, not the particular rules of court made by the Judges under the

E. T. DA SILVA v. SUKHAJ.

Supreme Court Ordinance of 1893 and approved by the Court of Policy on the 18th January, 1901, but any rules of court made by the proper rule-making authority under and by virtue of statute, which will, of course, include the Rules of the Supreme Court (Deeds Registry) 1921 upon which Counsel for the defendant relies in his submission as to the special nature of this particular form of action. As the latter is the only possible interpretation reasonably to be placed upon the words "these Rules," for otherwise no new additional or amending rules would be of any effect, the question remains whether or not the rules under which an opposition action is brought preclude the joinder of any other cause of action notwithstanding the very wide provisions of Order XVI as it now stands.

The right of opposition is one of long standing in our laws, and is saved by proviso (b) in section 3 of the Civil Law Ordinance (Cap. 7) which provides that "the law and practice relating to the right of opposition shall be the law and practice now administered in those matters by the Supreme Court." In the absence of any argument, and none was addressed to me on this point, I do not propose to consider whether or not the use of the word "practice" was intended to secure that the procedure to be adopted in relation to enforcing the right of opposition was to remain static as found on the date of the coming into operation of this Ordinance, and that in so far as procedure was varied by the Rules of 1921 such rules are *ultra vires*. I shall assume, therefore, for the purposes of this case that the procedure now lawfully required is that provided by those Rules. On this assumption it is in those Rules that one must seek any such modification or restriction of the general rules of Order XVI as would give to an opposition action a special form confined only to the determination of the issues peculiar to the right of opposition and the grant of that relief only to which the opponent as such is entitled by reason of his right to oppose.

I have given careful consideration to the submissions of counsel as well as to the relevant rules of Court and have reached the conclusion that what was in the past described by statute as an "opposition suit" is a form of action by means of which an opponent may secure a special form of relief in respect of a special cause of action by special provision prescribed by special rules. This has always been so, at least since the enactment of Ordinance No. 26 of 1855 by which provision was made for opposition suits which concluded by "sentence in opposition." The Rules of 1900 as also the Rules of 1921 prescribe and limit the nature of the claim and the grounds which may be alleged in support thereof and primarily by statute and latterly by rule the plaintiff or opponent was first permitted and later required to join therewith a further claim for substantive relief, The special procedure in opposition involves summary interference with the right of an owner of immovable property to alienate the

same at will and the special form of action prescribed is to enable the Court to determine without necessity for the consideration of further issues the justice or otherwise of the opposition.

The objects of the procedure may well be defeated by joinder of a variety of causes of action unconnected with the special relief sought and such joinder is in my view neither contemplated nor allowed by the relevant rules of Court, notwithstanding the general terms of Order XVI.

Any attempt so to join other causes of action or to seek other relief amounts to the "constitution of the suit in a way not authorised by law and the rules applicable to procedure," and is not subject therefore to the doctrines of waiver or delay.

Such part therefore of the plaintiff's claim as refers to any cause of action other than that upon which his opposition is founded must be struck out so that his claim is confined to the special relief prescribed on the special grounds allowed together with substantive relief in respect of the cause of action arising from the amount of the liquidated debt alleged to have accrued due at the date of opposition or, under Rule 7 (2) after opposition entered and before the issue of the writ, and the plaintiff is required to amend his claim accordingly.

A further difficulty arises, however, from the action of the defendant who by his delay in asking for the present order and by his counter-claim seeks to bring upon himself the very evil his application is intended to avert, by raising the issues to which he takes exception. While I do not wish to be understood as implying that in an opposition suit the defendant is necessarily precluded from availing himself of any set-off or counter-claim, at the same time it is my view that in the present case the defendant should consider whether or not he will withdraw his counter-claim at the same time amending his defence in respect of such parts thereof as relate solely to the plaintiff's claim for damages, or that the plaintiff should consider the advisability of applying under Order XVII rule 4, so that in either event the issues to be determined in this action may perhaps be confined to those arising out of the opposition, and that other issues between the parties be left for determination in other proceedings.

I would again emphasize the fact that had the defendant taken immediate steps, as he should have done, to confine the plaintiff's claim within its proper limits, before he pleaded thereto, much of the difficulty and delay that has ensued would have been avoided. In the circumstances each party will bear whatever additional costs may have been incurred by him in relation to the present application. The trial of the action is adjourned to a day to be fixed to enable the parties to consider what further steps if any they should take in the light of the view I have expressed as to the further course of the action.

Solicitors: *W. D. Dinally*, for defendant; *F. I. Dias*, for plaintiff.

SOOKEA v. E. A. C. TIAM FOOK

SOOKEA, IN HER CAPACITY AS THE EXECUTRIX OF CHARLES
CHUNG TIAM FOOK, DECEASED, Plaintiff.

v.

EDWIN ADOLPHUS CHUNG TIAM FOOK, Defendant.

[1942. No. 29.—BERBICE.]

BEFORE DUKE, J. (Ag.): IN CHAMBERS.

1942. JULY 6, 8.

Opposition—To transports and mortgages—Rules of the Supreme Court (Deeds Registry), 1921, rule 5—Application of—Not where one mortgage is opposed—By one person in respect of two causes of action.

Practice—Opposition action—Statement of claim—Amendment of indorsement in—Rules of Court, 1900, Order 18, rule 2—Basic principle of opposition actions—Not to offend against.

Practice—Transports and mortgages—Opposition to—Writ of summons to enforce—Indorsement—To restrain passing, and for declaration that opposition just, legal and well-founded—Rules of the Supreme Court (Deeds Registry), 1921, rule 7 (1)—Generally indorsed writ—Application to set aside writ—Statement of claim not yet filed—Power of plaintiff to extend indorsement of claim—In statement of claim—To include claim for judgment in respect of cause of action—Application premature—Not granted.

Rule 5 of the Rules of the Supreme Court (Deeds Registry), 1921, has no application where a proponent advertises his intention to pass one mortgage, and an opponent has two causes of action against him. Rule 5 applies to cases where a person seeks to enter opposition to two or more transports or mortgages advertised for the first time on the same day to be passed by one and the same person: in such cases, it is provided that one notice of opposition would be sufficient.

A plaintiff in an opposition suit would not be able to act under rule 2 of Order 18 of the Rules of Court, 1900, (which provides that whenever a statement of claim is delivered, the plaintiff may therein alter, modify or extend his claim without any amendment of the indorsement of the writ) in any manner which would offend against the basic principle of opposition actions.

An opposition was entered, on the ground of a liquidated demand, to the passing of a mortgage. In her writ of summons issued under rule 7 (1) of the Rules of the Supreme Court (Deeds Registry), 1921 (which provides that within a period of time therein specified, the opponent shall bring an action to restrain the conveyance or mortgage to which the notice of opposition relates, and if he has opposed by virtue of any claim in respect of which a right of action has then accrued to him, to enforce that claim also) the opponent claimed (a) an injunction to restrain the defendant from passing the mortgage, and (b) a declaration that the opposition was just, legal and well-founded. The writ was not specially indorsed, it was generally indorsed, and in the indorsement there was not included therein a claim for judgment in respect of the liquidated demand. The defendant, after entering appearance and before the plaintiff had delivered a statement of claim, took out a summons for an order striking out the writ of summons on the ground of irregularity and for non-compliance with rule 7 of the Rules of the Supreme Court (Deeds Registry), 1921.

Held (1) that, as the opponent asked in her writ that the opposition be declared just, legal and well-founded, she had partially sought to enforce the claim in respect of which a right of action had accrued to her;

(2) that in her statement of claim the opponent would be at liberty to ask that judgment be entered in her favour for the amount due to her;

(3) that the objection taken by the defendant was therefore premature, and must be refused.

SOOKEA v. A. C. TIAM FOOK

SUMMONS taken out by the defendant for an order striking out the writ of summons on the ground of irregularity and for non-compliance with the provisions of rule 7 of the Rules of the Supreme Court (Deeds Registry), 1921.

S. I. Cyrus, for the applicant, the defendant.

H. C. B. Humphrys, solicitor, (for *P. M. Burch-Smith*, solicitor), for the plaintiff.

Cur. adv. vult.

DUKE, J. (Ag.); This is a summons taken out by the defendant in which he asks for an order striking out the writ of summons in this action on the ground of irregularity and for non-compliance with the provisions of rule 7 of the Rules of the Supreme Court (Deeds Registry), 1921.

The defendant had caused to be advertised in the *Gazette* of the 18th April, 25th April and 2nd May, 1942 notice of his intention to pass a mortgage on the property described in the indorsement of claim on the writ of summons herein. On the 2nd May, 1942, the plaintiff entered two oppositions to the passing of the mortgage, one for \$103.75 the price of goods sold and delivered, and the other for \$49.27 moneys paid and advanced. In the affidavit of the defendant in support of the summons it is suggested that the plaintiff thereby failed to comply with rule 5 of the Rules of the Supreme Court (Deeds Registry) 1921. Rule 5, however, has no relation to the facts of this application. That rule applies to cases where a person seeks to enter opposition to two or more transports or mortgages advertised for the first time on the same day to be passed by one and the same person: in such cases it is provided that one notice of opposition would be sufficient. The plaintiff, however, offended against the general rule of procedure aimed at preventing multiplicity of proceedings. One opposition would have sufficed with respect to the claim for goods sold and also with respect to the claim for moneys paid and advanced. Consequently, if the plaintiff obtains judgment in the action with costs, the Taxing Officer will bear this in mind, and disallow the extra costs which were occasioned by reason of the entry of more than one opposition.

On the 11th day of May, 1942, the plaintiff filed a generally indorsed writ claiming (a) an injunction to restrain the defendant from passing the mortgage, (b) a declaration that the oppositions entered on the 2nd day of May, 1942, were just, legal and well-founded, and (c) costs. The Plaintiff did not specifically include in the writ a claim for the recovery of the sums of \$103.75 and \$49.27 referred to in the oppositions. Rule 7 (1) of the Rules of the Supreme Court (Deeds Registry), 1921 provides that, within a period of time therein specified "the opponent shall bring an action to restrain the conveyance or mortgage to which

SOOKEA v. E. A. C. TIAM FOOK

the notice of opposition relates, and if he has opposed by virtue of any claim in respect of which a right of action has then accrued to him, to enforce that claim also.” Counsel for the defendant submitted that the plaintiff failed to include in the writ of summons any claim in respect of which a right of action has accrued to the plaintiff (*vide* paragraph 3 of affidavit of plaintiff’s solicitor filed in support of the application), and urged that the writ of summons should be set aside for irregularity for want of compliance with rule 7 (1).

It is the statement of claim, and the statement of claim alone, that the trial judge considers, in order to ascertain what claim the plaintiff is seeking to enforce. The plaintiff has filed his writ, but the indorsement of writ in this action is not a statement of claim, as the writ is not specially, but generally, indorsed. The plaintiff, in due course of events, will have to file her statement of claim in which, in accordance with Order 18, rule 2 of the Rules of Court, 1900 the plaintiff “may therein alter, modify or extend her claim without any amendment of the indorsement of the writ.” It is true that the plaintiff would not be able to act under Order 18, rule 2 in any manner which would offend against the basic principle of opposition actions. But in this case the plaintiff has asked in the writ that the two oppositions be declared just, legal and well-founded. She has therefore partially sought to enforce the claims in which a right of action has accrued to her, and in the statement of claim she would be at liberty to ask that judgment be entered in her favour for the two separate sums of \$103.75 and \$49.27.

The objection taken by the defendant is therefore premature and his application is therefore refused.

The writ was not drafted in the manner commonly adopted by legal practitioners when opposing transports and mortgages. And I therefore make no order as to costs.

Application refused.

Solicitor for the defendant: *H. A. Bruton.*

R. LOVELL v. E. MARCUS.

RUTH LOVELL, Plaintiff,

v.

ERNEST MARCUS, Defendant.

[1942. No. 108.—DEMERARA]

BEFORE DUKE, J. (ACTING): IN CHAMBERS.

1942. JULY, 8, 9, 11.

Practice—Statement of Claim—Striking out—Application for—Main object of action—Setting aside deed of transfer—Undue influence—False representations—May be acts in exercise of undue influence—Sole point for determination—Whether mind of plaintiff accorded with her act—When she executed deed of transfer—Allegations in respect of undue influence—Not definitely separated from those in respect of false representation—Statement of claim not struck out.

Practice—Pleading—Allegation of undue influence—Particulars—Substance of case—Already contained in statement of claim—Particulars not ordered.

The plaintiff claimed a declaration that she was the owner of a building, and possession. In her statement of claim she pleaded that she had transferred the building to the defendant without consideration, and she alleged that the transfer was induced by the undue influence and the false representations of the defendant. The defendant applied that the whole statement of claim be struck out. It was submitted, on his behalf, that, while the statement of claim is understandable in so far as it relates to the issue as to false representation, it is embarrassing in so far as it relates to the issue of undue influence, inasmuch as it is not definitely set forth in the statement of claim itself what are the allegations therein which the plaintiff will submit at the trial relate to the issue of undue influence.

Held, (1) that the sole point for consideration by the trial judge was whether the mind of the plaintiff was in accord with her act when she executed the transfer (without consideration as she alleged) of the building in favour of the defendant: that her mind would not be in accord with her act whether her act was induced by the undue influence, or by the false representations, of the defendant; and that the false representations alleged in the statement of claim may very well prove, at the trial to be act in exercise of the undue influence alleged to have been used on the plaintiff;

(2) that, in these circumstances, it could not be said that the plaintiff acted wrongly in not meticulously separating the paragraphs relating to undue influence, from the paragraphs relating to false representation.

In order that a statement in a pleading may be struck out, it must be clearly impertinent, and it must be clear that it is not relevant.

Particulars of the character of the undue influence and the time, place and acts in exercise thereof were refused where the substance of the case as to the undue influence was contained in the statement of claim itself.

Summons filed by the defendant for an order striking out the statement of claim or alternatively parts thereof, and for particulars.

A. J. Parkes, for the defendant.

E. D. Clarke, solicitor, for the plaintiff.

Cur. adv. vult.

DUKE, J. (Acting): This is a summons taken out by the defendant for an order (1) striking out the statement of claim or alternatively certain parts thereof and (2) for particulars of certain paragraphs of the statement of claim.

As I understand it, the substance of the plaintiff's claim is as

R. LOVELL *v.* E. MARCUS.

follows. The plaintiff is a married woman living apart from her husband. She has a son and daughter (both still under the age of 21 years) who lived with her from the dates of their respective births. The daughter had saved a sum of \$200 given to her from time to time by one Andrew Padmore, and she gave the said sum to the plaintiff to purchase a house as a residence for the plaintiff and her family. Andrew Padmore died on the 17th June, 1989. He left a small legacy for the plaintiff, and she received payment thereof in the month of August, 1939. The plaintiff had no other means or resources. Apart from these two sums of money, she was destitute, and had no means of support. In September, 1939, she purchased a building at 14, Garnett Street, Campbellville, East Coast, Demerara, for \$500; possession of the building was delivered to the plaintiff; and the plaintiff and her two minor children took up residence there in September, 1939. In or about the month of November, 1939, the plaintiff, who was ill at the time, transferred the building to the defendant. The defendant is a magician by occupation, and up to the 26th June, 1939, he was an utter stranger to the plaintiff. The transfer of the building was made without consideration. The plaintiff left the Colony for Barbados on the 4th. December, 1939, and some of her household furniture and other goods were left with the defendant who undertook to keep them safely for her on the premises. As soon as the plaintiff had departed from the Colony, the defendant, who is a married man living apart from his wife, removed into the building at 14, Garnett Street, Campbellville, with an Aboriginal Indian woman named Lena, with whom he was and is still living, and their children, and the defendant, Lena and their children have occupied the building continuously to the present time. The plaintiff claimed a declaration that the building is her property, and possession of the building.

In support of her claim for relief the plaintiff has pleaded certain facts which, if proved, she will submit to the trial judge, would be sufficient to entitle her to the relief claimed. In short, the plaintiff has alleged in her statement of claim that the transfer was executed in consequence of the undue influence exercised on her by the defendant and/or in consequence of the false representations made to her by the defendant. Counsel for the defendant has submitted that, while the statement of claim is understandable in so far as it relates to the issue as to whether the defendant made a false representation to the plaintiff on the faith of which the transfer of the building is alleged to have been executed, it is embarrassing in so far as it relates to the issue as to whether the transfer was executed through the undue influence of the defendant, inasmuch as it is not definitely set forth in the statement of claim itself what are the allegations therein which the plaintiff will submit at the trial relate to the issue of undue

influence. Counsel has very forcibly argued that the whole statement of claim is so bad that it should be struck out altogether in the alternative, that certain parts specified in the summons should be struck out on the ground that they are irrelevant.

Although at the trial the plaintiff will lead evidence relating both to undue influence and to false representation, in this case the sole point for consideration by the trial judge is whether the mind of the plaintiff was in accord with her act when she executed the transfer (without consideration as she alleges) of the building in favour of the defendant. Her mind would not be in accord with her act if her act was induced by the undue influence of the defendant, and her mind would not be in accord with her act if her act were induced by the false representations of the defendant. The false representations alleged in the statement of claim may very well prove, at the trial, to be acts in exercise of the undue influence alleged to have been used on the plaintiff. In these circumstances, I am unable to say that the plaintiff acted wrongly in not meticulously separating the paragraphs relating to undue influence from the paragraphs relating to false representation. Further, the statement of claim is so full of the facts and circumstances which the plaintiff intends to prove at the trial that the defendant cannot justly contend to be embarrassed; he is put on his guard, as he knows what is the full nature of the case he has to meet at the trial, The application, therefore, that the whole statement of claim be struck out is therefore refused.

The portions of the statement of claim which, in the alternative, the defendant submits should be struck out are as follows:—

Paragraph 1: He (meaning the defendant) also claims to be a professor of spiritualism.

Paragraph 5: That her (meaning the plaintiff's) daughter, one of the children aforesaid (that is to say, of the plaintiff), had saved a sum of \$200 given her from time to time by the said Andrew Padmore, deceased in his life time, and gave the said sum to the plaintiff so that the plaintiff should purchase a house as a residence for herself and family.

Paragraph 7: When he (meaning the defendant) represented to her (meaning the plaintiff) that by occult means he would locate a bicycle which was stolen from her daughter on payment to him of the sum of \$1 which sum she paid him but the said bicycle was never traced or found.

Paragraph 8: He (meaning the defendant) frequently discussed his various magical feats and gave demonstrations at her house of his prowess as a magician by turning copper coins into silver ones and thereby entertaining her children and herself.

Paragraph 10: That thereafter in the said month of September, 1939 the defendant insidiously undermined the relationship existing between her (meaning the plaintiff) and her children,

R. LOVELL v. E. MARCUS.

who hitherto lived with her on terms of the utmost harmony and cordiality, by causing strife and friction between her (meaning the plaintiff) and her said children and by his rebuking and scolding them in their home, which they resented, and eventually in October, 1939 they left her (meaning the plaintiff's) home and lived elsewhere leaving her alone at her place of abode in Garnett Street aforesaid.

Paragraph 11: That she (meaning the plaintiff) became mentally distressed at the severance between herself and children who refused to return home and who had never previously lived apart from her and she (meaning the plaintiff) suffered from a severe nervous breakdown and was ill in consequence.

Paragraph 26: The defendant who is a married man living apart from his wife, in the said month of December, 1939, removed into her (meaning the plaintiff's) building along with an aboriginal Indian woman named Lena with whom he was and is still living and their children—in so far as the words “who is a married man living apart from his wife” and “along with an Aboriginal Indian woman named Lena with whom he was and is still living and their children” are concerned.

In *de Abreu v. Clarke* (1931-37) L.R.B.G. 476, 482 it was held by the Full Court (Crean, C.J. and Langley, J.) that in order that a statement in a pleading may be struck out it must be clearly impertinent, and it must be clear that it is not relevant.

With respect to paragraph 1 of the statement of claim I am unable to say, at this stage of the proceedings, that the statement as to the spiritualistic claims of the defendant is not relevant. It may very well be that it will tend to show why the plaintiff relied upon what she alleges that the defendant told her, and it may form a link in the chain of circumstances from which the plaintiff will ask the trial judge to draw the inference that she executed the transfer (without consideration as she alleges) of the building to the defendant by reason of his undue influence.

With respect to paragraph 5 of the statement of claim I am unable to say, at this stage of the proceedings, that it is irrelevant. The facts therein pleaded may be a link in the chain of circumstances to show that the plaintiff who, apart from her ownership of the building was destitute and without means, did act under the undue influence of the defendant or under some false representation made by him when she, the plaintiff, executed a transfer (without consideration as she alleges) of the building in favour of the defendant.

With respect to paragraph 7 of the statement of claim I am unable to say, at this stage of the proceedings, that the statement that the defendant represented that, by occult means, he would locate a bicycle which had been stolen from the plaintiff's daughter is not relevant. Counsel for the defendant has argued that the plaintiff is imputing that the defendant is guilty of a criminal offence. The statement objected to may form a link in

R. LOVELL *v.* E. MARCUS.

the chain of circumstances from which the trial judge will be asked to find that the transfer of the building (without consideration as the plaintiff alleges) was executed by the plaintiff in favour of the defendant as a result of his undue influence. A statement imputing a criminal offence will not be struck out of a statement of claim if it is relevant, or if a judge in chambers is not convinced that it is clearly irrelevant.

With respect to paragraph 8 of the statement of claim I am unable to say that the statement as to magical feats is not relevant. Sitting as a judge in chambers I cannot say, at this stage of the proceedings, that the statement is not relevant to the issue as to undue influence.

I am unable to say, at this stage of the proceedings, that paragraphs 10 and 11 of the statement of claim are irrelevant. Paragraph 10 relates to the defendant undermining the harmonious and cordial relationship which had always existed between the plaintiff and her children. Paragraph 11 relates to the mental distress, suffering and illness of the plaintiff as a result of the estrangement between the plaintiff and her children. It may well be that the achievement of these ends was desired by the defendant in order that he might be able, without interference, to exercise undue influence on the plaintiff.

At this stage of the proceedings I am unable to say that the statement in paragraph 26 of the statement of claim that the defendant, along with an Aboriginal Indian woman with whom he lives in adultery and their children, moved into the building, is not relevant. This may be a link in the chain of circumstances by virtue of which the plaintiff hopes to convince the trial judge that her mind did not go with the act when she executed the transfer (without consideration as she alleges) of the building in favour of the defendant.

The application, therefore, that the parts of the statement of claim specified in the summons should be struck out, is therefore refused.

The plaintiff pleaded in paragraph 19 of the statement of claim that the transfer of the building (without consideration as she alleges) was executed by her as a result of his undue influence. The defendant has applied for particulars of "the character of the undue influence and the time, place and acts in the exercise thereof." At the hearing of this summons, counsel for the defendant said that the pleader did not, in so many words, say where the facts alleging undue influence are to be found in the statement of claim. In reply the solicitor for the defendant has stated that the substance of the case as to undue influence is contained in the statement of claim itself. In a case of this description where the only true issue appears to be, whether the mind of the plaintiff went with her act when she executed the transfer (as she alleges without consideration) of the building in

R. LOVELL v. E. MARCUS.

favour of the defendant, it may very well be that the false representations alleged in the statement of claim will prove, at the trial, to be acts in exercise of the undue influence alleged to have been used on the plaintiff. The facts in support of undue influence, and the facts in support of false representation cannot, in this case, be kept in water-tight compartments. The application, therefore, for particulars of undue influence is therefore refused.

The defendant has, however, asked for particulars of the acts of the defendant that caused the strife and friction (referred to in paragraph 10 of the statement of claim) between the plaintiff and her children with the necessary date of each act; or, as the solicitor for the plaintiff prefers to call it, particulars of the substance of the case as to undue influence. I am not satisfied that the nature of this action permits of more particulars being given of the manner in which the relationship between the plaintiff and her children is alleged to have been undermined by the defendant. The plaintiff alleges that strife and friction arose between the plaintiff and her children in consequence of which her children left her home, and that all this was as a result of the insidious conduct of the defendant. The plaintiff has indicated to the defendant the substance of the case as to undue influence in so far as it relates to the alleged undermining of the harmonious and cordial relationship which had existed between the plaintiff and her children, and the defendant therefore knows the nature (although perhaps not the weight) of the case which he will have to answer with respect to paragraph 10 of the statement of claim. The application, therefore, for particulars of paragraph 10 of the statement of claim is therefore refused.

The summons which was filed by the defendant on the 29th day of June, 1942, is therefore dismissed with costs which I fix in the sum of \$7.50.

Application dismissed.

M. HUSSAIN AND ANR. v. E. A. C. TIAM FOOK.

MOHAMED HUSSAIN (HASHIM SANKAR) AND JOHN
GILBERT CHOONG, Plaintiffs,

v.

EDWIN ADOLPHUS CHUNG TIAM FOOK, Defendant.

[1942. No. 74.—DEMERARA].

BEFORE DUKE, J. (ACTING): IN CHAMBERS.

1942. JULY 6, 7, 10, 13.

Equity—Maxims of—Equity does not act in vain—When a court of equity refuses to act—Merely to show nature or extent of powers of a court of equity—Where remedy applied for would be useless to applicant.

Equity—Maxims of—He who seeks equity must do equity—Contract—Delay of one party in executing—Pecuniary loss suffered by other party from—No offer by first party to make restitution for—Specific performance—Against party suffering loss—Not entertained.

Specific performance—Contract of sale—Purchase money not at disposal of purchaser—Specific performance refused.

Specific performance—For the execution of a bilateral deed—Party applying unable to comply with terms of deed—Deed prejudicial to interests of other party—First party did not execute deed within time agreed upon—Specific performance refused.

Specific performance—Against a person who has agreed to lend money—Will not be decreed—Exception—Contract with a company to take up and pay for debentures—Companies (Consolidation) Ordinance, cap. 178, s. 103.

A judge of a court of equity does not act merely in order to show the nature or the extent of his powers. He does not act in vain, he does not act where the remedy applied for would be useless to the applicant.

Where a purchaser had no means at his disposal to pay for certain property which he had purchased, the Court refused to decree that the contract of purchase and sale ought to be specifically performed by the vendor.

The defendant had agreed to pass a mortgage in favour of the plaintiffs. The time fixed for passing the mortgage had passed, and the plaintiffs were no longer willing to accept the mortgage. The mortgage was for a sum of money far in excess of the value of the property sought to be bound by the mortgage. The Court was satisfied on the evidence that the defendant would not be able to make the monthly payments which he would have to make under the mortgage.

Held, that, as the plaintiffs were no longer bound *ex contractu* to accept the mortgage, it would be unreasonable for a judge of a court of equity to force them to accept a mortgage which, if transferred by them, could only be transferred at a loss, and the terms of which would not be complied with by the mortgagor.

A purchaser claimed that time was not the essence of a contract and sought the equitable relief of specific performance against the vendor. By reason of the delay of the purchaser in completing execution of the contract the vendor had lost the sum of \$120 to which he would have been entitled thereunder, if the contract had been executed. The purchaser did not pay, or offer to pay, to the vendor the sum of \$120.

Held, that he who seeks equity must do equity, and that specific performance must be refused.

A long and uniform course of decision of courts of equity has established that the remedy of specific performance is not available against a person who has agreed to lend money. An exception to this rule, however, occurs in section 103 of the Companies (Consolidation) Ordinance, Cap. 178, which provides that a contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

Where the plaintiffs agreed to lend money to the defendant on the security of a mortgage, and subsequently refused to accept the mortgage the Court refused to decree specific performance of the agreement.

M. HUSSAIN AND ANR. v. E. A. C. TIAM FOOK.

SUMMONS filed by the plaintiffs for an order that the terms of settlement filed herein on the 30th March, 1942, be made an order of Court, that an order for possession of the premises mentioned in the statement of claim he made, that such other relief be granted as may be necessary, and that the costs of the summons be paid by the defendant.

J. E. de Freitas, solicitor, for the plaintiffs.

S. I. Cyrus, for the defendant.

Cur. adv. vult.

DUKE, J. (ACTING): This is a summons taken out by the plaintiffs (1) for an order that the terms of settlement filed in this action on the 30th March, 1942, be made an order of Court, (2) that an order for possession of the premises mentioned in the Statement of Claim be made (3) that such other relief be granted as may be necessary and (4) that the costs of this application be paid by the defendant.

By an agreement in writing dated the 2nd May, 1940, the plaintiffs *inter alia*, let to the defendant as from the 1st May, 1940, the north half of lot 12 Section A, part of Pln. No. 79, Corentyne River, Berbice with all the buildings and erections thereon including the building known as the Metro Theatre and Engine House, at the monthly rental of \$70 payable in advance on the first day of each and every calendar month.

By clause 13 of the said agreement the plaintiffs were entitled to rescind the agreement and determine the tenancy and to re-enter the said premises or some part thereof in the name of the whole without any previous demand and without recourse to law and eject the tenant therefrom if the defendant failed to pay the rent within one calendar month after the time when the same ought to have been paid.

In the premises known as the Metro Theatre the defendant carried on the business of a cinema exhibitor.

On the 14th May, 1941 the plaintiffs, claiming that the defendant was then in default of payment for more than one calendar month of the rent which became due on the 1st days of February, March and April, 1941, determined the said agreement and reentered and took possession of the said Metro Theatre. On the 21st May, 1941, the plaintiff's, through their solicitors, gave the defendant notice to quit and deliver up possession forthwith of the two-storyed building situate on the north half of lot 12 Section A, Pln. No. 79, Corentyne River.

The plaintiff's and the defendant composed their differences and on the 28th May, 1941 the plaintiffs permitted the defendant to resume possession of the property let to him under the agreement. The defendant subsequently paid the plaintiffs the rent which had become due on the 1st days of February, March and April, 1941.

The plaintiffs have received no rent in respect of the property

set forth in the agreement for the months of May, June, July, August, September, October, November and December, 1941; and they have received no rent therefrom for the months of January, February, March, April, May, June and July this year. In other words, for a period of fifteen months the property has yielded no revenue to the plaintiffs.

The plaintiffs in or about the months of October and December 1941 demanded possession of the property described in the agreement, from the defendant, and on the 16th January, 1942 the plaintiff's, through their solicitors, gave the defendant notice to quit and deliver up possession of the said property on the 1st March, 1942.

The defendant withheld possession from the plaintiffs and on the 5th March, 1942 the plaintiffs issued the specially indorsed writ in this action, returnable for the 23rd March, 1942, against the defendant claiming possession of the property described in the agreement and rent and mesne profits at the rate of \$70 per month from the 1st May, 1941, till possession of the said property is delivered to the plaintiffs.

The writ of summons was served on the defendant on the 12th March, 1942. The defendant instituted an action against the plaintiffs (No. 76 of 1942, Demerara) claiming relief in respect of the forfeiture for non-payment of rent, and asking for an order for rectification of the agreement of the 2nd May, 1940, and for an injunction restraining the plaintiffs in the present action from dealing with or transporting the property specified in the said agreement, and from retaking possession of the property therein demised.

On the 21st March, 1942 the defendant filed an affidavit of defence in this action in which he stated, *inter alia*, that he was advised that the plaintiffs were not entitled to exercise the right of forfeiture for non-payment of rent, that he had a good defence to this action on the merits, and that the defence went to the whole of the plaintiffs' claim.

The matter was called in the Bail Court on Monday, the 23rd March, 1942, before His Honour Mr. Justice Luckhoo, who suggested that some efforts might be made to arrive at a settlement. The matter was accordingly adjourned to Monday, the 30th March, 1942.

The plaintiffs were not in Georgetown on the 23rd March, 1942, they were at No. 78 Village, Corentyne River, Berbice, where they reside.

On learning that the matter had been adjourned with a view to a settlement the plaintiffs left No. 78 Village on Tuesday morning the 24th March, 1942, at 3 a.m. They arrived in Georgetown at about 11.30 a.m. and proceeded to the office of their solicitor who told them what had happened.

The plaintiffs were not in favour of settling this action nor the action instituted by the defendant against them, but on being

M. HUSSAIN AND. ANR v. E. A. C. TIAM FOOK.

informed by their solicitor of the probable costs of the two actions and of the delay that would occur, they decided to consider any reasonable terms of settlement that might be put forward.

The defendant, learning that the plaintiffs were in Georgetown telephoned Ahmad Sankar, the brother of the plaintiff Mohamed Hussain or Hashim Sankar, and a meeting was arranged and took place on Wednesday evening, the 25th March, 1942 at the house of Ahmad Sankar when the terms of settlement were agreed on in outline.

On Thursday morning, the 26th March, 1942, the defendant and the plaintiff Mohamed Hussain (Hashim Sankar) attended at the office of the plaintiffs' solicitors where the terms of settlement of this action, and of the action No. 76 of 1942 which had been instituted by the defendant against the plaintiffs, were written out. The defendant was warned that this would be the last chance given to him, and he was allowed to fix the dates set out in the terms of settlement. The solicitor for the plaintiffs informed the defendant that the terms would have to be approved by his legal advisers. The defendant said that that was not necessary, but the plaintiffs' solicitor replied that no settlement could be made until such approval had been obtained. After the terms of settlement had been typed, a copy was handed to the defendant to take to his lawyers. His lawyers were Mr. S. I. Cyrus, Barrister-at-law, and Mr. H. A. Bruton, Solicitor. The defendant returned to the office of the plaintiffs' solicitor shortly afterwards, and he stated that he could find neither Mr. Cyrus nor Mr. Bruton, and that he would like to sign the terms of the settlement immediately as he wanted to leave Georgetown. The terms of settlement were accordingly signed on Thursday afternoon the 26th March, 1942, by the defendant and by the plaintiff Mohamed Hussain (Hashim Sankar) on behalf of himself and the other plaintiff John Gilbert Choong, on the distinct understanding that they were not to have effect until signed by the counsel for the defendant and by the solicitor for the plaintiffs.

The terms of settlement were intituled in this action (No. 74 of 1942). As signed on the 26th March, 1942, they were as follows:—

TERMS OF SETTLEMENT.

1. The plaintiffs to sell (*a*) the property known as the north half of lot number 12 (twelve) section A, said north half of lot number 12 (twelve) section A, containing an area of 1.023 English acres portion of the 79 section of the Nos. 78-79 Country District situate on the left bank of the Corntyne River in the county of Berbice and colony of British Guiana, the said lot being laid down and defined on a plan by H. Ormonde Durham, Sworn Land Surveyor, dated the 25th November, 1930 and duly deposited in the Deeds Registry of British Guiana on the 29th day of July, 1931, with all the buildings and erections thereon

including the building known as the Metro Theatre and the Engine House.

(b) the Petter Electric Plant and Sound Equipment.

(c) 250 chairs, benches, screen and other furniture of the said Metro Theatre for the sum of \$6,979.00 apportioned as follows:—
property \$3,500.00, Petter Electric Plant and Sound equipment \$2,500.00, Chairs., etc., \$979.00.

2. The plaintiffs to advertise transport of the said property as soon as the costs thereof are paid as hereinafter provided and to pass the same as soon as possible.

3. The defendant to advertise at the same time and pass a First Mortgage to the plaintiffs for \$7,250 in payment of the said purchase price and the expenses and costs of the plaintiffs with interest at 10 (ten) per cent., per annum from the 1st May, 1942, payable monthly, the capital to be repayable at the rate of \$120 per quarter, defendant to insure two buildings and machinery, for \$5,200 and assign policies to plaintiffs, defendant to be allowed six months to effect insurance on Cinema building and equipment, in meantime defendant to pay the equivalent of “without profit” premium to plaintiffs in respect thereof, usual covenants to pay rates and to repair and keep buildings in good condition etc., as approved by the plaintiffs’ solicitors.

4. Defendant to pay to the plaintiffs all costs of and incidental to the said transport and mortgage and this settlement.

5. If the defendant fails to pay the sum of \$100 towards the said costs as aforesaid on or before the 6th April, 1942, and the balance on or before 30th April, 1942, and to accept transport and pass mortgage on or before the 15th day of May, 1942, the above sale to be rescinded and an order for possession is to be made forthwith in this action.

6. The defendant to withdraw forthwith the action brought by him against the plaintiffs (No. 76 of 1942) and to abandon and release the claims made by him in the said action and all other claims or rights of action which he has or may have against the plaintiffs as at the date thereof.

7. These terms to be made an order of Court on the application of either party, all further proceedings in this action being in the meantime stayed.

Dated the day of March, 1942.

(Sgd.) MOHAMED HUSSAIN,

for self and John G. Choong,

Plaintiffs.

(Sgd.) EDWIN ADOLPHUS CHUNG TIAM FOOK,

Defendant.

Solicitor for plaintiffs.

Counsel for defendant.

M. HUSSAIN AND ANR. v. E. A. C. TIAM FOOK.

The defendant has not stated in his affidavit filed herein on the 25th June, 1942, or in his affidavit filed herein on the 9th July, 1942 that he did not hand to his counsel or to his solicitor the copy of the terms of settlement which was handed to him on Thursday, the 26th March, 1942 to take to his lawyers before he (the defendant) affixed his signature to the document.

On Friday, the 27th March, 1942 the defendant left Georgetown for New Amsterdam. While in the county of Berbice he authorised his counsel, Mr. S. I. Cyrus, by telegram, to amend the terms of settlement by making provision therein for the payment of \$90 fees due to the defendant's counsel.

The defendant's counsel communicated with the solicitor for the plaintiffs. On Monday, the 30th March, 1942, the words "including the sum of \$90 to be paid to the defendant's counsel" were inserted in the terms of settlement at the end of clause 4 thereof, in the handwriting of the plaintiffs' solicitor, and the insertion was initialled by the plaintiffs' solicitor and by the defendant's counsel. The words "on the said property" (which were inadvertently omitted from clause 3 of the terms of settlement) were inserted in the handwriting of the plaintiffs' solicitor between the words "pass a First Mortgage" and the words "to the plaintiffs for \$7,250". The insertion was initialled by the plaintiffs' solicitor and by the defendant's counsel. The proper revenue stamp was affixed and the terms of settlement were signed by the plaintiffs' solicitor and by the defendant's counsel. The date of the signing of the terms of the settlement by the plaintiffs' solicitor and by the defendant's counsel was inserted by the plaintiffs' solicitor. The revenue stamp was cancelled by the defendant's counsel, and he so cancelled it on behalf of the defendant. The cancellation is as follows:—
"S.I.C. for E.A.T.F. 30/3/42.

The terms of settlement, thus completed and signed, were produced to His Honour Mr. Justice Luckhoo in Court on Monday, the 30th March, 1942, when the specially indorsed writ in this action came up in the Bail Court for further consideration. Mr. J. Edward de Freitas, solicitor, appeared for the plaintiffs and Mr. S. I. Cyrus appeared for the defendant, Mr. Justice Luckhoo made the following notes of the proceedings in his minute book:—

"Action No. 74 of 1942.
Mohamed Hussain and J. G. Choong
v.
Edwin A. C. T. Fook.
de Freitas for the plaintiffs.
Cyrus for defendant.

Terms of settlement laid over. Application by parties that they be made a rule of Court. Application granted. All further pro-

ceedings in the action to be stayed until terms of settlement are carried out.”

Mr. Justice Luckhoo initialled the terms of settlement at the top left hand corner thereof on the 30th March, 1942.

No formal order was drawn up embodying the order made by Mr. Justice Luckhoo on the 30th March, 1942.

On the 2nd April, 1942, the defendant was informed by the solicitor for the plaintiffs that the costs which he (defendant) had to pay to the plaintiffs under clause 4 of the terms of settlement amounted to \$168.28. The defendant, on the same day, paid to the plaintiffs' solicitor the sum of \$100, leaving a balance of \$68.28 which, under clause 5 of the terms of settlement (made a rule of Court on the 30th March, 1942), was required to be paid to the plaintiffs on or before the 30th April, 1942.

The Petter Electric Plant and Sound equipment referred to in clause 1 of the terms of settlement were rented by the plaintiffs from Booker Bros. McConnell and Co., Ltd. under a hire purchase agreement. By clause 2 of the agreement of the 2nd May, 1940, the defendant was entitled to the use of the Petter Electric Plant and Sound equipment so long as he was a tenant of the plaintiffs. On the 1st December, 1941, Booker Bros. McConnell and Co., Ltd., removed the Electric Plant and Sound equipment; this was done, the defendant says, on the instructions and at the request of the plaintiffs themselves. On or about the 20th December, 1941, the plaintiffs paid Booker Bros. McConnell and Co., Ltd., the sum of \$100 in respect of the Electric Plant and Sound equipment. In the sum of \$7,250 for which the defendant was to pass a First Mortgage in favour of the plaintiffs under clause 3 of the terms of settlement, there was included the sum of \$80 being the cost of re-installing the Petter Electric Plant and Sound equipment.

After the terms of settlement were filed and made an order of Court on the 30th March, 1942 the defendant asked the plaintiff Mohamed Hussain to arrange for such installation immediately. On the 15th April, 1942, a meeting took place at the office of the plaintiffs' solicitors with Mr. deSouza, the manager of Bookers Garage belonging to Booker Bros. McConnell and Co., Ltd. Mr. deSouza was asked to allow the plaintiffs to sign a new hire purchase agreement and to instal the plant and equipment at once, but Mr. deSouza said that unless and until the full amount owing on the same was paid, he would not re-instal it. The plaintiffs were not willing to pay this amount until they were sure that the transactions referred to in the terms of settlement were going through. It was then agreed between the plaintiffs and the defendant that the installation should take place immediately after the mortgage was passed, and that the mortgage be advertised on the plant and equipment which will be acquired by the mortgagor and installed on the north half of lot 12, Section

M. HUSSAIN AND ANR. v. E. A. C. TIAM FOOK.

A, Pln. No. 79, Corentyne River, Berbice. The plaintiffs have an option on the plant and equipment, but they have not yet been installed. In paragraph 8 of his affidavit filed on the 9th July, 1942, the defendant stated that the installation takes more than a week for completion.

On the 16th April, 1942, the plaintiffs' solicitors gave the following letter to the defendant to show to his creditors:—

“16th April, 1942.

“The Creditors,
Edwin Adolphus Chung Tiam Fook.

Dear Sirs,

With reference to the following intended advertisement of transport and mortgage, namely—

- (1) Transport of N½ lot 12 No. 79 Village and the buildings including the Metro Theatre by Messrs. Hussain and J. G. Choong to E. A. C. Tiam Fook, and
- (2) Mortgage of the above and the Cinema business by E. A. C. Tiam Fook to Mr. Hussain—

we have been asked by Mr. Tiam Fook to explain that prior to the advertisements he was holding these properties *merely as a tenant* of Messrs. Hussain and Choong, and that in an action brought by them against him for possession they eventually agreed to hand over the properties to him on his passing a First Mortgage for \$7,250:—

“Mr. Tiam Fook will therefore be in a better financial position if the Transport and Mortgage are allowed to go through as otherwise possession of the properties will be given to Messrs. Hussain and Choong.

“If you wish further information on the subject, you may apply to us for the same.

Yours faithfully,
CAMERON & SHEPHERD.

The plaintiffs caused to be advertised in the *Gazette* of the 18th April, 1942, transport in favour of the defendant, of the immovable property agreed to be sold under clause 1 of the terms of settlement. And on the same date the defendant caused to be advertised in the *Gazette* a mortgage in favour of the plaintiffs of the property agreed to be sold under the said clause, save that, in consequence of the agreement between the plaintiffs and the defendant previously mentioned, in respect of the Petter Electric Plant and Sound Equipment, the mortgage was advertised on the plant and equipment “which will be acquired by the mortgagor and installed on the property firstly described,” that is to say, the north of lot 12 section A, Pln. No. 79.

The transport and the mortgage were advertised in the *Gazette*

for the second time, on the 25th April, 1942. At that time one opposition was entered to the mortgage, namely, by Oscar Edmund Bovell, on the 23rd April, 1942, for \$34.56.

The sum of \$68.28 which under the terms of settlement (made a rule of Court on the 30th March, 1942), was required to be paid to the plaintiffs by the defendant on or before the 30th April, 1942, was not so paid. The payment of the sum of \$68.28 to the plaintiffs' solicitor on the 30th April, 1942, would have enabled him to pay to the Registrar of Deeds the transport duty and the mortgage duty on or before the 2nd May, 1942, in order that if there were no oppositions, the transport might be ready for passing on Monday, the 4th May, 1942. Payment on the appointed day would have been an indication to the plaintiffs that the transport and the mortgage were really going through; and that they might not be acting hastily if they proceeded to complete arrangements with Bookers Garage for the installation of the electric plant and sound equipment by the 15th May, 1942, or as soon as possible thereafter.

On the 1st May, 1942, four oppositions were entered to the mortgage advertised to be passed by the defendant: (1) by Sookea, as executrix of C. C. Tiam Fook, deceased, for \$103.75 (2) by Duncan Dow for \$7.50; (3) by Mangroo for \$69; and (4) by Sookea, as executrix of C. C. Tiam Fook, deceased, for \$49.27. Before Sookea entered her oppositions to the mortgage, she called on the plaintiffs' solicitor for him to enter opposition on her behalf, and he advised her not to do so. She, however, went to another solicitor.

On the 2nd May, 1942, the transport and the mortgage were advertised, for the third time, in the *Gazette*. On that day 2 oppositions were entered to the mortgage advertised to be passed by the defendant: (1) by Hilda Chung-a-Hing for \$200, and (2) by Samuel Ignatius Cyrus, the defendant's counsel, for \$90.

The defendant could not pass the mortgage on the property on the 4th May, 1942, as at that time there were 7 oppositions in force for amounts totalling \$554.08.

On the 8th May, 1942, the defendant telegraphed to the plaintiffs' solicitors, by money order, the sum of \$120. The sum of \$68.28 and not the sum of \$120, was due to the plaintiffs, and the sum of \$68.28 should, under the terms of settlement (made a rule of Court on the 30th March, 1942) have been paid by the defendant not later than the 30th April, 1942. The plaintiffs' solicitors ignored the telegraph money order, and did not apply to the General Post Office, Georgetown for payment. However, the defendant's counsel, who was to receive \$90 as his fees under the terms of settlement and who had entered opposition on the 2nd May, 1942, to the passing of the mortgage by the defendant in respect of the said sum of \$90, interviewed the plaintiffs' solicitors on the 9th May, 1942, and stated to them that the sum of \$51.72 (\$120 less \$68.28)

M. HUSSAIN AND ANR. v. E. A. C. TIAM FOOK.

included in the telegraph money order was his property that he was accepting the sum of \$51.72 in full satisfaction of the sum of \$90 and that on payment by the plaintiffs' solicitors to him of the sum of \$51.72, he would withdraw his opposition to the mortgage. The plaintiffs did not authorise their solicitor to accept the sum of \$68.28 or to waive the non-payment on the same on the due date. The solicitor for the plaintiffs did not wish to cash the telegraph money order, but, in order to oblige Mr. S. I. Cyrus, barrister-at-law, the plaintiffs' solicitors paid him the sum of \$51.72, but made it clear to the defendant's counsel that the balance of \$68.28 could not be accepted without the consent of the plaintiffs. In order that they might be reimbursed the sum of \$51.72 paid to Mr. S. I. Cyrus on the 9th May, 1942 the plaintiffs' solicitor cashed the telegraph money order on the 14th May, 1942 and telegraphed the defendant as follows:—"Have received money and paid \$51.72 to Cyrus at his request but cannot accept balance without instructions." The plaintiffs never authorised their solicitor to accept the sum of \$68.28 or to waive the non-payment of the same on the due date. Counsel for the defendant, on the hearing of this summons, has submitted that the facts narrated show that the plaintiffs waived non-payment of the \$68.28 on the due date, but I did not consider him to be really serious, so that I shall merely say that I do not agree with his submission.

On the 9th May, 1942 the opposition by Duncan Dow in respect of \$7.50 was withdrawn. Six oppositions were however still in force for amounts aggregating \$546.58, (including the sum of \$90 in respect of which Mr. S. I. Cyrus had entered opposition).

On the 15th May, 1942 the position was unchanged. It was provided by clause 5 of the terms of settlement (made a rule of Court on the 30th March 1942), that if the defendant failed to accept transport and pass the mortgage on or before the 15th May, 1942 the sale under clause 1 of the terms of settlement was to be rescinded, and an order for possession was to be made forthwith in this action. On the 15th May, 1942 the defendant could not possibly pass the mortgage in view of the oppositions which were pending; one of these oppositions was by his own counsel who had been willing on the 9th May, 1942 to accept the sum of \$51.72 in full satisfaction of his claim for \$90.

On the 15th May 1942 the plaintiffs instructed their solicitor to make application to the Court for an order for possession of the premises mentioned in the statement of claim on the ground that the defendant had failed to comply with clauses 4 and 5 of the terms of settlement (made a rule of Court on the 30th March, 1942).

On the 29th May, 1942 the opposition by Oscar Edmund Bovell in respect of \$34.56 was withdrawn, and on the 1st June, 1942 the opposition by Hilda Chung-a-Hing in respect of \$200

was withdrawn. Four oppositions still however remained for amounts aggregating \$312.20 (including the sum of \$90 in respect of which Mr. S. I. Cyrus had entered opposition).

The summons in this action was filed on the 10th June, 1942.

On the 12th June, 1942 the opposition by Mangroo in respect of \$69 was withdrawn. Three oppositions still however remained for amounts aggregating \$243.20 (including the sum of \$90 in respect of which Mr. S. I. Cyrus had entered opposition).

On the 24th June, 1942, the defendant swore to an affidavit in which he stated that all the oppositions had been withdrawn save and except the oppositions by Sookea in respect of the sums of \$103.75 and \$49.27. This was a mistake as, although Mr. S. I. Cyrus did not complete his opposition in the manner specified in the Rules of the Supreme Court (Deeds Registry) 1921, he did not withdraw it until the 25th June, 1942, the date on which the affidavit was actually filed. The defendant stated in his affidavit of the 24th June, 1942, that a writ had been filed by Sookea to enforce her two oppositions, and that it was proposed to proceed pursuant to rule 8 (1) of the Rules of the Supreme Court (Deeds Registry) 1921, that is to say, to pay money into the Registry of Court to abide judgment (if any) against the defendant in the opposition action filed by Sookea, so that the mortgage could be passed notwithstanding the entry of the opposition.

This summons was heard on the 6th, 7th and 10th days of July, 1942. On the 7th July, on the application of the defendant, leave was granted to the defendant to file an additional affidavit setting out clearly and concisely the facts and circumstances upon which the defendant proposed to rely in support of his contentions (*a*) that the terms of settlement should not be made an order of Court, and (*b*) that the plaintiffs should not recover possession of the property mentioned in the statement of claim in the terms of settlement.

On the 9th July, 1942, Sookea withdrew her two oppositions after the plaintiffs' solicitor had told her that she should never have entered the oppositions.

At the present moment there are no oppositions to the passing of the mortgage.

The plaintiffs submit that, in accordance with clauses 4 and 5 of the terms of settlement, they were entitled to rescind the contract, and they are entitled to obtain an order for possession forthwith in this action. They point out that precise dates are mentioned in the terms of settlement for the performance by the defendant of the various acts to be done by him; that unpaid rent, etc., was capitalised and included in the amount to be secured by the mortgage; that for a considerable time the plaintiff's had derived no income from the property which was agreed to be sold under clause 1 of the terms of settlement; that during that period the defendant was in occupation of the dwelling house

and of the theatre building although he was not able to use the theatre building as a cinema theatre throughout the whole of the period (he could still use it for dances and for other purposes). The plaintiffs stressed that their position was this: what was the good of going on with the sale (which depended on a mortgage by the defendant to the plaintiffs going through at the same time) when the dilatoriness of the defendant reappears in the proceedings immediately precedent to the mortgage being executed? The plaintiff's fear that if the transport and the mortgage were allowed to go through, there would be dilatoriness of the defendant in making payments of the interest on the mortgage month by month, and that, on foreclosure proceedings being instituted, there would be an affidavit of defence in which allegations similar to those contained in the affidavits filed in this action by the defendant, would be hurled at them, and leave to defend would be applied for on the ground that it would be harsh and unconscionable to foreclose a mortgage because of non-payment of monthly interest on the due date for one, two or three months; and leave to defend would also be applied for on the ground that the terms of the mortgage should be rectified as the defendant never in fact agreed to such harsh and unconscionable terms. The plaintiffs say that, in the circumstances, the Court will not deny them their legal rights under the terms of settlement.

Counsel for the defendant has submitted that the terms of settlement were entered into by the defendant at a time when he was without independent legal advice. The writ in this action was served on the defendant on the 12th March, 1942; action No. 76 of 1942 was filed by the defendant on the 6th March, 1942 by his solicitor Mr. H. A. Bruton; the affidavit of defence was sworn to in Georgetown by the defendant on the 21st March, 1942; the defendant stated in his affidavit that his solicitor in this action was Mr. H. A. Bruton; on the 23rd March, 1942, Mr. S. I. Cyrus, Barrister-at-law appeared before Mr. Justice Luckhoo in the Bail Court as counsel for the defendant in this action when the judge suggested that some efforts might be made to arrive at a settlement. Counsel for defendant well knew, when the matter was adjourned on the 23rd March, 1942 to the 30th March, 1942, that it was so adjourned for the express purpose of making efforts to arrive at a settlement within the next few days. The defendant and the plaintiffs met on the 25th March, 1942, and agreed among themselves in outline as to how the action No. 76 of 1942 and the action No. 74 of 1942 were to be settled. The next morning they went to the office of the plaintiffs' solicitor who wrote out the terms of settlement. The terms of settlement were typed and a copy handed to the defendant to take to his lawyers, Mr. S. I. Cyrus, barrister-at law and Mr. H. A. Bruton, solicitor. Later that day, the defendant signed the terms of settlement. He had told the plaintiffs' solicitor that he could find neither Mr. Cyrus nor Mr. Bruton, and the

defendant (who wanted to return to Berbice on the next day, Friday, the 27th March, 1942), signed on the distinct understanding that his signature would not be effective unless and until his counsel (Mr. S. I. Cyrus) had also signed the terms of settlement. No advantage whatever was taken of the defendant. It is clear that Mr. Cyrus did obtain possession of the unsigned copy of the terms of settlement, (although he was not in his chambers when the defendant says that he called there on Thursday, the 26th March, 1942), as a telegram was sent by the defendant to Mr. S. I. Cyrus to amend the terms of settlement to make provision therein for the payment of the sum of \$90 as costs to Mr. Cyrus. Even assuming (which I hesitate to do) that Mr. Cyrus had no idea, until the receipt of the telegram from the defendant, that terms of settlement were signed by the defendant or were even in draft form, on the receipt of the telegram, he had full knowledge of what had taken place and such knowledge was acquired before the terms of settlement were effective. Mr. Cyrus perused the terms of settlement, was satisfied that his client's interests were sufficiently protected thereunder, he made provision therein for the protection (as directed by his client) of his (Mr. Cyrus's) own interests, he signed the terms of settlement, as counsel for the defendant, and he cancelled the revenue stamp on behalf of the defendant, using the following letters and figures "S.I.C. for E.A.T.F. 30/3/42." It was the signature of the defendant's counsel on the 30th March, 1942, that rendered effective the signature of the defendant which was affixed on the document on the 26th March, 1942. The submission, therefore, that the defendant acted without independent legal advice in respect of his signature to the terms of settlement is entirely unfounded, and there is no necessity for me to consider whether the plaintiffs were under any legal obligation to provide the defendant, a business man, with independent legal advice, inasmuch as there was in fact independent legal advice. In this connexion, I may here remark that the defendant's counsel on the 30th March, 1942, in open Court, asked that the terms of settlement be made a rule of Court.

Counsel for the defendant submitted that there was no mutuality in the terms of settlement. He said that there was no obligation on the part of the plaintiffs to pass transport at any particular time; that there was no obligation on the plaintiffs to withdraw this action even after the transport was passed to the defendant; that the amount of the proposed mortgage loan of \$7,250 included the sum of \$80 the cost of the reinstallation of the electric plant and sound equipment, that the installation would take a week, and that in the terms of settlement there was no obligation on the part of the plaintiffs to restore the electric plant and sound equipment within a stated time or at all. He further submitted that there was a failure to express in the terms of settlement terms which were agreed upon between the parties,

and the omission relates to terms containing obligations on the part of the plaintiffs. In other words, the defendant claims that the terms of settlement of the 30th March, 1942, should be rectified. (It will be remembered that in action No. 76 of 1942 filed by the defendant on the 6th March, 1942, the defendant asked for a rectification of the agreement in writing made between the plaintiffs and the defendant on the 2nd May, 1940).

The defendant had no money with which to purchase the property described in clause 1 of the terms of settlement. He was indeed passing a mortgage for a sum in excess of the purchase price of the said property. The defendant was obligated to pass the mortgage on or before the 15th day of May, 1942, the transport had to precede the mortgage, it was to be passed by the plaintiffs "as soon as possible", that is to say, as soon as possible after the 30th March, 1942, and prior to the 15th May, 1942. The defendant, however, could not claim that the plaintiffs should have passed transport to him between the 4th and 15th days of May, 1942, as he was not then in a position (in view of the 7 oppositions in operation on the 4th May and of 6 oppositions which were in operation on the 15th May) to pass the mortgage in favour of the plaintiffs. There is, therefore, no merit nor substance in the defendant's contention that, in the terms of settlement, there was no obligation on the part of the plaintiffs to transport at any particular time.

In the course of this judgment I have already dealt in part with the submission of counsel for the defendant as to the reinstatement of the electric plant and sound equipment. It was agreed between the plaintiffs and the defendant that the mortgage was to be passed on the plant and equipment "which will be acquired by the mortgagor and installed" on the north half of lot 12 section A, Pln, No. 79, Corentyne, and it was so stated in the advertisement. The plaintiffs would have acted in an unbusinesslike manner if they had, at any time between the 30th April, 1942 (the date on which the defendant was to pay the sum of \$68.23 to the plaintiffs, but didn't) and the 15th May, 1942 (the date on which the defendant was to pass the mortgage in favour of the plaintiffs, but couldn't) completed arrangements for the reinstatement of the electric lighting plant and sound equipment. The sum of \$80 was not paid by the defendant for the purpose, it was to be advanced by the plaintiffs, and was to form part of the loan to be secured by the proposed mortgage by the defendant in favour of the plaintiffs.

Counsel for the defendant has strenuously argued that, in the terms of settlement, there was no obligation on the part of the plaintiffs to withdraw this action even if the terms of settlement were carried into effect by the defendant; that there is a want of mutuality as it was carefully provided in clause 6 of the terms of settlement that the action No. 76 of 1942 brought by the defendant should be abandoned forthwith; that the terms of

settlement did not thereby embody all the terms agreed upon; that they therefore need rectification; and that the Court will not, as a consequence, enforce any other of the terms of settlement.

If the defendant had been in a position to accept transport from the plaintiffs and to pass a mortgage in their favour, the relationship between the plaintiffs on the one hand and the defendant on the other hand would have ceased to be that of landlord owner and tenant and would have become that of mortgagee and mortgagor owner. In those circumstances the plaintiffs' action for the recovery of possession from their tenant would have necessarily vanished. The defendant, however, submits that that would not be so in relation to the claim for rent and mesne profits, or for costs. But, on a consideration of the terms of settlement and of all the surrounding circumstances, I hold that such a term must necessarily be implied. Counsel for the defendant has conducted a detailed *post mortem* examination on the terms of settlement. He has, it is true, found what may be a slight defect in the body of the agreement, but that defect is not relevant to the purposes of this inquiry, namely, the cause of the death of the agreement: or, to use legal language, the reason why the plaintiffs claim that the agreement of sale specified in clause 1 of the terms of settlement is rescinded, or ought to be rescinded.

If the defendant did not communicate to his counsel or to his solicitor, prior to the signing by his counsel of the terms of settlement on Monday, the 30th March, 1942, what were all the terms agreed upon between the plaintiffs and himself (the defendant): or if the defendant's counsel, with full, or insufficient, knowledge of the facts, signed the terms of settlement on the 30th March, 1942, and, immediately after, asked that they be made a rule of Court, the defendant, who is neither a woman nor an infant nor a person who has suggested that he any time reposed any confidence or trust in the plaintiffs, cannot attach any blame on the plaintiffs for the absence, from the terms of settlement, of terms which may have been agreed upon, or for the absence from the terms of settlement of clear language that, if the mortgage was passed by the defendant, the plaintiffs would thereupon abandon the claim in this writ for rent and mesne profits, and for costs.

Mr. Cyrus asks for rectification, which is a remedy in equity of the terms of settlement so as to include the express term that, if the mortgage is passed by the defendant, the plaintiffs would thereupon abandon their claim for rent and mesne profits and for costs up to and including the 30th March, 1942. But the mortgage has not in fact been passed by the defendant. One of the maxims of equity is that equity never acts in vain. A judge of a court of equity does not act merely in order to show the nature or extent of his powers. He does not act in vain, he does not act where the remedy applied for would be useless to the applicant.

M. HUSSAIN AND ANR. v. E. A. C. TIAM FOOK.

The defendant's objections to the terms of settlement on the ground of alleged want of mutuality, or of alleged omission of agreed terms, are not entertained.

The defendant has alleged in paragraph 6 of his affidavit of the 24th June, 1942 and in paragraph 9 of his affidavit of the 9th July, 1942, that the plaintiffs induced, and inspired, some of the defendant's creditors to enter opposition to the mortgage, and that two of the defendant's creditors, Hilda Chung-a-Hing in respect of \$200 and Sookea in her capacity as executrix of C. C. Tiam Fook, deceased in respect of \$103.75 and \$49.27, actually entered oppositions as a result of such inducement. According to clause 5 of the terms of settlement (made a rule of Court on the 30th March, 1942) the defendant should have passed the mortgage in favour of the plaintiffs on the 15th May 1942. He could not possibly have done so, as there were at the time six oppositions to the mortgage, and not merely the three entered by Hilda Chung-a-Hing and Sookea (Sookea entered two oppositions, one for \$103.75 goods sold, and the other for \$49.27 moneys advanced). The defendant does not allege that the plaintiffs induced or inspired Oscar Edmund Bovell to enter opposition for \$34.56, or Mangroo to enter opposition for \$69, or Samuel Ignatius Cyrus to enter opposition for \$90. No one of these three last mentioned oppositions had been withdrawn on or before the 15th May, 1942. So that, if we were to exclude the three oppositions which the defendant alleges were induced or inspired by the plaintiffs, the defendant would still have been unable to pass the mortgage on the 15th May 1942 by reason of the oppositions of Oscar Edmund Bovell, Mangroo and of Mr. Samuel Ignatius Cyrus, the defendant's own counsel. Mr. Cyrus did not withdraw his own opposition until the 25th June, 1942, that is to say, he did not withdraw his opposition until nearly 6 weeks after the 15th May, 1942, the date upon which the defendant ought to have been in a position to pass the mortgage.

The defendant does not condescend to particulars as to the manner in which, or the dates upon which, the plaintiffs are alleged to have inspired and induced Hilda Chung-a-Hing and Sookea to enter their oppositions. The defendant has not deposed in his affidavit of the 24th June, 1942, or in his affidavit of the 9th July, 1942 that any one of the opposers entered opposition in respect of a fictitious claim, or that he (the defendant) was not truly and justly indebted to each one of them in the sums of money in respect whereof they respectively entered oppositions. For the purpose, therefore, of this summons I must assume that the defendant was in fact indebted to the several opposers in the several sums claimed by them.

The defendant, on the 16th April, 1942, received from the plaintiffs, through their solicitors, a letter for him (the defendant) to show to his various creditors. The terms of this letter are

set out in full in the earlier part of this judgment. The defendant's counsel has not suggested that the letter was not given in good faith or with the utmost sincerity. The letter was handed to the defendant for the special purpose of inducing the creditors of the defendant not to oppose. On the affidavits, I am unable to find that the plaintiffs induced or inspired any creditor of the defendant to oppose the mortgage.

It is not unlikely, indeed it is quite possible, that, assuming the letter of the 16th April, 1942, was shown by the defendant to his creditors Oscar Edmund Bovell (\$34.56), Sookea (\$103.75 and \$49.27), Duncan Dow (\$7.50), Mangroo (\$69), Hilda Chung-a-Hing (\$200), and Samuel Ignatius Cyrus (\$90)—the defendant has not taken the Court into his confidence on this point—each one of them, independently of one another, may have considered the matter thus “The letter is all very well, but the defendant is passing a mortgage for a large amount, \$7,250, The defendant does not owe me much money, and if I were to oppose, the plaintiffs will pay off my indebtedness, and add the amount to the sum of \$7,250, the amount proposed in the letter to be secured by the mortgage. After all, the amount of the mortgage loan can be increased. If the plaintiffs do not pay, then the mortgage cannot go through.” The creditors did not know that the sum of \$7,250 represented the utmost limit that the plaintiffs were prepared to go, and so they opposed. When they found out, or realised, that in entering the oppositions, they were throwing away good money after bad, they withdrew the oppositions.

In paragraph 6 of his affidavit of the 24th June, 1942, the defendant states that the plaintiff's did nothing to show any intention to carry into effect the terms of settlement. It is perfectly true that when the plaintiff Mohamed Hussain came to Georgetown on Monday, the 4th May, 1942, he did not pay to the opposing creditors an aggregate sum of \$554.08 along with their costs, and instruct his solicitors to increase the amount to be secured by the mortgage, \$7,250, by the total amount thereby paid to the opposing creditors, Had the plaintiffs done that, the oppositions would have disappeared, and the defendant would have been in a position to pass the mortgage on the 15th May, 1942.

But why should the plaintiffs have done that? They were under no legal obligation to do so. The Court cannot possibly say that, because the plaintiffs did not pay to the opposers the amount of the defendant's indebtedness to them, the plaintiffs thereby prevented the defendant from passing the mortgage.

The defendant himself had ample time between the 2nd May, and the 15th May, to have the oppositions withdrawn, had he the means and the inclination so to do. He could have paid off the indebtedness himself if he was justly indebted: and if he disputed the debts, or any of them, he could have lodged money in Court to abide the oppositions in those cases, and the mortgage

could easily have been passed on or before the 15th May, 1942. The defendant, however, failed to have the oppositions withdrawn on or before the 15th May, 1942. The only opposition withdrawn before that day was the one by Duncan Dow for \$7.50. The defendant's counsel did not withdraw his opposition until the 25th June 1942.

In paragraph 8 of his affidavit of the 24th June, 1942, and in paragraph 6 of his affidavit of the 9th July, 1942, the defendant stated that in the verbal agreement entered into between the plaintiffs and the defendant on Wednesday, the 25th March, 1942, and in the terms of settlement signed by the defendant on Thursday, the 26th March, 1942, and by the defendant's counsel on Monday, the 30th March, 1942, there was no express provision made as to what would happen if the mortgage by the defendant were opposed. That is perfectly true. The defendant, however, states that no such provision was made as none was anticipated in view of the letter written by the plaintiffs to the defendant's creditors. The Court does not disbelieve the defendant when he says that he anticipated no oppositions, as he thought that the letter from the plaintiffs' solicitors would have been sufficient to induce his (the defendant's) creditors not to oppose. But when the defendant asserts that the reason why no express provision was inserted in the terms of settlement as to what would happen if the mortgage were opposed, was because of the letter written by the plaintiffs' solicitors to the defendant's creditors he is suffering from a very bad lapse of memory, as that letter was not written until the 16th April, 1942, that is to say, three weeks after the terms of settlement were signed by the defendant.

The defendant has stated that the oppositions were acts beyond his control. I have already pointed out that if the defendant had the means and was so inclined, he could have had the oppositions withdrawn, or disposed of, before the 15th May, 1942. He further says that he endeavoured to settle the oppositions and to have the same withdrawn in order to permit of the passing of the mortgage. But he was only able to get one opposition withdrawn by the 15th May, 1942, namely, one by Duncan Dow for \$7.50.

Counsel for defendant has submitted that, as the inability of the defendant to pass the mortgage on the 15th May, 1942, was duo to the entry of oppositions, and as the terms of settlement failed to make provision as to what consequences were to follow if the defendant were unable to pass the mortgage by reason of the entry of oppositions, the defendant has committed no breach of the term that the mortgage was to be passed on the 15th May, 1942. The terms of settlement provided that the mortgage must be passed on or before the 15th May, 1942. If there were no oppositions, the mortgage could have been passed on the 4th May, 1942. If the defendant, or his counsel, did not think that

the defendant would have had sufficient time to clear off any possible oppositions by the 15th May, 1942, then the defendant, or his counsel, should have pointed this out to the plaintiffs or their solicitor on the 26th March, 1942, before the defendant signed the terms of settlement, or on the 30th March, 1942, before the defendant's counsel signed them.

The defendant knew on the 26th March, 1942, that he had creditors, and that it was not unlikely that they would oppose. If he did not inform his counsel that he had creditors, or if he deliberately avoided a personal interview with his counsel Mr. S. I. Cyrus before his (the defendant's) departure on Friday morning the 27th March, 1942, for New Amsterdam, and thereby deprived himself of the opportunity of giving his counsel the true and full facts about his financial position (but thereby deprived Mr. Cyrus of the opportunity of requesting him, the defendant, to pay his fees), then the defendant only has himself to blame. The circumstance that oppositions may be entered should always be uppermost in the minds of an intending mortgagor, so long as he has creditors. And it should not have been overlooked either on the 26th or the 30th March, 1942. There is no reason for me to believe that it was so overlooked, and I have already pointed out that the date fixed for the passing of the mortgage, the 15th May, 1942, provided ample time for the defendant to clear off all oppositions, provided that he had the means, and was inclined to do so. I disagree with Mr. Cyrus in his submission that the defendant committed no breach of clause 5 of the terms of settlement which provides that the defendant was to pass the mortgage on or before the 15th May, 1942.

Counsel for the defendant finally submitted that time was not the essence of the contract in the terms of settlement, but that the payment of the expenses to be borne by the defendant and the time allotted therefor were merely incidental to the main object of the terms of settlement, namely, the acquisition of the property by the defendant, and his rights to resume business immediately thereafter, and the protection of the plaintiffs for the money advanced by way of mortgage,

If the transaction contained in the terms of settlement were a contract of sale *simpliciter*, there may have been some force in the contention of the defendant. But it is not. The plaintiffs did in fact agree to sell certain property to the defendant for \$6,979, but the defendant had no money to pay for it. The plaintiffs agreed to accept a mortgage from the defendant on the property which they agreed to sell to him, and the mortgage was to be passed in favour of the plaintiff not for two-thirds of the purchase price (which is the maximum lent by mortgagees when the transaction is on a purely business basis), but for the sum of \$7,250 which sum exceeds the purchase price by \$271. The interest on the mortgage was at the rate of 10 per centum per

M. HUSSAIN AND ANR. v. E. A. C. TIAM FOOK.

annum, and was to be payable monthly. The interest payable monthly at the commencement would therefore be \$60., per month. The capital was to be repayable at the rate of \$120 per quarter. So that, for the present year, had the mortgage gone through on or before the 15th May, 1942, the defendant would have had to pay at the end of the following months the following sums of money: May \$60, June \$60, July \$180, August \$60, September \$60, October \$180, November \$60, December \$60—an aggregate of \$720 for 8 months of this year, or, on the average, \$90 per month to be paid out of the profits of the business of a cinema theatre proprietor in the country. The defendant did not pay any rent for the period May to November, 1941, a period of 8 months at \$70 a month, although he carried on the cinema business during that period.

The defendant cannot obtain transport unless he passes the mortgage in favour of the plaintiffs. He has not indicated in his affidavits that he has at his disposal some one who is ready willing and eager to take the place of the plaintiffs in order that the transaction of sale by the plaintiffs to the defendant might go through. Neither has his counsel, who has not failed to bring to the notice of the Court any circumstance which might possibly tend to the advantage of the defendant, suggested that there is any such person either in existence or in contemplation. Mr. Cyrus addressed for three afternoons, and occupied my attention for nearly 4 hours, and if there was any prospect of such an individual coming forward, he would not have failed to mention the fact.

The plaintiffs and the defendant entered into an agreement in writing on the 2nd May, 1940, and in action No. 76 of 1942 filed by the defendant on the 6th March, 1942, against the plaintiffs, the defendant asked for a rectification of the agreement.

On the 30th March, 1942, the plaintiffs and the defendant agreed on certain terms of settlement, for the settlement of this action and of action No. 76 of 1942. In the summons filed by the plaintiffs on the 10th June, 1942, the defendant has asked for rectification of the terms of settlement.

The solicitor for the plaintiffs has stated that the plaintiffs are no longer willing to accept any mortgage from the defendant. He was urged that the defendant was, prior to the institution of this action, dilatory in the payment of the rent of \$70 per month; that there has been dilatoriness in carrying out the conditions on the defendant's part to be performed in respect of the terms of settlement; that it was only on the 9th July, 1942, (nearly 8 weeks after the 15th May, 1942) that the defendant was in a position to pass the mortgage; that the oppositions filed show that the defendant owes at least the sum of \$464.08; that the circumstances show that the defendant will not be able to meet up the payments on the mortgage; that the result would be

that after a month or two the mortgagees would have to foreclose; that the defendant would then ask for leave to defend; that he would submit that the terms of the mortgage should be rectified as the defendant never did in fact agree that there should be the right to foreclose on non-payment of interest at the end of the first or second month; and that the litigation would go on, and the plaintiffs would continue for some time longer to derive no revenue from the property. He stressed that the plaintiffs had derived no revenue from the property since the end of April, 1941.

The legal situation is now as follows: The plaintiffs claim that the contract of sale is or ought to be rescinded by reason of the failure of the defendant to pay the sum of \$68.28 to the plaintiffs on the 30th April, 1942, and by reason of the inability of the defendant to pass the mortgage to the plaintiffs on the 15th May, 1942. At law, this contention is perfectly sound. The plaintiffs also claim possession of the property. They would also be entitled to this relief under the terms of settlement.

The defendant's case in substance is, that although the plaintiffs' case may be perfectly sound in law, he is asking the Court, in its equitable jurisdiction, to say that time was not the essence of the contract contained in the terms of settlement, to decree that as a consequence thereof, the contract has not been rescinded, and to decree that the terms of settlement be specifically performed by the plaintiffs who have stated that they are no longer willing to accept any mortgage from the defendant. In any such order for specific performance the plaintiffs would be directed not only to pass the transport, but also to accept the mortgage which would be executed by the defendant. An order for specific performance of the agreement of sale without reference to the mortgage would be valueless to the defendant as he has not the money at his disposal to pay cash for the property which he agreed to buy. So that, unless I can find that the defendant is entitled to specific performance of the agreement as to the mortgage the Court can grant no remedy to the defendant, as equity never acts in vain.

For the purposes of this judgment I have assumed that time was not of the essence of the contract, but it must not be thought that I have so decided.

The defendant has not brought into Court the sum of \$60 which would have been payable to the plaintiffs as interest on the 1st June had the mortgage been passed on the 15th May, neither has he brought into Court the sum of \$60 which would have been similarly due on 1st July. One of the maxims of equity is that he who seeks equity must do equity, In the course of his argument counsel for defendant has suggested to me that I could, as a condition of the grant of relief to the defendant cancelling the rescission of the contract, make an order for the payment of the sum of \$120. But that is not the proper procedure adopted in a Court of equity. The suppliant must be penitent and ask to be forgiven for his lapse. He must, however, go further.

M. HUSSAIN AND ANR. v. E. A. C. TIAM FOOK.

He must not wait for the judge to pronounce the terms on which relief may be granted to him. He must himself search his conscience and ascertain what are the amends which he ought to make, and make them, or offer to make them. If the amends which he makes, or offers to make, fall short of what the judge of a Court of equity thinks is right and proper, the relief may still be granted. In this case, the defendant has taken no active steps to make amends.

In any event, however, even if the defendant had paid the sum of \$120, sitting as a judge of a Court of equity, I would have to ask myself the question: would it be right for me to decree specific performance of the agreement by the plaintiffs to accept the mortgage from the defendant?

And my answer is that in the circumstances of this case I cannot so compel the plaintiffs. The defendant is applying for equitable relief, and the Court must be careful to see that the grant of relief to the defendant is not unreasonable to the plaintiffs. I have formed the definite opinion that the defendant will not be able to make the monthly payments which he would have to make under the mortgage: and equity does not act in vain. The proposed mortgage is a mortgage for more than the value of the property, and if transferred by the mortgagees, it can only be transferred at a loss. It would be unreasonable for a judge of a Court of equity to force an unwilling person to accept such a mortgage, where such a person is, *ex contractu*, no longer bound to accept the mortgage.

There is another reason why this Court will not decree specific performance by the plaintiffs to accept the mortgage from the defendant. A long and uniform course of decision of Courts of equity has established that the remedy of specific performance is not available against a person who has agreed to lend money: see *South African Territories, Limited v. Wallington* (1898) A.C. 309, 312, per Earl of Halsbury, L.C. An exception to this rule occurs in section 103 of the Companies (Consolidation) Ordinance, Chapter 178, which provides that a contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance. But there is no exception which provides for the Court enforcing, by specific performance, an agreement like the agreement made in the terms of settlement, by the plaintiffs to accept the mortgage from the defendant.

The defendant is therefore not entitled to the equitable remedy of specific performance, and, at law, the plaintiffs are entitled to a declaration that the contract has been rescinded, and to an order for possession. In the final analysis, therefore, there is no conflict between law and equity.

I declare that the contract of sale made between the plaintiffs and the defendant and contained in the terms of settlement filed herein on the 30th March, 1942, approved by Mr. Justice

M. HUSSAIN AND ANR. v. E. A. C. TIAM FOOK.

Luckhoo, on the 30th March, 1942, and made a rule of Court on the said day on the application of both parties is rescinded AND I further declare that the defendant is not entitled to specific performance of the said contract AND I direct that the defendant do deliver up the possession forthwith to the plaintiffs of the premises mentioned in the Statement of Claim filed in this action save that in respect of the dwelling-house possession must be delivered up by the defendant to the plaintiffs on or before the 13th August, 1942 AND I order that the costs of and incidental to this summons be taxed and paid by the defendant to the plaintiffs.

LIBERTY TO APPLY.

Application granted.

Solicitor for defendant: *H. A. Bruton.*

SARAH ELIZABETH LANGFORD, Petitioner,
 v.
 FELIX ADOLPHUS LANGFORD, Respondent.
 [1942. No. 1.—DEMERARA.]
 BEFORE DUKE, J. (Ag.)
 1942. JULY 11, 13, 16.

Matrimonial causes—Dissolution of marriage or judicial separation—Petition for—Main object of—Alimony pendente lite—Petition for—Not to be subordinated to—Where dominant object of originating petition—To obtain alimony pendente lite—Abuse of process of Court.

The allotment of alimony *pendente lite* is only incidental to a petition by a wife for dissolution of marriage, or for judicial separation. Alimony *pendente lite* is awarded by the Court in such cases in order that the wife might be reasonably maintained until the hearing of the petition when it would be determined whether her charges are justified or not. The main object of the originating petition must not be subordinated to the object of the petition for alimony *pendente lite* which petition only has legal efficacy because of the filing of the originating petition for dissolution or for judicial separation, and the order on which petition (for alimony *pendente lite*) will cease to have effect on the determination of the originating petition. It would be an abuse of the process of the Court for a petitioning wife to bring a petition for divorce or for judicial separation with the dominant object, not of obtaining a decree of dissolution of marriage or of judicial separation, but with the dominant object of obtaining alimony *pendente lite*.

MOTION by the petitioner for alimony *pendente lite*.

J. L. Wills, for the petitioner.

G. M. Farnum, for the respondent.

Cur. adv. vult.

DUKE, J. (ACTING): This is a motion by the petitioner for the allotment of alimony *pendente lite*.

S. E. LANGFORD v. F. A. LANGFORD.

On the 4th June, 1938, the petitioner, then a widow of the age of 53 years, was married to the respondent, then a widower of the age of 48 years. The respondent had 10 children by his previous marriage, 7 sons and 3 daughters, whose ages were between 8 and 19 years.

The petitioner was a registered money-lender carrying on business at Pere Street, Kitty; and the respondent was a plumber contractor. There was a short courtship during which the respondent borrowed from the petitioner the sum of \$145. The petitioner stated in her evidence in these proceedings, (and I believe her), that, prior to the marriage, the respondent had told her that he was earning \$50 a week.

After the marriage the petitioner lived and cohabited with the respondent at 182, Crown and Irving Streets, Queenstown, Georgetown. The respondent's 10 children resided in the same house.

Subsequent to the marriage the petitioner, at 182, Crown and Irving Streets which was not her registered money-lending address, lent to the respondent the sum of \$267.

In the month of October, 1938, four months after the marriage, the petitioner and the respondent began to live separately and apart from each other, and have continued so to do up to the present time.

In 1936 the petitioner had borrowed the sum of \$445 from the Demerara Mutual Life Assurance Society, Limited for the purpose of utilising it in her money-lending business. This money was borrowed on the security of her 15-year endowment policy for \$1,000 which will mature in 1946. The Petitioner pays \$26.70 a year as interest on the loan. After the separation had taken place between the petitioner and the respondent, the petitioner brought an action against the respondent for the recovery of the sums of \$145 and \$267 lent to him. The respondent pleaded that the loan of \$267 was not made at the registered address, and the petitioner was only able to obtain judgment for the sum of \$145. This sum the respondent subsequently paid to the petitioner. In instituting and prosecuting the action for the recovery of the said sums of \$145 and \$267 the petitioner had to incur legal fees and expenses. A sum of approximately three-fourths of the money borrowed from the Demerara Mutual Life Assurance Society, Limited, was lost by the petitioner as a result of her engagement and marriage to the respondent. The petitioner stated in evidence that, although she is still a registered money-lender, she is not actively carrying on new business, as her capital has disappeared.

The petitioner did not apply to a Magistrate's Court for maintenance under section 41 of the Summary Jurisdiction (Magistrates) Ordinance, Cap. 9.

On the 5th January 1942 she filed a petition for dissolution of

S. E. LANGFORD v. F. A. LANGFORD.

marriage in which she alleged that the respondent had maliciously deserted her in the month of October, 1938, and still continued so to do. That petition was served on the respondent on the 6th January, 1942. The answer of the respondent to the petition for dissolution was filed on the 23rd January, 1942. It was a bare denial of the fact of desertion. No reply was therefore necessary and none was indeed filed. The issue for determination on the trial of the petition for dissolution was clear and simple. The petitioner, however, did not set down the petition for dissolution for hearing in accordance with rule 17 of the Rules of Court (Matrimonial Causes), 1921, until the 24th day of June, 1942, that is to say, five months after the respondent had tiled his answer to the petition for dissolution.

However, on the 11th February, 1942, the petitioner filed, in this cause, a petition for alimony *pendente lite*. The respondent filed his answer to this petition on the 21st February, 1942. The petitioner replied on the 25th February, 1942, and on the 4th March, 1942, the motion for allotment of alimony *pendente lite* was filed in pursuance of rule 37 of the Rules of Court (Matrimonial Causes), 1921.

It would therefore seem that, although the petitioner has proceeded with a high degree of diligence in prosecuting her claim for alimony *pendente lite*, she has exercised a lower degree of diligence in respect of what should be the main object of the proceedings in this cause, namely, the obtaining of a decree for dissolution of her marriage with the respondent.

The allotment of alimony *pendente lite* is only incidental to a petition by a wife for dissolution of marriage, or for judicial separation. Alimony *pendente lite* is awarded by the Court in such cases in order that the wife might be reasonably maintained until the hearing of the petition when it would be determined whether her charges are justified or not. The main object of the originating petition must not be subordinated to the object of the petition for alimony *pendente lite* which petition only has legal efficacy because of the filing of the originating petition for dissolution or for judicial separation, and the order on which petition (for alimony *pendente lite*) will cease to have effect on the determination of the originating petition. It would be an abuse of the process of the Court for a petitioning wife to bring a petition for divorce or for judicial separation with the dominant object, not of obtaining a decree of dissolution of marriage, or of judicial separation, but with the dominant object of obtaining alimony *pendente lite*.

The petitioner is the owner of lot 5, Henry Street, Georgetown, (subject to mortgage); of lot 46, Pere Street, Kitty, East Coast, Demerara, (subject to mortgage); and of 2 lots in Pouderoyen Village, West Bank, Demerara. After making deductions in respect of mortgage interest, and rates and taxes, the petitioner derives, or ought to derive, from the immovable property an income of

S E. LANGFORD v. F. A. LANGFORD.

approximately \$18 a month. She pays no house rent; she resides in a house on her property in Henry Street, The petitioner is a registered money-lender, but she keeps no books, and the Court is left in doubt as to what profits, if any, she presently obtains from her money-lending business. In any event, they would be very small. After allowing for the payment of the interest on the loan from the Demerara Mutual Life Assurance Society, Limited, (which loan was for the purpose of her money-lending business) I find, on the evidence adduced, that the net income of the petitioner, from all sources, is approximately \$15 per month.

The respondent is the owner of lot 182, Crown and Irving Streets, Queenstown, (subject to mortgage) The mortgage interest and the rates and taxes amount to \$12.50 per month. He lives in the house on the said property. There is no evidence that there are any tenants. The respondent is one of the plumber contractors to the Public Works Department. He is not employed on Government work throughout the year. He does work for property owners in the city of Georgetown, but he says that, as a result of competition, he does not secure much of that work nowadays. The petitioner has called no evidence to prove what were the various sums received by the respondent from the Public Works Department during the last few years. The respondent has produced no books, he has relied on his very bad memory, and he has forborne to make enquiries from the Public Works Department as to the sums received by him during the last few years lest, perchance, he finds that his recorded receipts are not in accord with the sum of \$60 to \$64 per month which he estimates, and guesses, to be his average monthly earnings (after paying his workmen). On the evidence adduced, I cannot find, for the purpose of these proceedings for allotment of alimony *pendente lite*, that the average monthly earnings of the respondent exceed the sum of \$60 per month.

The amount usually allotted as alimony *pendente lite* is the amount which will bring the income of the wife to one-fifth of the joint incomes of the husband and the wife. The income of the respondent, on the evidence adduced, is approximately \$60 per month. The net income of the petitioner is approximately \$15 per month, and she has not got to pay house rent. The total income of the husband and the wife is approximately \$75 a month, and one-fifth of the total is \$15 a month, the present income of the wife. The petitioner, therefore, on the evidence adduced, is not entitled to alimony *pendente lite*.

There remains the question of costs. Counsel for the respondent has submitted that the petitioner did not act reasonably in instituting the proceedings for alimony *pendente lite*. I do not agree. The respondent had informed the petitioner, before the marriage, that he was earning \$50 a week. However, after the pleadings were closed, the petitioner ought to have realised that it would be impossible to obtain, by cross

S. E. LANGFORD v. F. A. LANGFORD.

examination of the respondent, any material fact which would aid her in proving her case for alimony *pendente lite*. The petitioner should have conducted a thorough and detailed probe of the moneys received by the respondent from the Public Works Department during the last few years, and should have called evidence to prove what they were. The petitioner did not do so. The respondent merely gave evidence as to what, according to him, was his recollection, and there was no evidence to prove that he was wrong. I find that the petitioner did not act reasonably in continuing the proceedings after the pleadings in the matter of the petition for alimony *pendente lite* had been closed, as she took no active steps to prove what was the actual income of the respondent.

The order for costs will therefore be as follows. The petitioner's costs of and incidental to the petition for alimony *pendente lite* up to and including the 4th March, 1942, and her costs of and incidental to the hearings on the 9th, 16th and 30th March, 1942, and to this order are to be paid by the respondent; all other costs of and incidental to the petition for alimony *pendente lite* and to the motion for allotment of the same are to be borne by the parties who respectively incurred them.

Solicitors: *E. D. Clarke; H. C. B. Humphrys.*

NORA ELOISE LUKE, Petitioner,
 v.
 MOSES LUKE, Respondent,
 [1940. No. 246.—DEMERARA.]
 BEFORE DUKE, J. (ACTING).
 1942. JULY 17, 20.

Matrimonial causes—Dissolution of marriage—Permanent maintenance of wife—Application for—When it may be made—After decree nisi up to within a month after decree absolute—With leave of Court, if made subsequently—When leave of Court may be granted—If in circumstances reason and good sense so require—How application made—In a separate petition—Meaning of—Separate petition in original cause—Rules of Court (Matrimonial Causes), 1921, rule 43 (1), (2)—Matrimonial Causes Ordinance, Cap. 143, s. 14 (1).

An application for permanent maintenance may be made—

- (1) at any time between the decree *nisi* and the decree absolute;
- (2) on the day the decree absolute is made, or within one month thereafter; or
- (3) with the leave of the Court, on the expiration of one month after the decree absolute, if in the circumstances reason and good sense so require.

An application for permanent maintenance should be made by way of a separate petition filed in the same cause as that in which the decree *nisi* has been granted.

N. E. LUKE v. M. LUKE.

PETITION for permanent maintenance. The petition was filed in the same cause as that in which the decree *nisi* for dissolution of marriage, and the decree absolute, were granted. It was filed the day after the decree absolute was granted. On the hearing of the petition, objections were taken to the hearing of the petition; they are fully set out in the judgment.

J. L. Wills, for the respondent.

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

Cur. adv. vult.

DUKE, J. (Acting): This is a petition for permanent maintenance, and it is brought under subsections (1) and (2) of section 14 of the Matrimonial Causes Ordinance, cap. 143.

Subsection (1) of section 14 corresponds with section 32 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which subsequently became subsection (1) of section 1 of the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), and is now section 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49).

Section 14 (1) of cap. 143 is as follows:

“The Court if it thinks fit, on any decree for dissolution, may order that the husband shall to the satisfaction of the Court secure to the wife that gross sum of money or that annual sum of money for any term not exceeding her life which, having regard to her fortune (if any), to the ability of the husband and to the conduct of the parties, it deems reasonable, and for that purpose may refer the matter to the registrar to settle and approve of a proper deed or instrument to be executed by all necessary parties, and the Court if it thinks fit may suspend the pronouncement of its decree until that deed has been duly executed”.

There was no provision in the Matrimonial Causes Act, 1857, for a decree *nisi*. Such provision was not made until 1860, when it was provided by section 7 of the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144) that “every decree for a divorce shall in the first instance be a decree *nisi*”

Sub-rules (1) and (2) of rule 43 of the Rules of Court (Matrimonial Causes), 1921 correspond in substance with rules 95 and 96 of the Rules and Regulations made on the 26th December, 1865, and which took effect in the Court for Divorce and Matrimonial Causes in England on and after the 11th day of January, 1866.

Sub-rules (1) and (2) of rule 43 are as follows:—

“(1) Application to the Court to exercise the authority given by sections seventeen (now fourteen), nineteen (now sixteen), twenty-two (now nineteen), thirty (now twenty-six), thirty-one (now twenty-seven) and thirty-four (now thirty) of the Ordinance are to be made in

a separate petition, which must, unless by leave of the Court, be filed as soon as by the said sections those applications can be made or within one month thereafter.

“(2) When application is made for maintenance under section seventeen (now fourteen), the petition may be filed as soon as, but not before, a decree *nisi* has been pronounced”.

Subsection (2) of section 14 of the Matrimonial Causes Ordinance, cap. 143, corresponds with section 1 of the Matrimonial Causes Act, 1866 (29 and 30 Vict. c. 32). This section was enacted as a supplement to section 32 of the Matrimonial Causes Act, 1857 “as it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any gross or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives”: see preamble to 29 and 30 Vict. c. 32.

Subsection (2) of section 14 of cap. 143 is as follows: “In that case the Court if it thinks fit may make an order on the husband for payment to the wife during their joint lives of any monthly or weekly sum for her maintenance and support the Court thinks reasonable, and that order may be made either in addition to or instead of an order under the preceding subsection.”

On the 10th February, 1941, the petitioner obtained a decree *nisi* for dissolution of her marriage with the respondent on the grounds of his adultery and of his malicious desertion. The decree *nisi* was made absolute on the 8th September, 1941, and on the following day the 9th September, 1941, the petitioner filed her petition for permanent maintenance. This petition was filed without the leave of the Court, and counsel for the respondent submits that, as it was not filed within a month after the decree *nisi* was made, it was filed out of time, that it was filed in direct contravention of the rules, and that the petition should be struck out and dismissed.

On January 18, 1866 the Full Court, on appeal from the Judge Ordinary (Lord Penzance) indicated in *Sidney v. Sidney* (1866) L.R. 1 P. and D. 80 that an order under section 32 of the Matrimonial Causes Act, 1857, (corresponding with section 14 (1) of the Matrimonial Causes Ordinance, cap. 143) must form part of the decree (that is to say, the decree absolute) for dissolution; in other words, it could not be applied for, after the decree was made absolute. That remark was not necessary to the decision of the Full Court, but it showed what the judges, at the beginning of the year 1866, when the Rules and Regulations of the 26th December, 1865 had just come into force, considered to be the proper procedure. In *Sidney v. Sidney* the order for permanent maintenance was in fact embodied in the decree absolute for dissolution of marriage: see *Sidney v. Sidney* (1865) 4 Sw. and

N. E. LUKE v. M. LUKE.

Tr. 178; 164 E.R. 1485. On appeal to the House of Lords, Lord Cranworth and Lord Westbury made observations, not necessary to the decision, from which it may be inferred that they thought that an order for permanent maintenance might properly be made after a decree of dissolution of marriage has been made absolute: see *Sidney v. Sidney* (1867) 36 L.J. P. and M. 73, 74, 75. Lord Cranworth said: "The fact is, that it (the order for permanent maintenance) is embodied in that decree (the decree absolute for dissolution of marriage) only by accident, for when the original act of parliament, in the 32nd section, said that it shall be lawful for the Judge Ordinary in such a decree to make the allowance now in question, it must have meant that that was to be something that was to follow in his decree, because till the decree was pronounced, no such question could be gone into, and the order allowing maintenance must have been a separate order. It is true that since the passing of the original act the decree dissolving marriage (by virtue of section 7 of the Matrimonial Causes Act, 1860) is, as it were, split into two parts, and therefore the petition from the wife seeking an allowance, coming intermediately between the decree *nisi* and the decree absolute as a matter of convenience, it may well be embodied in the same order which makes absolute the decree *nisi*". Lord Westbury, referring to the application for permanent maintenance, said: "It is a proceeding, the power of entertaining which arises only when the original jurisdiction has been exercised and its purpose fulfilled the petition for the dissolution of the marriage must be finally decided first, before the right to exercise the auxiliary or supplementary discretionary power can by possibility arise.

. . . . In fact, although it may not be so in terms, it is really an order pronounced upon an application to the discretionary power of the Court, which application can only be made after the other and more important jurisdiction has been exercised".

The question for determination by the Full Court was whether a right of appeal lay to the Full Court from an order for separate maintenance embodied in a decree absolute for dissolution of marriage. The Full Court held that there was no appeal to the Full Court, but that the appeal should go to the House of Lords. The appellant went to the House of Lords, and the House of Lords held that the appeal lay, not to them, but to the Full Court.

Notwithstanding the *obiter dicta*, of Lord Cranworth and of Lord Westbury, it continued to be the practice to embody in decrees absolute, orders for separate maintenance, and it was not considered that there was any power in the Court to make an order for permanent maintenance after a decree absolute had been pronounced: see arguments of counsel reported in (1878) 3 P.D. 47 and the following passage in *Browne & Watts* on Divorce, 10th edn. at page 151 "It was for a long time supposed that the Court had no power to make an order for the

permanent maintenance of a wife after a decree absolute had been pronounced”.

In *Bradley v. Bradley* (1878) L.R. 3 P.D. 47, a decree absolute for dissolution of marriage was made on the 20th November, 1877, but the petition for permanent maintenance was not filed until 13 days later, to wit, on the 3rd December, 1877. The respondent submitted to the President of the Probate, Divorce and Admiralty Division (Sir James Hannen) that the Court had no power to make an order for permanent maintenance after the decree absolute had been made. In *Vicars v. Vicars* (1859) 29 L.J. P. & M. 20 (before the days of decrees *nisi*), the Judge Ordinary (Sir C. Cresswell), with the concurrence of two other members of the Full Court, held that a petition for permanent maintenance could not be maintained where it was filed after the registration of the decree dissolving the marriage. In *Charles v. Charles* (1866) L.R. 1 P. & D 260 it was stated by the Judge Ordinary, that a petition for an order for permanent maintenance must be presented in accordance with rule 96 of the Rules and Regulations made on the 26th December, 1865 (and these Rules and Regulations were made by the Judge Ordinary alone), after the decree *nisi* and before the decree absolute.

In *Bradley v. Bradley* the then Judge Ordinary refused to follow *Vicars v. Vicars*. He was guided by the reasoning of Lord Westbury in *Sidney v. Sidney*, but he stated that if there were not that decision of the House of Lords to guide him, he would have arrived at the same conclusion. The Judge Ordinary thereupon held that the Court has power under section 32 of the Matrimonial Causes Act, 1857 (20 and 21 Vict. c. 85), which section corresponds with section 14 (1) of the Matrimonial Causes Ordinance, chapter 143, to make an order for the permanent maintenance of a wife after a decree absolute has been pronounced, and that a petition for such an order will be entertained even though it is filed after the decree *nisi* has been made absolute. The Judge Ordinary formed the opinion that the words “on any decree for dissolution” appearing in the said section 32 should not be construed as if they did not include the meaning “after any decree for dissolution.” In *Charles v. Charles* the then Judge Ordinary (Lord Penzance) had already expressed the opinion that the word “decree” appearing in the said section 32 means a decree absolute.

In *Scott v. Scott* (1921) P. 107, the Court of Appeal (Lord Sterndale, M. R., Warrington and Scrutton L. JJ.) held that the words “on any decree for dissolution of marriage” in section 1 (1) of the Matrimonial Causes Act, 1907 (formerly section 32 of the Matrimonial Causes Act, 1857 and corresponding with section 14 (1) of the Matrimonial Causes Ordinance, cap. 143) meant that the petition for permanent maintenance must be filed at or within a reasonable time after the decree, having regard to all the circumstances of the case. At the time of the delivery

N. E. LUKE v. M. LUKE.

of this judgment, Rules 95 and 96 of the Rules and Regulations of the 26th December, 1865 (which correspond with sub-rules (1) and (2) of the Rules of Court (Matrimonial Causes) 1921), were in full force and effect.

In *Fox v. Fox* (1925) P. 157, the Court of Appeal (Pollock, M.R., Warrington and Sargant, L.JJ.) held that the power to make an order for permanent maintenance arose “on any decree for dissolution of marriage”; that those words did not mean that the order must be made at the same moment that the decree for dissolution was made, and that “on” might mean before, or simultaneously with, or after act done, according as reason and good sense required with reference to the circumstances. It was further held that the order might be made before the decree absolute and in anticipation of it, upon materials which enabled the Court to make the order for maintenance at the same time as the decree for dissolution. The circumstance that rules 95 and 96 of the Rules of 1865 had, at the time of the judgment of the Court of Appeal, been replaced by rule 65 A of the Matrimonial Causes Rules, 1924 which provided that the application must be made, except by leave of a judge, “not later than one month after decree absolute” was not considered in the judgments.

In *Trimble v. Hill* (1879) L.R. 5 A.C. 342, the Privy Council held that where a colonial Legislature has passed an Act in the same terms as an Imperial statute, and the latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the Courts of the Colony. Consequently, I am bound to follow the decisions of the Court of Appeal in *Scott v. Scott* and in *Fox v. Fox*. I therefore hold (1) that the words “on any decree for dissolution of marriage” in section 14 (1) of the Matrimonial Causes Ordinance, cap. 143 do not mean that the order for permanent maintenance must be made at the same moment that the decree for dissolution is made; (2) that the word “on” might mean before, or simultaneously with, or after act done, according as reason and good sense required with reference to the circumstances; and (3) that the order for permanent maintenance might be made before the decree absolute and in anticipation of it, upon materials which enabled the Court to make the order for the maintenance at the same time as the decree for dissolution.

Sub-rule (1) of rule 43 of the Rules of Court (Matrimonial Causes), 1921 means that a petition for permanent maintenance under section 14 of the Matrimonial Causes Ordinance, cap. 143, must be made on the making of the decree absolute or within one month thereafter, and that if the application is not made within one month after the decree absolute, it cannot be made unless with the leave of the Court. Sub-rule (2) of rule 43 provides that the application *may*, if the petitioner thinks fit, be made as soon, as, but not before, a decree *nisi* has been pro-

nounced. In other words, sub-rule (2) described the earliest date, and sub-rule (1) prescribes the latest date, for making the application. In my opinion, Rule 65 A of the English Matrimonial Causes Rules, 1924, which enacts that an application for permanent maintenance may be filed “at any time after decree *nisi* but not later than one calendar month after decree absolute except by leave to be applied for by summons to a judge” makes no change in the procedure as to applications for permanent maintenance, it merely restates the effect of Rules 95 and 96 of the Rules and Regulations of 1865, in clear language.

To summarise: I hold that an application for permanent maintenance may be made:—

- (1) at any time between the decree *nisi* and the decree absolute;
- (2) on the day the decree absolute is made, or within one month thereafter; or
- (3) with the leave of Court, on the expiration of one month after the decree absolute, if in the circumstances, reason and good sense so require.

Counsel for the respondent has stated that he is not submitting that a petition for permanent maintenance cannot be brought after decree absolute. He, however, submits that it can only be made after decree absolute, if the leave of the Court has been obtained I have already held that the leave of the Court is only necessary if the applicant fails to file her petition within one month after the decree absolute. In this case, the petition was filed the day after the decree absolute was granted, and it was therefore filed in time.

The petition for permanent maintenance has been filed in the same cause in which the petitioner had obtained a decree *nisi*, and a decree absolute, for the dissolution of her marriage with the respondent. The respondent submits that this is wrong, and that an originating petition in another cause should have been filed. Rule 43 (1) of the Rules of Court (Matrimonial Causes), 1921 prescribes that the application for permanent maintenance is to be made “in a separate petition”. The fact, however, that in England it was possible (up to 1878) for the practice to grow up that the order for permanent maintenance *must* be embodied in the decree absolute is clear proof that the words “separate petition” appearing in Rule 95 of the English Rules and Regulations of 1865, were construed as meaning an application made in the same cause as that in which the decree *nisi* was granted, and in which the decree absolute was to be granted. In *Sidney v. Sidney* (1867) 36 L.J. P & M. 75, Lord Cranworth pointed out that the jurisdiction in respect of applications for permanent maintenance is a “discretionary jurisdiction, which is to be governed in its exercise altogether by the consideration of a variety of circumstances forming matter of

N. E. LUKE v. M. LUKE.

allegation and, if need be, matter of evidence, wholly and entirely apart and different from that which is to obtain in a petition for dissolution of marriage". It can therefore very well be understood why a petition for permanent maintenance must be a "separate" petition from the petition for dissolution, even where the petitioner in both matters is one and the same person. The practice in England has always been to file the petition for permanent maintenance (which may be brought not only by an innocent wife, but also, in a proper case, by a wife who had committed a matrimonial offence and against whom a decree *nisi* had been granted) in the original cause, and there is nothing in the Rules of Court (Matrimonial Causes), 1921 to indicate that a different procedure should be adopted in this Colony.

The objections by the respondent are therefore overruled. The petitioner's costs of and incidental to the hearing on the 17th July, 1942, in respect of counsel, solicitor and witnesses (if any), and of to-day in respect of counsel and solicitor must be paid by the respondent in any event.

Objections overruled.

Solicitors: *W. D. Dinally*, for petitioner; *F. Dias*, O.B.E. for respondent.

CHARLES RODRIGUES NASCIMENTO AND ALBERT
NASCIMENTO, Plaintiffs.

v.

CECELIA BLENMAN, Defendant.

[1938. No. 69.—DEMERARA].

BEFORE DUKE J, (ACTING). IN CHAMBERS.

1942. JULY 18, 22.

Local Government—Village or country district—Rates—When levied—On date of publication in Gazette of approval of estimate—Local Government Ordinance. Cap. 84, s. 117 (1); Ordinance No. 12 of 1937, s. 10 (2); Ordinance No. 20 of 1937, s. 3—When rates for whole year due, owing and recoverable—May the first.

Construction—Shall become due and payable—Shall be levied—To be interpreted in futuro—Circumstances arising after execution of document—Only applicable to.

Contract—Repairs and works required by local authority—Cost of—One party to pay other party—No notice given by second party—As to repairs or works or their cost—No breach of agreement to pay cost.

Words—Creditor—Meaning in document—Does not include village council in respect of rates.

Execution—Warrant of distress—For recovery of village rates—Not “levying execution”—Meaning in document.

By section 117 (1) of the Local Government Ordinance, cap 84 as amended by section 10 (2) of Ordinance No. 12 of 1937 and by section 3 of Ordinance No. 20 of 1937 rates in a village or country district are levied on the date of the publication of the approval of the estimate in the *Gazette*.

C. R. NASCIMENTO AND ANR. v. C. BLENMAN.

On the 27th May 1941 judgment was entered by consent as follows:—

1. that the defendant be at liberty to pay to the plaintiffs the amount due by her to the first named plaintiff, that is to say, the sum of \$260.00 (two hundred and sixty dollars) by monthly instalments of \$12.00 (twelve dollars) each, the first of such instalments to be paid by her on the 30th day of June 1941;
2. That the defendant shall also pay to the plaintiffs as the same shall become due and payable each quarter all rent, rates, taxes and assessments which shall be levied on the property, to wit, one board and zinc roofed building measuring about 28 feet by 20 feet on 3-foot wooden blocks with back gallery and kitchen attached, used as a common lodging house erected on leased land at lot 26 First Avenue, Bartica, in the county of Essequibo, by any competent authority;
3. That the defendant shall also pay to the plaintiffs the reasonable costs of all necessary repairs to maintain the said property in as good condition as it is at present together with the cost of any works required by the local authority to be done on the said premises;
4. That the defendant shall do each and every of the acts hereinmentioned within 15 days from the dates when such act should be done;
5. That in the event of the defendant failing or neglecting to do and perform any of the said acts hereinmentioned the defendant undertakes to deliver possession of the said property to the plaintiffs upon such failure of performance and in such event the plaintiffs shall thereafter become the full and beneficial owners of the said property;
6. That in the event of the defendant carrying out in full the terms hereof the plaintiffs undertake to re-transfer to the defendant the said property;
7. That neither the plaintiffs nor the defendant shall be at liberty to transfer or alienate the said property during the course of the performance of the abovementioned terms and in the event of any creditor of the defendant levying execution on the said property, the plaintiffs shall thereupon have the same right of possession as set forth in paragraph 5 hereof.

The defendant died on the 8th August, 1941, and her daughter Shandrina Pindar entered into possession of the building. The plaintiffs claimed that the defendant committed a breach of clause 2 before her death; and they further claimed that there were breaches of clauses 3 and 7.

Held, (1) that clause 2 should be interpreted *in futuro*, and that it only relates to rent, rates, taxes and assessments levied after the date of the order; and not to rent, rates, taxes and assessments which became due and payable after the date of the order, if “levied” before the date of the order (27th May 1941);

(2) that the rent, if an annual rent, was payable on the 1st January 1941 and so “levied” on that date, that is to say, before the date of the order; and that the rent, if payable monthly in arrear, would be payable to the plaintiffs under clauses 2 and 4, in respect of the months of May, June and July, on the 15th August 1941;

(3) that, by virtue of section 117(1) of the Local Government Ordinance, cap. 84, as amended by section 10 (2) of Ordinance No. 12 of 1937 and by section 3 of Ordinance No. 20 of 1937, the rates for the whole of the year 1941 were due and owing to the Bartica Village Council and were recoverable by the Council on the 1st May, that is to say, before the date of the order of the 27th May, 1941;

(4) that there can be no breach of clause 3 where the defendant, or the person in possession of the building, is not given notice of the matters specified therein;

(5) that the word “creditor” in clause 7 does not include the Bartica Village Council in respect of arrears of rates;

(6) that the Words “levying execution” in clause 7 do not refer to a warrant of distress for the recovery of rates, issued at the instance of the Bartica Village Council.

SUMMONS taken out by the plaintiffs for an order for the issue forthwith to the plaintiffs of a writ of possession of a building, the subject matter of the action. The summons was served on

C. R. NASCIMENTO AND ANR. v. C. BLENMAN.

the 9th June, 1942, upon Shandrina Pindar, the daughter of the defendant who died on the 8th August 1941. Shandrina Pindar was the person in possession of the building.

R. G. Sharples, solicitor, for the plaintiffs.

C. Lloyd Luckhoo, (for *Lionel A. Luckhoo*), for Shandrina Pindar.

Cur. adv. vult.

DUKE, J. (Acting): This is a summons taken out by the plaintiffs for an order for the issue forthwith to the plaintiffs of a writ of possession of one board and zinc roofed building measuring about 28 feet by 20 feet on 3-foot wooden blocks with back gallery and kitchen attached, used as a common lodging house, erected on leased land situate at lot 26, First Avenue, Bartica. The summons was addressed to Shandrina Pindar and was served upon her on the 9th June, 1942.

On the 23rd February, 1938, the plaintiffs filed a writ of summons against the defendant Cecelia Blenman claiming possession of the said building, mesne profits and costs. In the statement of claim the plaintiffs averred that the value of the building was the sum of \$200.

On the 27th May, 1941, judgment was entered by consent in pursuance of certain terms of settlement which were handed up to the judge and initialled by the Clerk of Court. It was ordered that these terms be made a rule of Court, and the order of Court, embodying the terms of settlement, was filed by the plaintiffs, and sealed and entered by the Registrar, on the 31st July, 1941.

The order as drawn up and entered was as follows:—

“IT IS BY CONSENT ORDERED as follows:—

1. That the defendant be at liberty to pay to the plaintiffs the amount due by her to the first named plaintiff, that is to say the sum of \$260.00 (two hundred and sixty dollars) by monthly instalments of \$12.00 (twelve dollars) each, the first of such instalments to be paid by her on the 30th day of June, 1941;

2. That the defendant shall also pay to the plaintiffs as the same shall become due and payable each quarter all rent, rates, taxes and assessments which shall be levied on the property, to wit, One board and zinc roofed building measuring about 28 feet by 20 feet on 3-foot wooden blocks with back gallery and kitchen attached, used as a common lodging house erected on leased land at lot 26, First Avenue, Bartica, in the county of Essequibo, by any competent authority;

3. That the defendant shall also pay to the plaintiffs the reasonable costs of all necessary repairs to maintain the said property in as good condition as it is at present together with the cost of any works required by the local authority to be done on the said premises;

C. B. NASCIMENTO AND ANR. v. C.BLENMAN.

4. That the defendant shall do each and every of the acts hereinmentioned within 15 days from the dates when such act should be done;

5. That in the event of the defendant failing or neglecting to do and perform any of the said acts hereinmentioned the defendant undertakes to deliver possession of the said property to the plaintiffs upon such failure of performance and in such event the plaintiffs shall thereafter become the full and beneficial owners of the said property;

6. That in the event of the defendant carrying out in full the terms hereof the plaintiffs undertake to re-transfer to the defendant the said property;

7. That neither the plaintiffs nor the defendant shall be at liberty to transfer or alienate the said property during the course of the performance of the abovementioned terms and in the event of any creditor of the defendant levying execution on the said property the plaintiffs shall thereupon have the same right of possession as set forth in paragraph 5 hereof.

AND IT IS FURTHER ORDERED that each party bear his or her own Costs.”

The defendant Cecelia Blenman died intestate on the 8th August, 1941. Prior to her death she had duly paid to the plaintiffs the instalment of \$12, which was due on the 30th June, 1941, and was required to be paid not later than the 15th July, 1941, in accordance with clauses 1 and 4 of the order.

On the 15th August, 1941, the last day for the payment of the second instalment of \$12 under clause 1 of the order Shandrina Pindar daughter of the defendant who had died 7 days previously, tendered to the plaintiff Charles Rodrigues Nascimento the said sum of \$12, but it was refused. The first named plaintiff deposed in his affidavit filed herein on the 18th May, 1942, in support of this summons that he “requested payment at the same time of the rent and rates payable by the defendant to him” under the terms of the order of Court “which latter were then overdue. The said Shandrina Pindar failed to comply with the plaintiff’s said request and the plaintiff refused to accept the said sum of \$12.00 and demanded possession of the said building.” Shandrina Pindar, in her affidavit filed herein on the 19th June, 1942, denies that the plaintiff Charles Rodrigues Nascimento requested, on the 15th August, 1941, payment of rates and land rent. She also deposed that the plaintiff Charles Rodrigues Nascimento, in refusing to accept the sum of \$12, stated that the defendant Cecelia Blenman (the mother of Shandrina Pindar) was dead, and that he was advised by his solicitor to refuse any payments. On the hearing of this summons the plaintiff’s solicitor submitted that the plaintiff Charles Rodrigues Nascimento would have been acting improperly in accepting payment of the sum of \$12 on the 15th August, 1941, as on that date the defendant had

already broken other terms and conditions of the order of Court, and the receipt of the \$12 might have operated as a waiver on his part of the breach of the other terms. It is therefore impossible for me to accept the statement of Charles Rodrigues Nascimento that on the 15th August, 1941, he made a request to Shandrina Pindar for payment of rent or rates. The statement of Shandrina Pindar that Charles Rodrigues Nascimento told her that he had been advised by his solicitor to refuse any payments accords with the statement made in Chambers by the plaintiff's solicitor, and I accept it.

On the 15th August, 1941, the plaintiffs demanded from Shandrina Pindar, who had entered into possession of the building after her mother's death, possession thereof. The plaintiffs contend that, prior to the date of her death on the 8th August, 1941, the defendant Cecelia Blenman had committed breaches of clause 2 of the order of Court of the 27th May, 1941, that the plaintiffs thereupon, under clause 5 of the order, became entitled to possession, and all rights of ownership of the defendant in the building were extinguished prior to her death.

The breaches assigned by the plaintiffs, and referred to by their solicitor in his argument are as follows:—

- (a) *Rent*.—On the 19th August, 1941, the plaintiffs had to pay to the Bartica Village Council the sum of \$4 as land rent for the period January to June, 1941. The first named plaintiff stated in his affidavit that “the rent payable was and is the sum of \$8.00 per annum, payable in monthly instalments on the last day of each month during each year, but the said Village Council was and is accustomed to accept payment of the said rent quarterly on the 1st days of January, April, July and October in each year.”
- (b) *Rates*.—On the 19th August, 1941, the plaintiffs had to pay to the Bartica Village Council the sum of 56 cents unpaid rates in respect of the year 1940; and the sum of \$4 unpaid rates for the first half of the year 1941. The first named plaintiff stated in his affidavit that “the said building is lawfully liable for payment of rates to the (Bartica) Village Council and was duly assessed for rates in the years 1941 and 1942, at the sum of \$400.00. The rates payable to the said Council during the said years were \$8.00 in each year. The said rates are payable quarterly on the 1st days of January, April, July and October in each year.”

Counsel for Shandrina Pindar submits that clause 2 of the order of Court of the 27th May, 1941, should be interpreted *in futuro*, and that it only relates to rent, rates, taxes and assessments levied after the date of the order (27th May, 1941); and not to such rent, rates, taxes and assessments which became

due and payable after the date of the order, if "levied" before the date of the order. I agree with this submission. If it were intended that clause 2 should apply to what had occurred before the 27th May, 1941, the words "as the same *shall* become due and payable" and the words "which *shall* be levied" would not have been used.

The arrears of rates for 1940 are clearly outside clause 2 of the order. They were, it is true, still due and payable on the 27th May, 1941, as they remained unpaid, but they were levied in the year 1940, and not subsequent to the 27th May, 1941.

By section 117 (1) of the Local Government Ordinance, cap. 84 as amended by section 10 (2) of Ordinance No. 12 of 1937, and by section 3 of Ordinance No. 20 of 1937 it is provided that "in every village or country district in which a rate is levied on an assessment of the appraised value of the property in the district, the rates set forth in the assessment shall be due and owing from the date of publication of the approval (by the Local Government Board) of the estimate" (which date would be the date on which the rates are levied and would be prior to the 1st April and therefore prior to the 27th May) "and the rate may be paid either in full or in four equal instalments due respectively on publication abovementioned, and on the first days of April, July and October: Provided that, on failure to pay an instalment within thirty days of the date when it becomes due as aforesaid, the rate for the whole year shall become due and owing, and it, or any portion of it, may be recovered as hereinafter provided." On the first day of May, no portion of the 1941 rates had been paid: consequently the rates for the year 1941 were due, owing and recoverable long before the 27th May, 1941, (the date of the order). The rates for 1941 were therefore outside the scope of clause 2 of the order.

With respect to the alleged breach as to non-payment of the rent, the allegation of the plaintiffs is that the defendant Cecelia Blenman did not pay to the plaintiffs, on or before the 16th July, 1941, the land rent for the months of January, February, March, April, May and June, 1941. The plaintiff Charles Rodrigues Nascimento in his affidavit filed herein on the 18th May, 1942, stated that the land rent was \$8 per annum, payable in monthly instalments on the last day of each month (that is to say, presumably not in advance but in arrear), but by custom payable quarterly on the 1st days of January, April, July and October (whether in advance or in arrear is not stated, but as the month of January is mentioned first, I must presume that it is payable quarterly in advance by custom). Counsel for Shan-drina Pindar has submitted that there is a lack of clarity in respect of the evidence tendered on behalf of the plaintiffs, as to when the land rent first becomes due and payable. I agree with this submission. The plaintiffs state that the rent is an annual

rent, payable monthly in arrear, but by custom payable quarterly in advance. The solicitor for the plaintiffs, in the course of his argument, however, stated that the rent was payable monthly. The plaintiffs' claim (put at its highest), is that, between the 27th May, 1941, and the 8th August, 1941, the defendant had committed a breach of clause 2 of the order of Court of the 27th May, 1941, inasmuch as during that period she failed and neglected to pay to the plaintiffs the land rent for the months of January, February, March, April, May, June and July, 1941. The rent for January was paid by the defendant to the Bartica Village Council on the 13th January, 1941. If the land rent was payable monthly, as the plaintiffs' solicitor stated in the course of his argument, then the rent for February, March and April was due and payable long before the 27th May, 1941 (the date of the order of Court); and the rent for May, June and July was due and payable to the Village Council on the last days of May, June and July. By clause 2 of the order of Court the defendant was required to pay the land rent *to the plaintiffs* each quarter; the first quarter after the 27th May, 1941 ended on the 31st July, 1941,; and by the joint effect of clauses 2 and 4 of the order of Court the defendant (if the rent was payable monthly) was required to pay to the plaintiffs the land rent for May, June and July 1941, on the 15th August, 1941, and not before that date as the plaintiffs erroneously thought. The plaintiffs refused to accept the second instalment of \$12 due under clause 1 of the order of Court on the ground that before the 8th August, 1941 (the date of the death of the defendant) she had already broken clause 2 of the order with reference to the payment of rent and rates to them; and the plaintiffs showed by their conduct on the 15th August, 1941, (and by the argument of their solicitor on the hearing of this summons) that they were not accepting payment on that date of any sums of money tendered to them in pursuance of the obligations of the defendant under the order of Court.

The plaintiffs stated in their affidavit filed on the 18th May, 1942, that the land rent in respect of the building is \$8 per annum. The rent for 1941 was therefore "levied," within the meaning of clause 2 of the order of Court of the 27th May, 1941, on the 1st January, 1941, that is to say, before the date of the order. The defendant therefore committed no breach of clause 2 of the order in so far as it relates to rent for 1941.

To summarise: I hold—

- (a) that clause 2 of the order of Court of the 27th May, 1941, does not relate to land rent, nor to rates, levied before the date of the order;
- (b) that an annual land rent is levied, within the meaning of clause 2 of the order, on the 1st January; and that rates are levied on the date of the publication in the *Gazette* of

- the approval by the Local Government Board of the village estimates (which date would be prior to the 1st April);
- (c) that the land rent for 1941 and the rates for 1941 were levied before the 27th May, 1941, and that consequently clause 2 of the order of Court of the 27th May, 1941, is not broken by failure or neglect to pay them or either of them;
- (d) that, by virtue of section 117 (1) of the Local Government Ordinance, cap. 84, as amended by section 10 (2) of Ordinance No. 12 of 1937 and by section 3 of Ordinance No. 20 of 1937, the rates for the whole of the year 1941 were due and owing to the Village Council and were recoverable by the Council on the 1st May, that is to say, before the date of the order of Court of the 27th May, 1941: and, consequently, clause 2 of the order is not broken by reason of failure or neglect to pay the rates for 1941, or any portion thereof ;
- (e) that neither at the time of the death of the defendant Cecelia Blenman on the 8th August, 1941, nor on the 15th August, 1941, had there been any breach in respect of clause 2 of the order;
- (f) that assuming that land rent was "levied" after the 27th May, 1941, and that it is paid monthly, the defendant had until 15th August, 1941, to pay the land rent for May, June and July, 1941; that on that date the plaintiffs were not prepared to accept any money from the defendant or her representative, as they were of the opinion that there had been a failure and neglect on the part of the defendant, prior to her death on the 8th August, 1941, to observe the terms of clause 2 of the order, and acceptance of rent on the 15th August, 1941, would have amounted to a waiver.

By reason of their conduct on the 15th August, 1941, the plaintiffs are precluded from submitting that the defendant or her representative has failed or neglected to observe and perform, subsequent to the 15th August, 1941, clause 1 or clause 2 of the order of Court, In the course of his argument, the solicitor for the plaintiffs did not rely on any breaches of clause 1: and the breaches of clause 2 on which he relied were all breaches which were alleged to have taken place before, and not after, the 15th August, 1941.

The building, the subject matter of the summons herein, is entered in the Bartica Village District books in the name of the plaintiffs, and the plaintiffs say that it is assessed in the sum of \$400.

The plaintiffs have stated that "on the 12th May, 1942, the Village Council of Bartica levied execution on the said building for the recovery of the unpaid rates on the said building for the second half of the year 1941. Since the said levy was made the

said Shandrina Pindar has paid the said rates and the costs of such levy and the same has been accordingly withdrawn." The solicitor for the plaintiffs urged that under clause 7 of the order of Court, which provided that "in the event of any creditor of the defendant levying execution on the said property the plaintiffs shall thereupon have the same right of possession as set forth in paragraph 5 thereof", the plaintiffs are entitled to possession. On the hearing of this summons the solicitor for the plaintiffs admitted that what was issued was not a writ of execution, but a warrant of distress under the provisions of sections 124 (1), 126 and 127 of the Local Government Ordinance, chapter 84. A warrant of distress issued by a magistrate's court is different from a writ of execution. If the parties to the terms of settlement had intended clause 7 to refer to a warrant of distress for the recovery of rates, such would have been clearly stated. I am not of the opinion that the word "creditor" in clause 7 includes the Bartica Village Council in respect of arrears of rates; and I am not of the opinion that the words "levying execution" refer to a warrant of distress for the recovery of rates issued at the instance of the Bartica Village Council. The plaintiffs, are, therefore, not entitled, under clause 7, to possession of the building.

Finally, the plaintiffs have stated that the defendant (Cecelia Blenman) and the said Shandrina Pindar have allowed the said building to fall into an insanitary and dilapidated condition, and the defendant demolished a privy on the said land used in conjunction with the said building and neither she nor the said Shandrina Pindar re-erected another in its place. On the 4th May, 1942, and on the 14th May, 1942, two notices were served on the plaintiff, the first by the sanitary authority of Bartica Village and the other by the Village Council of Bartica." The solicitor for the plaintiffs has submitted that the plaintiffs are therefore entitled to possession of the building by virtue of clause 3 of the order of Court. Shandrina Pindar was granted on the 9th May, 1942, Letters of Administration of the estate of the aforesaid Cecelia Blenman, deceased. Clause 3 implies that repairs, and work required to be done by the local authority should be performed by the plaintiffs, and that the defendant should pay the cost of the repairs, or other work, to the plaintiffs. The notice of the 4th May, 1942, referred to in the affidavit of the plaintiff Charles Rodrigues Nascimento was addressed to, and served on the plaintiff Albert Nascimento. It required the plaintiff Albert Nascimento, as "owner of premises situated at lot 26, First Avenue, Bartica, in the Bartica Village District," to (a) weed and clean the entire lot; (b) clean and grade the drains on above lot; (c) fill up open pit with earth or other suitable material; (d) fill up all holes on the said premises; (e) to mould up with earth the latrine on above lot and lime wash the interior and exterior walls of same; and (f) keep the said premises at all

times in a clean and in a sanitary condition. Paragraphs (a), (b), (d) and (f), are contained in notices served upon most householders every now and then; paragraph (c) probably refers to the privy which was demolished on the land, and referred to in the affidavit of the plaintiff Charles Rodrigues Nascimento; and paragraph (e) indicates that there was in fact a privy on the land on the 4th May, 1942, although the affidavit of the plaintiff Charles Rodrigues Nascimento, when hurriedly read, would leave one under the impression that on the 14th May, 1942, there was in fact no privy upon the land. Shandrina Pindar in her affidavit of the 19th June, 1942, stated that no sanitary notices served on the plaintiff were ever shown to her; that there were two latrines on the said land, one was demolished and the other is in a good sanitary condition, and the work requested by the sanitary authorities to be done on the said land was presently being done by her. As Shandrina Pindar was only served with the summons in this matter on the 9th June, 1942, (although leave was granted to serve it first on the 4th May, 1942, and then on the 1st June, 1942), I fail to see how the plaintiff's can reasonably suggest that Shandrina Pindar has failed to comply with the sanitary notice served on the plaintiff Albert Nascimento on the 4th May, 1942. The notice dated 14th May, 1942, referred to in the affidavit of the plaintiff Charles Rodrigues Nascimento dated the 14th May, 1942, was addressed to the plaintiff Albert Nascimento "owner of building situate at lot 26, First Avenue, Bartica," and was served on the plaintiff Charles Rodrigues Nascimento. Doubtless, it was a mere coincidence that it was received in time for the affidavit to be prepared in such a way that reference could be made to it. The notice of the 14th May, 1942, was signed by the chairman of the local sanitary authority of Bartica, and required the plaintiff Albert Nascimento to attend a meeting of the local sanitary authority on the 22nd May, 1942, to show cause why an order should not be made by the local authority declaring the building, the subject matter of the summons herein, to be unfit for human habitation, and that it shall not be inhabited after a date to be fixed by the local sanitary authority. Despite the apparent serious nature of this notice, Shandrina Pindar was not informed of it, until the 9th June, 1942—2 weeks after the date fixed for the appearance of the plaintiff Albert Nascimento at the meeting of the local authority. The Court has not been informed what action, if any, has resulted from the notice of the 14th May, 1942. The plaintiffs apparently think that clause 3 of the order of Court of the 27th May, 1941, should be interpreted as if the plaintiffs were not to give any notice to the defendant, or to the person in possession of the building, of the matters mentioned in the said clause. How is the defendant, or Shandrina Pindar, to know the cost of repairs which the plaintiffs consider necessary, if the plaintiffs do

C. R. NASCIMENTO AND ANR. v. C. BLENMAN.

not tell her? How is Shandrina Pindar to pay to the plaintiffs the cost of necessary repairs when the plaintiffs do not themselves know what is the cost? How can Shandrina Pindar execute works required by the local authority to be done on the premises when the plaintiffs deliberately withhold from her information as to what is required to be done by the local authority? Clause 3 of the order of Court has not been broken by Shandrina Pindar or by the defendant.

The plaintiffs have failed in their contention that they are entitled to possession of the building; and they have likewise failed in their contention that they are the full and beneficial owners thereof.

The summons filed by the plaintiffs on the 18th May, 1942, is therefore dismissed. Shandrina Pindar will recover her costs of and incidental to the summons from the plaintiffs.

Summons dismissed.

MOURAT, Plaintiff,
v.
TAHAL, Defendant.
[1942. No. 44.—BERBICE.]
BEFORE DUKE, J. (ACTING): IN CHAMBERS.
1942. JULY 27.

Practice—Execution—Discovery in aid of—Examination of person other than judgment debtor—Order for—Cannot be made—Rules of Court, 1900, Order 36, rule 29.

Under rule 29 of Order 36 of the Rules of Court, 1900, where the judgment debtor is an individual, an order cannot be made for the examination of any person other than the judgment debtor.

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

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

DUKE, J. (Acting): This is a summons by the plaintiff (1) that the defendant attend and be orally examined as to whether any and what debts are owing to him, and whether the defendant has any and what other property or means of satisfying the judgment obtained by the plaintiff on the 23rd March, 1942, against the defendant, such examination to be at such time and place as a Judge in Chambers may appoint, and (2) that the said defendant produce any books or documents in his possession or power relating to the same.

MOURAT v. TAHAL

The order was made in terms of the application. After the order was made, counsel for the plaintiff (judgment creditor) asked that the order made be extended to include an order for the examination of one Hazel.

The summons in this matter was filed under the authority of rule 29 of Rule 36 of the Rules of Court, 1900. This rule is as follows:—

When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the Court or a judge for an order that the debtor liable under such judgment or order or his representative, or in the case of a Corporation that any officer thereof, be orally examined as to whether any or what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order before a judge, and the Court or judge may make an order for the attendance and examination of such debtor or *any other person*, and for the production of any books or documents.

Rule 29 of Order 36 of the Rules of Court, 1900, is identical with rule 32 of Order 42 of the Rules of The Supreme Court, England. In *Irwell v. Eden* (1887) 18 Q.B.D. 589, 590, the Court of Appeal held that the expression “any other person” does not include within the rule, in the case of an individual debtor, any other person than himself or, in the case of a Corporation anyone but officers of the Corporation, and that it does not enable an order to be made except in such cases. On the authority of the judgment of the Judicial Committee of the Privy Council in *Trimble v. Hill* (1879) L.R. 5 A.C. 342, the Courts of this Colony are bound by the judgment of the English Court of Appeal in *Irwell v. Eden*. I am therefore entirely unmoved by the argument of counsel for the plaintiff that, in a previous matter, a judge of the Supreme Court of this Colony made a similar order to the one for which he is asking in this case.

Under rule 29 of Order 36 of the Rules of Court, 1900, where the judgment debtor is an individual (and in this matter the judgment debtor is an individual) an order cannot be made for the examination of any person other than the judgment debtor.

The application for the examination of Hazel is therefore refused.

Solicitors: *E. A. Luckhoo*. O.B.E.; *R. G. Sharples*.

R. V. EVAN WONG v. I. LEANDRO.

ROBERT VICTOR EVAN WONG, Plaintiff,

v.

ISADORE LEANDRO, IN HIS CAPACITY AS THE DULY CONSTITUTED ATTORNEY IN THIS COLONY, OF HANDEL HECTOR GRIFFITHS WHO WAS THE SOLE EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF MILLICENT GRIFFITHS, Defendant,

[1942. No. 158.—DEMERARA.]

BEFORE DUKE, J. (ACTING): IN CHAMBERS.

1942. JULY 27, 28.

Practice—Writ served on attorney—Whether defendant alive—At time of service—Considerable doubt—Judgment—In default of appearance—Set aside.

Practice—Costs thrown away—By default of attorney—In not informing Court of facts—Attorney personally liable to pay.

A judgment in default of appearance was set aside where the defendant was represented by an attorney, and the Court was not satisfied that, when the writ was served on the attorney, the defendant was still alive.

The attorney was ordered to pay the costs which were thrown away as a result of his failure and neglect to inform the Court, at the earliest possible moment, that there was considerable doubt as to whether the defendant was still alive.

SUMMONS for an order setting aside a judgment which was given against the defendant in default of appearance.

S. I. Cyrus, for applicant.

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

Cur. adv. vult.

DUKE, J. (Acting): This is a summons taken out by the defendant for an order that the judgment delivered in favour of the plaintiff on the 29th day of June, 1942, in default of appearance and entered on the 8th day of July, 1942, be set aside.

In the title to the action the defendant is stated to be "Isadore Leandro, in his capacity as the duly constituted attorney in this Colony of Handel Hector Griffiths, who was the sole Executor under the last Will and Testament of Millicent Griffiths deceased." The plaintiff claimed the sum of \$1,448.25 on two promissary notes, one made by Handel Hector Griffiths and Millicent Griffiths jointly and severally on the 9th December, 1935, for \$1,309.25, and the other made by Millicent Griffiths on the 8th November, 1935, for \$100, with accrued interest of \$39. Counsel for the applicant has submitted that it is not clear whether the writ was intended to be against the estate of Millicent Griffiths, deceased alone, or against Hendel Hector Griffiths, as well. I have no doubt that the writ was issued against the estate of Millicent Griffiths, deceased alone. Counsel for the plaintiff stated in the course of his argument that such was indeed

R. V. EVAN WONG v. I. LEANDRO.

the case. In order, however to avoid any possible misunderstanding in the future of the true position, I direct that in all subsequent proceedings filed or taken in this action after the entering of the order made on this summons, the defendant be described as "Handel Hector Griffiths in his capacity as the executor under the last Will and Testament of Millicent Griffiths, deceased, probate whereof was granted to him on the 25th February, 1939."

The writ in this action was served on Isadore Leandro by the marshal handing the same to his wife on the 23rd May, 1942. It was a specially endorsed writ, it was filed on the 21st May, 1942, and was made returnable for the 1st June, 1942 when the writ was so served, Isadore Leandro was not in Georgetown: he returned to Georgetown on Friday, the 29th May, 1942.

By power of attorney dated the 28th February, 1939, and registered in the Deeds Registry at Georgetown on the 16th October, 1939, as No. 39 of 1939, Handel Hector Griffiths appointed the said Isadore Leandro to represent him as his attorney not only as an individual, but also in his quality as the executor under the last Will and Testament of his late wife Millicent Griffiths, deceased.

This power of attorney would be automatically revoked by the death of Handel Hector Griffiths. Isadore Leandro does not state in his affidavit filed in support of the summons, when he last heard from Handel Hector Griffiths, but I understood counsel for the applicant, in the course of his argument, to say that Isadore Leandro last heard from Handel Hector Griffiths in the year 1939. Prior to the commencement of these proceedings the plaintiff (to quote the affidavit of his counsel filed the 24th July, 1942, for the purpose of putting all the facts before the Court) saw a paragraph appearing in an issue of the "Daily Chronicle" newspaper that the said Handel Hector Griffiths had died at Wrexham, Surrey, England, in November, 1938, (sic): further the plaintiff or his counsel had been informed that a relative of the said Handel Hector Griffiths had written the firm of Kings solicitors to say that her cousin had died and that she was making enquiries as to the nature of the property in which he had an interest in the Colony. The plaintiff relying on the paragraph in the "Daily Chronicle" newspaper and on the information about Kings solicitors being communicated with, instructed his counsel to write the Commissioner of Lands and Mines and counsel did so write, informing him on the 22nd May, 1941, that the said Handel Hector Griffiths was dead. In his affidavit Isadore Leandro stated that he was informed by Mr. H. C. B. Humphrys, solicitor, that he had received information from one of the relatives of H. H. Griffiths that the said H. H. Griffiths is deceased. The date of the receipt by Isadore Leandro of the information from Mr. H. C. B. Humphrys is not stated in the affidavit, but counsel for the applicant in the course of his argument, stated that it was sometime about April, 1942. Isadore Leandro stated in his

R. V. EVAN WONG v. I. LEANDRO.

affidavit that he had caused further enquiries to be made but he had up to the present, received no further confirmation thereof. He did not state what was the nature, nor what was the extent of these further enquiries, but, from the argument it does not seem that they were directed to obtaining confirmation from the country to which Handel Hector Griffiths belonged, and in which he is believed to have died. Isadore Leandro has not heard from Handel Hector Griffiths since 1939, and if there was any person in this Colony who ought to know (and whose duty it is to know) definitely whether Handel Hector Griffiths is dead, and the date of his death that person is Isadore Leandro. He, however, was quite content to carry on as attorney of Handel Hector Griffiths as if his constituent was alive; if, of course, the fact of his death became definitely established, Isadore Leandro would have to cease forthwith acting as attorney of Handel Hector Griffiths under the power of attorney executed on the 28th February, 1939.

The plaintiff held two promissory notes made by Millicent Griffiths whose executor was Handel Hector Griffiths whose attorney is (or was) Isadore Leandro. Isadore Leandro I gathered from the argument is in *de facto* control of certain property of the estate of Millicent Griffiths deceased, and this property is leased to one de Freitas. The plaintiff does not know, definitely, that Handel Hector Griffiths is dead, and he issued the writ in this action.

The writ was served, and Isadore Leandro, who ought to know whether his constituent is alive or dead, took it, on the 30th May, 1942, to Mr. A. G. King, solicitor and consulted him about the matter. Isadore Leandro does not tell Mr. A. G. King that the previous month Mr. H. C. B. Humphrys had told him that he had received information from one of the relatives of Handel Hector Griffiths that the said Handel Hector Griffiths is dead. The matter was called in the Bail Court on the 1st June, 1942, when it was postponed to the 8th June, 1942, in course of settlement. On the 1st June, 1942, Isadore Leandro did not cause the Court to be informed as to what Mr. H. C. B. Humphrys had told him in April, 1942. On the 8th June, 1942, the matter was adjourned by consent to the 29th June, 1942. On the 8th June, 1942, Isadore Leandro did not cause the Court to be informed as to the probability of the death of Handel Hector Griffiths. On the 29th June, 1942, judgment was entered in favour of the plaintiff in default of appearance of the defendant. On that day Isadore Leandro did not tell the Court that, from the information supplied to him by Mr. H. C. B. Humphrys, Handel Hector Griffiths was dead: that, if so, he Isadore Leandro was no longer his attorney; and that the writ was consequently not properly served.

The judgment by default was entered on the 8th July, 1942. On the 13th July, 1942 the plaintiff applied for a writ of execution,

R. V. EVAN WONG v. I. LEANDRO.

and on the 18th July, 1942, the summons herein was filed in which one of the grounds for asking the Court to set aside the judgment was stated to be "The said H. H. Griffiths is now deceased and was so at the time of the filing of the suit herein." However, on the hearing of this summons, counsel for Isadore Leandro declined to submit that Handel Hector Griffiths is dead, he preferred to rest his case on the submission that the plaintiff had stated to the Commissioner of the Lands and Mines on the 22nd May, 1941, that Handel Hector Griffiths is dead. In other words, Isadore Leandro wishes to continue acting as attorney under the power of attorney of the 28th February, 1939, as (so it is argued) he does not know of the death: but Isadore Leandro submits that the plaintiff is not entitled to treat him Isadore Leandro, as an attorney, as he, the plaintiff, said in 1941, that Griffiths is dead. Isadore Leandro, therefore, in plain language wishes to be in possession of the assets of the estate of Millicent Griffiths, deceased, but he does not wish to pay any of the debts of the said estate.

On the evidence, there is so much doubt as to Handel Hector Griffiths being alive, that there is considerable doubt in my mind as to whether, at the time of the commencement of this action, Isadore Leandro was in fact the attorney of Handel Hector Griffiths. I therefore set aside the judgment of the Court dated 29th June, 1942, and entered on the 8th July, 1942. It seems unlikely, but it may possibly be that further inquiries may show that Handel Hector Griffiths is still alive: and I therefore do not, at this stage, set aside the service of the writ nor the return of service. I have observed that, in the summons, the applicant only asked that the judgment be set aside.

The application by the plaintiff for final judgment in this matter will be set down for further consideration in the Bail Court on Monday, the 24th August, 1942. It is hoped that Isadore Leandro will immediately take proper steps to ascertain whether his constituent is dead, and, if so, to prove the fact of death to the Court beyond all doubt.

There remains the question of costs. Isadore Leandro should have informed the Court on the 1st June, 1942, of the probability, or the possibility, of Handel Hector Griffiths being dead. He failed to do so. Had he done so, the Court would have adjourned the hearing for inquiries to be made, and no further costs would have been incurred in these proceedings by the plaintiff until the result of those inquiries had been ascertained. The plaintiffs will therefore recover against Isadore Leandro in his own right his (the plaintiff's) costs of and incidental to this action incurred subsequent to the 1st June, 1942, his costs of and incidental to the request made the 13th July, 1942, for a writ of execution and his costs of and incidental to this summons and to this order.

Solicitor for plaintiff: *V. D. P. Woolford.*

S. SINGH v. W. A. JAUNDOO.
 SUKHPAUL SINGH, Plaintiff,
 v.
 WILLIAM A. JAUNDOO, Defendant.
 [1942. No. 212.—DEMERARA.]
 BEFORE DUKE, J. (ACTING): IN CHAMBERS.
 1942. JULY 27, 28.

Practice—Receiver and manager—Appointment of—When refused—Principles on which Court acts.

The Court refused to make an order for the appointment of a receiver where—

- (a) on the affidavits filed, the probability of the plaintiff succeeding in the action did not exceed the probability of the defendant succeeding;
- (b) the damage which would be suffered by the defendant as a result of the appointment of a receiver and manager would, if he succeeds in the action, be considerable, and the subsequent restoration of the business to the defendant would not afford adequate compensation to him;
- (c) the damage which might be suffered by the plaintiff as a result of a receiver and manager not being appointed, is not irreparable injury within the meaning of the decided cases;
- (d) the inconvenience to the defendant, if a receiver and manager is appointed, far exceeds the inconvenience to the plaintiff, if a receiver and manager is not appointed;
- (e) it would be a difficult matter to obtain, at an economic wage, a receiver and manager who would be honest and energetic, and approvable by the Court; and
- (f) it was not established that the defendant was not a suitable person to continue to carry on the business and to receive the incomings and pays the outgoings.

SUMMONS by the plaintiff for an injunction, and for the appointment of a receiver and manager.

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

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

Cur. adv. vult.

DUKE, J. (Ag.): This is a summons filed by the plaintiff for (a) an injunction restraining the defendant, his servants and/or agents from occupying and carrying on or entering upon the business and premises situate at Longden and Commerce Streets, Georgetown, known as the King George Boarding House, until after the trial of this action or until further order and (b) the appointment of a receiver and manager of the said business for the said period.

On the 23rd August, 1940, the plaintiff (whether for himself or for the defendant cannot at present be ascertained) purchased from one R. Sharma the stock in trade of the business known as the King George Boarding House for the sum of \$1,400. Possession of the business and effects thereof was delivered by R. Sharma on the 31st August, 1940.

The plaintiff states that he purchased the business and effects for himself, and that he appointed the defendant manager as from

S. SINGH v. W. A. JAUNDOO.

the 1st September, 1940, on the terms that the remuneration for his services would be 20 per centum of the profits in addition to free board and lodging. The defendant states that the plaintiff advanced the money for the purchase of the business, etc.; that the business belongs to him; and that he had agreed to repay to the plaintiff the sum of \$1,400 actually advanced by monthly instalments of \$50 each, with interest at the rate of 12 per centum per annum; and that the plaintiff had made advances to him (the defendant) amounting to \$132.94 in addition to the sum of \$1,400 advanced in the month of August, 1940. At the trial of this action the main issue to be determined by the trial judge would be whether the plaintiff purchased the stock in trade and business of the King George Boarding House for himself, or whether the purchase was effected, or must be deemed to have been effected, on behalf of the defendant.

On the 7th July, 1942, the plaintiff gave notice to the defendant that he must deliver up possession of the King George Boarding House to the plaintiff on or before the 10th July, 1942. The defendant refused to do so. On the 18th July, 1942, the plaintiff filed a writ against the defendant claiming (a) possession; (b) injunction; (c) accounts; (d) an order appointing a manager and receiver pending the determination of this action. The writ was served on the 18th July, 1942. The summons in this matter was filed on the 21st July, 1942. On the 24th July, 1942, the defendant entered appearance to the writ of summons, and filed an affidavit in opposition to the summons.

From the affidavits of the plaintiff and of the defendant and from the statements made by counsel in the course of their arguments, it would appear to be common ground—

- (a) that the defendant has been in possession of, and has managed, the King George Boarding House from the 1st September, 1940, up to the present time;
- (b) that the portion of the monthly profits retained by the defendant from time to time was never precisely 20 per centum of the net profits: and that it was never (according to statements rendered to the plaintiff by the defendant) more than \$17 per month;
- (c) that the portion of the monthly profits paid by the defendant to the plaintiff exceeded, on the average, \$50 per month; and on one occasion the defendant paid to the plaintiff the sum of \$100 out of \$111 profits stated by the defendant to have been made during the preceding month.

Counsel for the plaintiff has urged that as the stock in trade of the business consists entirely of movable property it would be an easy matter for the defendant to remove it. There is, however, nothing in the plaintiff's affidavit to indicate that the defendant has done any act either before or after the 10th July, 1942, from

S. SINGH v. W. A. JAUNDOO.

which it may reasonably be inferred or presumed that there is a probability, or even a possibility, of any such removal being made or contemplated by the defendant. The plaintiff has, it is true, stated that the defendant is poor: but the circumstance that a man is poor is no indication that he is dishonest, or is likely to be. If the plaintiff thinks that, nevertheless, there is a possibility of such removal by the defendant, he cannot reasonably complain if I say that, because the plaintiff is a man of means, there is a possibility of his seeking to remove the stock in trade of the King George Boarding House and also a possibility of the plaintiff seeking to have the tenancy of the Boarding House determined, in order that he (the plaintiff) might without recourse to a trial of this action, thereby obtain possession, and the dispossession of the defendant. I will therefore grant an injunction against both the plaintiff and the defendant, the object of which will be to preserve the stock in trade and business of the King George Boarding House until the hearing and determination of this action.

The plaintiff has not alleged in his affidavit that the defendant was not keen or energetic or that he took an insufficient interest in his management of the King George Boarding House. Counsel for the plaintiff, however, in the course of his argument stated that the defendant had not accounted to the plaintiff for all the profits made; and that in some monthly returns handed by the defendant to the plaintiff, the expenditure was stated at a higher figure than it should be, and counsel submitted that the plaintiff will suffer irreparable loss unless an order is made for the appointment of a receiver and manager. The defendant has stated that he has worked exceedingly hard to build up the clientele of the boarding house, and counsel for the defendant has urged that the defendant will suffer irreparable loss if an order is made for the appointment of a receiver and manager.

The plaintiff has requested that one Bharrat Singh, who he says is a landed proprietor and has considerable experience in the nature of the business of a boarding house keeper, be appointed as receiver and manager. The defendant objects on the ground that Bharrat Singh is the brother-in-law of the plaintiff and carries on a rival boarding house in Regent Street, Georgetown, known as the Premier Boarding House. If an order were made for the appointment of a receiver and manager, I could not possibly appoint Bharrat Singh to that office.

If I were to make an order for the appointment of a receiver and manager, and the incomings of the boarding house business were to drop or the outgoings increased, then the defendant, if he is successful in this action, would be very much damnified as the sum of \$50 which he is required (according to his case) to pay to the plaintiff every month is obtained by him out of the profits of the business. If the plaintiff is successful in this action, he would also be damnified, as (according to his case) he is to receive

S. SINGH v. W. A. JAUNDOO.

80 per centum of the net profits of the business every month. In such event, however, he would be the author of his own damage: and, further, although he may be financially able to lose money, he does not suggest that the defendant is in the same situation.

I am not satisfied that it would be possible to obtain, for a remuneration which would enable the plaintiff to receive from the defendant or the defendant to pay to the plaintiff as much as has hitherto been received and paid, the services of a receiver and manager who would not only be honest, but would also be energetic and interested enough to keep the incomings of the business, and the expenditure thereof, at present level. As far as the Court knows at the present moment, the defendant, after paying expenses and the sum which he alleges he was required to repay the plaintiff, did not keep for his own use more than the sum of \$17 in any one month.

On the affidavits, it seems to me that the defendant would be a suitable person to appoint as receiver and manager, if I were to make an order for such appointment. Because, if the defendant's story is true, he is definitely interested in seeing that the boarding house business flourishes and does not decrease; this was so even before the commencement of this action; is still so, and will continue to be so, if the defendant is successful in this action.

On the affidavits filed, I am unable to say that the probability of the plaintiff succeeding in this action exceeds the probability of the defendant succeeding.

I should be unwilling, except under the most impelling circumstances, to make an order for the appointment of a receiver and manager of a business as the King George Boarding House, as the receiver and manager would have to account to the Court for his incomings and outgoings, and the Court would prefer, if possible, not to be too intimately associated with the details of management of a business like the King George Boarding House.

I refuse to make an order for the appointment of a receiver, because:—

- (a) on the affidavits filed, I am unable to say that the probability of the plaintiff succeeding in this case exceeds the probability of the defendant succeeding;
- (b) the damage which would be suffered by the defendant as a result of the appointment of a receiver and manager would, if he succeeds in this action, be considerable, and the subsequent restoration of the business to the defendant would not afford adequate compensation to him;
- (c) the damage which might be suffered by the plaintiff as a result of a receiver and manager not being appointed, is not irreparable injury within the meaning of the decided cases;
- (d) the inconvenience to the defendant, if a receiver and manager is appointed, far exceeds the inconvenience to the plaintiff, if a receiver and manager is not appointed;

S. SINGH v. W. A. JAUNDOO.

- (e) it would be a difficult matter to obtain, at an economic wage, a receiver and manager who would be honest, and energetic, and approvable by the Court: and
- (f) it is not established that the defendant is not a suitable person to continue to carry on the business and to receive the incomings and pay the outgoings.

The defendant will therefore, until the hearing and determination of this action, remain in possession of the premises and business known as the King George Boarding House.

In his affidavit he states that there was an agreement where-under he agreed to pay the plaintiff the sum of \$50 per month. He is therefore directed to pay into the Registry of Court a sum of not less than \$50 per month within 15 days after the end of every calendar month, until the balance of the sum of \$1,532.94 (referred to in paragraph 7 of the affidavit of the defendant filed herein the 24th July, 1942) presently remaining due has been fully paid and satisfied in accordance with the terms referred to in paragraph 3 of the defendant's affidavit, or until the hearing and determination of this action.

The Order of the Court will be as follows:—(1) An injunction is granted restraining the plaintiff and the defendant from alienating, mortgaging or leasing the stock in trade or other equipment or any part thereof of the King George Boarding House carried on at the corner of Longden and Commerce Streets, Georgetown, (2) An injunction is granted restraining the plaintiff and the defendant from giving notice to quit to the landlord in respect of the premises on which the said boarding house is carried on, and from doing anything to induce the landlord to give notice to quit or which may have that effect; (3) An injunction is granted restraining the defendant his servants and agents from parting with the possession of the stock in trade or other equipment of the said boarding house; (4) An injunction is hereby granted restraining the plaintiff, his servants and agents and the defendant, his servants and agents from removing or permitting the removal from the King George Boarding House of the stock in trade or other equipment thereof or of any part thereof; (5) The defendant is directed to pay into the Registry of Court, to abide the further order of the Court within 15 days after the end of every calendar month a sum of not less than \$50 a month until the balance of the sum of \$1,532.94 presently remaining due by the defendant to the plaintiff, as the defendant states, has been fully paid and satisfied in accordance with the terms specified by the defendant in paragraph 3 of his affidavit or until the hearing and determination of this action, and the Registrar of the Supreme Court is directed to charge a fee of not more than \$2 in respect of the execution of all the acts of deposit of money under this clause of the order; (6) Costs of this application to be costs in the cause. Summons certified fit for counsel; (7) Liberty to apply.

Solicitors: *T. A. Morris; F. Dias*, O.B.E.

Re PLANTATION MARYVILLE ESTATES, LTD.*Re* PLANTATION MARYVILLE ESTATES, LIMITED.

[1942. No. 220.—DEMERARA.]

BEFORE DUKE, J., (ACTING): IN CHAMBERS.

1942. JULY 27, 29.

Company—Voluntary winding-up—Stay of all proceedings in—With a view to reconstruction of company—Consent of only creditor filed—Just and beneficial—Companies (Consolidation) Ordinance, cap, 178, ss. 134, 185.—Application should be made by way of summons.

All proceedings in the voluntary winding-up of a company stayed with a view to the reconstruction of the company, where the only creditor of the company had consented and, in the opinion of the Court, it was just and beneficial that the order should be made.

An application made under the authority of section 185 of the Companies (Consolidation) Ordinance, cap. 187 should be made by summons in accordance with rule (1) (h) of Order XL (C) of the Rules of Court, 1900 as enacted in 1932, as no procedure is provided in the Ordinance for making the application.

C. V. Wight, for the petitioner.

Cur. adv. vult.

DUKE, J. (Acting): This is a petition by the liquidator of Plantation Maryville Estates, Limited, in voluntary liquidation, for an order that all proceedings in the voluntary winding-up of the company should be stayed, with a view to a reconstruction of the company.

The application is made under the authority of the Companies (Consolidation) Ordinance, Cap. 178 and as no procedure is provided by the Ordinance for making the application, it should have been made by summons in accordance with rule 13 (1) (h) of Order XL (C) of the Rules of Court, 1900, as enacted in 1932.

Section 134 of the Companies (Consolidation) Ordinance, Cap. 178, which relates to companies wound-up by the Court, provides that “the Court may at any time after an order for winding-up has been made, on the application of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on any terms and conditions the Court thinks fit.” Section 185 (1) provides that “where a company is being wound up voluntarily, the liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding-up, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court.” Section 185 (2) provides that “the Court, if satisfied that the determination of the question or the required exercise of the power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the

Re PLANTATION MARYVILLE ESTATES, LTD.

Court thinks fit, or may make any other order on the application the Court thinks fit.”

In *Re The Steamship “Titian” Company, Limited*, (1885) 58 Law Times 178, 179, Chitty, J., was of opinion that on the true construction of sections 89 and 138 of the Companies Act, 1862, (which correspond with sections 134 and 185 of the Companies (Consolidation) Ordinance, cap. 178) the Court had jurisdiction to make an order staying all the proceedings in a voluntary winding-up with a view to the reconstruction of the company.

Acting under the authority of this decision, and being satisfied that the exercise of the power to stay all proceedings in the present winding-up will be just and beneficial and that the only creditor of the company has consented to the application being made, I hereby grant the application with costs to be paid out of assets of the company.

Application granted.

Solicitor: *Carlos Gomes.*

J. P. SANTOS & Co., LTD. v. W. C. TIAM FOOK.

J. P. SANTOS AND Co., LTD. Plaintiffs,

v.

WILLIAM CHUNG TIAM FOOK, IN HIS CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF MARIA CHUNG TIAM FOOK, DECEASED, Defendant.

[1940. No. 281.—DEMERARA.]

BEFORE DUKE, J., (ACTING).

1942. MAY 11, 12, 13, 18, 29; JULY 29.

Executor and administrator—Furniture and other household effects of deceased—Sale of—By administrator to himself—Without leave of Court—Sale not cancelled—If leave applied for, price which Court would have approved—Treated as a sale at that price.

Executor and administrator—Movable property of deceased—Sale of—By private treaty—Without leave of Registrar—Deceased Persons Estates' Administration Ordinance, cap. 149, s. 41, proviso (a)—If price fair and reasonable, Court will confirm sale—If price not fair and reasonable—Sale deemed to have been effected at fair and reasonable price—In special cases sale will be cancelled—If circumstances so warrant.

Executor and administrator—Debt of deceased—Action for—Defence—Plene administravit—Movable property sold—Without leave of Registrar or at under-value—Evidence—Admissibility of.

Costs—Administrator—Action against—Ought not to have been defended—Costs of action—Payable by administrator—Out of his own property.

Where an administrator, without leave of the Court, had sold to himself furniture and other household effects of the deceased, the Court did not cancel the sale, but treated the matter as if the Court had granted him leave to sell to himself at a price which, in the circumstances, it was considered the Court would have approved, had application for leave been duly made.

Where an administrator, without leave of the Registrar of the Supreme Court under proviso (a) to section 41 of the Deceased Persons Estates' Administration Ordinance, cap. 149, has sold movable property of the deceased by private treaty, the following principles should be applied: (a) if the price obtained was fair and reasonable, the Court would confirm the sale; (b) if the price obtained was not fair and reasonable, the Court would deem the sale to have been effected at a price which, in all the circumstances of the case, the Court considers to be fair and reasonable; and (c) in special cases, and where the circumstances so warrant, the Court may, however, declare the sale to be null and void.

Where in an action brought by a creditor against the executor or the administrator of the estate of a deceased person, the executor or administrator pleads that he has fully administered the estate and that he has no money in his hands to satisfy the debt, the creditor is entitled to bring to the notice of the Court that the executor or the administrator, as the case may be, has sold movable property without leave of the Registrar; and also, if so be the case, that the property was sold at a gross under-value.

Abdool Kadeer v. Moore, ex parte Adams et al, (1928) L. R. B. G. 35 considered.

The plaintiffs brought an action against the defendant, in his capacity as administrator of the estate of a deceased person for the price of goods sold and delivered to the deceased. The defendant pleaded *plene administravit*. At the trial, the Court found that the administrator, at the time of the commencement of the action, either had or ought to have had in his hands a sum of money more than sufficient to satisfy the claim of the plaintiffs. Counsel for the defendant submitted that as there was evidence that there were other creditors the plaintiffs should only be given judgment for a proportionate part of the moneys found to be in the hands of the administrator.

Held (1) that the Court was not concerned about creditors who prefer to sleep on their rights, and not to enforce them;

J. P. SANTOS & Co., LTD. v. W. C TIAM FOOK

(2) that judgment must be entered for the plaintiffs for the full amount of their claim against the defendant in his capacity as administrator of the estate of the deceased, with a finding of the Court that, at the time of the institution of the action, the defendant had, or ought to have had, in his hands more than sufficient money to satisfy the plaintiffs' claim.

Where an administrator of the estate of a deceased person ought not to have defended an action brought against him, the Court ordered that his costs of defending the action, and the plaintiffs' costs, should be paid by him out of his own property.

ACTION by the plaintiffs against the defendant in his capacity as the administrator of the estate of his deceased wife, for goods sold and delivered to his deceased wife Maria Chung Tiam Fook.

L. M. F. Cabral, for the plaintiffs.

J. A. Luckhoo, K.C., and *C. Lloyd Luckhoo*, for the defendant.

Cur. adv. vult.

DUKE, J. (Acting): The plaintiffs claim from the defendant in his capacity as administrator of the estate of Maria Chung Tiam Fook, deceased, the sum of \$852.07 being the balance of an account for the price of goods sold and delivered, and moneys paid and advanced, from the 4th day of August, 1936, to the 31st day of May, 1938.

Maria Chung Tiam Fook died on the 13th October, 1938, and Letters of Administration in respect of her estate were granted in favour of her surviving spouse, the defendant William Chung Tiam Fook after a bond, with a surety had been entered into by the defendant on the 19th December, 1938, in the sum of \$6,000.

The deceased used to carry on a spirit shop business at the Shamrock spirit shop, Lamaha and Light Streets, Alberttown; and she had trading shops in the Mazaruni mining district at Eping, at Perenong, at Tamakay and at Honey Camp.

In the estate duty declaration and inventory of the estate of the deceased (No. 546 of the 15th December, 1938), the assets were stated by the defendant to be—

- (a) 20 Pln. Versailles and Schoon Ord shares valued by Mr. Percy C. Wight in the sum of \$160.
- (b) Cash at Bankers \$14.66;
- (c) Money out on promissory notes, \$1,200;
- (d) Book debts of Shamrock spirit shop \$263.45, and of Eping Shop \$731.96, together totalling \$995.41;
- (e) Judgment against Aaron Seaforth on the 11th August, 1938, \$242.61;
- (f) Household goods \$1,974 as valued by Mr. J. G. Teixeira, jewels \$1,130 as valued by Mr. Percy C. Wight, aggregating in value the sum of \$3,104;
- (g) Stock-in-trade of Shamrock spirit shop \$150, and of the trading shops in the interior \$460, together totalling \$610;
- (h) Five galvanised shop buildings, with four logies situate

J. P. SANTOS & Co., LTD. v. W. C. TIAM FOOK.

at Eping, Perenong, Tamakay and Honey Camp, valued in all at \$220;

- (i) One undivided half of water or mud lot 50, section A, Sisters Village, West Bank, Demerara, with one undivided half in the buildings, valued at \$400.

The deceased was heavily indebted to merchants in respect of goods sold and delivered and moneys paid and advanced. It appears from the papers annexed to the inventory, and from the evidence of Mr. J. I. de Aguiar, managing director of J. P. Santos & Co., Ltd, one of the principal creditors, that the creditors agreed to waive 50 per centum of the amounts due to them, and, as a result, the liabilities of the estate were reduced to \$4,852.78. The funeral expenses amounted to the sum of \$245.98.

The declaration filed on the 15th December, 1938, discloses:—

Assets	...	... \$6,946 68
Deductions	...	... <u>5,098 76</u>
Net value of estate	...	... <u>\$1,847 92</u>

Estate duty amounting to \$18.48 was paid by the defendant on the net value of the estate. No corrective declaration showing that the value of the assets was less than was estimated on the 15th December, 1938, has been filed.

At the time of the death of the deceased, she was indebted to the plaintiffs in the sum of \$3,666.91. Fifty per centum of this sum was waived, so that the indebtedness of the estate of the deceased was reduced to the sum of \$1,833.45. The defendant made payments as follows:—

18. 1.1939	...	...	\$500 00
13. 5.1939	...	...	233 38
4. 8.1939	...	...	148 00
12. 1.1940	...	...	<u>100 00</u>
Total payments	...	...	<u>\$981 38</u>

The writ in this action was filed on the 11th October, 1940. On the 25th October, 1940, leave to defend was granted.

On the 1st November, 1940, the defendant in his capacity as administrator of the estate of Maria Chung Tiam Fook deceased, filed in the Registry of Court an account of his administration of the estate. It was stated in the affidavit verifying the account, that the account was not a final account. Section 45 (2) of the Deceased Persons Estates Administration Ordinance, cap, 149, provides that if the account is not the final account it shall set forth all debts due to the estate and outstanding and all property, goods and effects, still unsold and unrealised, and the reason why they have not been collected, sold or realised, as the case may be. The defendant did not comply with the provisions of this subsection. No further account has been filed by the

J. P. SANTOS & Co., LTD. v. W. C. TIAM FOOK.

defendant in the Registry of Court. A further account should have been filed on the 1st November, 1941.

The account filed by the defendant discloses that on the 1st November, 1940, there was a sum of \$42.22, due to him by the estate of the deceased, The payments and receipts were stated to be as follows:—

Payments	...	... \$4,127 38
Receipts	...	... <u>4,085 06</u>
Deficiency	...	... \$ <u>42 22</u>

The defence in this action was filed on the 9th May, 1941. The defendant admitted that the estate of Maria Chung Tiam Fook, of which he is the administrator, is indebted to the plaintiffs in the sum of \$852.07 as claimed in the writ filed in this action. And he pleaded that he had fully administered all the personal estate and effects of the said Maria Chung Tiam Fook which had ever come to his hands as administrator to be administered; and that he had not, at the commencement of this action, or at any time afterwards nor did he then (that is, on the 9th May, 1941), have any personal estate or effects of the said deceased in his hands as administrator to be administered; and that he the defendant had a good defence to the action on the ground of *plene administravit*. It, therefore, appeared from the defence that on the 9th May, 1941, the estate of the deceased had already been fully administered by the defendant. The defendant, however, cannot say that he did not know of the claim of the plaintiff until after the estate of the deceased had been fully administered. He was well aware of the nature, and its extent, before Letters of Administration were issued in his favour.

In their Reply, the plaintiffs pleaded that there ought to have been at the time of the issue of the writ in this action sufficient assets of the estate of the said Maria Chung Tiam Fook, deceased available to pay the debt of \$852.07 due to them. The plaintiffs gave notice to the defendant that they would rely upon whatever assets of the said estate are proved at the trial of this action, from the defendant's accounts or otherwise, to have existed, or ought to have existed, in the defendant's hands at any time or times up to and after the delivery of the defence in this action. The plaintiffs, in their reply, also denied that the defendant had lawfully administered the estate of the deceased as regards the assets exhausted.

The defendant has deposed that since the filing of his defence on the 9th May, 1941 he has collected the sum of \$90—\$50 from Avis Parris on account of a promissory note made by him in favour of the deceased, and \$40 from John Hyndman in respect of a similar promissory note. These promissory notes were not mentioned nor referred to in the estate duty inventory. The only promissory note therein specified was one for \$1,200 made

J. P. SANTOS & Co., LTD. v. W. C. TIAM FOOK.

by the defendant's father Peter Chung Tiam Fook, on the 30th September, 1930 on which nothing has ever been paid, and as to which the defendant deposed that he doubted whether it was worth anything. At the trial of this action the defendant produced 117 promissory notes (including the one made by Peter Chung Tiam Fook) which he said had not been paid. Endorsements on the backs of some of these notes show that the following payments were made after the death of Maria Chung Tiam Fook on the 13th October, 1938:—

C. Weeks	...	... \$ 2
J. Sandiford	...	... <u>7</u>
	Total	<u>\$ 9</u>

The defendant has asserted that no portion of the book debts relating to the Shamrock Spirit Shop, \$263.45 or of the book debts relating to the shops in the Mazaruni district, \$731.96, has been collected. I do not believe him. The plaintiffs called evidence to show that two amounts of \$1.40 and \$3.41 (totalling \$4.81) due to the Shamrock Spirit Shop were paid off, but I am unable to determine precisely what other amounts due to the Shamrock Spirit Shop were paid off. The Balance Sheet of the Shamrock Spirit shop shows that on the 31st December, 1938 the book debts amount to \$189.86, that is to say, to \$73.59 less than they were at the time of the death of Maria Chung Tiam Fook. I therefore assume that, between the 13th October, 1938 and the 31st December, 1938 the defendant received payment of book debts amounting to, at least, the sum of \$73.59, due to the Shamrock Spirit Shop. The question of the book debts relating to shops in the interior will be dealt with later.

The household goods and effects of the deceased were valued by Mr. J. G. Teixeira in the sum of \$1,974; and an itemised valuation of the articles is annexed to the estate duty inventory. Among other things, a Sparton 5-valve radio which was sold at public auction as the property of the estate was not included in the articles so valued, neither was it included in the estate duty inventory. There were other articles omitted from the estate duty inventory and not valued by Mr. Teixeira which were sold by private treaty: these will be referred to later.

The defendant advertised the furniture and household effects of the deceased for sale by public auction. The auction sale took place on the 6th March, 1939, nearly three months after Mr. Teixeira had valued, for estate duty purposes, the furniture and household effects of the deceased.

There were 81 items in Mr. Teixeira's valuation. The five items (1) brass ornaments, \$25; (2) glass and E.P. ware \$25; (3) crockery, \$20; (4) cutlery, \$12; and (5) pantry and kitchen utensils \$10, were valued in the aggregate in the sum of \$92. The brass ornaments, glass and E.P. ware, crockery, cutlery and pantry and kitchen utensils which were sold at the auction

J. P. SANTOS & Co., LTD. v. W. C. TIAM FOOK.

sale realised a gross sum of \$189.25, more than double the amount of the valuation; and all the articles were not sold at public auction.

Fourteen tables were included in Mr. Teixeira's valuation, and were valued in the sum of \$53; eight tables were sold at public auction for a total sum of \$32.75. Six tables ought to have been left over, valued at, approximately, \$24.

The following 15 chairs were sold at public auction:—

	<i>Valuation.</i>	<i>Auction Sale Price.</i>
1 corner chair (2 for \$3)	\$ 1 50	... \$ 8 00
8 dining room chairs	20 00	... 25 75
1 wicker rocker	2 00	... 1 75
1 B.W. stool	2 00	... 3 50
2 B.W. chairs	2 00	... 2 00
<u>2 B.W. chairs (4 for \$3)</u>	<u>1 50</u>	... <u>4 00</u>
<u>15</u>	<u>\$29 00</u>	<u>\$45 00</u>

The following 9 chairs were not sold at public auction:—

	<i>Valuation.</i>
1 corner chair (2 for \$3)	... \$ 1 50
1 Berbice chair	... 10 00
2 C.W. rockers	... 15 00
2 Canadian rockers	... 8 00
1 B.W. rocker	... 3 00
<u>2 chairs (4 for \$3)</u>	<u>... 1 50</u>
<u>9 chairs</u>	<u>\$39 00</u>

These chairs, in view of what was realised at the sale for other chairs, must be considered as being worth at least the sum of \$39.

The articles sold at public auction, other than those previously mentioned, were as follows:—

<i>Number of item in valuation.</i>	<i>Valuation.</i>	<i>Auction Sale Price.</i>
10. One Wall Mirror	\$6	... \$ 6 75
11. 3 carved pictures (Part of a "lot" valued at \$30)		7 50
15. 1 mirrored sideboard	15	... 20 00
18. 1 cedar china cabinet	15	... 20 00
20. Mahogany cake stand	8	... 1 50
25. 8-day clock	6	... 10 50
45. 1 book case	2	... 3 50
49. 1 3-mirrored Vanity case	40	... 40 00
52. 1 towel horse (2 for \$2)		... 1 25
59. 1 Reading Lamp	2	... 2 25
62. 1 M.T. washstand	15	... 10 00
68. 1 Reading Lamp	2	... <u>6 75</u>
		\$130 25
Sparton 5-valve radio	not valued	... 33 00
Carved cigarette box	not valued	... 1 50
Silver cigarette box	not valued	... <u>4 00</u>
		<u>\$168 75</u>

The gross amount realised at the auction sale was \$435.75, composed of the sums of \$189.25, \$32.75, \$45 and \$168.75 previously mentioned.

The net sum realised from the auction sale was \$313.75.

J. P. SANTOS & Co., LTD. v. W. C. TIAM FOOK.

The following articles, which were included in the estate duty inventory, were not sold at the auction sale:—

<i>Number of item in valuation.</i>	<i>Highest bid.</i>	<i>Valuation.</i>
1. Strohenger Player Piano	...	\$ 450 00
2. Lot Pianola Rolls	...	30 00
3. One Large centre carpet	\$ 15 00	25 00
4. Three-piece drawing room suite	...	100 00
5. 6, 7, Six tables (8 sold out of 14)		
13, 19, 31, Six tables (8 sold out of 14)		
34, 35, 42, Six tables (8 sold out of 14)	...	24 00
56, 75, 76, Six tables (8 sold out of 14)		
8. One corner chair	...	1 50
9. Oxydised floor lamp	12 50	15 00
11. Lot pictures (part sold for \$7.50)	...	22 50
12. Brass ornaments		
13. Two waggonettes	7 50	6 00
17. One tea waggon	...	2 00
21. One music cabinet	8 00	8 00
22. Lot Glass and E.P. ware		
23. Lot crockery (part sold)		
24. Lot cutlery		
26. Pantry and kitchen utensils (part sold)		
27. Mirrored hatstand	9 50	10 00
28. Berbice chair	8 00	10 00
30. B.W. Rocker	...	4 00
32. Two C.W. Rockers	...	15 00
33. Two Canadian Rockers	6 00	8 00
36. One small carpet	7 00	8 00
37. Two rugs	...	4 00
38. One meat safe	8 00	10 00
39. One Medicine Chest	...	8 00
40. One Frigidaire	...	90 00
41. One Royal typewriter	...	30 00
43. One writing desk	...	5 00
44. One press	...	8 00
46. Large Mahogany M/wardrobe	...	120 00
47. Large cedar wardrobe	50 00	70 00
48. M.T. dressing case	...	50 00
50. M.T. washstand and toiletware 3 00 (T.W.)	...	20 00
51. Double bedstead complete	25 00	40 00
52. One towel rack (1 sold)	...	1 00
54. One Chesterfield	10 00	30 00
55. One writing desk	...	12 00
57. One B.W. rocker	...	3 00
60. One M.T. dressing case	26 00	35 00
61. One Mirrored wardrobe	...	40 00
63. Two Simmons bedsteads complete	\$45, one only	70 00
64. Two Clothes Horses	...	4 00
65. One Commode	7 00	8 00
67. One Singer treadle machine	105 00	150 00
69. One dressing case	21 00	30 00
70. One M.T. washstand	...	15 00
71. One Gent's wardrobe	...	40 00
72. One Simmons Bedstead complete	...	20 00
73. One Cot complete	...	12 00
74. One Reading Lamp	...	2 00
77. One book stand	3 00	2 00
78. 2 chairs (4 for \$3)	...	1 50
79. One hat rack	...	3 00
80. One wardrobe	...	20 00
81. One Clothes Horse	...	2 00
		<u>\$1,694 50</u>

J. P. SANTOS & Co., LTD. v. W. C. TIAM FOOK.

The defendant stated in evidence that favourable prices were not being realised at the auction sale, and that he therefore decided to sell the remaining furniture and household effects by private treaty, and thus save the commission and expenses of the auctioneer.

Furniture and other household effects were sold by private treaty from the 3rd to the 11th March, 1939, and on the 27th and 28th June, 1939. In June baskets of plants, were sold to the value of \$10. The defendant stated in evidence that the furniture and other household effects realised the sum of \$650: a perusal of the record of sales kept by the defendant and produced by him in evidence shows that the said prices amounted to \$670.37. The defendant has only accounted for the sum of \$650.

He therefore has in his hand the sum of \$20.37.

The following articles sold by private treaty appear to have been included in the estate duty declaration:—

Number of item in Valuation

4. Three-piece drawing room suite	...	\$100 00
5. 6, 7, 13, 19, 31, 34, 35, 42, 56, 75 and 76, Four tables	...	23 00
8. Mahogany chair	...	3 50
11. Picture	...	2 50
12. Brassware	...	26 90
22. Glass and E.P. ware	...	7 71
26. Pantry and Kitchen utensils	...	13 10
27. Mirrored hatstand	...	9 00
38. Meat Safe ...	...	9 00
40. Frigidaire	...	85 00
41. Royal typewriter	...	30 00
47. Mirrored wardrobe	...	70 00
50. Toilet ware	...	3 00
50. One M.T. washstand	...	12 00
60. One M.T. mirrored dressing case	...	34 00
61. One Mirrored wardrobe	...	36 00
67. One Singer Treadle Machine	...	100 00
69. One Dressing case	...	24 00
74. One Reading Lamp	...	<u>2 00</u>
	Total	<u>\$590 71</u>

The sale price of items (27), (38), (40), (41), (47), (50), (60), (61), (67), (69) and (74) was \$414, and they were valued at \$482, that is to say, they were valued at \$68 more than the selling price. If they had been sold at public auction and had realised a sum not exceeding, and not less than, the amount of the valuation, the auctioneer's commission and expenses, which are roughly 15 per centum, would have been \$72.30, that is to say, more than \$68.

The following articles were sold by private treaty for \$79.66, but it does not seem that they were included in the estate duty declaration and inventory:—

J. P. SANTOS & Co., LTD. v. W. C. TIAM FOOK.

China vase	...	\$ 1 75
Hat stand	...	6 00
Mahogany cake stand	...	3 75
Venetian blinds	...	23 00
Plants	...	11 50
Table cloth, guest towels, bed-spreads, dress lengths, ladies' dresses, tea cloth	...	<u>33 66</u>
		Total <u>\$79 66</u>

The defendant deposed in evidence that he took over, at the sum of \$350, all the furniture and other household effects which remained unsold after the auction sale, and the sales by private treaty, had been concluded. He said that the date of the taking over was the 13th July 1939. In answer to the court he specified the articles taken over as hereunder:—

<i>Number of item in valuation.</i>		<i>Valuation.</i>
1. Strohmenger flayer Piano	...	\$450 00
2. Lot Pianola Rolls	...	30 00
3. One large centre carpet	...	25 00
16. One waggonette	...	3 00
24. Some cutlery, about \$6 worth	...	6 00
26. Some kitchen utensils about \$10 worth	...	10 00
36. One small carpet	...	8 00
37. Three rugs	...	4 00
38. One meat safe (there were two meat safes)	...	10 00
46. Large Mahogany M/wardrobe	...	120 00
48. M.T. dressing case	...	<u>50 00</u>
	Total	<u>\$686 00</u>

A comparison between the articles unsold at the auction sale, and the articles sold by private treaty shows, however, that the defendant has entirely forgotten that three years ago he took over the following, among other, items:—

1. Glass ware.
2. E.P. ware.
3. Crabwood dinner waggon with cupboard.
4. English music cabinet.
5. Mahogany waiter and other waiters.
6. Crabwood trolley.
7. Pictures.
8. Electric standing lamp.
9. Piano stools and music stand.
10. Tables.
11. Canadian rockers.
12. Double bedsteads complete.
13. Bedroom sofa.
14. Medicine press.
15. Commode.
16. Cot complete.
17. Book stand.
18. Writing desks.
19. M.T. wash stand; and
20. Gent's wardrobe.

The defendant as administrator did not apply for, or obtain, the leave of the Court to sell to himself in his own right for the sum of \$350 the unsold furniture and other household effects of

J. P. SANTOS & Co., LTD. v. W. C. TIAM FOOK.

the deceased. He has been in possession of these articles for the past 3 years, their value may have considerably depreciated, and some of the articles may not now be in existence. It may, therefore, be beneficial to the defendant to cancel the sale: and, in such event, he would be profiting by his own wrong. I am inclined to think that leave would have been granted by the Court to effect the sale which was in fact made, but not for the sum of \$350: it does not appear likely that the Court would have approved of a sum of less than \$650. I shall therefore treat this matter as if the Court had granted leave to the administrator to sell to William Chung Tiam Fook in his own right, for the sum of \$650, the furniture and other household effects of the deceased which remained unsold on the 13th July, 1939, As the defendant has only accounted for \$350 he must be deemed to have the sum of \$300 in his hands for the estate in respect of this transaction.

In March and April, 1942 the defendant sold, for \$39, certain household effects which, in the lifetime of the defendant's wife, had belonged to her. In view of the Court's approval of the sale *nunc pro tunc* (at the present time, for the 13th July, 1939) those articles must be considered as the property of the defendant in his own right.

The defendant has deposed that he received the sum of \$925.40 and no more, from the sale of the jewellery of the deceased. He has produced a book kept by himself, showing the following entries:—

17. 3.1939 To jewellery sold	...	\$ 279 00
22. 3.1939 To jewellery sold	...	78 40
10. 5.1939 To amount of jewellery sold	...	360 00
10. 8.1939 To jewellery sold	...	140 00
13.10.1939 To jewellery sold	...	60 00
20. 1.1910 To jewellery sold	...	<u>8 00</u>
Total	...	<u>\$ 925 40</u>

Included among the jewellery of the deceased there were a 3-stone diamond ring which was valued by Mr. Percy C. Wight, at \$400, and a diamond and sapphire ring which Mr. Percy C. Wight valued at \$250. Mr. Wight stated that the values placed by him were conservative, and minimum sale values, and that he would have been prepared to buy the jewellery at the prices at which he valued it. The defendant asserts that he sold the 3-stone diamond ring for \$100 to one Mrs. Low of George Street, the wife of some one who he thinks is engaged in the wood business; and that he sold the diamond and sapphire ring to one Mr. Bayley, an American employed at Air Base at Hyde Park for the sum of \$40. From the book produced by the defendant which he said over and over again that he wrote up as and when transactions took place, no one of these two sales, if they ever did take place, could have been effected later than the 13th October, 1939, and it was conceded by counsel for the defendant that there was no American Air Base at Hyde Park at

that time. If the \$250 diamond and sapphire ring was really sold for \$100 to an American at the Hyde Park Air Base, then the sale took place at a time subsequent to October, 1939, and there is no record of it in the defendant's book of account. The defendant has brought no evidence to corroborate his remarkable story that he sold a \$400 diamond ring, for \$100, and no explanation has been offered as to why the purchaser has not been called as a witness on his behalf. The defendant did not obtain, under proviso (a) to section 41 of the Deceased Persons Estates' Administration Ordinance, cap. 149 leave from the Registrar of the Supreme Court to sell these two rings, by private treaty, for the respective sums of \$100 and \$40. The plaintiffs do not know where the \$400 3-stone diamond ring and the \$250 diamond and sapphire ring are at present: consequently an order setting aside the sales would be of no material value to them, as they would be unable to levy execution on the rings. They, however, ask that the defendant be deemed to have sold the rings at their proper value. No executor or administrator is at liberty to make gifts of property forming part of the estate of a deceased person if those gifts would tend to be prejudicial to the interests of creditors. The plaintiffs are creditors of the estate of the deceased. They agreed to accept 50 per centum of the debt in full satisfaction and the 50 per centum has not been paid, although the deceased died nearly 4 years ago. The defendant was not, in those circumstances, entitled to make gifts of the assets of the deceased, as he certainly did when he sold (as he alleges) for \$140, two rings whose minimum sale price was \$650.

In *Abdool Kadeer v. Moore, ex parte Adams et al* (1928) L.R.B.G. 35 an executor had sold movable property (buildings) without the leave of the Registrar of the Supreme Court, a creditor of the deceased who had obtained judgment levied execution on the buildings, and it was urged on behalf of the judgement creditor that the sale, having taken place without the leave of the Registrar, was null and void. Douglass, J. however, held that the Court had power to confirm the sales, and, as the sales were genuine, they would be confirmed. In that case it was not proved that the sales were at a gross under value, and in that case the parties were the judgment creditor on the one hand, and the persons who purchased the buildings from the executor on the other hand. In this action the sales were at a gross under value, and the parties are a creditor and the executor. In my opinion, where in an action brought by a creditor against the executor or the administrator of a deceased person, the executor or the administrator pleads that he has fully administered the estate and that he has no money in his hands to satisfy the debt, the creditor is entitled to bring to the notice of the Court that the executor or the administrator, as he case may be, has sold movable property without leave of the Registrar and also, if so be the case, that the property was sold

at a gross under value. If there is anything in *Abdool Kadeer v. Moore, Ex parte Adams, et al*, which may be considered as being in conflict with my expression of opinion, I decline to follow that judgment in so far as it does not agree with my views.

The sales of the rings (if indeed they be sales) must be deemed to have been made for not less than the minimum sale price, \$650. The defendant has accounted for \$140 and so he is deemed to have the sum of \$510 in his hands arising out those sales (if indeed they be sales).

On the 18th November, 1938, James Alexander Sue-a-Quan valued the stock of the Shamrock Spirit Shop at \$150. On the 5th and 8th December, 1938, Sue-a-Quan supplied to the Shamrock spirit shop 21 gallons of high wines; the price was \$162.75. Sue-a-Quan was paid \$46.50 on the 16th December, \$60 on the 21st December and the balance of \$56.25 on the 30th December, 1938. In the account filed by the defendant in the Registry of Court on the 1st November, 1940 it is not shown that there were any moneys received by the Shamrock spirit shop from the 13th October, 1938, up to the 31st December, 1938: payments made by the administrator in connection with the spirit shop are, however, carefully recorded. In the balance sheet of the Shamrock spirit shop (put in evidence by the defendant) the assets as on the 31st December, 1938 consisted, *inter alia*, of (1) cash in hand \$100.83; (2) stock \$53.23; (3) sundry debtors \$189.86 and (4) good-will and utensils \$280. At the end of 1938 the administrator sold without leave of the Registrar, the stock of the Shamrock spirit shop to his brother, Louis Chung Tiam Fook, or to his sister-in-law Gladys Chung Tiam Fook, for the sum of \$53.23. This sum has not been paid, and the administrator must be deemed to have it in his hands. Further, the sum of \$100.83 representing the cash in hand when the business was closed down has not been included by the Administrator among the receipts in his account. The sum which the administrator has in his hands will accordingly be increased by the sums of \$53.23 and \$100.83.

The book debts of the Shamrock spirit shop were not sold along with the stock. There is no evidence upon which I can reasonably draw the inference that any of the book debts of the spirit shop as they existed on the 31st December, 1938 were paid. It is difficult to believe that none were paid, even though the administrator does not admit the receipt of any part of such book debts.

The utensils of the spirit shop were not sold along with the stock in trade. The good-will and utensils were entered in the balance sheet at the sum of \$280. The spirit shop had no good-will, even though it was given a value in the balance sheet, for the purpose of making the assets appear to be of greater value than they really were. The stock could very well be purchased without the book debts, but the stock

would be valueless without the utensils. I deem them to have been purchased (if in actual fact they were not) along with the stock, for the sum of \$40. In making this estimate, I have considered the probable value (from a selling point of view) of such utensils, and also the possible book value which was placed by the deceased on the imaginary goodwill of the Shamrock spirit shop. The sum which the administrator has in his hands will accordingly be further increased by the sum of \$40.

My findings up to the present show that at the date of the commencement of this action the administrator had or ought to have had, in his hands the sum of \$1,064.80 for the estate of the deceased. And the administrator admitted that, subsequent to the filing of the defence herein, he received the sum of \$90. These two sums are more than the amount of the plaintiffs' claim \$852.07 and as the plaintiffs have consequently succeeded on their claim, it would, ordinarily, be unnecessary to deal with the other contentions put forward by the plaintiffs. But, as there may be an appeal from my findings it is only right that I should express my opinion on the other points which were in issue in this action.

The shop buildings, and the logies, in the interior were valued in the estate duty inventory in the sum of \$220 (\$680 less \$460). This was a very conservative valuation. Four of them were sold by the administrator for the sum of \$536. The building and the logie at Tamakay, Mazaruni were not sold. The permission to occupy the land on which it is situate was not renewed, and the land on which they were situate is now in the possession of somebody else. The balance sheet, put in by the defendant, shows that all the buildings had a book value of \$1,515.36. I do not, however draw the inference that more than the sum of \$536 was received by the administrator from the sale by the defendant, without leave of the Registrar, of the buildings, or that a greater sum ought to have been received. No doubt, if the managing director of the plaintiffs had been administrator, a greater sum than \$536 would have been realised: but it would be wrong for me to deal with the defendant in the same manner as if he was a keen and energetic businessman as Mr. J. I. de Aguiar.

After Mr. de Aguiar had given evidence in chief on the 12th May, 1942, specifying his objections in detail to the account filed by the administrator in the Registry of Court on the 1st November, 1940, with the view of showing (contrary to the contention of the defendant that on that date the estate of the deceased was indebted to him in the sum of \$42.22) that the administrator had, or ought to have had, in his hands a sum of money far exceeding the amount of the plaintiffs' claim, Mr. J. A. Luckhoo, K.C., senior counsel for the defence, stated that notice should have been given to the administrator of the objections to the account filed. The balance sheet of the business carried on by the deceased in the interior of British Guiana was not produced

J. P. SANTOS & Co., LTD. v. W. C. TIAM FOOK.

by the defendant until the 13th May, 1942, when he was giving evidence on his own behalf. I have considered Mr. Luckhoo's objection and I have decided that, unless it is clear from the evidence, that at some stage of the proceedings the administrator knew, or ought to know, that the plaintiffs were objecting to a particular transaction, I would make no definite finding for the purposes of this case.

In the estate duty inventory the book debts of the interior business were stated to be \$731.96. In the balance sheet as at the 31st December, 1938, the book debts are stated to amount only to the sum of \$22.34. A reasonable inference to be drawn from these two documents (both coming from the administrator) would be that between the 13th October, 1938 (when the deceased died) and the 31st December, 1938, the administrator had received payment of book debts to the extent of \$709.62 (that is to say, \$731.96 less \$22.34). This point was, however, not specifically put to the defendant; and it was not mentioned by Mr. de Aguiar when he was giving his evidence, as the defendant had, at that time, not yet produced the balance sheets. As the defendant may have a good explanation, I make no finding of fact on this point.

The balance sheet as at the 31st December, 1938, shows that on that date there was merchandise in the interior business valued at \$296.65, and counsel for the plaintiffs contends that it has not been accounted for. This sum is, however, the aggregate of the following amounts which formed part of a sum of \$553.13 which is included in the receipts in the administrator's account:—

6.1.39 Gold and goods from Tamakay	...	\$ 97 26
13.1.39 Gold and goods from Tamakay	...	<u>199 39</u>
Total	...	<u>\$ 296 65</u>

In the balance sheet as at the 31st December, 1938, the following items are included as "Cash":—

"Cash"

at shops	...	\$ 6 29
Cash Orders balance	...	17 79
Cash account	...	<u>316 56</u>
Total	...	<u>\$ 340 64</u>

Counsel for the plaintiffs has submitted that this cash in hand has never been accounted for. There is no reference whatever to these items in the receipts admitted by the administrator in his account. It is difficult to see what explanation can be given by the administrator but as he has had no opportunity of explaining, I make no finding of fact on this point. Counsel for the plaintiffs pointed out that in the balance sheet the utensils of the shop were put down at \$70, and that they were not accounted for by the administrator, but, apart from the fact that the \$70 may have been only a book value, possibly inflated, it is fair to infer that

when the buildings were sold, the utensils were treated as part of the buildings sold.

If I had not already found sufficient assets in the hands of the administrator to satisfy the plaintiffs' claim I would have deferred giving judgment in this matter until after the vacation, so that the administrator might have had an opportunity to give an explanation as to (a) book debts of interior shops, \$709.62, and (b) cash of interior shops, \$340.64. But, in the circumstance, it is not necessary for me to do so.

It will be observed, from the findings of fact which I have made in this judgment that I am of the opinion that, where an executor or an administrator has sold movable property of the estate of the deceased by private treaty, without leave of the Registrar of the Supreme Court under section 41 of the Deceased Persons Estates' Administration Ordinance, cap. 149, the following principles should be applied: (a) if the price obtained was fair and reasonable, the Court would confirm the sale; and (b) if the price obtained was not fair and reasonable, the Court would deem the sale to have been effected at a price which, in all the circumstances of the case, the Court considers to be fair and reasonable. In special cases, and where the circumstances so warrant, the Court may, however, declare the sale to be null and void.

Maria Chung Tiam Fook and her sister Mary Colley (who died on the 23rd September, 1938) owned mud lot 50, Sisters, West Bank, Demerara in common by transport dated 23rd April, 1934, No. 341. The Registrar of the Supreme Court granted leave to the administrator of the estate of Maria Chung Tiam Fook to sell by private treaty, the deceased's one-half of lot 50, Sisters, for the sum of \$400, and transport to Ngui Kon Sue was passed accordingly on the 4th December, 1939, No. 1372. A similar order seems to have been made by the Registrar of the Supreme Court in the matter of the estate of Mary Colley, and transport was passed of Mary Colley's one-half of lot 50, Sisters, in favour of Ngui Kon Sue on the 22nd January, 1940, No. 123, for the sum of \$400. There were certain circumstances which reasonably led the plaintiffs to suspect that the purchase price of one-half of lot 50, Sisters was, in fact, more than the sum of \$400. After hearing the evidence, however, I find that the purchase price did not exceed \$400.

On the 20th July, 1939, the defendant as administrator of the estate of Maria Chung Tiam Fook, deceased, received from the Hand-in-Hand Mutual Fire Insurance Co., Ltd. the sum of \$34.32 being cash profits in respect of two policies of fire insurance for an aggregate sum of \$1,600 on the stock in trade of the Shamrock spirit shop. This sum was omitted by the administrator from the account filed by him on the 1st November, 1940, in the Registry of Court. The sum which the administrator ought to have in his hands will accordingly, be further increased by the sum of \$34.32.

The deceased had a policy of insurance with the British Guiana

Mutual Fire Insurance Co., Ltd. in respect of her furniture. This policy was transferred on the 1st November, 1939, to the defendant personally. At that time the policy was in credit to the extent of \$33.75. If the policy had been surrendered by the administrator, the sum of 70 per centum of \$33.75, or \$23.62 would have been repaid (out of the premiums paid) by the insurance company to the administrator in July, 1940. This sum was omitted by the administrator from the account filed by him on the 1st November, 1940, in the Registry of Court. The sum which the administrator ought to have in his hands will, accordingly, be further increased by the sum of \$23.62.

The plaintiffs have objected to certain payments made by the administrator and referred to in the account filed by him, and I shall now deal with them.

(1) Item 36, "Paid J. A. Luckhoo, K.C., fees *re* estate \$200.36", is objected to in so far as it relates to the sum of \$35, the fee of Mr. J. A. Luckhoo, K.C., in *re Eveline Fung v. Edgar Chung Tiam Fook*. The objection is allowed.

(2) Item 16, "*Official Gazette* subscription for the year ending 31st December, 1939, \$2", is objected to. The objection is allowed, as the business of the deceased ceased to be carried on, after the end of the year 1938. Further, the account appears to have been in the name of the defendant personally.

(3) Item 17, "Post Office *re* rental of post box No. 263 for the year 1939, \$3", is objected to. The objection is allowed, for the reasons stated with respect to item 16.

(4) Item 18, "Remington's Drug Store account, \$3.60", is objected to. The objection is disallowed. There is nothing to show that the account is not genuine.

(5) Item 26, "Argosy Co., Ltd. account, \$6.12", paid on the 26th October, 1938, is objected to. The objection is allowed, as the account appears to have been in the name of the defendant personally.

(6) Item 28, "Aerated drinks at auction sale \$6.08" is objected to. The objection is disallowed. Drinks were in fact provided.

(7) Item 34, "Telephone rent from October, 1938 to June, 1939, \$18", is objected to in so far as it relates to January to June, 1939, \$12. The objection is allowed. The deceased died on the 13th October, 1938, and the telephone should have been disconnected from her residence at the end of December, 1938.

(8) Item 55, "Safety Deposit Box Rental for 1939 \$6," is objected to. The objection is disallowed as the jewellery of the deceased was kept there.

(9) Item 6, "Insurance premium on lot 50, Sisters \$36," is objected to in respect of one-half. Item 19, "Rates on lot 50, Sisters, \$2.50" is similarly objected to. Item 36 "Paid J. A. Luckhoo, K.C. fees *re* estate \$200.36" is objected to in so far as it relates to "Fee *re* matter with Colley—letters, etc, \$25." Item

37, "Queenstown Stables funeral account of Mary Colley, deceased, in settlement of estate of said Mary Colley, deceased, against the estate of Maria Chung Tiam Fook, \$215" is objected to. It was submitted by counsel for the plaintiffs that there was no genuine debt due by the estate of Maria Chung Tiam Fook to the estate of Mary Colley, deceased, The correspondence, however, which passed between Mr. A. G. King, Solicitor, representing the Administrator of the estate of Mary Colley, deceased, and Mr. J. A. Luckhoo, K.C., representing the administrator of the estate of Maria Chung Tiam Fook, deceased, shows the contrary to be the case even though the defendant omitted the claim which was for \$865 when he was filing the estate duty declaration. The matter was amicably settled by the administrator of the estate of Maria Chang Tiam Fook paying the funeral expenses of Mary Colley, and the amount so paid was 25 per cent., of the claim. The objections are disallowed.

In the result therefore the sums of \$35, \$2, \$3, \$6.12 and \$12, aggregating the sum of \$58.12 are disallowed from the amounts specified in the administrator's account of the 1st November, 1940 as having been paid by him.

In his account filed on the 1st November, 1940 the administrator has stated that the payments made by him exceeded the receipts which came to his hands by the sum of \$42.22. In the course of this judgment I have made findings of fact that at the time of the institution of this action the administrator of the estate of Maria Chung Tiam Fook, deceased, had, or ought to have had, in his hands several sums of money which, in the aggregate amount to the sum of \$1,223.08. Consequently, at the time of the commencement of this action the defendant had, or ought to have had, in his hands as administrator of the estate of Maria Chung Tiam Fook, deceased, a sum of not less than \$1,180.86. Further, since the institution of this action, he has, on his own admission, received the sum of \$90.

The following is a summary of my findings as to assets:—

1.	Received from C. Weekes and J. Sandiford on promissory notes \$	9 00
2.	Shamrock spirit shop book debts received prior to 31st December, 1938 ...	73 59
3.	Proceeds of furniture and other household effects sold by private treaty, not accounted for by administrator (\$670 37 less \$650) ...	20 37
4.	Value of furniture and other household effects taken over by administrator and not accounted for by him (\$650 less \$350) ...	300 00
5.	Value of 3-stone diamond ring and of diamond and sapphire ring sold by administrator and not accounted for by him (\$650 less \$140) ...	510 00
6.	Cash at Shamrock spirit shop on 31st December, 1938, not accounted for by administrator ...	100 83
7.	Sale price of stock of Shamrock spirit shop as on 31st December, 1938, not accounted for by administrator ...	<u>53 23</u>
	Carried forward	... <u>\$1,067 02</u>

J. P. SANTOS & Co., LTD. v. W. C. TIAM FOOK.

	Brought forward	...	\$1,067 02
8. Value of utensils of Shamrock spirit shop as on 31st December, 1938, not accounted for by administrator	...	...	40 00
9. Profits from Hand-in-Hand Mutual Fire Insurance Co., Ltd., not accounted for by administrator	...	...	34 32
10. Profit from British Guiana and Trinidad Mutual Fire Insurance Co., Ltd.	...	...	23 62
11. Items disallowed from payments made by administrator	...	...	<u>58 12</u>
	Total	...	\$ 1,223 08
Deficiency appearing in administrator's account	...	...	<u>42 22</u>
	Net Total	...	<u>\$ 1,180 86</u>

Junior counsel for the defendant, Mr. C. Lloyd Luckhoo, submitted that the plaintiffs could only obtain judgment for a proportionate part of the moneys found to be in the hands of the administrator, I do not agree with the submission. The Court is not concerned about creditors who prefer to sleep on their rights, and not to enforce them.

The administrator ought not to have defended this action. The costs incurred by him in respect of his defence must therefore be borne by him personally, and he will not be indemnified out of the estate of the deceased. The plaintiffs' costs of and incidental to this action must be paid by the defendant out of his property, and if they cannot be so recovered, then out of the estate of the deceased. If the defendant pays the plaintiffs their costs out of the estate, he must indemnify the estate of the deceased therefor.

The judgment of the Court will be as follows: The Court having found that, at the time of the institution of this action the defendant William Chung Tiam Fook in his capacity as administrator of the estate of Maria Chung Tiam Fook, deceased had, or ought to have had, in his hands the sum of \$1,180.86 for the use of the said estate and that after the institution of this action he received as such administrator the sum of \$90:

It is adjudged that the plaintiffs recover against the defendant in his capacity as administrator of the estate of Maria Chung Tiam Fook, deceased, the sum of \$852.07, and that the plaintiffs recover their costs of and incidental to this action against the defendant in his own right and if such costs or any part thereof cannot be so recovered, then the plaintiffs shall be at liberty to recover their costs or any unpaid portion thereof against the defendant in his capacity as the administrator of the estate of Maria Chung Tiam Fook, deceased, and that the defendant's costs of and incidental to this action be paid by him out of his own property, and that he have no right of indemnity therefor or for the plaintiffs' costs or any portion thereof out of the estate of Maria Chung Tiam Fook, deceased.

Judgment for plaintiffs.

Solicitors: *F. I. Dias; D. P. Debidin.*

BOOKER BROS, & Co., LTD. v. W. C. TIAM FOOK.
 BOOKER BROS. MCCONNELL AND CO., LTD., Plaintiffs,
 v.
 WILLIAM CHUNG TIAM FOOK, Defendant,
 [1942. No. 82.—DEMERARA.]
 BEFORE DUKE, J., (ACTING).
 1942. MAY 18; JULY 29.

Executor and administrator—Estate duty declaration and inventory—Under Estate Duty Ordinance, cap. 44, s. 13—Deceased Persons Estates' Administration Ordinance, cap. 149, s. 32—Inventory under.

Executor and administrator—Promissory notes—Property of estate of deceased—Payment received by executor or administrator—Notes administered by him—"Unduly administered"—Administered without being contained in an inventory—Deceased Persons Estates' Administration Ordinance, cap. 149, s. 34—Estate Duty Ordinance, cap. 44, s. 13; cap. 149, s. 32—Value of property unduly administered—Not less than amount of debt—Executor or administrator—Personal liability of—For debt due by deceased.

Executor and administrator—Deceased Persons Estates' Administration Ordinance, cap. 149, s. 34—Application of—Not restricted to administration actions—Purpose of section—To provide a simple remedy to creditors of deceased person—Where assets omitted from inventory filed.

Executor or administrator—Deceased Persons Estates' Administration Ordinance, cap. 149, s. 34—Actions under—Admission of assets—Personal liability of executor—Actions against executor or administrator—Based on admission of assets—Special promise by executor or administrator—To answer damages out of his own estate—To be in writing—Civil Law of British Guiana Ordinance, cap. 7, s. 20—Not applicable to those actions.

Executor or administrator—Deceased Persons Estates' Administration Ordinance, cap. 149, s. 40—After inquiry—Meaning of—Whether before or after grant of probate or letters of administration.

Executor or Administrator—Admission of assets—What amounts to.

An estate duty declaration and inventory under section 13 of the Estate Duty Ordinance, cap. 44, is an inventory under section 32 of the Deceased Persons Estates' Administration Ordinance, cap. 149.

Where an executor or administrator receives payment in respect of promissory notes made in favour of the deceased, he has administered the promissory notes within the meaning of section 34 of the Deceased Persons Estates' Administration Ordinance, cap. 149.

Estate of a deceased person is unduly administered within the meaning of the proviso to section 34 of the Deceased Persons Estates' Administration Ordinance, cap. 149, when it is administered without its having been contained in an inventory under section 32 of the Deceased Persons Estates' Administration Ordinance, cap. 149, or under section 13 of the Estate Duty Ordinance, cap. 44.

An administrator of the estate of a deceased person is personally liable, under section 34 of the Deceased Persons Estates' Administration Ordinance, cap. 149, (and subject to the proviso thereto), for a debt due by the deceased where he has administered property of the deceased not contained in an inventory under section 32 of the Deceased Persons Estates' Administration Ordinance, cap. 149 or under section 13 of the Estates Duty Ordinance, cap. 44, and where the value of such property is not less than the amount of the debt.

Section 34 of the Deceased Persons Estates' Administration Ordinance, cap. 149 is not restricted to administration actions; it provides a simple remedy to creditors in case of default of an executor or an administrator in filing the inventories required by section 32 of the Ordinance.

Section 20 of the Civil Law of British Guiana Ordinance, cap. 7, has no application to an action under section 34 of the Deceased Persons Estates' Administration Ordinance, cap. 7. The right of action under section 34 arises under the statute, and not *ex contractu*: there is, therefore, no promise, and no special promise, to be put into writing.

BOOKER BROS. & Co., LTD. v. W. C. TIAM FOOK.

The words "after inquiry" in section 40 of the Deceased Persons Estates Administration Ordinance, cap. 149, mean, after inquiry made either before or after the grant of probate or of letters of administration.

A promise by an executor or administrator to pay a debt of a deceased based on an admission of assets is not a special promise within the meaning of section 20 of the Civil Law of British Guiana Ordinance, cap. 7.

Section 20 of the Civil Law of British Guiana Ordinance, cap. 7, does not apply where there is an admission of assets by an executor or administrator who is sued personally by a creditor for the amount of the debt due to him by the estate of the deceased person.

The deceased died insolvent. At the request of the defendant, her surviving spouse, the creditors, including the plaintiffs, agreed to accept not a dividend, but a specific dividend of 50 per centum of the debts due by the deceased to them at the time of her death. At the request of the defendant the plaintiffs, and the other creditors, signed consents in the following terms: "We hereby agree to accept from the estate of Maria Chung Tiam Fook, deceased, the sum of fifty per cent of the amount of \$419.32 due by the said estate in full settlement". The consents of the creditors were filed with the proper officer under the Estate Duty Ordinance, cap. 44; the debts due to the creditors, including the plaintiffs, were reduced by 50 per centum; the estate became solvent; the defendant and his children became entitled as heirs *ab intestato* to the net value of the estate of the deceased which was declared at the sum of \$1,847.92 by the defendant; and Letters of Administration of the estate of the deceased were granted and issued to the defendant. The defendant paid estate duty amounting to \$18.48. Although, at the time of the trial, nearly 3½ years had elapsed since he had made the estate duty declaration the defendant had made no application for return of duty, and he had filed no corrective declaration nor additional inventory. The defendant did not pay to the plaintiffs the sum of \$209.66, one half of the debt due by the deceased to them at the time of her death; he had only paid the sum of \$113.85. The plaintiffs claimed the sum of \$95.81 from the defendant in his own right, on the ground that he had admitted assets.

Held, that there was an admission of assets and that the plaintiffs were entitled to judgment.

OPPOSITION action on the ground of a liquidated demand. The facts appear from the judgment.

J. Edward de Freitas, solicitor, for the plaintiffs.

Carlos Gomes, solicitor, for the defendant.

Cur. adv. vult.

DUKE, J. (Acting): This is an action for opposition to the passing of a transport by the defendant in which the plaintiff claims: (a) a declaration that the opposition entered by the plaintiffs on the 7th March, 1942, to the passing of a transport by the defendant in favour of the Ursula Willems is just, legal and well-founded, (b) an injunction restraining the defendant from passing the said transport; (c) the sum of \$95.81 being the amount of assets admitted by the defendant as administrator of the estate of Maria Chung Tiam Fook, deceased, who died on the 18th October, 1938, and Letters of Administration of whose estate were granted to him on the 17th December, 1938; and (d) costs.

At the time of the death of the deceased, she was indebted to the plaintiffs in the sum of \$419.32. On the 12th December, 1938, the plaintiffs agreed to accept a compromise of 50 per centum. Their claim was thereby reduced to \$209.66. The

BOOKER BROS. & Co., LTD. v. W. C. TIAM FOOK.

defendant paid the plaintiffs the sum of \$113.85 leaving the balance of \$95.81 which the plaintiffs are now claiming against the defendant in his own right.

The defendant filed an estate duty declaration in the Deeds Registry on the 15th December, 1938, (No. 546) under section 13 of the Estate Duty Ordinance, cap. 44, He never filed any further or other estate duty declaration.

The defendant omitted to mention the following, among other assets of the estate of the deceased, in his estate duty declaration.

- (1) Promissory notes by C. Weekes and J. Sandiford and by Parris and Hyndman in favour of the deceased. The defendant received \$2 in respect of the note made by C. Weekes and \$7 in respect of the note made by J. Sandiford, and he received the sum of \$50 in respect of the note made by Parris and the sum of \$40 in respect of the note made by Hyndman,—in all the sum of \$99.
- (2) Sparton 5-valve radio. This was sold at public auction on the 6th March, 1939 for \$33.

These items amount to the sum of \$132. The only amount which is included in the account filed on the 1st November, 1940 in the Registry of Court by the defendant in his capacity as administrator of the estate of Maria Chung Tiam Fook, deceased, is the item relating to the radio, \$33. The other items amount to the sum of \$99 and this last mentioned sum has not been used by the defendant in paying debts of the deceased.

Section 34 of the Deceased Persons Estates' Administration Ordinance, cap. 149 is as follows:—

If any person after a grant to him of probate or letters of administration, administers, distributes, or in any wise disposes of, any property, goods, or effects belonging to the estate of which he is the executor or administrator not contained in the inventory or inventories thereof furnished to the registrar previous to that grant, or not contained in any inventory or additional inventory made or caused to be made by him and delivered or transmitted to the registrar and filed in the registry in terms of section thirty-two of this Ordinance, that person shall thereupon become personally liable to pay to the creditors and legatees respectively of the deceased all debts due by him at the time of his death or which have thereafter become due from his estate, and all legacies bequeathed by him so far as the proceeds and assets of the estate are insufficient for the full payment thereof:

Provided that when anyone sued for the payment of any debt or legacy he has rendered himself personally liable to pay in manner aforesaid proves to the satisfaction of the Court before which he is sued that the true amount and value of the property which has actually been unduly

BOOKER BROS. & Co., LTD. v. W. C. TIAM FOOK.

administered, distributed, or disposed of, by him did not exceed a certain sum, and that his administration, distribution, or disposal of it was not fraudulent, then he shall be personally liable for only so much of that sum as he fails to prove has been administered, distributed or disposed of according to law, and for the amount of the costs incurred in and concerning the action as well by him as by the plaintiff therein, notwithstanding that by reason of his personal liability having been restricted in manner aforesaid the plaintiff has not recovered from him any part of the debt or legacy sued for”.

An estate duty declaration and inventory under section 13 of the Estate Duty Ordinance, Chapter 44, is an inventory under section 32 of cap. 149. That section provides that every executor and administrator shall from time to time thereafter (that is to say after the grant or probate or letters of Administration) and so soon as he finds or knows of any other property, goods or effects belonging to the estate and not contained in the first inventory cause to be made an additional inventory, showing the value of all the last mentioned property, goods and effects, and shall forthwith transmit or deliver the inventory to the registrar to be filed as of record.

Letters of Administration of the estate of Maria Chung Tiam Fook, deceased, were granted to the defendant on the 17th December, 1938; the defendant administered within the meaning of section 34 of the Deceased Persons Estates' Administration Ordinance, cap. 149, the promissory notes made by Weekes, Sandiford, Parris and Hyndman, as he received payment in respect of the promissory notes; the promissory notes by Weekes, Sandiford, Parris and Hyndman were not mentioned or included by the defendant in the inventory of the 15th December, 1938, nor in any additional inventory; in his account filed in the Supreme Court Registry on the 1st November, 1940, the defendant stated that his payments as administrator exceeded his receipts as such by the sum of \$42.22; when allowance is made for the sum of \$33, the value of the Sparton radio, which was sold at public auction on the 6th March, 1939, and which sum has been duly accounted for in his said account, the true amount and value of the property of the deceased which was unduly administered, that is to say which was administered without its having been contained in an inventory did not exceed the sum of \$99.

Prima facie, therefore, the defendant, by virtue of section 34 of the Deceased Persons Estates' Administration Ordinance, cap. 149 and of the facts proved or admitted in this case, is personally liable to pay to the plaintiffs the sum of \$95.81 the amount claimed in this action.

The solicitor for the defendant, however, submitted that section 34 of the Deceased Persons Estates' Administration Ordinance

nance, cap. 149 cannot be prayed in aid by a creditor unless he brings an administration action. I do not agree with this submission. The object of this section is to enforce the filing of full and complete inventories, and it provides a simple remedy to creditors in case of default of an executor or administrator. If a creditor ascertains that there is an omission from the inventory, the presumption is that the executor or administrator has taken the property of the estate, so omitted, for his own use and benefit and that is why the executor or administrator is made personally liable. If, however, the executor or administrator can prove that the property, though omitted, was used in due course of administration, then he will only be liable to the extent of the value of the property which was not so used, but in any case he will be liable to pay the plaintiff's costs.

The solicitor for the defendant also submitted that in consequence of section 20 of the Civil Law of British Guiana Ordinance, cap. 7, the action is not maintainable. That section, so far as it is relevant to the submission, provides that no action shall be brought whereby to charge any heir, executor or administrator, upon any special promise to answer damages out of his own estate unless the agreement upon which the action is brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised. The right of action under section 34 of the Deceased Persons Estates Administration Ordinance, cap. 149, arises under the statute, and not *ex contractu*. There is therefore no promise, and no special promise, to be put into writing. The objection is therefore overruled.

The solicitor for the plaintiffs also claimed that the plaintiffs are entitled to judgment on another ground, namely, that the defendant admitted the possession of assets of the deceased sufficient to meet the sum of \$209.66, being 50 per centum of the indebtedness of Maria Chung Tiam Fook to the plaintiffs at the time of her death; and that consequently he is personally liable.

According to the documents filed with the estate duty declaration and inventory by the defendant under the provisions of the Estate Duty Ordinance, cap. 44, the estate of the deceased was insolvent at the time of her death.

Section 40 of the Deceased Persons Estates' Administration Ordinance, cap. 149, provides that "if an executor or administrator finds after inquiry that the estate is insolvent he shall immediately take the necessary proceedings for having it administered in insolvency unless the creditors consent to receive a dividend in full satisfaction of their claims and proof of that consent is tiled with the registrar." The words "after inquiry" mean, after inquiry made either before or after grant of probate or of letters of administration. The defendant, who was the surviving spouse of the deceased, made such inquiry before the grant of letters of administration, and found that the estate of his deceased wife

BOOKER BROS. & Co., LTD. v. W. C. TIAM FOOK.

was insolvent. He did not take any proceedings for having the estate of the deceased administered in insolvency.

He approached the creditors of his deceased wife, and at his request, they agreed to accept not a dividend but a specific sum, namely 50 per centum of the debts due by the deceased to them at the time of her death.

The managing director of J. P. Santos and Company, Ltd. who were the largest creditors of the deceased, deposed that he would not have consented to administration by the defendant of the estate of Maria Chung Tiam Fook, deceased, if his company was only to receive a dividend, as opposed to a dividend of a specific amount; that he saw the inventory papers which were subsequently filed by the defendant in respect of the estate of Maria Chung Tiam Fook, deceased, that the papers showed that there was more than sufficient assets to pay the creditors 50 per centum of their claims; and that he agreed to accept 50 per centum on behalf of his company.

On the 12th December, 1938, the plaintiffs, at the request of the defendant signed the following consent:—

Georgetown, Demerara,
12th December, 1938.

“We hereby agree to accept from the estate of Maria Chung Tiam Fook, deceased the sum of fifty per cent., of the amount of \$419.32 due by the said estate to us in full settlement.

Booker Bros, McConnell & Co., Ltd.
by their attorney
JNO. SCHULZ.”

This consent was filed with the said inventory along with similar consents signed by the other creditors of the deceased.

As a result of the creditors undertaking in writing at the request of the defendant, to accept a specific dividend of 50 per centum in full satisfaction of their claims, the estate of the deceased which was insolvent at the time of her death became solvent with a net value of \$1,847.92 of which the defendant was entitled to the sum of \$935.97. Consequently, on the face of the inventory filed by the defendant on the 15th December, 1938, and declared to by the defendant before the proper officer under the Estate Duty Ordinance, cap. 44, the defendant acquired a pecuniary advantage by reason of the creditors (including the plaintiffs) foregoing 50 per centum of their claims.

Estate duty amounting to \$18.48 was paid by the defendant on the net value of the estate. No corrective declaration showing that the value of the assets was less than was estimated on the 15th December, 1938, has been filed by the defendant.

Mr. John Schulz, the attorney of the plaintiffs who signed the consent on the 12th December, 1938, agreeing to accept 50 per centum in full settlement, was not available to the plaintiffs for the purpose of giving evidence. But one may safely presume that

the course of conduct adopted by Mr. J. I. de Aguiar, the managing director of J. P. Santos and Company. Ltd., when the defendant went to him asking him to accept 50 per centum of his claim in full settlement, was also followed by Mr. Schulz, as it is reasonable, and would be followed by all business men.

The solicitor for the defendant submitted that the Court should be very cautious to presume an admission of assets from which a promise to pay can be implied, and that the Court will consider whether a mistake was not made, when the admission of assets was alleged to have been made. He also submitted that by reason of section 20 of the Civil Law of British Guiana Ordinance, cap. 7, the agreement is unenforceable as it was not in writing.

A promise by an executor or an administrator to pay a debt of the deceased based on an admission of assets, is not a special promise within the meaning of section 20 of the Civil Law of British Guiana Ordinance, cap. 7, as if an executor has sufficient assets, it is his duty to pay the debts. An executor or an administrator, if he has assets, does not confer any favour on the creditors by paying the debts or by promising to do so. I therefore hold that section 20 of the Civil Law of British Guiana Ordinance, cap. 7, does not apply where there is an admission of assets by an executor or administrator who is sued personally by a creditor for the amount of the debt due to him by the estate of the deceased person.

In this case I hold that there was an admission of assets by the defendant. The estate of the deceased was insolvent. The defendant did not take steps to have it administered in insolvency. He made inquiry as to the value of the assets, and the total amount of liabilities, and he ascertained that if the creditors agreed to waive 50 per centum of their claims, or agreed to accept a dividend of 50 per centum of their claims, the estate of the deceased would not only become solvent, but a sum of \$1,847.92 would be available for his children and himself. He put his proposal to the creditors of the deceased, they accepted it, and they signed consents accordingly. The consents were filed with the inventory of the estate of the deceased. The defendant signed the estate duty declaration, and he declared to the inventory before the proper officer under the Estate Duty Ordinance. In his declaration he stated that there was sufficient to pay all the listed liabilities, and that there would be a surplus of \$1,847.92. He paid estate duty amounting to \$18.48 on the surplus. The defendant has made no application for return of estate duty, and he has filed no corrective declaration nor additional inventory. I have carefully considered the submission of the defendant's solicitor that the Court should be cautious in holding that there has been an admission of assets, when the circumstances show that a mistake has been made as to what the true valuation of the assets was when the defendant was making the declaration. If the defendant did in fact make a genuine mistake, he must bear the consequences thereof. He should not have asked the creditors to

BOOKER BROS. & Co., LTD. v. W. C. TIAM FOOK.

accept a specific dividend of 50 per centum on their claims, unless he was prepared to pay the dividend out of his own property or he was definitely satisfied that he would have been able to pay the 50 per centum from a realisation of the assets of the deceased.

The plaintiffs are therefore entitled to succeed, because, firstly, the defendant is personally liable under section 34 of the Deceased Persons Estates' Administration Ordinance; and, secondly, the defendant is personally liable, at common law, because he has made an admission of assets.

There will therefore be judgment for the plaintiffs against the defendant in terms of the statement of claim and costs.

Judgment for Plaintiffs.

SHERLOCK KISSOON, Appellant (Defendant),

v.

JAMES KINGSTON, P. C. Respondent (Complaint)

[1942. No. 144.—DEMERARA.]

BEFORE FULL COURT: VERITY, C.J., AND DUKE, J. (Ag.)

1942. JULY 31; AUGUST 4.

Criminal law and procedure—Conviction—Sentence—Consecutive terms of imprisonment—Undergoing imprisonment for another offence—Meaning of—Person liable to arrest but not arrested under section 31 (2) of Summary Jurisdiction (Appeals) Ordinance, cap. 16—Not undergoing imprisonment—Summary Jurisdiction (Offences) Ordinance, cap. 13, s. 22; Summary Jurisdiction (Offences) (Amendment) Ordinance, 1987 (No. 6), s. 2.

Motor vehicles—Driving of—Disqualification from—Purpose of—To keep off road a person not fit to drive upon it—For a period which may give him an opportunity so to reconsider his ways as to be no longer a menace to the lives of his fellowmen.

A person who is liable to arrest, but has not yet been arrested, under section 31 (2) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16, is not “undergoing imprisonment” within the meaning of section 22 of the Summary Jurisdiction (Offences) Ordinance, cap. 13, as enacted by section 2 of the Summary Jurisdiction (Offences) Amendment Ordinance, 1937 (No. 6).

The purpose of disqualifying a person from holding or obtaining a driving licence was to keep off the road a person who is not fit to drive upon it, for a period which may give him an opportunity so to reconsider his ways as to be no longer a menace to the lives of his fellow-men.

On a complaint under section 31 (5) of the Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22) for driving a motor vehicle while disqualified from holding a driving licence, a magistrate has power, under section 30 (1) (a), to disqualify the defendant from obtaining a driving licence for a further period.

By section 28 of the Summary Jurisdiction (Appeals) Ordinance, cap. 16, the Full Court (of Appeal) has power to correct errors and omissions made by a magistrate in a sentence or conviction.

A magistrate wrongly directed that a sentence of 4 months’ imprisonment which he imposed should commence on the expiration of another sentence of 4 months; and when the appeal against the first mentioned sentence of 4 months came on for hearing the appellant had already served

S. KISSOON v. J. KINGSTON.

the latter sentence. The Full Court was of the opinion that, had the magistrate appreciated that the sentences should run concurrently, he would have imposed the maximum sentence, to wit, a sentence of 6 months' imprisonment.

Held that the Full Court (of Appeal) could correct the error of the magistrate by merely deleting from the sentence imposed by the magistrate the words following those which impose imprisonment for 4 months, but as under section 31 (2) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16, this would have the effect of making the appellant liable to serve 4 months' further imprisonment from the date of his arrest pursuant to the order of Court in this appeal, making 8 months in all, the Court, in order to secure to the appellant the full benefit of his success in this appeal but to give effect also to the penalty which should have been imposed by the magistrate in the first instance (namely, 6 months' imprisonment), the sentence of the magistrate's court would be set aside and there would be substituted therefor a sentence of 3 months' imprisonment with hard labour which, by virtue of section 31 (2) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16, would commence from the date of arrest pursuant to the order of this Court.

The appellant was convicted on the 16th March, 1942 for driving a motor vehicle while disqualified from holding a driving licence. He was so disqualified by order of the Supreme Court in October, 1939 when, on a conviction for motor manslaughter, he was sentenced to 12 months imprisonment with hard labour. On the 18th June, 1941 he was convicted for driving a motor vehicle while disqualified from holding a driving licence, and the appellant had also, since his disqualification, been convicted of other offences connected with the use of a motor vehicle. The magistrate omitted to order that the appellant be disqualified from obtaining a driving licence for a further period.

Held, that as the appellant had not availed himself of the opportunity afforded to him by the three-year period of disqualification, to reconsider his ways, the magistrate ought to have disqualified the appellant from obtaining a driving licence for a further period, but, as he did not do so, the Full Court (of Appeal) would correct the omission of the magistrate by ordering that the appellant should be disqualified from obtaining a driving licence for 3 years from the date of his conviction in the magistrate's court.

APPEAL by the defendant from a decision of a Magistrate of the Georgetown Judicial District sentencing him on the 16th March, 1942, to undergo 4 months' imprisonment with hard labour on a charge, to which he had pleaded guilty, of driving a motor vehicle while disqualified from holding a driving licence. The magistrate ordered that the sentence should commence after the expiration of a sentence of 4 months' imprisonment imposed on the defendant on the 18th June, 1941, on a charge of driving a motor vehicle while disqualified from holding a driving licence; this sentence was affirmed by the Full Court of Appeal on the 13th March, 1942, but on the 16th March, 1942, he had not yet been arrested under section 31 (2) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16, to serve that sentence. This latter sentence was, however, served by the appellant before the present appeal was heard.

E. V. Luckhoo, for the appellant.

S. E. Gomes, Assistant Attorney-General, for the respondent.

Cur. adv. vult.

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

This is an appeal from the decision of a Magistrate whereby

S. KISSOON v. J. KINGSTON.

the appellant was convicted of driving a motor vehicle while disqualified from holding a driving licence and upon a plea of guilty was sentenced to imprisonment with hard labour for a term of four months to commence after the expiration of a sentence imposed in a previous case.

It appears that on 18th June, 1941, the appellant was convicted and sentenced to four months imprisonment for a similar offence. Against this conviction he appealed but the conviction and sentence were affirmed by the Supreme Court on the 13th March, 1942. He was again before the Magistrate's Court on 16th March, 1942, on the charge out of which this appeal arises but had not then been arrested in pursuance of the order of the Supreme Court on the previous charge.

By section 22 of the Summary Jurisdiction (Offences) Ordinance, (Cap. 13) as amended by Ordinance No. 6 of 1937 it is provided that "where the court adjudges any person to undergo a term of imprisonment . . . and he is already undergoing . . . imprisonment for another offence, the Court may direct that that imprisonment shall commence at the expiration of the imprisonment which he is then undergoing."

The offence to which the present matter relates being a repetition of that in respect of which he had previously been convicted the Magistrate very properly felt that the appellant should undergo imprisonment for a term additional to that imposed in the previous case and imposed the sentence against which this appeal is brought, directing that imprisonment thereunder should commence from the expiration of the previous sentence, being of the opinion that in order to give effect to the intention of the enactment it would be a proper interpretation thereof to hold that when a defendant was previously sentenced to undergo a term of imprisonment which he had not served he was "undergoing" such term.

We are of the opinion that in the circumstances of this case to adopt such an interpretation would be so to strain the words of the statute as to distort their meaning, for in no sense can it be said that a man who is not in custody, who has not been arrested and whose liberty is not at the moment restrained is "undergoing imprisonment." This is a case which may readily be distinguished from such a case as *R. v. Cutbush* 10 Cox 484, where, as is explained in *R. v. Martin* (1911) 2 K.B. 450, a person convicted before justices and immediately placed on trial on a second charge may rightly be deemed to be undergoing imprisonment for the first offence in that he is there and then in custody and cannot regain his liberty until the first sentence has been served.

We are of the opinion therefore that the learned magistrate had no power to order that the imprisonment imposed by him should commence from the expiration of the previous sentence of imprisonment which at that time the appellant was not in fact undergoing.

S. KISSOON v. J. KINGSTON.

We are quite clear that this Court not only has power to say that the learned magistrate erred but also by virtue of section 28 of the Summary Jurisdiction (Appeals) Ordinance (Cap. 16) has power to correct the error. This might be done by merely deleting from his sentence the words following those which impose imprisonment with hard labour for four months. Should we do so, then by the operation of section 31 of the Ordinance the appellant would be liable to serve four months further imprisonment from the date of his arrest pursuant to our Order.

It cannot be said that the appellant has already served this sentence of imprisonment even though on another charge he was in prison during that period. He cannot have served a sentence for which he has never in fact been committed to prison, any more than he could be said to be undergoing imprisonment while still at large. It was however urged by counsel and conceded by the Crown that the effect would be that the appellant, by reason of the magistrate's error, would be called upon to serve a term of imprisonment beyond that which the magistrate could lawfully have imposed had he viewed the law aright. We have some sympathy with this view though none with the appellant whose conduct shows an utter disregard amounting to open defiance of the powers of the Supreme Court which ordered his disqualification. Moreover, we are not disposed to assume that the learned magistrate in such case would have inflicted upon the appellant no further penalty for his second breach of the law in this regard. We are indeed of the opinion that had he done so he would have erred on the side of leniency. Had the magistrate taken the right view of the law we have no doubt that he would have imposed, and would have been fully justified in imposing, the maximum sentence prescribed, and in such case the appellant, while serving the first four months of his sentence concurrently with the sentence previously imposed would have served also a further period of two months. In order, therefore, to secure to the appellant the full benefit of his success in this appeal but to give effect also to the penalty which we think should have been imposed upon him by the magistrate in the first instance, the sentence of the lower court will be set aside and there will be substituted therefor a sentence of imprisonment with hard labour for the term of two months. By virtue of section 31 (2) of the Ordinance (Cap. 16) this sentence will commence from the date of arrest pursuant to this Order.

There is one other aspect of the matter which engages attention. The appellant in October, 1939, was convicted of man-slaughter and in addition to a sentence of twelve months imprisonment was disqualified from holding a driving licence for three years. The purpose of such disqualification is to keep off the road a person who is not fit to drive upon it, for a period which may give him an opportunity so to reconsider his ways as to be no longer a menace to the lives of his fellowmen. The

S. KISSOON v. J. KINGSTON.

appellant shows no sign of having done so. On the contrary, he has been convicted twice of driving despite the disqualification as well as of other offences connected with the use of a motor vehicle. In such circumstances the Court had the power, which in our view it should have used, to disqualify him from obtaining a driving licence for a further period. This omission we shall also correct.

The order of this Court is, therefore, that the sentence of the lower court be set aside and that there be substituted therefor a sentence of imprisonment with hard labour for the term of two months and it is further ordered that the appellant be disqualified from obtaining a driving licence for the space of three years from the date of his conviction in the lower court for this offence.

We regret that the appellant escapes the full measure of punishment his conduct merits, owing to the fortuitous circumstances of the case coupled with a form of enactment which elsewhere has been subjected to an amendment, the adoption of which those concerned may see fit to consider. At the same time our order is directed to secure fitting punishment of the offender and the protection of the public from danger to life and limb in so far as we are lawfully able. There is no order as to costs.

Sentence varied

FRANK E. DE SOUSA, Appellant (Plaintiff),
v.
IRVING CRUM EWING, Respondent (Defendant).
[1942. No. 191.—DEMERARA.]
BEFORE FULL COURT: VERITY, C.J. and DUKE, J. (ACTING.)
1942. AUGUST 4, 5.

Landlord and tenant—Rent restriction—Standard rent—Permitted increase—In respect of rates and taxes—Dwelling house—No increase since they were first payable—Rent may not be increased by amount of rates—Rent Restriction Ordinance, 1941 (No. 23), s 6 (1) (b).

Where no rates or taxes were payable in respect of a dwelling house in respect of the year 1939 the landlord is permitted, under section 6 (1) (b) of the Rent Restriction Ordinance, 1941 (No. 23), to increase the standard rent of a dwelling house to which the Ordinance applies, by an amount not exceeding any increase in the amount for the time being payable by the landlord in respect of rates and taxes, over the corresponding amount paid in respect of the yearly period which included the date on which the rates and taxes first became payable on the dwelling house.

The first rates and taxes paid in respect of a certain dwelling house were for the period commencing on 1st January, 1941. The rates and taxes payable for the year 1942 in respect of the dwelling house did not exceed those paid in respect of the year 1941. No rates and taxes were paid in respect of the dwelling house in respect of the years 1939 and 1940. The landlord claimed that he was entitled to increase the standard rent by the amount of the rates and taxes payable in respect of the dwelling house.

F. E. DE SOUZA *v.* I. CRUM EWING.

Held that the landlord was not permitted, under section 6 (1) (b) of the Rent Restriction Ordinance, 1941 (No. 23) to increase the standard rent, as the rates and taxes payable in respect of the dwelling house had never been increased.

APPEAL by the plaintiff from a decision of a Magistrate of the Georgetown Judicial District. The facts appear from the judgment.

S. I. Cyrus, for the appellant.

Respondent in default of appearance.

Cur. adv. vult.

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

This is an appeal from the decision of a Magistrate dismissing a suit by a landlord to recover an amount alleged to be due by Way of rent. The amount claimed consists of a certain part of an increase of rent sought to be imposed upon the tenant as from 1st March, 1942.

The defendant became the tenant of the plaintiff on 1st December, 1939, in occupation of a dwelling house completed during November, 1939, at a rental of \$16 per month. As from 1st March, 1942, the plaintiff sought to raise the rent to \$19 per month of which \$1.60 represented an increase of 10% allowed by section 6 (1) (c) of the Rent Restriction Ordinance, 1941, and \$1.40 in respect of an alleged increase of rates and taxes.

The plaintiff admitted that he paid no rates and taxes in respect of this dwelling house in 1939 and 1940 and that the first rates and taxes paid in respect of this dwelling house were for the period commencing on 1st January, 1941.

The learned Magistrate held that there was no such increase in the amount for the time being payable by the landlord in respect of rates and taxes as would bring the case within the provisions of section 6 (1) (b) of the Ordinance and that the claim therefore failed and judgment was entered for the defendant with costs.

Both parties rely upon the terms of the last mentioned subsection of the enactment which allows the landlord to increase the rent of a dwelling house by “an amount not exceeding any increase in the amount for the time being payable by the landlord in respect of rates and taxes over the corresponding amount paid in respect of the yearly period which included the 3rd day of September nineteen hundred and thirty-nine, or in case of a dwelling house for which no rates or taxes were payable in respect of any period which included that date, the period which included the date on which rates and taxes first become payable thereon.”

In view of the plaintiff’s evidence it would appear to be plain that the case is one of a dwelling house for which no rates or taxes were payable in respect of any period which included the

F. E. DE SOUZA v. I. CRUM EWING.

3rd September, 1939, but it was argued on behalf of the plaintiff that under the Town Council Ordinance rates and taxes are not levied on houses but on the whole property, that there has been an increase in the rates and taxes payable on the whole property over the amount payable in respect of the yearly period including the 3rd September, 1939, and that the landlord is therefore permitted to increase the rent by a proportionate sum.

If this be the proper interpretation of the subsection then the latter part thereof would appear to be meaningless and of no effect, but we are confident that it is not so. The amount payable for rates and taxes rests upon the appraised value of the property and such appraisal takes into consideration the value of the dwelling houses thereon. In so far as the value of such a house is included in or excluded from such appraisal so may it be said that the house is one for which rates and taxes are or are not payable. Admittedly in the present case the appraisal of the property remained unaffected by the erection of this dwelling house until 1940 and the rates and taxes payable on the property remained unaffected thereby until 1st January, 1941. In this sense, which we hold to be the true sense of the subsection, this is a dwelling house for which no rates and taxes were payable in respect of any period which included 3rd September, 1939, and the period which included the date on which rates and taxes first became payable thereon is the yearly period commencing 1st January, 1941.

There has admittedly been no increase in the amount payable for rates and taxes since that date, the landlord is not permitted therefore to increase the rent by any amount in relation to rates and taxes and the learned Magistrate rightly dismissed the plaintiffs claim.

Whether or not this decision imposes a hardship on landlords may be open to debate, but it is not a matter with which this Court is concerned. Our duty is to interpret the law as we find it and upon its true interpretation the appellant is not entitled to succeed and his appeal is dismissed.

Appeal dismissed.

SOOKNANNAN v. SUNICHERY.

SOOKNANNAN, Plaintiff,

v.

SUNICHERY, EXECUTRIX OF THE ESTATE OF WOOTMY,

DECEASED, Defendant.

[1941. No. 49.—BERBICE.]

BEFORE DUKE, J. (ACTING):

1942. JUNE 29, 30; AUGUST, 10.

Immovable property—Full and absolute title to—Does not extinguish trusts—Title for benefit of cestuis que trust—Deeds Registry Ordinance, cap. 177, s. 21 (2).

Trust and Trustee—In English meaning—Familiar in legal practice in the Colony—When Roman Dutch law was common law.

Trust—Declaration or creation of—Required to be in writing—Not where cestui que trust has been in possession of trust property from inception of trust—Civil Law of British Guiana Ordinance, cap. 7, section 3, proviso (d).

Equitable defences—Laches and acquiescence—Person in possession of trust property from time trust arose—Seeking to acquire legal title thereto—Defence of laches not applicable.

Opposition to transport—Possession by opposer nec vi nec clam nec precario for 36 years—Right to oppose.

Limitation of actions—Advertisement of transport by registered owner—Action to oppose transport—By person in possession—Not an action to recover immovable property—Civil Law of British Guiana Ordinance, cap. 7, s. 4 (2).

The full and absolute title conferred by section 21 (2) of the Deeds Registry Ordinance, cap. 177, does not extinguish trusts which exist in respect to the immovable property, the subject matter of the title, but the full and absolute title enures for the benefit of the *cestui que trust*.

When Roman Dutch law was the common law of this Colony, the designation of trustees in its English meaning of denoting persons entrusted with the control of property with which they are bound to deal for the benefit of others, was familiar in legal practice in this Colony. Proviso (d) to section 3 of the Civil Law of British Guiana Ordinance, cap. 7, (which enacts that no action shall be brought whereby to charge any one upon any declaration, creation.....of any trust relating to immovable property unless the agreement or some memorandum thereof is in writing and signed by the party to be charged or some other person thereunto by him lawfully authorised) has no application where the *cestui que trust* has been in possession of the trust property from the inception of the trust.

The equitable defence of laches is inapplicable where the person seeking to acquire legal title to the trust property has been in *de facto* possession of the trust property from the time when the trust arose.

Where a person is in possession for 36 years *nec ve nec clam nec precario* of immovable property, he has a right to oppose the passing of a transport by the registered owner of the immovable property.

Section 4 (2) of the Civil Law of British Guiana Ordinance, cap. 7, (which enacts that no person shall bring an action or suit to recover immovable property, but within twelve years next after the time at which the right to bring or recover the same has accrued to him or to some person through whom he claims) does not apply where the plaintiff is in possession and he has instituted an action to restrain the registered owner of the land from passing transport thereof.

OPPOSITION action brought by the plaintiff. The facts and arguments appear from the judgment.

E. W. Adams, for the plaintiff.

H. Matadial, for the defendant.

Cur. adv. vult.

SOOKNANNAN v. SUNICHERY.

DUKE, J. (ACTING): This is an action brought by the plaintiff by way of opposition to the passing of a transport by the defendant, and the plaintiff claims that he is the beneficial owner of lot 4, Woodley Park, West Coast, Berbice, consequential relief and costs.

In or about the year 1905, Pln. Woodley Park (or Pln. No. 11) West Coast, Berbice, was in the market for sale. It was offered to certain East Indians who were living, and working, on Plantation Bath, West Coast, Berbice. The purchase price was subscribed by various persons. The subscribers made payments at the rate of \$60 a lot or share: Kungal, male East Indian, No. 224 ex "Senator," 1878, paid the sum of \$180 for 3 shares or lots.

The plaintiff says that he paid the sum of \$60 to Kungal for the purchase of one lot or share, and that Kungal only purchased two shares for himself, the remaining share being purchased on behalf of the plaintiff. The main issue for determination in this action is whether this is so or not.

Four persons were selected as headmen to receive transport on behalf of the subscribers. They were Goopiah, male, No. 406, ex "British Trident," 1866, Bassati, male, No. 74308, ex "Lena," 1896, Toolah, male, No. 36369, ex "Foyle," 1887, and the said Kungal. It was arranged that, after these four persons had received transport from the owner of Pln. Woodley Park, they would in turn pass transports in favour of the respective subscribers.

The plaintiff used to work in the shovel gang and in the forking gang at Pln. Bath (No. 16), West Coast, Berbice. He was not in impecunious circumstances. The plaintiff's sister Wootmy, who was older than the plaintiff, was married to Kungal. The plaintiff had cattle, and the cattle were all branded with the brand of Kungal. The plaintiff and Kungal were on very friendly terms with each other.

The transport of Plantation Woodley Park was passed in favour of Goopiah, Bassati, Toolah and Kungal on the 24th June, 1906 (transport No. 95 of 1906).

The plaintiff stated that he was the first person from Pln. Bath to take up residence at Pln. Woodley Park, and that he went there before Kungal and Wootmy did so. His testimony is supported by that of his son Ramto-hul who was 8 years old in 1906 and by that of Mr. Jadoo Basant, son of Toolah, one of the head men, and by that of Allan Alexander McCurdy. The evidence of the plaintiff Sooknannan, of Ramto-hul, of Allan Alexander McCurdy and of Mr. Jadoo Basant is stoutly denied by the following witnesses called by the defendant, Ramessar who was 4 years old in 1906, Mahabir an old man of 80 years, George Linder an old man of 81 years, and John Pluck an old man of 71 years. Pluck stated that he knew Kungal and Sooknannan when they

were living at Pln. Bath; that Kungal died at No. 11 Village (Woodley Park); that when Kungal died, Sooknannan was living and working at Pln. Bath (No. 16); that it was not until 2 or 3 years after Kungal's death that Sooknannan went to live at Pln. Woodley Park; that Kungal was already dead when Woodley Park was surveyed by Seymour; that when the plaintiff first went to live at Woodley Park, he lived on lot 2; that Kungal owned lots 2, 3 and 4; that he John Pluck lived on the same lot of land at Pln. No. 10 all his life; and that he did not know the numbers of the lots as Dr. J. S. Nedd had taken away the diagram showing the sub-division into lots. Kungal died (as will be shown later in this judgment) 2½ years after Seymour had made his survey; it is unbelievable that Pluck should know so much about the private affairs of people in an adjoining plantation and yet know nothing about his own; Pluck stated that when Kungal died Sooknannan was living and working at Pln. Bath while Ramessar stated that, at that time, Sooknannan was living at Pln. Bath (No 16) and working at Pln. No. 27, West Coast, Berbice. George Linder stated that he knew both Kungal and Sooknannan; that when Kungal died Sooknannan was not living at No. 11 Village; that 2 or 3 years after Kungal's death Sooknannan went to live at Pln. Woodley Park; that Sooknannan lived at lot No. 2 or at lot 2, Woodley Park; that he remembered when Woodley Park was surveyed by Fowler; that he did not know of the sub-division of Woodley Park into lots by surveyor Seymour; and that he was the son of one of the persons who brought an action against the four head men to restrain them from passing the transports to the individual subscribers on the ground that the lands dealt with included lands claimed by the opposers. It is not reasonable to ask me to believe that George Linder would be interested in, or would have an intimate knowledge of, the private affairs of the East Indians who had purchased Pln. Woodley Park (No. 11) for the purpose of settling there. Mahabir stated that he knew Kungal, Wootmy and Sooknannan; that he knew when Kungal went to live at No. 11 Village; that he Mahabir went there after Kungal and before Kungal's death; that Sooknannan went to No. 11 Village after the death of Kungal; that Sooknannan went to No. 11 Village 3 or four years after Mahabir; and that he didn't know what lot he lived on at Pln. Woodley Park. The manner in which this witness gave his evidence showed clearly that he was suffering from a very impaired memory. Ramessar stated that Sooknannan went to live at Woodley Park 6 years after Kungal died; and that when Kungal (Ramessar's father) died, Sooknannan was working at Pln. No. 27 and living at Pln. Bath (No. 16); that in order to secure the attendance of Sooknannan at Kungal's funeral a telephone message was sent from Pln. Bath to Pln. No. 27; and that he was 9 years old at the time. Ramessar is so bitterly opposed to the claim made by Sooknannan that it was only after considerable difficulty) that his own counsel

SOOKNANNAN v. SUNICHERY.

got him to admit that Sooknannan was his uncle, the brother of his (Ramesar's) mother Wootmy, Allan Alexander McCurdy stated that when the place was surveyed (this was in 1908) Sooknannan was at Woodley Park. McCurdy had been living on Woodley Park before it was transported to the four headmen, and, after the transport, he continued to live there. Mr. Jadoo Basant was appointed a councillor of the Woodley Park Country District on the 25th August, 1913. His evidence was supported by documents produced by him. Mr. Basant stated that, after the purchase of Woodley Park by the Bath East Indians, Sooknannan was the first person to live at Woodley Park. Ramtohul stated that Sooknannan and his (Ramtohul's) mother went to live at Woodley Park before Kangal died. After a careful consideration of the evidence, I have arrived at the conclusion that the plaintiff's statement that he was first East Indian from Pln. Bath to live on Woodley Park is true, and, further, I am satisfied that he went to live there, before Kangal did.

Plantation Woodley Park was surveyed by James Tudor Seymour, Sworn Land Surveyor, on the 23rd December, 1908, and subdivided into lots. His diagram, recording the results of his survey, was deposited in the Registrar's Office of British Guiana at New Amsterdam on the 1st March, 1909.

The plaintiff stated that the land which he occupied when he went to live on Pln. Woodley Park is lot 4. He stated that he planted about 200 cocoanut trees on lot 4, and he also planted plantain trees. He built a house on the land. The plaintiff said that he has been living on the same lot 4, up to the present. He is corroborated by his sons Seetahal and Ramtohul, by Mr. Jadoo Basant and by Allan Alexander McCurdy. I do not believe the evidence of Ramessar, George Linder and John Pluck, witnesses for the defendant, when they state that the plaintiff Sooknannan was at one time living in a house on lot 2, or lot 3, Woodley Park. I accept the evidence of the plaintiff and his witnesses that the plaintiff Sooknannan has always lived on lot 4, Woodley Park and has never lived on lot 2, or lot 3, Woodley Park.

The plaintiff stated that he paid the sum of \$30 to his brother-in-law Kangal in respect of surveying and legal expenses. He is corroborated by Mr. Jadoo Basant. Shortly after Pln. Woodley Park had been purchased by Goopiah, Bassati, Toolah and Kangal, Toolah, the father of Mr. Jadoo Basant, became ill, and Mr. Jadoo Basant was deputed by his father to transact business in respect of Plantation Woodley Park on his behalf. Mr. Basant produced documents showing that in the year 1909 he was so authorised, Mr. Basant stated that the sum of \$10 per share was assessed for the surveying and legal expenses, that Kangal did not have money, and that Sooknannan handed \$30 to Kangal. I accept the evidence of the plaintiff that he paid the sum of \$30 to his brother-in-law in respect of surveying and legal expenses as to lots 2, 3 and 4, Woodley Park.

SOOKNANNAN v. SUNICHERY.

In the month of March, 1909, Goopiah, Bassati, Toolah and Kungal caused to be advertised in the *Gazette* transports of the lots as defined on Seymour's plan to the respective subscribers. The passing of the transports was opposed by James McKaley, Scotland Nedd and Richard Linder, for themselves and on behalf of others. The opposers instituted action No. 107 of 1909 in the Limited Jurisdiction of the Supreme Court to enforce the opposition. The opposition was dismissed by Hewick, J. on the 19th May, 1910. An appeal was brought by the opposers to the Full Court constituted by Bovell, C J., Berkeley, J. and Hawtayne, J. (Acting), and it was dismissed on the 30th March, 1911.

After the appeal was dismissed, the four headmen, Goopiah, Bassati, Toolah and Kungal executed a power of attorney in favour of a barrister-at-law for the purpose of having the transports passed in favour of those persons who had subscribed for the purchase of Pln. Woodley Park. These transports were passed on the 29th June, 1911, and on the 11th July, 1911.

Kungal died on the 5th July, 1911, at No. 11 Village, (Woodley Park, West Coast, Berbice. It must be presumed that the attorney was unaware of the fact of death, when he passed the transports on the 11th July, 1911.

By transport dated 24th June, 1906, No. 65 Kungal was the registered owner of one-fourth of Pln. Woodley Park, and thus of one-fourth of lots 2, 3 and 4, portions of Woodley Park. By transport dated 11th July, 1911, No. 122, passed after his death, he acquired title from Goopiah, Bassati and Toolah for three-fourths of the said lots 2, 3 and 4, Pln. Woodley Park.

Kungal made a will at Pln. Woodley Park on the 29th July, 1910. On the 6th April, 1912, this will was deposited as No. 20 of 1912, in the Registrar's Office of British Guiana with proof of due execution. The act of deposit was made by Wootmy, female, No. 401 ex *Artist* 1876, the executrix named in the will. Kungal left his property to his wife and 5 children, the wife to have 1 share, and each of the 5 children to have 1 share. The names of the 5 children named as beneficiaries in the will of Kungal were Lutchman, Ramlal, Rhamassar, Megnot and Sookdeo. Wootmy was therefore entitled to one-sixth of the property left by Kungal.

Wootmy died on the 19th September, 1930, at No. 11 Village, (Woodley Park), West Coast, Berbice, testate. The defendant was named as executor in the will, and probate thereof was granted to her on the 26th November, 1930. Wootmy bequeathed all her property to her daughter Sunichery, the defendant in this action. The defendant sought to vest title in herself in respect of one-sixth of lots 2, 3 and 4, Pln. Woodley Park, and the plaintiff opposed the passing of the transport in so far as lot 4, Woodley Park was concerned.

The plaintiff states that when his brother-in-law died, his

SOOKNANNAN v. SUNICHERY.

sister's children were young, and, as he and his sister Wootmy were on good terms, he did all the work which was required to be performed by the proprietors of lots 2, 3 and 4, for the benefit of the whole estate. In the early days, rates at Woodley Park were not paid in money, the rates were "labour rates." Within recent years they are paid in cash.

The plaintiff says that he never paid rent for the land occupied by him at Woodley Park, to Kangal, to Wootmy nor to any one of the children of Kangal and Wootmy. I believe him. I do not believe Ramessar, one of the sons of Kangal and Wootmy, when he says that Sooknannan asked for, and was given, permission by Wootmy to build a house on lot 2, Woodley Park. Sooknannan was living on lot 4, Woodley Park, long before Wootmy occupied lots 2 and 3, Woodley Park. He did not go to Woodley Park after Wootmy did, and he never lived on lot 2. It is not true that Sooknannan agreed to pay \$3 a year rent, payable in cash or labour, and it is not true that Sooknannan paid the rent for one year. I do not believe Ramessar when he says that Sooknannan asked for, and was given, permission by Wootmy to build a house on lot 4, Woodley Park. Sooknannan had been living at Pln, Woodley Park on lot 4, before Kangal's death, and he was there in 1909, when the transports of the lots of Woodley Park were being advertised. I believe the witness Allan Alexander Mc Curdy when he states that Sooknannan was planting lot 4, Woodley Park during the life time of Kangal who expressed satisfaction with what Sooknannan had been doing, and who stated that the fruit trees planted by Sooknannan would be of some benefit to his (Sooknannan's) children. It is not true that the plaintiff Sooknannan agreed to pay Wootmy \$3 a year as rent for a house spot on lot 4, or that he ever paid Wootmy any rent in respect of his occupation of lot 4. Sooknannan was in possession of lot 4 before the death of Kangal, and so he could not possibly have gone to Wootmy and begged her for permission to enter into possession of lot 4, or of any part thereof.

In or about the year 1938 the children of Kangal and Wootmy made an effort to recover rent from Sooknannan in respect of lot 4, but they were not successful.

In or about the year 1939 Rural Constable James Gopaul was requested by Ramessar, one of the sons of Kangal and Wootmy, to arrest one of the plaintiff's sons for picking cocoanuts. In his examination in chief Ramessar (who was the first witness called on behalf of the defendant) stated that the cocoanut tree from which the cocoanuts were picked by the plaintiff's son was in front of the lots on Woodley Park; that there was no paal showing the division between lot 3 and lot 4; and that the dispute was whether the cocoanut tree was in front of lot 3 (which, it is admitted, belongs to the children of Kangal and Wootmy) or in front of lot 4 (which the plaintiff claims as his property); the rural constable took the plaintiff's son to Fort Wellington Police

Station, West Coast, Berbice. He did not sign the complaint against the plaintiff's son: Ramessar did so. The complaint was subsequently withdrawn.

Sometime after, a meeting took place at the house of Sooknannan for the purpose of settling differences between the plaintiff and his sons, on the one hand and the children of Kangal and Wootmy on the other hand. The plaintiff has deposed that, at this meeting, he never offered to pay rent in respect of lot 4, Woodley Park; and Gopaul has stated that there was no talk about the plaintiff paying rent, that he did not agree to pay any rent, and that the conversation at the meeting was about cocoanuts. Ramessar deposed that, at the meeting, he said that the rates on lots 2, 3 and 4 Woodley Park (they were assessed together, and at that time they were payable in cash and not in labour) were killing his brothers, sister (the defendant) and himself and that he wanted Sooknannan to pay \$3 rent in cash to assist the children of Kangal and Wootmy in paying the rates. Ramessar said that the plaintiff did not agree to pay \$3, he agreed to pay \$2, this offer was accepted, and the meeting then terminated. Ramessar is corroborated by Harricharan who stated that Ramessar had told him the same day (but not at the meeting) that the rates on Woodley Park were now payable in cash. Lochan Sookra also corroborated Ramessar, and he stated that there was no mention at the meeting of rates at Woodley Park being payable in cash. While I do not believe that, at this meeting, the plaintiff agreed to pay rent in respect of any part of lot 4, Woodley Park, I believe that the plaintiff did agree, in consequence of the rates being then payable in cash and not in labour, to make a contribution of \$2 per year towards the rates on lots 2, 3 and 4 Woodley Park. This sum was accepted by Ramessar partly in view of the old age of the plaintiff and partly in view of the fact that the sons of Kangal and Wootmy had been cultivating part of lot 4, without payment of rent to the plaintiff.

I have already found (contrary to the contention of the defendant) that the plaintiff never paid rent, or offered to pay rent, in respect of lot 4, Woodley Park or any thereof to Kangal or to Wootmy or to any of their children. I have already found (contrary to the contention of the defendant) that the plaintiff Sooknannan was in possession of lot 4, Woodley Park between 1906 and 1909, that he was in such possession before Kangal and Wootmy entered into possession of lots 2 and 3, Woodley Park, that he was in such possession before the death of Kangal on the 5th July, 1911, that he built a house on lot 4, Woodley Park, and that he planted cocoanut trees, fruit trees and rice on the said lot 4.

It now remains for me to consider the other reasons advanced by Ramessar as to why the plaintiff should not succeed in this action. *Firstly*, he says that notices for payment of rates on lot 4, Woodley Park were always sent to him on behalf of the

SOOKNANNAN v. SUNICHERY.

heirs of Kangal and Wootmy. This is not surprising, as lot 4, Woodley Park was not separately assessed in the name of the plaintiff; lots 2, 3 and 4, Woodley Park were assessed together (except in 1931, when an attempt was made to separate them); the legal title to lots 2, 3 and 4, was in Kangal (and his heirs); and the heirs of Kangal and Wootmy would not permit lot 4, Woodley Park to be separately assessed. In July, 1941, he plaintiff had to pay all the rates then due on lots 2, 3 and 4, Woodley Park in order to prevent lot 4 from being sold at execution for non-payment of rates. The heirs of Kangal and Wootmy did not pay their proportionate share in respect of lots 2 and 3; the plaintiff sued in the magistrate's court and obtained judgment (which was by consent) accordingly: but the heirs of Kangal and of Wootmy have not yet satisfied the judgment. *Secondly*, he says that since the death of his mother Wootmy on the 19th September, 1930, (who died less than 12 years before the institution of the present suit) his brother Ramlall (one of the heirs under Kangal's will) rented a house spot on the southern or backdam side of the public road running through lot 4, to Jameer, and that Jameer erected a building; that the rent was paid by Jameer to Ramlall; that Jameer sold the building to Ramjohn who continued to pay rent to Ramlall; and that Ramjohn sold the building to Mohabir; that before Mohabir purchased the building he spoke to Randall, Ramessar, Lutchman and Sookdeo, (four of the five sons of Kangal named in the will, the fifth son Megnot having died); and that Mohabir has paid rent to Ramlall in respect of the period of which he has been in occupation; he paid rent to Ramlall on the 28th January, 1941, in respect of a period for which Ramlall claimed that Ramjohn had owed him rent. I believe Seetahal, a son of the plaintiff when he states that Jameer had rented the house spot from the plaintiff and had paid the plaintiff rent for 2 years at the rate of \$4 per annum. If the plaintiff is in fact the beneficial owner of lot 4, Woodley Park, then Ramlall would be liable to account to the plaintiff for whatever rents he may have received from Jameer, Ramjohn or Mohabir. *Thirdly*, Ramessar says that in the life time of Wootmy, Karim was given permission by Wootmy to build a house on lot 4, Woodley Park, that he built a house there, and paid his mother \$3 a year rent for the house spot; that when Karim built the house on lot 4, Woodley Park, Sooknannan had already been on lot 4, Woodley Park for more than 10 years; that Sooknannan went to live at lot 4, Woodley Park in the year 1925; that Karim built on lot 2 and also on lot 4; that it was not true that Karim only lived at lot 2 and not at lot 4; and that among the documents admitted in evidence there is a receipt showing that Karim paid rent to Wootmy in 1921. The receipt, however, does not show that it relates to lot 4, Woodley Park. I am not convinced that Karim built a house on lot 4 in the life

time of Wootmy, or that he built a house on lot 4 after the death of Wootmy. A perusal of the full notes which I took at the trial reveals that neither the plaintiff Sooknannan nor any of his sons Seetahal and Ramtohul was asked whether Karim had erected a house on lot 4 during the lifetime of Wootmy or at all. *Fourthly*, Ramessar says that lot 4 is planted by his brothers and himself, and they pay no rent to the plaintiff. This took place long after the death of Wootmy, and was brought about by the nephews of the plaintiff threatening to shoot him, and by the nephews of the plaintiff preventing the sons of the plaintiff from planting the land. The sons of Kangal started to plant part of lot 4, Woodley Park less than 12 years before the institution of the present suit. *Fifthly*, Ramessar says that the plaintiff never asked Kangal for transport and that he never asked Wootmy for transport. The plaintiff trusted Kangal, and he always lived on good terms with Kangal and Wootmy. Further, the transport in favour of Kangal was not passed until after Kangal's death. His will was proved on 6th April, 1912. According to the law at that date, the legal title to the immovable property registered in the name of Kangal at the time of his death vested in Wootmy, and their sons Lutchman, Rhamassar, Ramlall, Megnot and Sookdeo. These children were young at the time, and it would not have been an easy matter for the plaintiff to obtain the passing of a transport of lot 4, Woodley Park in his favour.

Having considered all the objections raised on behalf of the defendant I, find, as a fact, that the plaintiff Sooknannan has been in possession of lot 4, Woodley Park, West Coast, Berbice, from the year 1906, up to the present time; and that within the past 6 or 7 years the sons of Kangal and Wootmy have tried to interrupt that possession (a) by telling Jameer, a tenant of the plaintiff in respect of house spot, not to pay rent to the plaintiff, but to pay the rent to them, and (b) by using force, or threats of force, to prevent the plaintiff and his sons from cultivating parts of Plantation Woodley Park.

Having considered all the evidence in this case, I find that the plaintiff Sooknannan did pay to Kangal the sum of \$60 for a share in Pln. Woodley Park; that Kangal purchased 3 shares, 2 shares for himself and one for the plaintiff; that the plaintiff Sooknannan selected lot 4, Woodley Park, as his share in Pln, Woodley Park; and that Kangal selected lots 2 and 3, Woodley Park as his 2 shares. Counsel for the defendant submitted that the statement of the plaintiff that he gave the sum of \$60 to Kangal is not corroborated; and that, in a case of this nature, where Kangal is dead and his wife Wootmy is dead, the Court should not act upon the uncorroborated statement of the plaintiff. The circumstances of the case are, however, in my opinion, ample evidence confirming the statement of the plaintiff, and showing that it is true.

SOOKNANNAN v. SUNICHERY.

I therefore hold that, in so far as the transport dated 24th June, 1906, No. 65, passed in favour of Kangal and others relates to lot 4, Woodley Park, and in so far as the transport dated 11th July, 1911, No. 122 relates to the said lot 4, Woodley Park, the said Kangal was a bare trustee for Sooknannan, the plaintiff herein.

Evidence was led that every subscriber who had a share in Plantation Woodley Park was also entitled to a piece of land on the western portion of the windward half of Pln. No. 10, but as the subject matter of this action only relates to lot 4, Woodley Park, I am unable, in this action, to make any declaration as to that piece of land.

Counsel for the defendant has urged that the plaintiff is not entitled to any of the relief claimed in this action because—

- (a) the title of Kangal (and his children) to lot 4, Woodley Park, is now indefeasible by virtue of section 21 (2) of the Deeds Registry Ordinance, cap. 177, and that the trust, if any, has been extinguished thereby;
- (b) that if there was a trust, it was created not later than 1909, at which time the Roman Dutch law, which did not recognise trusts, was part of the common law of the colony;
- (c) that if there was a trust, it cannot, by reason of its not being in writing, be enforced, in consequence of proviso (*d*) to section 3 of the Civil Law of British Guiana Ordinance, cap. 7;
- (d) that the plaintiff was guilty of laches in bringing this action, and he is therefore not entitled to any equitable relief; and
- (e) that this action is one for the recovery of immovable property, and it is barred by reason of section 4 (2) of the Civil Law of British Guiana Ordinance, cap. 7.

Section 21 (2) of the Deeds Registry Ordinance, cap. 177, provides that “a transport passed before the first day of January, nineteen hundred and twenty, and in force at that date shall, after the expiration of two years from that date if still in force, vest in the transferee thereof the full and absolute title to the immovable property or to the rights and interest therein described, subject to (*a*) statutory claims, (*b*) registered encumbrances, (*c*) registered interests, and (*d*) registered leases.” The plaintiff does not dispute that the title to lot 4, Woodley Park, is indefeasible: his case is that the full and absolute title to lot 4, Woodley Park (acquired by Kangal’s children) is held by them in trust for him, and should be transferred to him. The full and absolute title acquired under subsection (1), or under subsection (2), of section 21 of the Deeds Registry Ordinance, cap. 177 may, in equity, belong to some one for whom the registered owner holds the property in trust. If A., on behalf of C., purchases

immovable property from B., and has the transport passed not in the name of C., but in the name of A., A. acquires, under section 21 (1), full and absolute title to the immovable property, but he is nevertheless, in equity, trustee for C., in respect, of that full and absolute title. Similarly, there can be a trust in respect of a full and absolute title acquired under section 21 (2) of the Deeds Registry Ordinance, cap. 177. If there was a trust with respect to lot 4, Woodley Park, it was not extinguished when the title of the devisees of Kangal became full and absolute on the 1st January, 1922, but the full and absolute title enured for the benefit of the plaintiff.

In *Obermuller v. Obermuller* (1927) L.R. B.G. 71, 75, Douglass, J. pointed out that, even when Roman Dutch Law was the common law of this colony, the designation of trustees in its English meaning of denoting persons entrusted with the control of property with which they are bound to deal for the benefit of others, was familiar in legal practice in this Colony.

By proviso (d) to section 3 of the Civil Law of British Guiana Ordinance, cap. 7, "no action shall be brought whereby to charge any one upon any declaration, creation of any trust relating to immovable property unless the agreement or some memorandum thereof is in writing and signed by the party to be charged or some other person thereunto by him lawfully authorised." In this case the person seeking to prove the trust and to have it enforced has been in possession of the trust property from the time that the trust arose. Proviso (d) to section 3 of cap. 7 has no application where the *cestui que trust* has been in possession of the trust property from the inception of the trust. Likewise, the defence of laches is inapplicable where the person seeking to acquire legal title to the trust property has been in *de facto* possession of the trust property from the time when the trust arose.

Section 4 (2) of the Civil Law of British Guiana Ordinance, cap. 7, provides that "no person shall bring an action or suit to recover any immovable property, but within twelve years next after the time at which the right to bring or recover the same has accrued to him or to some person through whom he claims." The action filed by Sooknannan against Sunichery in her capacity as the executrix under the will of Wootmy, deceased, is however, not one to recover possession of immovable property, and so it is not an action to recover immovable property within the meaning of section 4 (2): the plaintiff is in possession of lot 4, Woodley Park, the subject matter of the controversy in the present proceedings. The plaintiff's action is to restrain the defendant as executrix of Wootmy from passing transport in favour of herself as the sole devisee under the will, of the legal title in one undivided sixth part or share of and in lot 4, Woodley Park. By rule 7 (1) of the Rules of the Supreme Court (Deeds Registry), 1921, the plaintiff in an opposition suit is required to seek to

SOOKNANNAN v. SUNICHERY.

enforce the claim on which his opposition is based, if a right of action has accrued to him in respect thereof: and, in obedience to that rule, the plaintiff Sooknannan has claimed that he is the beneficial owner of lot 4, Woodley Park, and that the persons in whose names the legal title to lot 4, Woodley Park is vested, are bare trustees for him in respect of that lot, If the plaintiff had not established the existence of the trust he would, by reason of his possession of lot 4, Woodley Park *nec vi nec clam nec precario* for a period of 36 years, still have been entitled to a declaration that the opposition entered by the plaintiff on the 8th August, 1941, was just, legal and well-founded, and to an injunction restraining the defendant from passing the transport in question.

All the objections taken by counsel for the defendant are, therefore, overruled.

The order of the Court will be as follows: The Court having found that Kangkal in the pleadings mentioned was trustee for Sooknannan, the plaintiff herein in respect of lot 4, Woodley Park West Coast, Berbice (more particularly described hereunder) transported to Kangkal by transports dated 24th June, 1906, No. 65 and 11th July, 1911, No. 122 AND that the plaintiff has been in possession of the said lot 4, Woodley Park from the year 1906 up to the present time:

IT IS ADJUDGED that the opposition entered on the 8th August 1941, by the plaintiff to the passing by the defendant SUNICHERY in her capacity as executrix under the last will and testament of WOOTMY, female, No. 401 ex "Artist" 1876, deceased, probate whereof was granted to her on the 26th November, 1930, in favour of herself as the sole devisee under the said will, of one undivided sixth part or share of and in lot number 4 (four), Woodley Park, West Coast, Berbice, the said lot number 4 (four) being laid down and defined on a diagram by James Tudor Seymour, Sworn Land Surveyor, dated the 23rd December, 1908, and deposited in the Registrar's Office at New Amsterdam, on the 1st March, 1909, is just, legal and well-founded:

And an injunction is hereby granted restraining the defendant in her capacity as executrix under the last will and testament of Wootmy, deceased, from passing transport of the said one undivided sixth part or share of and in the said lot 4 (four), Woodley Park, West Coast, Berbice, in favour of any person other than the plaintiff Sooknannan:

And it is ordered that the defendant in her capacity as executrix under the last will and testament of Wootmy, deceased, do appear before the Registrar of Deeds or a judge of the Supreme Court of British Guiana within 14 (fourteen) days from the date of this order and pass transport of the said one undivided sixth part or share of and in lot number 4 (four), Woodley Park, West Coast, Berbice, to and in favour of the plaintiff Sooknannan and that, if transport is not so passed within 14 (fourteen) days

SOOKNANNAN v. SUNICHERY.

from the date of this order the Registrar of the Supreme Court, or a Sworn Clerk and Notary Public duly authorised in writing by the Registrar of the Supreme Court for the purpose, may, at the request of the plaintiff, appear before a judge of the Supreme Court or the Registrar of Deeds, as the case may be, and execute the deed of transport for and on behalf of the defendant Sunichery in her capacity as executrix under the last will and testament of Wootmy, deceased:

And it is adjudged that the plaintiff recover from the defendant his costs of and incidental to this action, such costs to be taxed and recoverable from her own property.

The subject matter of this action only concerns 1/6 of lot 4, Woodley Park, the property sought to be transported, and the relief given to the plaintiff is therefore restricted to that. If Sunichery is entitled to any legal right to any share in lot 4, Woodley Park, by virtue of the death of her brother Megnot, it is hoped that she will advertise transport of that interest to the plaintiff, forthwith, and thus avoid having to pay costs in another law suit. Lutchman, Rhamassar, Ramlall and Sookdeo were not parties to this action, and so I cannot make any order against them in these proceedings.

Judgment for plaintiff.

Re EST. DHUNAWO, DECD., *ex parte* v. S. M. HANIFF.

Re ESTATE OF DHUNAWO, DECEASED; *ex parte* SHEIK
MOHAMED HANIFF.

[1942. No. 117.—DEMERARA].

BEFORE DUKE, J. (ACTING): IN CHAMBERS.

1942. MAY 18; JULY 6; AUGUST 10, 17.

Practice—Action—Discontinuance—Before defence—Undertaking by defendant—Not to recover costs against plaintiff—Discontinuance filed on faith of undertaking—Rules of Court, 1900, Order 24, rules 1 and 4—Originating summons—To compel plaintiff to pay costs—Not entertained.

Executor—Action against—Costs—Executor entitled to—Against plaintiff—Rules of Court, 1900, Order 24, rules 1 and 4—Costs recoverable—Right to costs—Waived by executor—Without leave of Court or Judge—Assets of estate—Not recoverable against.

Executor—Right of indemnity—Against assets of estate—Residuary estate to be first exhausted—Before recourse can be had to assets specifically bequeathed,

Practice—Costs—Executor—Originating summons by—Claiming right of indemnity—Dismissed—Costs—To be paid by executor—Out of own property.

H., the executor named in the will of D. and the residuary legatee thereunder, applied for probate. S. entered a caveat, and instituted an action against H. in which he claimed that D. had died intestate, and that he was the sole heir. Before the filing of the defence, S. discontinued the action on the faith of an undertaking by H. that he would not seek to recover his costs of action against him under rules 1 and 4 of Order 24 of the Rules of Court, 1900. This undertaking was given by H. without obtaining the leave of the Court or a Judge. S. was one of the legatees to whom specific bequests were given under the will; the value of his bequest was more than double the amount of the costs. The value of the residuary estate exceeded the amount of the costs. H. took out an originating summons for an order that the costs incurred by him in defending the action should be paid by S., or alternatively, out of the estate of the deceased,

Held (1) that it was a breach of faith on the part of H., in these proceedings, although they are independent of the action, to ask that the costs of the action be paid by S., and that the Court would not so order;

(2) that if the executor had a right of indemnity for his costs of the action against the estate of the deceased, such right, in the absence of some direction of the Court or a Judge to the contrary, was primarily exercisable against the residuary estate of the deceased, and the value of the residuary estate which was bequeathed to the executor exceeded the amount of the costs;

(3) that, by the voluntary act of the executor and without leave of the Court or a Judge, he had relieved S. from payment of his (the executor's) costs of the action, and he could not therefore have a right of indemnity for those costs against the assets of the estate of the deceased unless there was no possibility of recovering them against S.;

(4) that the executor had no right, of indemnity for his costs of the action, against the assets of the estate of the deceased, inasmuch as they could have been recovered out of the assets devised to S., the value of the said assets being more than double the amount of the costs; and

(5) that the costs of the executor, and the costs of the parties served with notice of his application, must be paid by the executor out of his own property.

ORIGINATING summons taken out by Sheik Mohamed Haniff, the executor under the last will and testament of DHUNAWO, female East Indian, No. 8407 *ex Clarence*, 1874, deceased, for an order that the costs incurred by him in action No. 212 of 1940 in defending an action brought by Seecharan (who was a specific legatee under the will) for an order that the deceased died intestate and that he be granted Letters of Administration

Re EST. DHUNAWO, DECD., *ex parte* v. S. M. HANIFF.

as being her sole heir, be paid out of the assets devised to SEECHARAN under the last will and testament of the said DHUNAWO; alternatively, out of the estate of the said deceased.

A. J. Parkes, for the applicant.

C. A. Burton, for Seecharan.

Surujdai (Hamidan) and *Ramdaya (Basiran)*, specific legatees under the will of DHUNAWO appeared in person. MOHAMED IBRAHIM, the surviving spouse of SAHADAYA (NASIRAN), the other specific legatee under the will was also present.

Cur. Adv. Vult.

DUKE, J. (Acting): This is an originating summons taken out by Sheik Mohamed Haniff, in his capacity as the executor of the estate of Dhunawo, female No. 8407, *ex Clarence*, 1874, deceased, for an order of approval that the sum of \$100 borrowed by the executor and paid to counsel and solicitor to represent the said executor in action 212 of 1940 together with the interest payable thereon be paid out of the assets devised to Seecharan, a devisee under the will of the said Dhunawo, deceased, alternatively out of the estate of the deceased; and/or for such further or other order as may be just, with costs.

The summons was supported by an affidavit by the executor. It was served on Seecharan on the 17th April, 1942. On the 15th June, 1942, Seecharan filed an affidavit in opposition to the application. On the 6th July, 1942, the Court ordered that leave be given to Sheik Mohamed Haniff to serve the originating summons along with copies of the affidavits of Sheik Mohamed Haniff and of Seecharan and a sealed copy of the order on the legatees, other than Seecharan, under the will of Dhunawo. Service was effected on Surujdai (Hamidan) and Ramdaya (Basiran). Service could not be effected on Sahadaya (Nasiran) as she had died subsequent to the date of the death of Dhunawo and before the date of the order of the 6th July. On the hearing of this summons the executor was represented by counsel and Seecharan was represented by counsel, Surujdai (Hamidan) and Ramdaya (Basiran) were present, but were not represented by solicitor or counsel. Mohamed Ibrahim, the surviving spouse of Sahadaya (Nasiran) was present.

Dhunawo, female, No. 8407 *ex Clarence*, 1874, deceased, died on the 10th October, 1939. On the 5th day of December, 1939, Sheik Mohamed Haniff (Surujnauth) deposited in the Registry of Court a document bearing the date, the 9th day of May, 1939, purporting to be the last will and testament of Dhunawo. He was named in the will (No. 331 of 1939) as the executor and he applied for probate. On the 8th December, 1939, a caveat was entered by Seecharan (Baichoo).

According to the will, and the estate duty declaration and

Re EST. DHUNAWO, DECD, *ex parte* v. S. M. HANIFF.

inventory filed in connection with the estate of Dhunawo, deceased, (No. 464 of the 5th December, 1939), the legatees, and the values of the bequests, were as follows:—

1. Mohamedan Mosque at Good Hope, Mahaica	...	\$ 20 00
2. SURUJDAI (HAMIDAN)—House lots 9, 21, 76 North Helena No. 2	...	350 00
Cultivation lots 3, 19, North Helena No. 2 ...		100 00
3. RAMDAYA (BASIRAN)—House lots 89, 90 section D, South Good Hope	...	80 00
Cultivation lots 21, 22, North Helena No. 2...		100 00
4. SAHADAYA (NASIRAN)—House lots 91, 92 section D, Good Hope	...	80 00
Cultivation lots E1/2 56, 57 North Helena No. 2	...	75 00
5. SEECHARAN—House lots 93, 95 section D, Good Hope ...	...	80 00
Cultivation lots 35, 36, 38 section C, North Helena ...	...	150 00
6. SHEIK MOHAMED HANIFF (SURUJNAUTH) (Residue of estate)		
Cultivation lot 36, South Helena No. 2	...	50 00
Cultivation lot 52, North Helena No. 1	...	50 00
Movable property	...	<u>1 19</u>
Total		\$1,136 19
Debts and funeral Expenses		<u>45 81</u>
Gross value of estate		<u>\$1,182 00</u>

On the 3rd August, 1940, Seecharan filed a writ of summons No. 212 of 1940, against Sheik Mohamed Haniff (Surujnauth) and in which he claimed to be the son and next of kin of Dhunawo, female East Indian No. 8407 *ex Clarence* 1874, and to be entitled to the estate of the said Dhunawo, deceased, and to have the will of the 9th May, 1939 (No. 331 of 1939), previously referred to, pronounced against. Sheik Mohamed Haniff was sued (as stated in the indorsement of claim) in his capacity as the executor named in the said will in respect whereof he had applied for probate. The writ of summons was served on Sheik Mohamed Haniff on the 7th August, 1940, and he entered appearance on the 9th August, 1940. On the 18th August, 1940, Sheik Mohamed Haniff took out a summons that action No. 212 of 1940 be dismissed for want of prosecution, with costs. On the 23rd September, 1940, it was by consent ordered by the Court that Seecharan be at liberty to file and deliver his statement of claim within 14 days from the date of the order, and that in, default of tiling and delivering the said pleading within the said time the action do stand dismissed with costs. The Court made

Re EST. DHUNAWO, DECD., ex parte v. S. M. HANIFF.

no order as to the costs of the summons. On the 5th October, 1940, Seecharan filed his statement of claim in which he alleged. that "the deceased at the time the said will purports to have been executed, was not of sound mind, memory and understanding; alternatively, the execution of the said will was obtained by the undue influence of the defendant" Sheik Mohamed Haniff (Surujnauth). The latter applied for particulars of the undue influence; and on the 10th March, 1941, a notice of discontinuance of the action No. 212 of 1940 was filed in the Registry of Court, this notice being signed not only by the solicitors for the parties in that action, but also by the parties themselves.

Under rule 1 of Order 24 of the Rules of Court, 1900, as the discontinuance was before the delivery of the defence in action No. 212 of 1940, Seecharan was liable, by virtue of the rule, to pay Sheik Mohamed Haniff's costs of action; and, under rule 4 of Order 24, if the costs were not paid within 4 days after taxation, Sheik Mohamed Haniff could have applied *ex parte* for judgment in respect of those costs.

On hearing of this summons on the 18th May, 1492, I adjourned it in order to give Sheik Mohamed Haniff an opportunity to tax a bill of costs under rule 1 of Order 24 of the Rules of Court, 1900. The summons was again before me on the 6th July, 1942, when counsel for Sheik Mohamed Haniff, and for Seecharan were agreed in the statement that action No. 212 of 1940 was withdrawn and discontinued on the faith that Seecharan should not bear the executor's costs of that action personally. Sheik Mohamed Haniff is therefore precluded from recovering his costs of action from Seecharan in his own right, as he would have been entitled to do under rules 1 and 4 of Order 24 of the Rules of the Court, 1900.

On the hearing of this summons before me on the 10th August, 1942, counsel for the applicant stated that he understood from the solicitor who acted for Sheik Mohamed Haniff in action No. 212 of 1940 that the arrangement was that the executor Sheik Mohamed Haniff would get his costs out of the estate Counsel submitted that the costs incurred by the executor in defending the action No. 212 of 1940, were costs incurred in protecting and defending the interests of all the legatees under the will, and that consequently the executor is entitled to be indemnified out of the assets of Dhunawo, deceased, in respect of those costs.

Apart from the specific pecuniary bequest to the Mohamedan Mosque at Good Hope, Mahaica, the bequests were to (1) Seecharan, a son of the deceased; (2) to Surujdai, Ramdaya, Sahadaya children of Seecharan; and (3) to Sheik Mohamed Haniff (Surujnauth) another granchild, in respect of the residuary estate.

The solicitor for Sheik Mohamed Haniff in the action No. 212 of 1940 did not obtain the permission of a judge in chambers to

Re EST. DHUNAWO, DECD., ex parte v. S. M. HANIFF.

expend the sum of \$100 in defending the action, and he has not taxed a bill between solicitor and client, so that Sheik Mohamed Haniff's costs of action have not been precisely ascertained.

On the 27th May, 1940, Sheik Mohamed Haniff as executor of Dhunawo, deceased, put Surujdai (Hamidan), Ramdaya (Basiran) and Sahadaya (Nasiran) into possession of the lands specifically bequeathed to them under the will of the deceased. This fact is not contained in any of the affidavits, but it was stated on the 10th August, 1942, on the hearing of the summons by Surujdai, Ramdaya and Mohamed Ibrahim, the surviving spouse of Sahadaya; and it was admitted by Sheik Mohamed Haniff. The writ of summons in action No. 212 of 1940, was not served upon Sheik Mohamed Haniff until the 7th August, 1940, that is to say, nearly 21/2 months afterwards. Yet Sheik Mohamed Haniff who, according to the estate duty declaration and inventory filed by him on the 5th December, 1939, was entitled to less than 10 per centum of the net value of the estate did not even seek the concurrence of Surujdai, Ramdaya and Sahadaya with his intention to borrow the sum of \$100 to defend the action.

For the purposes of this summons, I will assume that Sheik Mohamed Haniff's costs of defending action No. 212 of 1940, amount to the sum of \$100. Sheik Mohamed Haniff would be committing a breach of faith with Seecharan, if he were to seek to recover those costs from Seecharan by way of an application in action No. 212 of 1940, made under the authority of rule 4 of Order 24 of the Rules of Court, 1900. Likewise, he has committed a breach of faith with Seecharan when in these proceedings, although independent of action, No. 212 of 1940, he asks that the sum of \$100 be paid out of the assets devised to Seecharan under the will of Dhunawo, deceased. The application of Sheik Mohamed Haniff that the sum of \$100 borrowed by him and paid to counsel and solicitor to represent him as executor in action No. 212 of 1940, together with the interest payable thereon, be paid out of the assets devised to Seecharan, a devisee under the will of the said Dhunawo, deceased, is therefore refused.

There remains, however, for determination the question whether the sum of \$100 with accrued interest, should be paid out of the assets of the estate of Dhunawo, deceased, and, if so, out of what assets.

Before Sheik Mohamed Haniff entered appearance to writ of summons No. 212 of 1940 he did not obtain an order of a judge charging all the assets of the deceased, whether specifically devised or devised under the residuary estate, with the costs of defending the action. He did not obtain such an order when Seecharan was discontinuing the said action and he has not obtained such an order up to the present time. It is a well established rule of Courts of equity that, where an executor has a right of indemnity out of the assets of his testator, the

Re EST. DHUNAWO, DECD., *ex parte* v. S. M. HANIFF.

right of indemnity should be first exercised in respect of the residuary estate, and the right of indemnity is not exercisable in respect of estate specifically bequeathed, until the residuary estate has been fully exhausted. To use a term which was familiar under the Roman Dutch law, *jus excussionis* must first be applied to the residuary estate, which is primarily liable. It therefore follows that as no order has been made by a judge varying the incidence and the operation of that rule, (assuming for the sake or argument, that the executor has a right of indemnity), the residuary estate of the deceased is primarily liable to satisfy the executor's claim to be reimbursed out of the assets of the deceased's estate, the sum of \$100 with interest. At the time of the loan, according to the valuation produced by the executor to the proper officer under the Estate Duty Ordinance, cap. 44, the residuary estate was valued at \$101.19. If there is a right of indemnity, the executor must, therefore, pay the sum of \$100 out of the residuary estate.

The executor claims a right of indemnity in respect of the aforesaid sum of \$100, with accrued interest, out of the estate of the deceased. He was, however, entitled to recover judgment for this sum against Seecharan. He waived and abandoned this right, and he did so without leave of the Court or a judge. He is therefore, not entitled to an indemnity out of the estate of the deceased unless he can prove that it was not possible for him to recover the costs against Seecharan. It is not possible for the executor to prove this, as, even if Seecharan was, apart from the bequest to him under the will of Dhunawo, penniless, Seecharan was bequeathed property under the said will, valued in the sum of \$230. The executor therefore has no right of indemnity in respect of the sum of \$100, his costs of action No. 212 of 1940, against the estate of Dhunawo, deceased, That sum ought to have been satisfied out of the property of Seecharan, by virtue of rules 1 and 4 of Order 24 of the Rules of Court, 1900, but by the voluntary act of the executor, and without leave of the Court or a judge, he relieved Seecharan from payment of his (the executor's) costs of the action.

To summarise: I hold—

- (a) that as action No. 212 of 1940 was withdrawn and discontinued by Seecharan on the faith that he should not bear the executor's costs of that action personally, it is a breach of faith on the part of the executor Sheik Mohamed Haniff in these proceedings, although independent of action No. 212 of 1940, to ask that the executor's costs of action No. 212 of 1940 be paid out of the assets devised to Seecharan, a devisee under the will of Dhunawo, deceased, and the Court would not so order.

Re EST., DHUNAWO, DECD., *ex parte* v. S. M. HANIFF.

- (b) that, if the executor had a right of indemnity for the costs of the action against the assets of the estate of the deceased, such right, in the absence of some direction of the Court or a judge to the contrary, is primarily exercisable against the residuary estate of the deceased, and the value of the residuary estate which was bequeathed to the executor exceeded the amount of the costs.
- (c) that by the voluntary act of the executor and without leave of the Court or a judge, he had relieved Seecharan from payment of his (the executor's) costs of the action and he could not therefore have a right of indemnity for those costs against the assets of the estate of the deceased unless there was no possibility of recovering them against Seecharan.
- (d) that the costs could have been recovered out of the assets devised to Seecharan, as their value was more than double the amount of the costs; and that the executor therefore had no right of indemnity for his costs in action No. 212 of 1940 against the assets of the estate of Dhunawo, deceased.

The summons is therefore dismissed with costs to be paid by the applicant out of his own property. The applicant will have no right of indemnity out of the estate of Dhunawo, deceased, in respect of his costs of the summons.

Summons dismissed.

N. E. LUKE v. M. LUKE.

NORA ELOISE LUKE, Petitioner,

v.

MOSES LUKE, Respondent.

[1940. No. 206.—DEMERARA.]

BEFORE DUKE, J. (ACTING).

1942. AUGUST 12, 13, 24.

Matrimonial causes—Permanent maintenance—Petition for—Fortune of wife—Jewellery and earnings—Whether fortune—Matrimonial Causes Ordinance, cap. 143, s. 14 (1)—Order under—For security only—If no security cannot be ordered, application fails.

Matrimonial causes—Permanent maintenance—Petition for—Monthly or weekly payments—Order for—No matrimonial offence committed by wife—Bum casta clause not to be inserted in order—Dum sola clause inserted—Petition filed after decree absolute—Order not to relate back to date of decree—Matrimonial Causes Ordinance, cap. 143, s. 14 (2).

Practice—Costs—Application made on two grounds—Fails on one ground—Costs of trial—Increased by issue on which applicant loses—No trial necessary on other issue—How costs to be borne—By parties who respectively incurred them.

Jewellery to the value of \$400 which was not used by a wife only for the purpose of adornment of her person is "fortune" within the meaning of section 14 (1) of the Matrimonial Causes Ordinance, cap. 143.

The circumstance that a wife earned money from the sale of fruits obtained from land which her father had agreed to donate to her, and of which she had been in *de facto* possession for 15 years, cannot be ignored by the court in determining the fortune of a wife under section 14 (1) of the Matrimonial Causes Ordinance, cap. 143.

Where a decree for dissolution of marriage was granted to a petitioning wife, in an undefended petition, on the ground of the malicious desertion and the adultery of the husband, the court refused to make the condition, *dum casta vixerit*, a part of an order for permanent maintenance, but ordered that the *dum sola vixerit* clause be inserted in the order.

The only order which can lawfully be made under section 14 (1) of the Matrimonial Causes Ordinance, cap. 143 is an order that the husband shall secure to the wife either a gross sum of money or an annual sum of money for any term not exceeding her life. It is not an order for payment of money, or for delivery of property, or for division of property. It is an order for security *simpliciter*. If therefore, the facts do not warrant the making of an order for security, then no order can be made under section 14 (1).

The Court refused to make an order for security under section 14 (1) of the Matrimonial Causes Ordinance, cap. 143, where the main income of the respondent was earned income of \$30 a month, and his remaining income was \$5.50 a month derived from the rents of a parcel of land.

Where a petition for permanent maintenance was not filed until the day after the decree had been made absolute, the Court declined to direct that an order for permanent maintenance made under section 14 (2) of the Matrimonial Causes Ordinance, cap. 143, should relate back to the date of the decree absolute.

A petition for permanent maintenance was filed under subsections (1) and (2) of section 14 of the Matrimonial Causes Ordinance, cap. 143. The petitioner failed in so far as her application was founded under subsection (1), and succeeded in so far as her application was based on subsection (2). Were it not for the application under subsection (1), an order could have been made under subsection (2) on the pleadings, without the necessity of having *viva voce* evidence led in Court.

Held that the petitioner was entitled to her costs up to and including the date upon which the petition was set down for hearing, but that, with respect to subsequent costs, the petitioner and the respondent would bear their own costs.

N. E. LUKE v. M. LUKE.

PETITION for permanent maintenance under subsections (1) and (2) of the Matrimonial Causes Ordinance, Cap, 143. The facts appear from the judgment.

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

J. L. Wills, for the respondent.

Cur. adv. vult.

DUKE, J. (Acting): This is a petition filed on the 9th September, 1941, under the authority of subsections (1) and (2) of section 14 of the Matrimonial Causes Ordinance, cap. 143, for an order (a) that the respondent Moses Luke, do to the satisfaction of the Court secure to the petitioner Nora Eloise Luke such gross or annual sum of money for her life by way of maintenance as to the Court shall seem just; and (b) that the respondent do pay to the petitioner during the joint lives of herself and the respondent such monthly or weekly sums of money for her maintenance as may be reasonable.

The respondent filed his answer on the 19th September, 1941, and the petitioner filed a reply on the 12th November, 1941. In accordance with rules 44 (1) and 46 of the Rules of Court (Matrimonial Causes), 1921, the answer and the reply were verified by affidavit.

On the 6th July, 1940, the petitioner and the respondent visited the District Commissioner's Office in connection with their separation from each other, and told the clerk-interpreter that they wanted to effect a division of property. The respondent agreed to give the petitioner, and the petitioner agreed to accept from the respondent, a house at Bagotville Village which was erected on land belonging to the petitioner's father, certain articles of household furniture and effects, and the sum of \$100. Counsel for the petitioner has submitted that the application now before the Court is not an application for division of property under section 147 (1) of the Immigration Ordinance, cap. 208, and should not be treated as such; that the petitioner had no independent legal or other advice on the 6th July, 1940; that she was subsequently advised as to her legal rights; that she is not estopped from pursuing her petition under section 14 of the Matrimonial Causes Ordinance, cap. 143, by reason of what took place in the District Commissioner's Office; and that the house which the respondent purported to agree to give to the petitioner was already her property. In other words, the petitioner has repudiated the agreement. Had she not done so, the Court, by consent, would have dismissed the petition on being satisfied that the terms of the agreement had been carried out by the respondent,

If the petitioner had only asked for an order under section 14 (2) of the Matrimonial Causes Ordinance, 143, there was sufficient evidence of the average monthly income of the respon-

dent in paragraphs 4, 6 and 7 of his sworn answer, upon which the Court could have made an order under that sub-section, without the necessity of oral evidence.

The petitioner stated that her jewellery was valued at \$200 while the respondent stated in his answer that it was valued at \$400. The petitioner produced 10 pawn tickets which showed that she has pawned jewellery for the aggregate sum of \$132.50. She stated, on *viva voce* examination in Court, that the jewellery was pawned in order to secure for herself, the bare necessities of life. She, however, had to admit that some of the jewellery was pawned by her in order that she might pay her lawyers. The petitioner was re-imbursed the money so paid, as she taxed a bill of costs against the respondent up to and including the decree *nisi* for dissolution of her marriage with him, and the respondent has paid those costs. I am not satisfied that more than an infinitesimal amount of the money obtained by the petitioner from the pawnbrokers was used in providing the petitioner with the necessities of life. All of the jewellery of the petitioner has not been pledged, and, in view of the large sum of money \$132.50 loaned on the security of the jewellery pledged, the probabilities are that the value of the petitioner's jewellery is nearer \$400 than \$200. Counsel for the petitioner stated that a woman's jewellery is for the purpose of adornment, and is not "fortune" within the meaning of section 14 (1) of the Matrimonial Causes Ordinance, cap. 143. The evidence in this matter, however, shows that the petitioner did not use the jewellery only for the purpose of adornment of her person. The petitioner has the good fortune to possess jewellery of the value of about \$400, which can be turned into money, and on which money can be borrowed. And I hold that such jewellery is "fortune" within the meaning of section 14 (1) of cap. 143.

The petitioner has been, for about 15 or 16 years, in the possession of a parcel of land at Bagotville Village facing Canal No. 1. The land was given to her by her father, but, although he has made a will bequeathing it to her, he has not passed transport of the land in her favour. The petitioner has never paid rent to her father in respect of the land, and her father has never been in possession. There are 4 cocoanut trees, 4 orange trees and 3 mango trees on the land. The petitioner states that the rates on the land were paid out of the proceeds of sale of the cocoanuts, oranges and mangoes; and that she bought furniture for the house and other articles out of the proceeds of sale when the respondent and herself were living together. She has not given the Court, in her evidence on *viva voce* examination, any clear idea of the income derived by her from selling the fruits. She stated that sometimes she made \$4 a week, sometimes \$5 a week and sometimes nothing at all. On the evidence, I estimate that she makes \$2 a week from the sale of the fruits. Her counsel has, however, submitted that the land at Bagotville Village does

N. E. LUKE v. M. LUKE.

not belong to the petitioner, and that the gift by her father to her is not complete. It is quite true that the land may be levied upon and taken in execution at the instance of the creditors of the petitioner's father, who is registered as the owner of the land. If the land were registered in the name of the petitioner, it would be an easy matter for her creditors (if any) to levy execution on the land. So that as conditions are at present, the land is probably a greater asset to the petitioner, and of more enduring value, than if transport had already been passed in her favour. In these circumstances, in determining the amount of the petitioner's "fortune" under section 14 (1) of the Matrimonial Causes Ordinance, cap. 143, I cannot ignore the fact that she makes \$2 a week from the sale of fruits from the land at Bagotville Village.

The petitioner pays no house rent, and she resides in a house which is reasonably furnished. The petitioner has no children.

In her petition, the petitioner stated that she is the owner of the building on her land at Bagotville Village. In his answer, the respondent swore that the building was erected by him with his own money in 1925 at the cost of approximately \$1,100; that its present value is \$500; and that he has always paid the rates levied by the village council on the land on which the building is erected. In her evidence before the Court, the petitioner stated that the house belonged to her, that it was erected with money and materials supplied by her father as a gift to her, and that the house was now worth \$200. The petitioner's father gave evidence in Court, and he stated that he came to Georgetown on a Tuesday and withdrew the sum of \$400 from his account in the Post Office Savings Bank; that he took this money to his home in Canal No. 1 Polder, and on his way he passed the petitioner's house; that on the following Sunday the petitioner and the respondent visited him at his house at Canal No. 1 Polder; that he handed the sum of \$600 to his daughter as a gift in the presence of the respondent; that the petitioner handed the sum of \$600 to the respondent in his presence; and that the sum of \$600 was made up of the sum of \$400 withdrawn by him from the Post Office Savings Bank and of the sum of \$200 which he had at home. The extract from the Post Office Savings Bank account of the petitioner's father, which was produced by a clerk of the Post Office Savings Bank, is not consistent with the evidence of Ramlogan that he withdrew, on one occasion and at one time, the sum of \$400 from the bank. On the 6th July, 1940, in the office of the District Commissioner, Vreed-en-Hoop, the petitioner and the respondent treated the house as being the house of the respondent. On the hearing of this petition, counsel for the petitioner submitted that the respondent, in these proceedings, could not ask the Court to determine the ownership of the house; and that, in these proceedings, the position was that both

N. E. LUKE v. M. LUKE.

petitioner and the respondent claimed the house. For reasons which will appear later, it is not necessary for me to determine, in these proceedings, whether the owner of the house is the petitioner or the respondent.

The respondent is the owner of a piece of land at Bagotville Front. There is a building thereon rented as a shop at \$8 a month. On the 19th September, 1941, it appears to have been unoccupied. From the evidence it seems that the average net income, during the time when the petitioner and the respondent were living together, was \$5.50 per month which was deposited in the savings bank account of the petitioner with the Post Office Savings Bank. I assess the net income from the land and the shop building at \$5.50 per month. After the separation between the petitioner and the respondent, another building was erected in which a gasolene and lubricating oil business is carried on. The respondent used to be the owner of a motor car which he drove for hire up to the 14th May, 1941. His income from the motor car business used to be \$40 a month. The respondent says that his income now, as salesman of the gasolene and lubricating oil business is now \$3 a week. If the respondent is not the owner of the business, but is (as he alleges) only a salesman, the Court will still not treat the respondent as having an average income of \$3 a week; it will take into consideration his past earnings, and his potential ability to earn money. In those circumstances, the Court would assess the present average income of the respondent at \$30 per month. The petitioner, however, asserts that the respondent is the owner, and not the salesman, of the business. Mohamed Alli, who was called as a witness on her behalf, deposed on *viva voce* examination that he had seen the licence for the gasolene filling station; that it was on the wall of the filling station; that it was in the name of the respondent; and that drums of gasolene which were consigned to the filling station were observed by him to be marked "M. L." Mohamed Alli also stated that the respondent had informed him that he was making \$40 a month profit from the filling station.

Mohamed Alli was one of the witnesses for the petitioner on the hearing of her petition for a decree *nisi*. While, however, he might be accused of a desire to inflate the profits of the gasolene and lubricating oil business in order that he might assist the petitioner who not only cannot read and write but is an extraordinarily ignorant and stupid woman, he cannot possibly have been mistaken in his evidence as to the licence for the filling station, or as to the gasolene drums. In those respects he is either telling the truth or he is telling a deliberate falsehood. Mohamed Alli did not mention dates; and he may have been speaking of events which occurred subsequent to the 19th September, 1941, on which date the respondent swore that he was not the owner, but only the salesman, of the gasolene business.

N. E. LUKE v. M. LUKE.

When due allowance is made for any possible desire on the part of Mohamed Alli to inflate the profits, and when allowance is made for the present conditions (which will exist for some time to come) under which the sale and consumption of gasoline has been restricted and controlled, I think that it would be reasonable to assess the income of the respondent from the gasoline and lubricating oil business (assuming that the respondent is the owner and not the salesman) at the rate of \$30 a month. So that, whether the respondent is owner or only salesman, this Court assesses his earned income at the average monthly rate of \$30.

The petitioner now has the sum of 38 cents in the Post Office Savings Bank. On the 19th September, 1941, the respondent had the sum of \$150.75 in Barclays Bank (Dominion, Colonial and Overseas); there was no evidence as to whether this amount has increased or decreased, and, for the purposes of this application, I must assume that the respondent still has that amount in the bank.

The petitioner stated in her *viva voce* evidence that, when the respondent and herself were living together, the respondent used to give her \$5 a week for housekeeping money, and that he would bring fish, and, when required, a bag of rice. It is not clear from the evidence, but I gathered from the remarks of counsel for the petitioner that one Parbati with whom the respondent committed the adultery on which the decree absolute for dissolution is founded, used to form part of the petitioner's household. At the present time, neither the respondent nor Parbati lives in the house of the petitioner. Apart from washing and cooking for herself and keeping her house clean, the petitioner has done no work since the separation between the respondent and the petitioner took place in the month of June, 1940: prior to that, the petitioner used to do some sort of work to provide herself with articles which the respondent was financially unable to provide for her.

To sum up: The respondent derives an average net income of \$35.50 per month from his land at Bagotville front and from the gasoline filling and lubricating oil station there situate; he claims to be the owner of the house in the possession of the petitioner at Bagotville Village; and he has \$150.75 in the Bank. The petitioner has no children; she pays no house rent; she lives in a house at Bagotville Village which house is valued by the respondent in the sum of \$500 and by her in the sum of \$200; she claims to be the owner of the house; she has jewellery to the value of about \$400 on which she has borrowed the sum of \$132.50; she makes, or ought to make, the sum of \$2 a week from the sale of fruits; her house is reasonably furnished; and she has 38 cents in the bank.

The petitioner was not guilty of any matrimonial offence. The decree for dissolution of marriage was granted to the petitioner

on the ground of malicious desertion, and also on the ground of the adultery of the respondent, who did not enter appearance to the petition for dissolution. If the petitioner is entitled to an order for permanent maintenance under section 14 of the Matrimonial Causes Ordinance, cap. 143, the Court will not insult the petitioner by presuming that she may not live a chaste life, and so will not make the condition, *dum casta vixerit*, a part of the order. The *dum sola vixerit* clause will, however, be inserted, to provide that, on re-marriage of the petitioner, the order would cease to have effect.

The only order which can lawfully be made under section 14 (1) of the Matrimonial Causes Ordinance, cap. 143, is an order that the husband shall secure to the wife either a gross sum of money or an annual sum of money for any term not exceeding her life. It is not an order for payment of money, or for delivery of property, or for division of property. It is an order for security *simpliciter*. If therefore, the facts do not warrant the making of an order for security, then no order can be made under section 14 (1). In an order under section 14 (1) the wife takes the benefit for her life (and not merely joint lives) free from fluctuation of the husband's income. The respondent's income in this case is not derived from investments, it is derived, almost entirely, from his own labour and exertions. In *Shearn v. Shearn* (1931), P. 1, Hill, J. said that "the Court will naturally desire to make the maintenance as secure as possible, and in cases where it can properly be done the Court will order a husband who is possessed of ample free capital to appropriate a sufficient part of it to secure the whole of her maintenance. In many cases that cannot be done, because the husband's capital, though ample, is yet not realizable, and not readily chargeable or transferable, and in all cases where it is impossible to secure the whole, it has always to be considered whether it is in the wife's interest to order part to be secured; it may be that to compel the husband to realize or transfer his assets in order to secure under subsection (1) will hamper him in earning the income out of which he is to make the payments under subsection (2). The matter has to be considered from all these points of view. It is entirely in the discretion of the Court.....and the wife has no greater right to an order to secure than she has to an order to pay."

The respondent is not possessed of ample free capital; he possesses no property which can be separated from his other property and specifically charged with the payment of maintenance. All the property owned by the respondent consists of a parcel of land at Bagotville Front and if he were directed to sell that piece of land and deposit the proceeds in Court, the interest obtainable from the proceeds of sale would not go very far in securing maintenance for the petitioner. The same result would follow if the house at Bagotville Village is the property of the respon-

N. E. LUKE v. M. LUKE.

dent, and was sold by him. The application by the petitioner for an order, under section 14 (1) of the Matrimonial Causes Ordinance, cap. 143, is therefore refused.

In my judgment delivered on the 20th July, 1942, on the preliminary objection taken by the respondent, I pointed out that section 1 of the Matrimonial Causes Act, 1866 (which is equivalent to section 14 (2) of the Matrimonial Causes Ordinance cap. 143) was, to quote the preamble to that Act, enacted as a supplement to section 32 of the Matrimonial Causes Act, 1857, (which is equivalent to section 14 (1) of cap. 148), "as it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any gross or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives."

I have already held that the respondent has no property on which the payment of any gross or annual sum can be secured. The question then remaining for determination is whether, nevertheless, the respondent would be able to make a monthly or weekly payment to the petitioner during their joint lives.

It is but natural that the petitioner should wish Parbati and the respondent to suffer and to punish as a result of an order for maintenance under section 14 (2) of the Matrimonial Causes Ordinance, cap. 143. Parbati appears to have been treated by the petitioner as an adopted child; the petitioner, a few months before the separation took place between the respondent and herself, had expended an aggregate sum of \$200 in making preparations for the marriage of Parbati; and the respondent deserted the petitioner and committed adultery with the said Parbati. Nevertheless, the Court make an order against the respondent which would have the effect of depriving him of all reasonable means of sustenance, and of the opportunity of ever being able to enjoy any of the reasonable comforts of life.

Counsel for the petitioner has urged that I should adopt the "one-third" rule which prevails generally in cases of judicial separation, and award the petitioner one-third of \$48, or \$16, per month. I have already found that the respondent's income is not \$18 per month but \$35.50 per month. If I were to award the petitioner one-third of \$35.50 or \$11.83 per month, the respondent would be left with \$23.67 per month, out of which he would have to pay house rent, and to maintain and keep himself in a manner befitting his calling in life. It is out of the earnings of the respondent that an order would be made under section 14 (2), and, in the long run, it would be unprofitable to the petitioner for an order to be made against the respondent with which he could not reasonably comply.

Counsel for the petitioner, in the course of the hearing, stated that the respondent wanted the petitioner to go and work in the

N. E. LUKE v. M. LUKE.

fields. If the only work which the petitioner is capable of doing is practising the art of agriculture, she should not consider it as beneath her dignity to perform such work. There is a dignity in all labour; the dignity of knowing and of feeling that the task which one has to perform has been well and efficiently done.

The petitioner ought to derive an income of \$2 a week from the sale of her fruits alone. She used to get \$5 a week for housekeeping money, to provide for the respondent, Parbati and herself; she now only has to provide for herself. She has not got to pay house rent. Taking all the circumstances into consideration, I make an order on the respondent Moses Luke for payment to the petitioner Nora Eloise Luke during their joint lives and so long as she shall remain unmarried, of the sum of \$7 per month for her maintenance and support.

Counsel for the petitioner has asked that the order should relate back to the date of the decree absolute. Had this petition been filed before the decree had been made absolute, I would have acceded to this request. The petitioner, however, for some reason which does not appear on the surface, restrained herself, until the day after the decree had been made absolute, from filing her petition for permanent maintenance. I therefore decline to direct that the order should relate back to the date of the decree absolute,

There remains the question of costs. These have been considerably increased by reason of the petitioner seeking to obtain an order under section 14 (1) of the Matrimonial Causes Ordinance, cap. 143, as well as an order under section 14 (2). I have already pointed out that an order under section 14 (2) could have been made on the pleadings, without the necessity for any *viva voce* examination of witnesses. The petitioner, further, has utterly failed in her application in so far as it is based on section 14 (1). In these circumstances I order that the petitioner do recover against the respondent her costs of and incidental to this petition (except in so far as it relates to an application under section 14 (1) of the Matrimonial Causes Ordinance, cap. 143), up to and including the 14th November, 1941, on which date the petition was set down for hearing, and I make no order as to the costs of the respondent on the issue on which he has succeeded.

In conclusion, I may mention that even if the agreement made between the petitioner and the respondent on the 6th July, 1940, at the District Commissioner's Office, Vreed-en-hoop, could be construed as amounting to a covenant by the petitioner not to bring the petition for permanent maintenance, which is the subject matter of the present proceedings, the petitioner was, nevertheless, not precluded, on the authority of *Hyman v. Hyman* (1929) A.C. 601, from prosecuting her present claim.

Solicitors: *W. D. Dinally; F. Dias*, O.B.E.

G. N. ROBERTS v. H. A. ROBERTS.
 GEORGE NATHANIEL ROBERTS, Petitioner,
 v.
 HORTENSE AUGUSTA ROBERTS, Respondent.
 [1941. No. 352.—DEMERARA.]
 BEFORE DUKE, J. (ACTING).
 1942: AUGUST 26.

Matrimonial causes—Dissolution of marriage—Decree nisi—No appearance by respondent to petition—Intervention by respondent after decree nisi—Not permitted—Matrimonial Causes Ordinance, cap, 143, s. 12; Rules of Court (Matrimonial Causes), 1921, r. 31 (1).

Matrimonial Causes—Petition for dissolution—Decree nisi—Application by respondent for rehearing—No appearance by her to petition—Whether rehearing essential to attain the ends of justice.

The words “any person” in section 12 of the Matrimonial Causes Ordinance, cap. 143 and in rule 31 (1) of the Rules of Court, (Matrimonial Causes) 1921 do not include the person against whom the decree *nisi* has been pronounced.

A decree *nisi* for dissolution of marriage was granted to a husband on the ground of malicious desertion. Subsequent thereto, the wife entered appearance and filed an affidavit opposing the making of the decree absolute.

Held, that the respondent was not entitled to show cause why the decree *nisi* should not be made absolute, and that her application that she be granted permission to be heard before the decree absolute is made, must be refused.

Application for a rehearing of a petition for dissolution of marriage refused, where a rehearing is not essential to attain the ends of justice.

APPLICATION by a wife to be heard before a decree *nisi* of dissolution made against her, was made absolute. The application was also treated as one for rehearing of the petition.

Applicant, in person.

R. S. Miller, for the petitioning husband.

DUKE, J. (Acting): This is an application by the respondent for permission to be heard before the decree *nisi* for dissolution of marriage granted on the 6th March, 1942, in favour of the petitioner is made absolute.

The petitioner was married to the respondent on the 3rd December, 1931. He is a member of the police force. A child of the marriage, Evelyn, was born on the 23rd April, 1932. On the 10th December, 1941, the petitioner filed a petition for dissolution of marriage on the ground of the desertion by the respondent: the citation and the petition were served on the respondent on the 11th December, 1941, in the city of Georgetown. The respondent says that she is practically a pauper, but she did not avail herself of the facilities offered by the Rules of the Supreme Court (Poor Persons), 1925. She did not enter appearance to the petition for dissolution. The petition was undefended, and it was advertised in the *Gazette* that it would be heard on the 23rd February, 1942. The hearing was postponed to the 3rd March, and then to the 6th March, 1942, on which date a decree *nisi* for dissolution of the marriage was made.

On the 7th March, 1942, the respondent read in the "Daily Chronicle" newspaper that a decree *nisi* had been granted to the petitioner. On or about the 7th May, 1942, she made an informal application opposing the making of the decree absolute. On the 31st July, 1942, the respondent entered appearance for the purposes of her application, and on the same day she tiled an affidavit. As I understand the respondent's application, her contention is that if her side of the case were heard, a decree *nisi* would not have been granted, and that the decree *nisi* should not be made absolute.

For the purposes of this judgment I shall treat the informal application as if it had been made in proper form and in accordance with the relevant rules and procedure.

Section 12 of the Matrimonial Causes Ordinance, cap. 143 (which is equivalent to section 7 of the Matrimonial Causes Act, 1860,) provides that during the period between the grant of the decree *nisi* and the grant of the decree absolute "any person shall be at liberty in the manner the Court by general or special order in that behalf from time to time directs, to show cause why the decree should not be made absolute by reason of its having been made by collusion, or by reason of material facts not brought before the Court." Rule 31 (1) of the Rules of Court (Matrimonial Causes) 1921, (which is equivalent to rules 70, 71 and 72 of the Rules and Regulations for Divorce and Matrimonial Causes made in 1865 and which came into force on the 11th January 1866) provides that any person desiring to show cause against making absolute a decree *nisi* for dissolution of marriage, shall enter an appearance in the cause in which the decree has been pronounced, and shall at the time of entering appearance or within four days thereafter file affidavits setting forth the facts upon which he relies and deliver copies of the same to the party in whose favour the decree *nisi* has been pronounced.

The effect of the judgments in *Stoate v. Stoate* (1861) 2 Swabey and Tristram 384 and in *Pattenden v. Pattenden* and *Herzfeld* (1869) 19 Law Times 612, is that the words "any person" in section 7 of the Matrimonial Causes Act, 1860 (that is to say, in section 12 of the Matrimonial Causes Ordinance, cap. 143) and in rules 70, 71 and 72 of the Rules and Regulations of 1865 (that is to say, in rule 31 (1) of the Rules of Court (Matrimonial Causes) 1921) do not include the person against whom the decree *nisi* has been pronounced.

The respondent is therefore not entitled to show cause why the decree *nisi* should not be made absolute, and her application that she be granted permission to be heard before the decree absolute is made, is consequently refused.

Although counsel for the petitioner does not agree, I shall now deal with the respondent's application as if it were an application for a rehearing of the petition for dissolution, and as if it had been made in proper legal form. The respondent

G. N. ROBERTS v. H. A. ROBERTS.

appeared in person before the Court and stated that the informal application and the affidavit contained all the facts upon which she was relying. The decree *nisi* was granted on the ground of desertion. The respondent says that she is innocent, that is to say, that she did not desert the petitioner. It is clear that the parties separated either in 1933 or in 1934. The petitioner stated in his petition that the separation was on account of unhappy differences and that the respondent continues to live separate and apart from him, despite several attempts by the petitioner to have the respondent resume cohabitation. The respondent states that attempts to resume cohabitation between the petitioner and herself were in fact made at Springlands in 1939 and in Georgetown in 1940.

I have arrived at the conclusion that an order for a rehearing of the petition for dissolution should not be made. My reasons are as follows:—

Firstly, the respondent elected to pursue the course of not defending the petition, and of hoping that the petitioner would either abandon the petition or would not be able to prove that she had deserted him. She, however, failed in her hopes and expectations. Although she knew of the decree *nisi* the day after it was pronounced, she waited for two months before she made the informal application in this matter.

Secondly, the evidence which the respondent desires to place before the Court on the rehearing is evidence which was in her possession long before the petition for dissolution was tiled, and was evidence which she could herself give. It was not evidence, which, with due diligence, could not have been given on the hearing of the petition. The petitioner has been living in Georgetown from the time the petition was served upon her to the present time.

Thirdly, in *Lester Jones v. Lester Jones and Stirrett* (1920) 123 Law Times 584 an application was made for a rehearing by a co-respondent, who had not entered appearance in that cause, and against whom heavy damages were awarded. The application was based on the grounds that the respondent with whom he had committed adultery was a woman of loose morals, and that he did not know that she was a married woman. The application was refused. In the course of his judgment Sir Henry Duke (subsequently Lord Merrivale), P., said: "It is not enough that the successful party has given some evidence which would be disputed on a rehearing. If that were the law, hardly a judgment would stand." The Court would not grant the respondent the privilege of a rehearing merely in order to afford her the opportunity to deny on oath some of the evidence given by or on behalf of the petitioner.

Fourthly, according to the statements made by the respondent in her informal application it would seem that she separated her-

G. N. ROBERTS v. H. A. ROBERTS.

self from her husband in 1934 because he did not permit her to wash his clothes or to prepare his meals; and that (according to the respondent) the petitioner does not want to be responsible for her but nevertheless desires to use her as a convenience for the purpose of conjugal rights. The respondent was not entitled to separate herself from her husband because he preferred not to have her prepare his meals or to wash his clothes. The respondent made two applications to a magistrate's court for an order that the petitioner maintain her, and in neither case did the magistrate make an order. She is, therefore, not justified in complaining that the petitioner did not maintain her. Neither in her informal application nor in her affidavit, has the respondent disclosed any defence to a *prima facie* case of desertion.

Fifthly, a rehearing in this matter is not essential to attain the ends of justice (see *Durant v. Durant* (1824) 2 Addams 167) as the respondent would, on the material before me, not derive any benefit from a rehearing. If the application for a rehearing were granted, the petitioner would suffer delay in obtaining his decree *nisi*: he would be put to considerable expense in retaining counsel and solicitor for the rehearing, and, if he could not find the necessary funds for the purpose, he would have to abandon his petition and thus not be able to obtain a decree *nisi*.

The application of the respondent in so far as it may be considered as an application for a rehearing is therefore refused.

As it does not appear that the petitioner would be able to recover against the respondent his costs of and incidental to this application I make no order as to costs.

Application dismissed.

A. BAGADO v. C. WELCOME.

ALBERT BAGADO, Appellant, (Defendant),

v.

CHARLES WELCOME, P.C. 4400, Respondent (Complainant).

[1942. No. 204—DEMERARA.]

BEFORE FULL COURT: VERITY. C.J., AND DUKE, J.; ACTING).

1942. AUGUST 28, 31.

Criminal law and procedure—Summary conviction offence—Complaint for—Form and substance—Criminal Justice Ordinance 1932 (No. 21), s. 7—Matters to be proved at hearing, and form of conviction—Not affected thereby.

Motor vehicles—Dangerous driving—Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22), s. 35 (1)—Essence of offence—Danger to the public—No reference thereto—In complaint, magistrate's reasons for decision, or in conviction as drawn up by magistrate—Conviction quashed

Section 7 of the Criminal Justice Ordinance, 1932 (No. 21) does not mean that those essential elements of the offence which are not specified in the complaint should be ignored by the magistrate when he is determining whether the defendant is guilty or not guilty: neither does the section mean that those elements can properly be omitted from the conviction. Section 7 does not apply to convictions: it only relates to the form and the substance of the charge which the defendant is required to answer.

The defendant was charged with driving a motor vehicle dangerously on a public road, contrary to section 35 (1) of the Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22) It was not specified in the complaint that the motor vehicle was driven either at a speed or in manner which was dangerous to the public. The magistrate did not find that the appellant drove the motor vehicle either at a speed or in a manner which was dangerous to the public: he convicted the appellant of dangerous driving *simpliciter*. The offence, as stated in the conviction as drawn up, was identical with the particulars of the offence as set out in the complaint.

Held (1) that danger to the public is the essence of the offence of dangerous driving contrary to section 35 (1) of the Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22);

(2) that the conviction, as drawn up by the magistrate, could not be amended to make it appear that the decision of the magistrate was that the defendant was convicted of driving a motor vehicle on a road in a manner (*or* at a speed) which was dangerous to the public, as the magistrate did not convict the defendant of that offence, but of the offence of dangerous driving *simpliciter*, which is not an offence under the law; and

(3) that the conviction must be quashed.

APPEAL by the defendant from a decision of a Magistrate of the Georgetown Judicial District convicting him of driving a motor vehicle dangerously on a public road contrary to section 35 (1) of the Motor Vehicles and Road Traffic Ordinance, 1940.

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 delivered by DUKE, J. (Acting), as follows:—

This is an appeal by the defendant from a decision of a Magistrate of the Georgetown Judicial District convicting him of driving a certain motor vehicle, to wit, motor car No. H 5344 on the 28th September, 1941, dangerously on Craig Public Road.

A. BAGADO v. C. WELCOME.

a road in the Georgetown Judicial District, contrary to section 35 (1) of the Motor Vehicles and Road Traffic Ordinance, 1940.

In the statement of offence as contained in the complaint, the offence was described as “Driving dangerously—Contrary to Section 35 (1) of the Motor Vehicles and Road Traffic Ordinance, 1940”. The particulars of offence were as follows: “Defendant on 28th September, 1941, on Craig Public Road in the Georgetown Judicial District did drive a certain motor vehicle to wit, Motor car No. 5344 dangerously.”

The offence as stated in the conviction, as drawn up, is identical with the particulars of the offence as set out in the complaint. In the conviction, as well as in the complaint, it was stated that the offence was contrary to section 35 (1) of the Motor Vehicles and Road Traffic Ordinance, 1940.

It is an offence under section 35 (1) to drive a motor vehicle on a road at a speed which is dangerous to the public, having regard to all the circumstances of the case; and it is also an offence to drive a motor vehicle on a road in a manner which is dangerous to the public, having regard to all the circumstances of the case. But it is not an offence under section 35 (1) to drive a motor vehicle dangerously on a road, unless the motor vehicle is driven either at a speed or in a manner which is dangerous to the public.

By section 7 of the Criminal Justice Ordinance, 1932, (No. 21) it is provided that—

(1) every information, complaint, summons, warrant or other document in connection with any proceedings for an offence shall be sufficient if it contains a statement of the specific offence with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the charge;

(2) the statement of the offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and *without necessarily stating all the essential elements of the offence*, and if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence;

(3) after the statement of the offence, necessary particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be required.

(4) any information, complaint, summons, warrant or other document to which this section applies which is in such form as would have been sufficient in law if this Ordinance had not been enacted shall notwithstanding anything in this section continue to be sufficient in law.

Under section 7 (4) the following form of complaint which was sufficient in law prior to the coming into force of the Criminal Justice Ordinance, 1932 (No. 21) would still have been sufficient in law; “Albert Bagado on the 28th September, 1941 on Craig Public Road, a road in the Georgetown Judicial District did drive

A. BAGADO v. C. WELCOME.

a certain motor vehicle to wit motor car No. H 5344 in a manner (*or* at a speed) which was dangerous to the public having regard to all the circumstances of the case, contrary to section 35 (1) of the Motor Vehicles and Road Traffic Ordinance, 1940." That form contains all the essential elements of the offence of driving to the public danger under section 35 (1), and it is not much longer than the form authorised under subsections (1), (2) and (3) of section 7 of the Criminal Justice Ordinance, 1932—the form adopted by the complainant in this case.

The complaint in this case did not contain the allegation that the motor vehicle was driven either at a speed or in a manner which was dangerous to the public, and so it did not state all the essential elements of the offence of driving to the public danger under section 35 (1) of the Motor Vehicles and Road Traffic Ordinance, 1940. However, under section 7 (2) of the Criminal Justice Ordinance, 1932 the complaint is not necessarily defective, as the complaint does in fact contain a reference to the section of the Ordinance creating the offence.

Section 7 of the Criminal Justice Ordinance, 1932, does not mean that those essential elements of the offence which are not specified in the complaint should be ignored by the Magistrate when he is determining whether the defendant is guilty or not guilty; neither does the section mean that those elements can properly be omitted from the conviction. Section 7 does not apply to convictions: it only relates to the form and the substance of the charge which the defendant is required to answer.

In his reasons for decision the magistrate dealt with the case as if all the essential elements of the offence of driving to the public danger under section 35 (1) of the Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22) were in fact contained in the particulars of offence as set out in the complaint, and as if dangerous driving, in itself, were an offence under the subsection. In so doing, the magistrate was probably misled by the particulars of offence which did not in fact contain all the essential elements of the offence; and when he was determining the question as to whether the defendant was guilty or not guilty, he failed to take into consideration, or to appreciate, that the offence of driving to the public danger under section 35 (1) is not established unless and until it is proved that the driving of the motor vehicle was at a speed or in a manner which was dangerous to the public. The danger to the public is the essence of the offence of "dangerous driving".

The magistrate did not find that the appellant drove the motor vehicle either at a speed or in a manner which was dangerous to the public. He convicted the appellant of dangerous driving *simpliciter*. There was neither error nor mistake in the conviction as drawn up by the magistrate: it was in full accord not only with the particulars of offence as set out in the complaint, but also with the terms of the decision of the magistrate as contained in his reasons for decision. The conviction, as drawn up

A. BAGADO v. C. WELCOME

by the magistrate, cannot be amended to make it appear that the decision of the magistrate was that the appellant was convicted of driving a motor vehicle on a road in a manner (*or* at a speed) which was dangerous to the public, as the magistrate did not convict the appellant of that offence, but of the offence of dangerous driving *simpliciter* which is not an offence under the law. The appeal is therefore allowed, the conviction quashed and the order of the magistrate disqualifying the appellant from holding or obtaining a driver's licence for the period of nine months from the date of that conviction is set aside with costs.

Appeal allowed.

Solicitor for appellant: *R. G. Sharples.*

EDWIN ADOLPHUS CHUNG TIAM FOOK, Applicant
(Defendant),

v.

MOHAMED HUSSAIN AND JOHN GILBERT CHOONG,
Respondents (Plaintiffs).

[W. I. C. A. 1942. No. 6.—BRITISH GUIANA]

BEFORE DUKE, J. (ACTING):

1942. SEPTEMBER 7, 9.

Appeal—West Indian Court of Appeal—Extension of time—Motion for—To bring appeal—Discretion of Court—Perfectly free—Question for consideration—Whether upon facts of particular case discretion should be exercised—West Indian Court of Appeal Rules, rule 6 (1); West Indian Court of Appeal (Amendment) Rules, 1930, rule 2.

The discretion of the Court under rule 6 (1) of the West Indian Court of Appeal Rules, as enacted by rule 2 of the West Indian Court of Appeal (Amendment) Rules, 1930, to grant an extension of time to bring an appeal is a perfectly free one, and the only question for consideration is whether upon the facts of the particular case that discretion should be exercised.

MOTION by the defendant Edwin Adolphus Chung Tiam Fook for an order extending the time for bringing an appeal to the West Indian Court of Appeal.

S. L. van B. Stafford, K.C., (S. I. Cyrus with him) for the applicant.

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

Cur. adv. vult.

E. A. C. TIAM FOOK v. M. HUSSAIN AND ANR.

DUKE, J. (Acting); This is a motion by the defendant Edwin Adolphus Chung Tiam Fook for an order extending the time for bringing an appeal from an order of a judge in chambers made on the 13th July, 1942, and entered on the 15th July, 1942, to the West Indian Court of Appeal. The motion was filed on the 27th August, 1942, and it is made to the Supreme Court of British Guiana, by virtue of the authority conferred by rules 18 (1) (d) and 18 (2) of the West Indian Court of Appeal Rules, 1920 as enacted by rule 5 of the West Indian Court of Appeal (Amendment) Rules, 1930.

Immediately after the judge in chambers had delivered decision on the 13th July, 1942, counsel for the defendant (now his junior counsel) applied for leave to appeal. Leave to appeal is not required where an appeal lies to the West Indian Court of Appeal: it is, however, usually required where the appeal lies to the Full Court. The judge in chambers, not wishing to express any opinion as to whether an appeal from his order would lie to the Full Court of the Supreme Court, or whether such an appeal should be taken to the West Indian Court of Appeal, made the following order "Leave to appeal, *if necessary*." This Court adopts the attitude which was adopted by the judge in chambers, and declines to express any opinion as to whether the defendant is right or wrong in appealing to the West Indian Court of Appeal, and not to the Full Court of the Supreme Court.

The time limited by the West Indian Court of Appeal Rules for appealing to the West Indian Court of Appeal expired on the 26th August, 1942. On that day the defendant's solicitor swore to an affidavit in support of an application for extension of time to bring an appeal to the West Indian Court of Appeal. However, for some reason which was not explained, the defendant's motion herein was not filed until the following day. This Court hesitates to comment adversely on the conduct of the solicitor in not tiling the present application before the time limited for appealing had expired, as he has not been afforded an opportunity to explain the reason for the delay. But, in any event, the Court will not reject this motion merely because of lack of diligence of the defendant's solicitor in filing the motion herein before the time limited for appeal to the West Indian Court of Appeal had expired.

In *Gatti v. Shoosmith* (1939) 3 All E.R. 916, the Court of Appeal held that under Order 58, rule 15 of the Rules of the Supreme Court, England, (which rule corresponds with rule 6 (1) of the West Indian Court of Appeal Rules, 1920, as enacted by rule 2 of the West Indian Court of Appeal (Amendment) Rules, 1930), the discretion of the Court to grant an extension of time to bring an appeal is a perfectly free one, and the only question for consideration is whether upon the facts of the particular case that discretion should be exercised.

E. A C. TIAM FOOK v. M. HUSSAIN AND ANR.

In the affidavit filed in support of this motion the defendant's solicitor stated that the applicant is financially embarrassed, and, as a consequence, there was delay in obtaining the opinion of senior counsel on the question as to whether the appeal should be taken to the Full Court of the Supreme Court, or to the West Indian Court of Appeal. This Court accepts, without reserve, the statement made at the bar by senior counsel for the defendant that he had considerable difficulty in determining that question, and that its determination entailed considerable research. In these circumstances, the Court, in the exercise of its jurisdiction, will make an order for extension of time to bring an appeal to the West Indian Court of Appeal from the order made by the judge in chambers on the 13th July, 1942, but the defendant, for this indulgence, must pay in any event the plaintiffs' costs of and incidental to this motion and to this order.

Application granted.

Solicitors: *H. A. Bruton*, for defendant;

J. Edward de Freitas, for plaintiff's.

S. A. SATTAUR v. W. SCHROEDER.
 S. A. SATTAUR, Appellant (Defendant),
 v.
 WILLIAM SCHROEDER, Respondent (Plaintiff).

[1942. No. 160.—DEMERARA.]

BEFORE FULL COURT: VERITY, C.J., AND DUKE, J. (ACTING)

1942. AUGUST 28; SEPTEMBER 11.

Principal and agent—Commission agent—Finding a purchaser—Meaning of—Finding a person who enters into a contract of purchase and not merely a person willing and able to purchase—Contract may however provide otherwise—But clear and unequivocal language must be used—Where agent not entitled to commission on contract—Agent not entitled to damages because owner refuses to sell—Agent not entitled to claim on a quantum meruit—Risk natural to business of commission agent—That he receive no recompense for expenditure of time and energy, if sale not effected.

The plaintiff approached the defendant, who was aware that he was a licensed house agent, and ascertained that the defendant then wanted to sell his property for \$3,600. The plaintiff told the defendant that he could find a purchaser. The defendant then told the plaintiff to bring him a purchaser. The plaintiff found a person some four weeks later who was ready, willing and able to purchase the property for the stated price, but on consideration the defendant refused to enter into a contract of sale on the ground that the value of property was going up and that he then wanted \$4,000 as the purchase price. The magistrate found that the contract was that the defendant would pay commission if the plaintiff brought a purchaser who was ready willing and able to purchase, and that the plaintiff, having carried out his part of the contract, was entitled to commission, though the purchase was never completed owing to refusal on the defendant's part to proceed with the sale. The defendant appealed.

Held (1) that there was not expressed, in the terms of the contract, in clear and unequivocal language a provision that the agent was to be remunerated for the mere introduction of one who offers to purchase at the minimum price;

(2) that the contract in this case was for implied remuneration if the respondent found a purchaser, that is a person who enters into a contract to purchase, and not merely for the introduction of a person willing and able to purchase;

(3) that, as no contract of sale was in fact entered into, the respondent could not recover remuneration under the contract;

(4) that the respondent was not entitled to damages for breach of any implied contract on the part of the appellant to let the sale go through; and

(5) that it was a risk natural to the business of a commission agent that he would expend time and energy and receive no recompense therefor if no sale was effected, and that the respondent could not recover on a *quantum meruit*.

Appeal by the defendant from a decision of a Magistrate of the Georgetown judicial district in which he gave judgment in favour of the plaintiff. The facts and arguments fully appear from the judgment.

E. V. Luckhoo, for the appellant.

G. M. Farnum, for the respondent

Cur. adv. vult.

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

This is an appeal by the defendant from a judgment entered

S. A. SATTAUR v. W. SCHROEDER.

for the plaintiff by a Magistrate in a suit for the recovery of commission on an alleged contract whereunder the plaintiff was engaged to find for the defendant a purchaser for a certain property. The learned magistrate found that the contract was that the appellant would pay commission if the respondent brought a purchaser who was ready, willing and able to purchase, and that the respondent having carried out his part of the contract he was entitled to commission, though the purchase was never completed owing to refusal on the appellant's part to proceed with the sale.

In the first place it is necessary to ascertain what are the precise terms of the contract. These were not reduced to writing but the terms have been found by the learned magistrate to be contained in a certain conversation between the parties. The respondent approached the appellant, who was aware that he was a licensed house agent, and ascertained that the appellant then wanted to sell his property for \$3,600. The respondent told the appellant that he could find a purchaser. The appellant then told the respondent to bring him a purchaser. These then are the terms of the contract and no more, though it is to be implied that the appellant undertook to remunerate the respondent. The question for determination is whether in the circumstances which followed, the respondent was entitled to such remuneration. He found a person some four weeks later who was ready, willing and able to purchase the property for the stated price, but on consideration the appellant refused to enter into a contract of sale on the grounds that the value of property was going up and that he then wanted \$4,000 as the purchase price.

At the hearing of the appeal both parties referred to a case recently decided in the House of Lords, *Luxor Ltd. v. Cooper* (1941) 1 A. C. p. 108, in which the law relating to such contracts was fully discussed and earlier authorities were considered. In that case what was described by Lord Wright as the essential term of the contract included the words "on completion of the sale" and the case turned upon whether or not there was an implied term that the vendor could not refuse to go on with a proposed sale, and whether, if he so refused, the agent would be entitled to damages. In its precise terms, therefore, the contract in that case may be distinguished from that to which this appeal refers, but consideration of the opinions delivered by their Lordships in *Luxor v. Cooper* is nevertheless of value in determining the principles which may properly be applied to the facts of the present case.

Lord Simon expressed the view that contracts of this nature fall into several obvious classes. He refers to the class "in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount" and his Lordship proceeded "if that is all that is needed in order to earn his reward it is obvious that he is

S. A. SATTAUR v. W. SCHROEDER.

“entitled to be paid when this has been done, whether his principal accepts the offer and carries through the bargain or not.”

It is within this class that the learned magistrate has placed the contract in question, and in his references to *Prickett v. Badger* (1856) 1 C.B.N.S., 296, Lord Wright uses words which would appear to support this view, for he says “in Prickett’s case it is not easy to find out what the contract was. It was oral, but Williams, J., states the agent’s obligation to have been to find a purchaser—presumably a person able and willing to purchase at a price named—which he did. If that was all, and if there was no condition that there should have been actual purchase, it would seem to follow that the plaintiff was entitled to get the whole agreed commission.”

In deciding whether or not this is the sole obligation of the agent upon discharging which he has earned his reward some little difficulty may arise from the terms of the contract and does arise in the present case. The obligation of the respondent is expressed in the few words “find a purchaser”, a phrase which Lord Simon describes as “itself not without ambiguity.” Lord Romer goes further and says that “finding a purchaser” must mean at least a person who enters into a binding contract to purchase, while Lord Russell of Killowen expresses the opinion that “it is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price; but such a construction of the contract would in my opinion require clear and unequivocal language.”

This seems to be the guiding factor, and indeed in *Prickett v. Badger*, Williams, J., referred to what he termed “the implied understanding” in an ordinary case that “the agent is only to receive a commission if he succeeds in effecting a sale, but if not then he is to get nothing.”

Although the present contract is expressed in the most brief terms yet they do not appear to constitute a contract any different in essence from the ordinary case in which a vendor engages the services of an agent to “find a purchaser,” using that phrase in the sense understood by Lord Romer. They certainly do not express in clear and unequivocal language that the agent is to be remunerated for the mere introduction of one who offers to purchase at the minimum price. The weight of authority appears to decide that in such case the agent is not entitled to commission, and on that ground it would seem that the learned magistrate erred in holding that the respondent was entitled to recover. Nor is he entitled to damages for breach of any implied contract on the part of the appellant to let the sale go through.

Before us it was argued, however, that the respondent was entitled to succeed on a *quantum meruit* and in support of his contention counsel relied upon *Prickett v. Badger*.

In *Luxor v. Cooper* considerable doubt was thrown upon the

S. A. SATTAUR v. W. SCHROEDER.

authority of *Prickett v. Badger* and Lord Wright held the view that it must be treated "as a decision on its special facts and on the manner in which the "plaintiff had formulated his claim," His Lordship was clear, however, that it was no authority for so wide a rule as that when an agent succeeds in finding a person able and willing to purchase but the employer declines to sell, the agent is entitled to sue on a *quantum meruit* for his work and labour. It would appear that in the present case no such claim is applicable. The contract was for implied remuneration if the respondent found a purchaser, that is a person who entered into a contract to purchase and not merely for the introduction of a person willing and able to purchase. That he has not done for no contract of sale was in fact entered into. He cannot therefore recover remuneration under the contract, and although he may have expended time and energy and for it receive no recompense this is a risk natural to his business and there is no rule which may be deduced from the authorities enabling an agent in such case to recover on a *quantum meruit*. If this were so then an agent would be entitled to recover in every case and the business risk recognised by all authorities and adverted to more than once in the case of *Luxor v. Cooper* would be reduced to vanishing point.

The judgment of the learned magistrate cannot be upheld on the basis upon which it was pronounced: recovery of commission earned by fulfilment of the contract, nor can it be supported by any claim on a *quantum meruit*.

In our view therefore the appeal should be allowed, the judgment in the lower court be set aside and judgment entered for the defendant therein with costs.

The appellant is entitled to his costs of this appeal.

Appeal allowed.

J. MARTIN v. E. G. DOOKWAH.

JEROME MARTIN, Appellant (Defendant,

v.

E. G. DOOKWAH, Respondent (Complainant).

[1942: No. 135.—DEMERARA.]

BEFORE FULL COURT: VERITY, C.J., AND DUKE, J. (ACTING).

1942. AUGUST 4; SEPTEMBER 11.

Public health—Offensive manufacture—Declared to be—That process, or any part, of offensive—Proof not required—Manufacture—Includes any stage in process—Establishes—Whether connotes permanence or stability—Public Health Ordinance, 1934 (No. 15), s. 95.

The appellant was charged with establishing an offensive manufacture, to wit soap-making, at a certain place without the consent of the Central Board of Health. On the 25th October, 1941 the appellant was engaged in a process admitted by him to be the conversion of soft soap into hard soap at a place in relation to which he had not the consent of the Board. By resolution of the Central Board of Health passed under the authority of section 95 of the Public Health Ordinance, 1934 (No. 15), soap-making was declared to be an offensive manufacture. The process of conversion of the soft soap into hard soap involved the use of some solution separate and apart from the soft soap before it became the finished article.

Held (1) that the process was a stage in the making of the particular kind of soap required, and that the appellant was engaged in soap-making which is declared by resolution of the Central Board of Health to be an offensive manufacture:

(2) that where a person is charged under section 95 of the Public Health Ordinance 1934, (No. 15) with establishing a manufacture which is declared by the Ordinance or by resolution of the Central Board of Health made under the authority of the Ordinance, to be an offensive manufacture, proof is not required that the process, or any part of it, is in fact offensive.

Quaere: whether the establishing of a manufacture under section 95 of the Public Health Ordinance, 1934 (No. 15) must be evidenced by proof of something in the nature of permanence or stability.

Soap making apparatus was on the premises for ten or eleven days before the 25th October, 1941, when the appellant was found making soap. On the 25th October there was a drum of material which the appellant said was “kept there to be refined into hard soap,” and on that day the appellant admitted that he was “first carrying on the manufacture of soap” there, as owing to the war he was unable to erect his building at the spot for for which he had the consent of the Central Board of Health. Early in November, 194 , the appellant, when questioned as to whether he was still working at the same place, stated that he would carry on until after the prosecution.

Held that there was sufficient evidence (if needed to indicate a measure of permanence or stability.

APPEAL by the defendant from a decision of the Magistrate of the Georgetown judicial district convicting him of an offence under section 95 of the Public Health Ordinance, 1934 (No. 15).

S. I. Cyrus, for the appellant.

S. E. Gomes, Assistant Attorney-General, for the respondent.

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

This is an appeal against a conviction and sentence by a Magistrate for a breach of section 95 of the Public Health Ordinance, No. 15 of 1934.

J. MARTIN v. E. G. DOOKWAH.

The appellant was charged with establishing an offensive manufacture, to wit, soap making on a certain place without the consent in writing of the Central Board of Health. The facts as found by the learned magistrate are that on the 25th October, 1941, the appellant was engaged in a process admitted by him to be the conversion of soft soap into hard soap at a place in relation to which he had not the consent of the Board.

Three main arguments were relied upon at the hearing of the appeal.

Firstly, it was submitted that where upon the facts there is any ambiguity as to the nature of the process in which the defendant is engaged it must be proved affirmatively that it is an offensive trade or manufacture, even though it be akin to a trade or manufacture declared by or under authority of statute to be an offensive trade or manufacture. Counsel relied upon the case of the *Cardiff Manure Co. v. Cardiff Union*, 54 J. P. p. 661 and the *Wanstead Local Board of Health v. Hill*, 13 C. B. (N. S.) p. 479. The latter case is inapplicable as the trade there involved was that of brick-making which was not declared to be an offensive trade by the statute under which the charge was brought. In the former case it would appear that the defendant was charged as a "bone-boiler" and the question arose as to whether the process used by him was bone-boiling. It was held that if the process was not "bone-boiling" within the meaning of the statute then the process was not an offensive trade unless its offensive nature were proved.

Whether or not this principle can be applied to the present case depends upon the soundness of the second contention raised by Counsel, that the process of converting soft soap into hard soap is not "soap-making" within the meaning of the resolution of the Central Board of Health declaring under authority of the Ordinance "soap-making" to be an offensive trade or manufacture. No expert or technical evidence upon the process of making soap was adduced and a conclusion must be arrived at on the facts proved and upon the ordinary meaning of the words used in the resolution. In such a sense the word "making" would appear ordinarily to include the whole process of converting the raw material into a finished article and any stage in the course of such conversion or a stage in and part of the making. In the making of hard soap, which is admittedly soap, it would appear from the evidence that soft soap is either the raw material from which hard soap is made or that it is material in a condition somewhere between the raw material and the finished article and at an intermediate stage in the process of conversion or manufacture. It is clear from the appellant's own evidence that the raw material had not yet become the finished article and that it was no question of merely drying the finished article or otherwise preparing it for sale to the public. The conversion of soft soap into the finished article, hard soap, involved the use

J. MARTIN v. E. G. DOOKWAH.

of some solution separate and apart from the soft soap. The material required some further degree of processing before it became the finished article and it is clear that this process was a stage in the making of the particular kind of soap required. That being so the appellant was on the date charged engaged in soap-making and this having been declared to be an offensive manufacture proof is not required that the process, or any part of it, is in fact offensive.

The final argument of Counsel rests upon the contention that this was an isolated act which did not in the circumstances constitute the establishing of a manufacture, which, it was argued, must be evidenced by proof of something in the nature of permanence or stability. Even if this be so there is sufficient in the evidence of the Sanitary Inspector to support the view that in this case the element of stability existed. The apparatus was on the premises for ten or eleven days before the actual incident of the 25th October when the appellant was found making soap; there was on the latter date a drum of material which the appellant said was "kept there to be refined into hard soap"; on that day the appellant admitted that he was "first carrying on the manufacture of soap" there, as owing to the war he was unable to erect his building at the spot for which he had the Board's consent; and early in the following month the appellant, when questioned as to whether he was still working at the same place, stated that he would carry on until after the prosecution. It is true that the appellant denies certain of these allegations and states in his evidence that he was doing no more than hardening some soft soap there to meet a special order. The learned magistrate, however, having heard the witnesses accepted the testimony of the Sanitary Inspector. We see no reason to differ from his view and upon that evidence there can be no doubt that there is sufficient, if it be needed, to indicate a measure of permanency or stability.

In our view the conviction was right and must be upheld.

In regard to sentence the learned magistrate has given his reasons for the penalty he imposed. It is impossible for us to say in view thereof, that he acted upon any wrong principle, in determining the measure of punishment, In view of the fact that the penalty imposed does not exceed one third of the maximum penalty allowed by law We cannot say that it is harsh or excessive.

Both conviction and sentence are therefore affirmed and the appeal dismissed with costs.

Appeal dismissed.

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

DEMERARA STORAGE Co., LTD., Plaintiffs,

v.

DEMERARA WHARF AND STORAGE Co., LTD., Defendants.

[1041. No. 136.—Demerara.]

BEFORE VERITY, C.J.: IN CHAMBERS

1942. JUNE 29; SEPTEMBER 14.

Judgments and orders—Decree for specific performance—Against company—Default in compliance—Subsequent thereto—Action for liquidated demand by chairman of company—Against company—Judgment obtained—Levy on property subject of decree for specific performance Chairman of company restrained from proceeding with levy—In suit in which specific performance decreed—In order to give effect to the decree.

The plaintiffs obtained from the Court an order for the specific performance by the defendant company for the sale of certain property. The defendant company did not comply with the terms of the order. Shortly after the date of the order, and pending steps to carry it out, the chairman of the defendant company commenced proceedings to recover from that company moneys paid by him on its behalf, obtained judgment, and proceeded to levy on the property which was the subject of the order for specific performance.

The plaintiffs took out a summons, in the suit in which the decree for specific performance was made, to prevent the judgment creditor from proceeding with the levy.

Held (1) that, to allow the levy to proceed, would be to stultify the prior order for specific performance, and from such a result the Court would protect itself and the party for whose benefit the order was made;

(2) that the Court would in this suit set aside the levy as such a course was necessary to give effect to its order; and

(3) that there would therefore be an order restraining the judgment creditor from proceeding with the levy.

SUMMONS taken out by the plaintiff. The facts and arguments appear from the judgment.

H. C. Humphrys, K.C., (*W. J. Gilchrist* with him), for the applicants, the plaintiffs.

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

Cur. adv. vult.

VERITY, C. J.: In this matter the plaintiff company seeks an order restraining the defendant company from entering on certain property, staying a levy by a judgment creditor of the defendant company upon the said property, and requiring the defendant company or in default authorising the Registrar, to pass transport of the property to the plaintiff company, There is also an application to issue a writ of attachment against the judgment creditor who is chairman of the defendant company.

It appears that the plaintiff company obtained from the Court an order for the specific performance of a contract for the sale of the property in question. The defendant company is in default of compliance with this order and shortly after the date of the order and pending steps to carry it out, the chairman of the

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

defendant company commenced proceedings to recover from that company moneys paid by him on its behalf, obtained judgment and proceeded to levy on the property which was the subject of the order for specific performance. The object of the present application is to prevent the judgment creditor from proceeding with the levy.

The point at issue is simple: in the circumstances which have arisen in this case is it within the right of the creditor of the defendant company to take proceedings and levy upon the property to recover his debt?

It is true that in this country property such as this passes only by transport and that until transport has been duly passed the property remains in the vendor, and, it is submitted, is subject to levy for the judgment debts of the vendor. Superficially this may appear incontrovertible, but nevertheless the nature and effect both of an order for specific performance and of a writ of execution cannot be overlooked. Both move from the Court in execution of its judgment and it may be difficult to conceive of a position in which the Court may properly order in the first instance the conveyance of property to one person and subsequent thereto direct its sale to another to satisfy the debt of the defaulting vendor. The question does not appear to have been decided in these Courts in any case, where, as in the present, there is no allegation of fraud or collusion between the debtor and creditor, but in the case of *Peroo v. Dooknie and Another* 1919, L. R. B. G. p. 150, Douglas, J., expressed the view that "were the Court to order the levy to proceed it would stultify its former judgment that the vendor do convey the said property to the plaintiff". The case was not decided on this ground for in that case the learned judge found that there was fraud and held that opposition to the sale at execution was for this reason well founded. Nevertheless the view expressed appears to be consonant not only with reason but also with the principles upon which a court of equity in England would be disposed to act, as appears from *Brunton v. Neale* 14 L. J. R. (N.S.) Chancery p. 8, for it is to be observed that in the present case the judgment creditor must have been aware of the order for specific performance and only brought proceedings to recover his debt after that order had been made and while his company was in default of compliance.

It is said that the plaintiff company may protect itself by paying the defendant company's debt, more especially as the debt was incurred, it is alleged, for the benefit of the plaintiff company, but it is difficult to see why the plaintiff company should be called upon to do so, and counsel for the judgment creditor was perhaps wise to rest little weight upon this contention or upon any ground relating to the moral aspect of the affair.

I am satisfied that to allow the levy to proceed would be to stultify the prior order for specific performance and from such a

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

result the Court will protect itself and the party for whose benefit the Order was made.

It was further submitted that the procedure adopted by the plaintiff company is inapt and that the Court will not in this suit set aside a levy regularly issued in execution of a judgment obtained by a third party in another suit. I am satisfied, however, that where such a course is necessary to give effect to its order the Court will restrain the conduct of a third party even though he be not a party to the suit.

There will be, therefore, an order restraining the judgment creditor from proceeding with the levy and directing the Registrar to proceed with the passing of transport as authorised by the Order of the Court dated the 1st April, 1942.

In regard to the application for a writ of attachment against the judgment creditor and chairman of the defendant company for contempt of Court other considerations arise. The defendant company was in default of compliance with the Court's order, and the judgment creditor by the filing of his writ after that order and by proceeding to levy on the whole property worth \$50,000 to recover a debt of \$500 at the least lays his conduct open to criticism. By its order, however, the Court had made provision for non-compliance by means other than attachment. It may be that the judgment creditor was advised in bringing the proceedings which culminated in the levy, and the point was not one which as far as I have been able to enquire had previously been decided by these Courts. The solicitor for the judgment creditor has himself accepted responsibility for the instructions to levy.

In the circumstances I am of the opinion that the Court may adequately vindicate its authority and demonstrate its power to insist upon compliance with its orders by the restraint it places upon the judgment creditor in relation to his attempt to defeat that order by levying upon the property affected thereby. The application for a writ of attachment is therefore refused, but the plaintiff company will be entitled to recover the whole of the costs of this summons against the respondents thereto jointly and severally.

Certified tit for Counsel.

Application granted.

Solicitors: *J. Edward deFreitas*, for plaintiffs.

A. G. King, for respondents.

SUREJPAUL v. RAMDEYA AND SARJU.

SUREJPAUL, Plaintiff,

v.

RAMDEYA AND SARJU, Defendants.

[1941. No. 34.—DEMERARA.]

BEFORE DUKE, J., (ACTING).

1942. SEPTEMBER 8, 9, 10, 11, 15, 16, 17, 24.

Contract—Consideration—Marriage as valuable consideration—Sufficient to support ante-nuptial promises—Whether made by parties to marriage or by third persons.

Contract—Agreement in consideration of marriage—Meaning of “Marriage”—Marriage valid according to laws of colony—Does not include a Hindu marriage, which is not capable of being registered, contracted between immigrants—Immigration Ordinance, cap. 208, ss. 147, 131, 233, 142 (1) proviso.

Agreement in consideration of marriage—No action to be brought—Unless agreement in writing—Civil Law of British Guiana Ordinance, cap. 7, s. 20—Written agreement after marriage—In pursuance of parol agreement before marriage and referring thereto—Case taken out of statute.

Movable property—House—Upper and lower flats—Two rooms on lower flat—One unoccupied—Notice by owner of house—Served on tenant of room on lower flat—To pay rent to another person who is now owner and landlord—Not a delivery of house.

Movable property—House—Transfer of—Whether by bill of sale—Bills of Sale Ordinance, cap 67, Part I.

Immovable property—House—Owner of—Also owner by transport of land on which house stands—Whether house immovable property—Gift of house—Whether could be completed otherwise than by transport.

Immovable property—Transfer of—Can only take place if perfected by transport. Gift—How effected—By conveyance or assignment of property—By declaration of trust thereof.

Trust—Declaration of—Settlor’s property—Intention to become a trustee—Expression of.

Gift—Intended to take effect—By transfer of property—Transfer incomplete—Does not operate as a declaration of trust.

Specific performance—Contract—Relating to immovable property—Made without consideration—No question of part performance.

Contract—Consideration—Relief from liability to maintain daughter—Father not legally liable to maintain child of 17 years—Maintenance Ordinance, cap. 145. ss. 2,7—Assumption of liability to maintain daughter—Man married by Hindu rites not legally liable to maintain the woman.

An agreement made in consideration of marriage can only mean an agreement made in consideration of a marriage which is lawful according to the laws of the land.

Marriage is a valuable consideration sufficient to support ante-nuptial promises made not only by the parties thereto, but also by third persons.

Section 147 of the Immigration Ordinance, cap. 208, does indeed provide for a division of property between immigrants who have cohabited with each other and who have not been married to each other in accordance with the laws of the colony, but it makes no alteration to the meaning of the word “marriage” as importing valuable consideration to a contract.

The meaning of “marriage” as importing valuable consideration is not extended to include a Hindu marriage performed between immigrants within the meaning of sections 131 and 233 of the Immigration Ordinance, cap. 208, where such ceremony is not performed in accordance with the provisions of the proviso to section 142 (1) of the said Ordinance.

By section 20 of the Civil Law of British Guiana Ordinance, cap. 7, it is provided that “no action shall be brought... to charge anyone upon any agreement made upon consideration of marriage . . . unless the agreement upon which the action is brought or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.”

SUREJPAUL v. RAMDEYA AND SARJU.

Held (1) that where there is a written agreement after marriage in pursuance of a parol agreement before marriage, that takes the case out of the section and

(2) that no one can rely on a note or memorandum in writing of a prior verbal agreement in consideration of marriage, unless it appeared on the face of the note or memorandum that the verbal agreement to which it refers was made before marriage.

G. owned lot 111, Alexanderville, Kitty, by transport. There was a cottage, belonging to G., situate on the eastern half of the lot. There were 2 rooms underneath the cottage. The cottage and one only of the rooms were tenanted. The tenant of the room downstairs gave evidence that G., served her with a notice in the following terms: "I hereby give you notice that the house situate at lot 111, Barr Street, Kitty Village, is now the property of my son-in-law Surejpaul. You are therefore requested to pay all house rent to him in future as he is the present owner and landlord of the above property. Surejpaul was not present when the notice was served. The tenant of the cottage, the upper flat of the building, in respect of which a monthly rental of \$6 was payable, received no such notice.

Held, that assuming the house to be movable property, the notice served by G., on the tenant of the room downstairs did not operate as a delivery to Surejpaul of the house.

Quaere: whether the house was capable of being transferred by a bill of sale under Part I of the Bills of Sale Ordinance, cap. 67.

Quaere: whether the house, which stood on land belonging, by transport, to the owner of the house, was immovable property; and whether, as such, a gift of the house could be completed otherwise than by way of transport.

G. purported to donate to S. the W½ lot 111, Alexanderville, Kitty of which he was the owner by transport. Up to the time of his death, G. had not passed transport in favour of S.

Held, (1) that it is part of the law of this colony that no transfer of immovable property can take place unless perfected by transport;

(2) That the gift to S. of the W½ lot 111, Alexanderville, Kitty was not completed at the time of the death of G.

A man may transfer his property, without valuable consideration, in one of two ways: (a) he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership in which case the person who by those acts acquires the property takes it beneficially or on trust, as the case may be; or (b) the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee and, without an actual transfer of legal title, may so deal with the property as to deprive himself of its beneficial ownership and declare that he will hold it from that time forward on trust for the other person.

For a man to make himself a trustee, there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise.

If a settlement is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.

On the 10th March, 1940 the plaintiff Surejpaul was married to Durpatie, then 17 years old, a daughter of Gojadhhar, according to the rites of the Hindu religion. At some time prior to the 10th March, 1940, Gojadhhar promised to give to the plaintiff a house and a parcel of land if he married Durpatie. Arrangements were made for the marriage to be performed according to the rites of the Hindu religion, but none were made whereby the marriage was to become a lawful marriage according to the laws of this colony. The certificate required by the proviso to section 142 (1) of the Immigration Ordinance, cap. 208 to be obtained prior to the Hindu marriage was not so obtained; and consequently it is not possible to render the Hindu marriage ceremony a lawful marriage according to the laws of this colony.

On the 14th March, 1940, Gojadhhar signed a document in the presence of 2 witnesses in the following terms: "I the undersigned Gojadhhar, male East Indian No. 53665 ex Foyle, 1892 of lot number 117 Barr Street, Kitty, East

SUREJPAUL v. RAMDEYA AND SARJU.

Coast, Demerara do hereby give to Surejpaul my son-in-law as a wedding gift the western half of lot 111 (one hundred and eleven) with a cottage thereon situate on the eastern half of the said lot, and to transport same to him, whenever he is ready as was promised by me, if he married my daughter in Hindoo fashion.”

Held (1) that it sufficiently appears on the document of the 14th March, 1940, that the verbal agreement to which it refers was in fact made before the Hindu marriage ceremony, and that the requirements of form prescribed by section 20 of the Civil Law of British Guiana Ordinance, cap. 7, had therefore been complied with;

(2) that the Hindu marriage ceremony performed between Durpatie and the plaintiff on the 10th March, 1940, was not valuable consideration for a promise made prior to the 10th March, 1940, by Gojadhar, the father of Durpatie, to give the plaintiff the western half of lot 111, Alexanderville, Kitty, with a cottage thereon situate on the eastern half of the said lot;

(3) that Gojadhar was not relieved of the duty of maintaining his daughter Durpatie neither was this obligation assumed by the plaintiff. Durpatie was 17 years of age at the time of the Hindu marriage ceremony and her father was under no legal obligation, under sections 2 and 7 of the Maintenance Ordinance, cap. 145, to maintain her: the plaintiff was under no legal obligation, whether by statute or otherwise, to maintain Durpatie, who is not his lawfully wedded wife;

(4) that the agreement which the plaintiff Surejpaul claimed to have been made in consideration of marriage was made without consideration;

(5) that the document of the 16th March, 1940, purported to effect a gift to be completed by transport, whenever the plaintiff was ready; that there was an incomplete gift; that the document showed that the question of a trust was entirely absent from the mind of Gojadhar; and that there was nothing in the document from which there could be inferred an intention on the part of Gojadhar to become a trustee.

The plaintiff claimed specific performance of an agreement which the Court found to have been made without consideration.

Held, that, as the agreement was a *nudum pactum*, there could be no question of part performance.

ACTION by the plaintiff Surejpaul for an order that the defendant Ramdeya in her capacity as executrix of Gojadhar transport to him W½ lot 111, Alexanderville, Kitty, with a cottage situate on the E½ of the lot. The defendant Sarju was bequeathed lot 111, Alexanderville, Kitty, under the will of Gojadhar.

J. A. Luckhoo, K.C., and *C. Vibart Wight*, for the plaintiff.

E. G. Woolford, K.C., and *H. B. S. Bollers*, for the defendant Ramdeya.

G. M. Farnum, for the defendant Sarju.

Cur. adv. vult.

DUKE, J. (Acting): The plaintiff Surejpaul, also known as Debidin, claims (a) a declaration that the defendant Ramdeya in her capacity as executrix of the estate of Gojadhar, male, 53665 *ex Foyle* 1892, deceased is a trustee for the plaintiff of W½ lot 111, Barr Street, Alexanderville Village, Kitty, East Coast, Demerara, with a cottage thereon situate on the east half of the said lot, and that the plaintiff is entitled to receive transport therefor; and (b) an order of Court compelling the defendant Ramdeya in her aforesaid capacity to transport to the plaintiff W½ lot 111, Barr Street, Alexanderville, Kitty, East Coast, Demerara, with a cottage situate on the east half of the said lot.

Sarju was joined as a defendant because by the last will and testament of Gojadhar, dated the 3rd November, 1938, and deposited in the Supreme Court Registry on the 21st May, 1940, (No. 143 of 1940), probate whereof was granted to the defendant Ramdeya on the 23rd August, 1940, the testator bequeathed to his son, the defendant Sarju, lot 111, Barr Street, Kitty, with all the buildings and erections thereon. Sarju claimed that on the 16th May, 1940, when Gojadhar died he was the owner of the property bequeathed to him (Sarju): whereas the plaintiff claimed that at that time he was the beneficial owner of the W½ lot 111, Barr Street, and of a cottage thereon situate on the east half of the lot.

The defendant Ramdeya was served with the writ of summons herein on the 11th February, 1941. The statement of claim was delivered to the defendant Sarju on the 28th June, 1941, and it was filed on the said day. The defendant Ramdeya entered appearance on the 23rd September, 1941. She did not deliver or file a defence. At the trial of this action she was represented by senior and by junior counsel. They, however, took no part in the proceedings except to inform the Court at the beginning of the trial that the defendant was adopting an entirely neutral character in the dispute between the plaintiff and the defendant Sarju, and except to inform the Court, at the end of the trial, that the defendant Ramdeya was the lawful widow of Gojadhar, that the only vat, and the only cow-pen, possessed by Gojadhar in his lifetime were on the W½ lot 111, and that there must be a mistake in that part of the will which relates to the bequest to the defendant Sarju as Gojadhar could not have intended to leave the vat and cow-pen to any person other than the defendant Ramdeya.

Gojadhar was married on the 15th August, 1923, to the defendant Ramdeya under the provisions of sections 137 to 140 of the Immigration Ordinance, cap. 208. Of that marriage there were two children, Sursatie and Durpatie. Gojadhar had been previously "married" under Hindu rites to another lady, but that "marriage" was not registered. In his will Gojadhar made bequests to the children of that "marriage," but he made none to the children of his lawful marriage. He, however, made a bequest to Ramdeya of the half lot of land on which their dwelling house stood, and he also bequeathed to her the residue of his estate. The residue of the estate was nearly 40 per cent., of the whole estate, and the value of the total bequest to Ramdeya was two-thirds of the value of the whole estate. The testator no doubt felt confident that his widow Ramdeya would make such provisions for their children Durpatie and Sursatie as she may from time to time think proper.

On the 10th March, 1940, the plaintiff was married to Durpatie, then under the age of 21 years, according to the rites of the

SUREJPAUL v. RAMDEYA AND SARJU.

Hindu religion. The plaintiff, Gojadhar, Ramdeya and Durpatie were all Hindus, and they all professed the Hindu religion.

It is difficult for me to believe, but the weight of evidence is to the effect, that at some time prior to the 10th March, 1940, Gojadhar promised to give to the plaintiff a house and a parcel of land if he married Durpatie. Neither Ramdeya nor Sarju knew of this promise. Arrangements were made for the marriage to be performed according to the rites of the Hindu religion, but no arrangements were made whereby the marriage was to become a lawful marriage according to the laws of this colony. The certificate required by the proviso to subsection (1) of section 142 of the Immigration Ordinance, cap. 208 to be obtained prior to the Hindu marriage was not so obtained, and it is not possible to render the Hindu marriage ceremony a lawful marriage according to the laws of this Colony.

The plaintiff deposed in evidence, and he was supported by Sugrim Singh and Dundee Davidson, that on the 14th March, 1940, a document was prepared by Sugrim Singh on the express instructions of Gojadhar. The document was as follows:—

“I the undersigned Gojadhar, male East Indian, No. 53,665, ex *Foyle*, 1892, of lot number 117, Barr Street, Kitty, East Coast, Demerara, do hereby give to Surejpaal my son-in-law as a wedding gift the western half of Lot 111 (one hundred and eleven) with a cottage thereon situate on the eastern half of the said lot, and to transport same to him, whenever he is ready as was promised by me, if he married my daughter in Hindoo fashion.

“This done and signed at Kitty Village this 14th day of March, 1940, in the presence of the subscribing witnesses.

	his
“1. Sugrim Singh	Gojadhar X
“2. D. Davidson	mark.”

No memorandum of the alleged promise was made prior to the Hindu marriage ceremony of the 10th March, 1940. By section 20 of the Civil Law of British Guiana Ordinance, cap. 7, it is provided that no action shall be brought.....to charge anyone upon any agreement made upon consideration of marriage.....unless the agreement upon which the action is brought or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised. In *Barkworth v. Young* (1860) 4 Drewry 1, 16; 62 E.R. 1, 7, Kindersley, V.C. stated that “the plaintiff cannot rely on a note or memorandum in writing of a prior verbal agreement in consideration of marriage unless it appears on the face of the note or memorandum that the verbal agreement to which it refers was made before marriage.” The judgment of Kindersley, V.C. was approved by the Court of

Appeal in *In re Holland, Gregg v. Holland* (1902) 2 Ch. 360, where it was also held that where there is a written agreement after marriage in pursuance of a parol agreement before marriage, that takes the case out of the Statute of Frauds. It sufficiently appears on the face of the document of the 14th March, 1940, that the verbal agreement to which it refers was in fact made before the Hindu marriage ceremony. The requirements of form prescribed by section 20 of the Civil Law of British Guiana Ordinance, cap. 7 have therefore been complied with.

An agreement made in consideration of marriage can only mean an agreement made in consideration of a marriage which is lawful according to the laws of the land. In Halsbury's Laws of England, 2nd edition, volume 7, p. 146, para. 205, the following statement appears under the title "Contract" which was contributed by Lord Atkin: "Marriage is a valuable consideration sufficient to support ante-nuptial promises made not only by the parties thereto, but also by third persons." One of the requisites of a valid marriage according to the laws of this Colony is that certain requirements preliminary to the marriage prescribed by the Marriage Ordinance, cap. 142, or by the Immigration Ordinance, cap. 208 as amended by Ordinance No. 42 of 1929, must be observed: compare Halsbury's Laws of England, 2nd edition, vol. 16, paras. 836, 837. No arrangements were made prior to the Hindu marriage ceremony, to have it registered as a marriage valid in accordance with the laws of this Colony, and the Hindu marriage ceremony performed between Durpatie and the plaintiff on the 10th March, 1940, is therefore, not valuable consideration for a promise made prior to the 10th March, 1940, by Gojadhar, the father of Durpatie, to give the plaintiff the western half of lot 111, Alexanderville, Kitty, with a cottage thereon situate on the eastern half of the said lot.

Counsel for the plaintiff has, however, submitted that there was in fact consideration for the promise as Gojadhar was relieved of the duty of maintaining his daughter Durpatie and this obligation was assumed by the plaintiff. The plaintiff is, however, under no legal obligation whether by statute or otherwise, to maintain Durpatie, who is not his lawfully wedded wife. Durpatie was 17 years of age at the time of the Hindu marriage ceremony, and her father was under no legal obligation, under sections 2 and 7 of the Maintenance Ordinance, cap. 145 to maintain her. The circumstances stated by counsel do not therefore amount to consideration,

Counsel for the plaintiff has stressed that section 147 of the Immigration Ordinance, cap. 208 indicates that the meaning of "marriage" as importing valuable consideration should be extended to include a Hindu marriage which has not been performed in accordance with the provisions of the proviso to section 142 (1) of cap. 208, so long as the ceremony is performed between persons who are immigrants within the meaning of

SUREJPAUL v. RAMDEYA AND SARJU.

sections 131 and 233 of the Immigration Ordinance, cap. 208. Section 147 does indeed provide for a division of property between immigrants who have cohabited with each other and who have not been married in accordance with the laws of the Colony, but it makes no alteration to the meaning of the word "marriage" as importing valuable consideration to a contract.

For the above reasons, I hold that the agreement which the plaintiff claims was made in consideration of marriage was made without consideration.

The plaintiff contends that the agreement was part performed by Gojadhar, and the acts of part performance alleged are (1) delivery of the house; and (2) delivery of possession of the land. As the agreement was a *nudum pactum*, there can be no question of part performance. But the question still has to be determined, whether what the plaintiff describes as acts of part performance can properly be regarded as acts evidencing that the gifts of the house and the land were complete.

By transport dated 11th May, 1907, No. 225 Gojadhar became the owner of lot 111, Barr Street, Alexanderville, Kitty. The house or cottage on the east half of lot 111, belonged to him.

Gojadhar never transported the west half of lot 111, Alexanderville, to the plaintiff. It is part of the law of this Colony that no transfer of immovable property can take effect unless perfected by transport: see *Mangru v. Kalla* (1931-37) L.R.B.G. 414,418. Consequently, the gift to the plaintiff of the W½ lot 111, Alexanderville was not completed at the time of the death of Gojadhar on the 16th May, 1940.

There were two rooms under the cottage. One of the rooms was rented by Alice Davis for \$1.44 a month. The evidence is so very conflicting as to whether the other room was in the occupation of a tenant between the 10th March, 1940 (the date of the Hindu marriage ceremony) and the 16th May, 1940, the date of the death of Gojadhar) that I have been unable to arrive at a conclusion on this point, one way or the other. The key to the solution is held by the defendant Ramdeya who as executrix of Gojadhar who had an iron safe for his documents, would be in possession of the counterfoils of the receipts issued by or on behalf of Gojadhar, but Ramdeya who was present in Court throughout the proceedings was not called as a witness. For the purposes of my judgment, I shall assume that the only room on the lower flat of the cottage which was tenanted during the period 10th March, 1940 to the 16th May, 1940, was the room which was occupied by Alice Davis. The upper flat of the cottage was occupied by Adina Merritt, and she continued to be in possession until after the death of Gojadhar. The executrix Ramdeya served her with a written notice to quit, and she removed on or about the 2nd June, 1940.

Dundee Davidson stated in evidence that on the 16th March, 1940, Gojadhar asked him to write an authorisation for the plain-

SUREJPAUL v. RAMDEYA AND SARJU.

tiff Debidin to collect the rent from the house Gojadhar presented to him; that he wrote 2 authorisations on the said day, one in respect of Mrs. Davis; that he read them over to Gojadhar who said that was what he wanted and touched the pen; that the authorisations were witnessed by C. Bishop (now a tenant of the plaintiff in respect of the premises formerly occupied by Mrs. Merritt) and himself; and that the notice addressed to Alice Davis (although Davidson stated that he was only requested by Gojadhar to write an authorisation for the plaintiff to collect the rent from the house on E½ lot 111, Barr Street) was as follows:—

“Kitty Village,
East Coast, Dem.
16.3.40.

“Mrs. Davis,
111, Barr Street,
Kitty Village.

I hereby give you notice that the house situate at Lot 111, Barr Street, Kitty Village, is now the property of my son-in-law Surejpaul. You are therefore requested to pay all house rent to him in future as he is the present owner and landlord of the above property.

GAJHADHAR,
His X mark.”

Witnesses:

1. D. Davidson,
2. C. Bishop.”

The evidence as to service of this notice on the tenants Alice Davis and Adina Merritt is not satisfactory. It would appear that Gojadhar was unaccompanied by the plaintiff when he is alleged to have served the notices. This Court finds as a fact that no such notice was served on, or received by, Adina Merritt. The only evidence in proof of service on Merritt is that, after the notice was served upon Alice Davis by Gojadhar, Gojadhar went upstairs with another letter which he had in his hand and that she Alice Davis “should think Mrs. Merritt was at home at the time.” I accept the evidence of Adina Merritt that Gojadhar did not in any way request her to pay rent to the plaintiff Debidin or Surejpaul, neither did Gojadhar tell her that he had given the house to Debidin. Further, the plaintiff has not discharged the burden of proving that a notice similar to the one alleged to be served on Alice Davis was served by Gojadhar on Adina Merritt.

Gojadhar became ill immediately after the 16th March, 1940, and he never served any notice on Adina Merritt.

I am not satisfied that the repairs to the house on the E½ lot 111, Barr Street and to the palings on the W½ lot 111 Barr Street, which the plaintiff alleges were done by him, were in fact done in the lifetime of Gojadhar; and I do not believe that, during the lifetime of Gojadhar, the plaintiff tilled up holes or

cleaned drains or did weeding on any part of lot 111. The plaintiff did not wish to do anything, in the lifetime of Gojadhar, which might possibly make Sarju or Ramdeya suspect that Gojadhar had, as he Debidin alleges, promised to give him the W½ lot 111, Barr Street, and the cottage on the east half of the lot. With respect to Alice Davis, she had owed Gojadhar money in respect of rent, and the receipt which, it is alleged, passed between the plaintiff and the defendant on the 1st May, 1940, was a secret receipt between them. Sarju did not know, and had no means of knowing, that any such receipt was given, if in fact it was given. The circumstance that Alice Davis failed to pay rent to Gojadhar between the 16th March and the 16th May, 1940 would not operate to make either Ramdeya or Sarju suspect that a transaction had taken place between Gojadhar and the plaintiff, as Alice Davis was permitted to leave her rent unpaid, until the return of her husband from the gold fields.

Counsel for the defendant Sarju has submitted, on the authority of the judgement of Savary, J. in *Eldorado Block Co-operative Credit Bank v. James* (1931—37) L.R.B.G. 76 that the cottage was in itself immovable property as it stood upon land belonging to the owner of the house; that, as a result, a gift of the house could not be completed otherwise than by way of transport; and that Gojadhar had not conveyed the house by way of transport. Counsel for the plaintiff, on the other hand, has submitted that the house was capable of being transferred by delivery and was in fact so transferred. Gojadhar took ill 8 days after the Hindu marriage ceremony, and he never at any time took the plaintiff to the house to effect even a semblance of delivery. And I hold that the service of the notice of the 16th March, 1940, upon Alice Davis did not, in law, even if written in accordance with the instructions of Gojadhar, operate as a delivery to the plaintiff of the house. The principal tenant, Adina Merritt, who paid \$6 a month rent for the upper flat, received no notice from Gojadhar.

All the transactions between the plaintiff and Gojadhar were shrouded in secrecy. But the plaintiff should have taken particular care to ensure that delivery of the house was in fact made to him. The point has not been argued, and so I express no opinion as to whether the house was capable of being transferred by a bill of sale under Part 1 of the Bills of Sale Ordinance cap. 67.

Having arrived at the conclusion that the house, even if movable property as submitted by counsel for the plaintiff, was not delivered by Gojadhar to the plaintiff, it is unnecessary for me to determine whether the house was immovable property as submitted by counsel for the defendant Sarju.

Counsel for the plaintiff has finally submitted that the document of the 16th March, 1940, should be construed as a declaration of trust, that is, as meaning that Gojadhar has constituted himself as a trustee of “the western half of lot 111, (Barr Street,

Kitty, East Coast, Demerara) with a cottage thereon situate on the eastern half of the said lot” in favour of the plaintiff. The document, however, shows that the question of a trust was entirely absent from the mind of Gojadhar, and that it purported to effect a gift, to be completed, whenever plaintiff was ready, by transport.

In *Richards v. Delbridge* (1874) L.R. 18 Eq. 11, 14, 15, Sir George Jessel, M.R. said: “A man may transfer his property without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by these acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of legal title, may so deal with the property as to deprive himself of its beneficial ownership and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, “I declare myself a trustee,” but he must do something which is equivalent to it, and use expressions which have that meaning, for however anxious the Court may be to carry out a man’s intention, it is not at liberty to construe words otherwise than according to their proper meaning. The true distinction appears to me to be plain, and beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not retain it in the donor’s own hands for any purpose, fiduciary or otherwise.” Sic George Jessel, M.R., later in his judgment, stated that the following remarks of Turner, L.J. in *Milroy v. Lord* (1862) 4 DeGex, F. & J. 264, 274, contain the whole law on the subject: “If a settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.”

When these pronouncements by Sir George Jessel, M.R. and by Lord Justice Turner are applied to the document of the 14th March, 1940, and to the facts and circumstances of this case, it will be seen that this Court cannot construe that document as a declaration of trust. There was an incomplete gift, and there is nothing in the document from which there can be inferred an intention on the part of Gojadhar to become a trustee.

There will therefore be judgment in favour of the defendants with costs, and I certify for counsel.

Judgment for defendants.

Solicitors: *W. D. Dinally*, for plaintiff; *F. I. Dias* for defendant, Sarju.

HEIRS OF DE FREITAS, LIMITED, Plaintiffs,
 v.
 STANLEY FERNANDES AND ELSA FERNANDES, Defendants.
 [1942. No. 28.—DEMERARA.]
 BEFORE LUCKHOO, J. (ACTING).
 1942. FEBRUARY 9, 10, 16.

Landlord and tenant—Rent restriction—Recovery of possession—Premises let as a dwelling house—Sub-let as furnished apartments—Status of premises when recovery sought—Regard to be had to—Premises not within protection of Rent Restriction Ordinance, 1941—Ordinance No. 23 of 1941, sections 3 (1), (3), (5), (6), 7 (1), 11.

In applying the provisions of the Rent Restriction Ordinance, 1941 (No. 23), regard must be had to the status of the premises at the time when possession is sought to be recovered.

Consequently, where premises are let as a dwelling-house but are subsequently sub-let by the tenant, and occupied by the sub-tenants, as furnished apartments, the Rent Restriction Ordinance, 1941 (No. 23), does not apply; and notice to quit may be given, and an order for possession may be made against the tenant, in the same manner as if the Ordinance had not been passed, or was not in operation.

On June 1, 1941, the plaintiffs let a dwelling house to the defendants at a rental of \$30 a month. In August, 1941, the defendants sub-let the premises, furnished, to two sub-tenants. The plaintiffs served notice to quit on the tenants, and sued in the Supreme Court for the recovery of possession. The defendants objected that owing to the provisions of the Rent Restriction Ordinance, 1941 (No. 23), the plaintiffs were not entitled to possession, and they were not entitled to sue for possession in the Supreme Court.

Held, that as the premises were now furnished apartments the Rent Restriction Ordinance, 1941, did not apply, and an order for possession would issue.

Action to recover possession of a cottage and premises situate at 70, Murray Street, Georgetown, let by the plaintiffs to the defendants. The facts and arguments appear from the judgment.

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

L. M. F. Cabral, for defendants.

Cur. adv. vult.

LUCKHOO, J. (Acting): Two very important points under the Rent Restriction Ordinance 1941, were argued before me when the

HEIRS OF DEFREITAS v. S. FERNANDES

claim by the plaintiffs against the defendants to recover possession of the cottage and premises situate at lot 70, Murray Street, in the city of Georgetown, let by the plaintiffs to the defendants as monthly tenants at a rental of \$30 per month, and for mesne profits until possession be delivered up, engaged my attention on the 9th and 10th instant.

The writ was specially indorsed in accordance with the provisions of Order IV, Rule 6, of the Rules of Court, 1932. An affidavit verifying claim filed by the plaintiffs set out in detail (more than is usual in such an affidavit) the facts upon which the plaintiffs relied to obtain an order on the claim indorsed on the writ.

The defendants in their affidavit of Defence raised the question of want of jurisdiction of this Court to hear or deal with the claims of the plaintiffs on the ground that the Rent Restriction Ordinance, 1941, applies to their tenancy with the plaintiffs, and that the plaintiffs could not legally determine the tenancy as they purported to do: in short the tenancy was never terminated, and the plaintiffs are not entitled to possession owing to the provisions of the said Ordinance.

In the ordinary course of procedure, leave to defend would have been applied for, but both Mr. Humphrys, K.C., and Mr. Cabral, counsel for the plaintiff's and defendants respectively, agreed that as the matter was one of urgency it was desirable that the points of law involved in the suit should be argued and adjudicated upon as if the matter had been listed for hearing.

Counsel for the plaintiffs stated the case to be presented for argument in this way. Defendants cannot claim the protection of the Rent Restriction Ordinance, 1941, because

(a) The premises were never within the provisions of the said Ordinance.

(b) The premises were sub-let furnished by the defendants in August, 1941, and were therefore furnished premises at the time of the coming into force of the said Ordinance, by the provisions of which furnished premises are expressly excluded.

(c) Alternatively, even if the premises were at any time within the Ordinance, they became outside of the Ordinance on the defendant's sub-letting the said premises furnished to the occupying sub-tenants.

(d) Regard must be had to the status of the premises when possession is sought to be recovered.

The following facts which are relevant and necessary for the determination of the above submissions were not in dispute:

1. That the plaintiffs did let to the defendants the cottage and premises situate at lot 70, Murray Street, Georgetown, as from the 1st day of June, 1941, on a monthly tenancy at a rental of \$30 per month and the same was used as a dwelling house by the defendants.

HEIRS OF DEFREITAS *v.* S. FERNANDES.

2. That the defendants re-let furnished to two sub-tenants the said premises in the month of August, 1941.

3. That the plaintiffs on the 31st day of December, 1941, during the occupation of the premises, by one of the sub-tenants, furnished as aforesaid, served a notice on the defendants to quit and deliver up possession of the said premises on the 1st day of February, 1942.

4. That the plaintiffs on the 2nd day of February, 1942, instituted these proceedings for the recovery of possession of the said premises and for mesne profits.

The relevant sections of the Rent Restriction Ordinance, 1941, which are necessary to be looked at and interpreted are sections 3, 7 and 11. Save for section 11 they have their corresponding counterparts in the Increase of Rents and Mortgage Interest (Restrictions) Act, 1920, sections 12 and 5.

The object of the Ordinance as well as that of the English Act is to regulate the maximum rents of premises to which the Ordinance or Act applies and to restrict the power of the Courts in giving possession.

If as contended by Mr. Humphrys the premises were never within the provisions of the Ordinance, the plaintiffs were entitled to exercise their Common law right to give the defendants notice to quit the premises rented to them and to secure an order from this Court for possession thereof.

On the 1st day of June, 1941, the premises were rented by the plaintiffs to the defendants as a dwelling house and used by them, and it is clear that had they continued to occupy the same as such at the time notice to quit was given, it could not have been contended that their tenancy was not within the protection of the Ordinance.

Section 3 (1) of the Ordinance reads as follows:—

“This Ordinance shall apply to a house or part of a house, or a room or rooms let as a separate dwelling, where the annual amount of the standard rent does not exceed four hundred and eighty dollars, and the house or part of a house or room or rooms shall be deemed to be a dwelling-house to which this Ordinance applies.”

It is admitted that in the month of August, 1941, the defendants re-let furnished to two sub-tenants the said premises, and Mr. Humphrys on the one hand contends that they were furnished premises at the time of the coming into force of the Ordinance which was passed by the Legislative Council on the 22nd day of October, 1941; and such furnished premises were expressly excluded by reason of section 3, subsection 3, from the protection of the said Ordinance.

That subsection reads as follows:—

“This Ordinance shall not apply to a dwelling-house let in good faith at a rent which includes payments in respect of

HEIRS OF DE FREITAS v. S. FERNANDES

board, attendance or use of furniture, or to any premises used for business, trade or professional purposes.”

Mr. Cabral on the other hand submits that the furnished premises so relet by the defendants is saved from such exclusion by reason of the provisions of subsection 6 of the said section which reads:—

“Where this Ordinance has become applicable to any dwelling-house or land it shall continue to apply thereto *whether or not the dwelling-house or land continues to be property to which this Ordinance applies.*”

He drew the Court’s attention to the provisions contained in subsection 5 of section 3 and section 11 of the said Ordinance, and argued that the premises having been let to the defendants as a dwelling-house on the 1st day of June, 1941, before the Ordinance was passed, that the critical date to be considered is the 8th day of March, 1941, and not the 22nd day of October, 1941.

Subsection 5 of section 3 reads as follows:—

“This Ordinance shall not apply to a dwelling-house erected after, or in course of erection on, the eighth day of March, nineteen hundred and forty-one.”

Section 11 reads as follows:—

“Where the landlord of a dwelling-house or of land to which this Ordinance applies has served a notice to quit on a tenant during the period subsequent to the eighth day of March nineteen hundred and forty-one, and the commencement of this Ordinance, that notice shall not be of any legal effect unless the circumstances were such that an order or judgment for the recovery of possession would have been made or given under section seven of this Ordinance if that section had been operative during the said period.”

It was on this foundation that learned counsel sought to re-inforce the arguments he advanced that once the Court came to the conclusion that the Ordinance was retroactive, the tenancy created in the month of June came within the sacred protection of subsection 6 of section 3 quoted above.

Let us examine the wording of section 11 and see what the legislature intended and expressed in clear language to carry out such intention.

It said to the landlord: if during the period subsequent to the 8th day of March, 1941, and the commencement of the Ordinance you served a notice on your tenant to quit the dwelling-house or land to which the Ordinance applies and took no steps before the Ordinance came into force, that notice shall not be of any legal effect unless you could bring your case for the recovery of possession under any one of the five grounds set out in section 7 (1) of the Ordinance and the Court considers it reasonable to make the order or give the judgment. In other words, by the language used in section 11 the Legislature intended that the provisions of section 7 (1) should apply to a dwelling-

HEIRS OF DEFREITAS v. S. FERNANDES.

house or land in respect which notice to quit was given subsequent to the 8th day of March, 1941, and before the commencement of the Ordinance.

Mr. Cabral has asked me to read into the section the words "subsequent to" between the word "and" in line 4 and the words "the commencement": and for the section to read "and subsequent to the commencement of this Ordinance" in order to bring his clients' tenancy within the protection afforded by section 7 of the Ordinance.

He agrees, if I were to come to the conclusion that the gates of entry within the sacred precincts of subsection 6 of section 3 are not open to him then the consideration of section 11 would not avail him.

He drew my attention also to section 7 (3) where any order or judgment has been made or given before the commencement of this Ordinance but not executed, and, in the opinion of the Court, the order or judgment would not have been made or given if this Ordinance had been in force at the time when such order or judgment was made or given, the Court may, on the application of the tenant, rescind or vary such order or judgment in such manner as the Court may think fit for the purpose of giving effect to this Ordinance.

If I understand, correctly, the submission of Mr. Cabral on this point he seeks to rely on the premised fact that the Ordinance being retroactive, on the 1st day of June, 1941, the tenancy of his clients was in respect of a dwelling-house and that they were entitled to avoid the notice to quit unless the circumstances were such that an order or judgment for the recovery of possession would have been made or given under section 7 of the Ordinance.

After listening very carefully to an interesting and ingenious argument on the interpretation to be placed on the words of section 11 quoted above, I cannot agree that his clients' interest in the tenancy is protected by that section.

In my view the words "during the period" would have no meaning at all if the word "subsequent" were to be read as Mr. Cabral thinks it should, It is a rule of construction that every word in a section should be given its proper meaning and I cannot read into the section the words "and subsequent" which would nullify the meaning that should be given to the plain use of the words "during the period."

Section 7 amply protects any tenancy within the Ordinance, and after the commencement thereof.

The protection given by section 11 is really intended to meet cases arising during a reasonable time prior to the change over from the common law to express legislation.

I admire the skill and artistry employed by learned counsel in examining these sections and, seeking to harness them, to pull his chariot within the gates but they did not carry with it the sting of conviction.

HEIRS OF DE FREITAS v. S. FERNANDES

Mr. Cabral's main contention to bring his clients' tenancy within the protection of the Ordinance was centred on the construction to be placed on subsection 6 of section 3 of the Ordinance.

For comparison with the corresponding English enactment which has received judicial interpretation from time to time it would be well to set them out side by side—

Section 3 (6) of the Rent Restriction Ordinance is as follows:—

“Where this Ordinance has become applicable to any dwelling-house or land it shall continue to apply thereto whether or not the dwelling-house or land continues to be property to which this Ordinance applies.”

Section 12 (6) of the Rent and Mortgage Interest (Restrictions) Act, 1920, reads

“Where this Act has become applicable to any dwelling house or any mortgage thereon, it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this act applies.”

Learned counsel for the plaintiffs cited several authorities in which this subsection of the English Act has been mentioned and interpreted.

Learned counsel for the defendants whilst not disputing the applicability and correctness of those judgments to the English subsection drew a keen distinction between the use of the word “property” in the local enactment and the word “one” in the corresponding English Act.

He argued that the local legislature deliberately used the word “property” to save cases of tenancy which began by the letting of dwelling-houses which were afterwards changed, not suffering a loss of identity, into furnished dwellings. He submits that the initial holding of the tenant must be looked at and not what he has done with the premises after.

In presenting his argument on this point and distinguishing the cases cited by Mr. Humphrys he drew my attention to the words in proviso (i) to section 12 (2) of the Act of 1920.

“This Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance or use of furniture.” That in the corresponding local enactment there is an absence of the words *“save as otherwise expressly provided”* and contends that those words must be given some meaning and effect and a distinction is to be drawn. That in the English Act sections 9 and 10 deal with furnished buildings, whilst there are no similar provisions in the Ordinance,

He states that section 3 (6) refers to property once within the Ordinance—and that this subsection would be defeated if such property once protected was afterwards to lose such protection if sub-let furnished.

Mr. Humphrys in answer to those contentions referred the Court to the plain reading of subsection 3 of section 3 of the

HEIRS OF DEFREITAS v. S. FERNANDES

Ordinance that the Legislature could not have enacted subsection 6 of section 3 with the meaning assigned to it by Mr. Cabral which would clearly defeat the very object of the Ordinance by expressly excluding furnished premises and that when the Legislature passed the said Ordinance they meant to exclude such premises as then existing. He relies upon the very words "*save as otherwise expressly provided*" which do not appear in the local enactment to give emphasis to his contention that more so in this Colony the aid of the provisions of subsection 6 of section 3 cannot be invoked.

Before referring to the cases quoted during the argument it will be well to set out the remaining submissions made by Mr. Cabral. That even if the dwelling-house was sub-let furnished it still remains property within the definition of section 3 (6). That there was not *such a change of status* to deprive it of the use of the term property in section 3 (6). That section 3 (6) would be entirely useless if the English cases quoted are applicable.

To deal in the first place with the submitted distinction to be drawn between the word "property" and the word "one," it is necessary to look at the object of the Ordinance and Act respectively. They both protected a house or part of a house let as a separate dwelling, and by the Ordinance also to every parcel of land let for the purpose of erecting a dwelling-house thereon or on which a dwelling-house has been erected by the tenant. In the English Act any land or premises let together with a house shall, if the rateable value of the land or premises let separately would be less than one quarter of the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house.

To what property does the Ordinance apply "dwelling-house or land"? In the English Act to what "one" refers "dwelling-house" or "land" (site of the house). Both "property" and "one" in my opinion refer to the object to be protected. It can bear no other meaning.

A Court is not at liberty to put a strained or invented meaning which is not called for by the sense, or the objects, or the mischiefs of the enactment.

Section 3 (6), says Mr. Cabral, would be entirely useless if it is given the same construction like the corresponding English section 12 (6), which in many cases dealt with dwelling-houses which had completely lost their identity and that in no case where the Ordinance had become applicable to any dwelling-house such dwelling-house would continue to be property to which the Ordinance applies.

Let us examine the relevant English authorities on that subsection. In *Williams v. Perry* (1924) 1 K.B. 936 Swift, J., at p. 938 said: "Mr. Woolf puts his argument into this proposition;

HEIRS OF DE FREITAS v. S. FERNANDES

premises at one time within the protection of the Act continue within that protection no matter what happens to them, short of a complete destruction of their identity. *It is admitted* on the authority of *Phillips v. Barnett* (1922) 1 K.B. 222 that if the identity of the premises is so altered that they cannot be recognised as the same, the protection of the Act is gone, and no fresh protection is obtained for some other building erected on the site. But it is said that so long as the identity of the premises, physically and structurally, is not altered, *they* if at one time within the protection of the Act, continue to be so. I am unable to accept that view. I see no reason why premises at one time a *dwelling-house* and *therefore* within the Act should not at another time be a warehouse or business premises and outside the protection of the Act—For the defendant reliance is placed upon section 12, subsection 6 of the Act of 1920, which provides that ‘*where this Act has become applicable to any dwelling-house. . . it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies.*’ The subsection does not say that “where this Act has become applicable to any dwelling-house . . . it shall continue to apply to a factory or other business premises into which the house was converted.”

In the case of *Phillips v. Barnett* cited in the case just referred to Scrutton, L. J., said Mr. Matthews argued “that when a dwelling-house comes within the Rent (Restrictions) Acts, the restrictions cling to the structure even when it has ceased to be a dwelling-house. He goes further. He contends that even if the dwelling-house were demolished the restrictions would inhere in the land. Mr. Matthews relied upon s. 12, subsection 6 of the Act but that subsection applies only to that *which is still a dwelling-house*, although the Act may have ceased to apply to it.”

Two reasons suggest themselves to me upon which a tenant could claim the benefit of section 3 (6) of the Ordinance.

(1) That the dwelling-house to which the Ordinance applies still remains as such although the rental has been increased beyond the sum of \$480 per annum since the third day of September, 1939, the date of the fixing of the standard rent—that is to say, the Ordinance became applicable to all dwelling-houses the rental of which on the 3rd day of September, 1939, did not exceed \$480 per annum. “*Standard rent*” means the rent at which a dwelling-house or land was let (“let” includes sub-let) on the 3rd day of September, 1939, . . . Therefore where the Ordinance became applicable to any dwelling-house the rental of which was \$480 or less on the 3rd day of September, 1939, it will continue to apply thereto *whether or not* the dwelling-house or land continues to be *property* to which the Ordinance applies, that is to say, whether or not the standard rent is exceeded. (2) There is also section 6 of the Ordinance which permits of an increase of rent under certain circumstances from time to time, which but for the saving right conferred by section 3 (6) would

HEIRS OF DEFREITAS v. S. FERNANDES

have taken the dwelling-house outside of the operation of the Ordinance, that is to say, where such permitted increase, or increases caused the rental to exceed \$480 per annum.

But the dwelling-house must remain a dwelling-house under the Ordinance and not converted into a furnished house for the purpose of being sub-let. It will then become excluded from the protection of the Ordinance by reason of section 3 (3) thereof.

Apart from the two circumstances I have given, I find a third circumstance mentioned by Greer, J., (as he then was) in the case *Phillips v. Hallaham* (1925) 1 K.B. at p. 760. This is what he said: "The interpretation of S. 12, sub-sec. 6, is not quite a simple task, but I think it means that so long as premises are, and whenever they are, used as a dwelling-house the Act applies. If the landlord lets the premises for twelve months as business premises the Act does not apply to them, but if after the expiration of those twelve months the premises are again used as a dwelling-house the landlord would be bound by the Act, and could not say that because they had once been outside the Act by being business premises they are taken out of the Act altogether. I think that in such a case sub-sec. 6 was intended to enable the tenant to say that inasmuch as the premises were a dwelling-house to which the Act applied before they became business premises, now that they had again become a dwelling-house the Act again applied to them."

The case of *Prout v. Hunter* (1924) 2 K.B., p. 736, is of importance in considering this point. It is a Court of Appeal case, and although Colonial Courts are only bound by the decisions of the Judicial Committee of the Privy Council and the House of Lords yet the greatest respect has always been given to decisions delivered by such a Court. The Lords Justices in that case were Bankes and Scrutton and Sargant, J. (as he then was), a more able combination sitting in the Court of Appeal one would be unable to refer to. In that case section 12, subsection 6, came before the Court again for interpretation, and there L.J. Scrutton held that the furnishing and letting furnished of a dwelling-house which had previously been let unfurnished is a sufficient destruction of its identity, within the principle of *Phillips v. Barnett* to exclude the application of section 12 (6) of the act. At p. 743 of the report of that case the learned Lord Justice stated: "A landlord lets to a tenant an unfurnished flat; the tenant sub-lets it furnished; and the question arises whether that flat is within the protection of the Act at all. The landlord says that as the flat is let at a rent which includes payment for the use of furniture the Act does not apply to it. The tenant says that as the landlord let it to her unfurnished it is within the Act as between him and her, though as between herself and her sub-tenant it is not. The matter is complicated by s. 12, sub-sec. 6, which provides that: "Where this Act has become applicable to any dwelling-house

. . . . it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies.” What Parliament exactly meant by those latter words is far from clear. We had that section before us in a case where three dwelling-houses were structurally altered and converted into a factory: *Phillips v. Barnett*: and counsel for the appellant there went so far as to argue that if a building once came within the Act, whatever happened to it, even if it were pulled down and another building erected in its place, the Act continued to apply to the substituted building. We declined to accede to that argument, and said that where the dwelling-house to which the Act originally applied was no longer existing but had been altered into something substantially different, the tenant could not claim the protection of s. 12, sub-sec. 6, and the premises were outside the Act. I think we should have come to the same conclusion if the facts had been that what had been a dwelling-house was, without structural alteration, let entirely as business premises, and the reason would have been the same, that the dwelling-house to which the Act originally applied had ceased to exist, by reason of its being altered into something wholly different—namely, business premises. And I think that, following that reasoning, we should also say in the present case there is no longer a dwelling-house within the Act, but a furnished house to which the Act has expressly said the provisions as to ejection shall not apply. Notwithstanding that the house may at one time have been let unfurnished, and notwithstanding the provisions of s. 12, sub-sec. 6, if at the time the landlord seeks to obtain possession it is furnished the Act affords no protection. This view, I think, follows the lines upon which this Court decided *Glossop v. Ashley*. There on an application by a landlord for possession of a house it appeared that before August 3, 1914, it had been let to a tenant at £130 a year who had sublet it at a rent of £24, and the question was, Which of those two rents was the standard rent? I certainly took the view, and I do not think that my brothers dissented, that you must look at the occupying tenant and at the rent which he is paying, rather than to the rent which is received by the landlord. So in this case also I think you must look at the occupying tenant and at the nature of his occupation, and as it appears that the house was let to him furnished, the premises are outside the protection of the Act. For these reasons I have come to the same conclusion as the Divisional Court, and the only point on which I differ from them is that Bailhache, J., at any rate would have decided otherwise but for *Glossop v. Ashley*. I should have decided the same way if *Glossop v. Ashley* had not been in existence, and I think that that decision was right.”

The above decision supports the alternative submission made by Mr. Humphrys that even if the premises were at any time within the Ordinance, they became outside of the Ordinance on the

HEIRS OF DE FREITAS v. S. FERNANDES

defendants sub-letting the said premises furnished to the occupying sub-tenants.

The comparatively recent case of *Barrell v. Fordree* (1932) 101 L.J., K.B. 529, a House of Lords judgment binding upon this Court, confirms the view expressed in the case of *Prout v. Hunter*.

When steps were taken by the plaintiffs to recover possession of the premises the sub-tenants (occupying tenants) were in possession of furnished premises. The Court must look at the status of the premises at the time of the action for possession is brought: see *Gidden v. Mills*, (1925) 2 K.B. 713.

To return to the consideration of section 12, sub-section 2, proviso (i) of the English Act of 1920 wherein the words "save as otherwise expressly provided" appear. In England, furnished houses have a qualified protection by reason of the provisions of sections 9 and 10 of the Act, and Mr. Cabral's contention is it was never meant that section 12, sub-section 6 should become operative in their favour, hence all the decisions in England on furnished houses although they were at one time let unfurnished cannot apply.

At first, I was struck by the subtle analytical feature of his argument and had an open mind on the point when I reserved decision, but my own researches of the several authorities decided under the subsection lead me to the conclusion that in the various judgments already referred to, the non-applicability of section 12, subsection 6 of the Act in those circumstances would have been commented upon.

All that section 12, subsection 2, proviso (i) does, is to standardise the rent of furnished dwellings in England. Furnished dwellings are only let in for that purpose. In this Colony they are expressly excluded for all purposes.

Mr. Cabral drew my attention to the fact that section 3, subsection 6 of the Rent Restriction Ordinance, 1941, is a new subsection. It is not to be found in the repealed Ordinance passed nearly 20 years ago. In my view the insertion of the new subsection is a decided improvement on the previous legislation on this subject, and brings it in line with the English Act. It was enacted for the benefit of tenants and they must bring their cases within the operation of that subsection if they desire to derive the benefit which it is intended to give.

The defendants for the reasons above stated have failed to do so.

The whole of the cottage or dwelling-house and premises had been let furnished by the defendants in the month of August, 1941, and were in the occupation of the persons (occupying tenants) who had so taken them at the date of the notice to quit and the issue of the writ of summons, and the time at which one has to consider whether a dwelling-house is a dwelling-house subject to the protection of the Act, is the date when notice to

HEIRS OF DE FREITAS v. S. FERNANDES

quit was given. In other words the Court must look at the status of the premises at the time the action for possession is brought.

I realise the importance of this decision to both landlords and tenants with respect to the letting of dwelling-houses unfurnished and the sub-letting by those tenants to sub-tenants of the whole or separate parts or rooms of such dwelling-houses *furnished* hence the above dissertation on two important sections of the Ordinance.

It was apparent during the discussion of this case that at the present time there are many such tenancies within the territorial ambit defined in the Ordinance and it is well that both landlords and tenants should know exactly when the provisions apply to them and when not.

The plaintiffs having legally terminated the tenancy with the defendants by a proper notice to quit are entitled to recover possession of the cottage and premises.

I accordingly make an order that the defendants do deliver possession of the said cottage and premises to the plaintiffs not later than the first day of April, 1942.

I fix this date in order to give the defendants an opportunity to serve a proper notice on their present sub-tenants.

I fix the sum of \$40 per month as mesne profits from the 1st day of February, 1942.

The plaintiffs are also entitled to judgment for the sum of \$30 rent claimed for the month of January, 1942, and the Costs of this suit which I fix at \$148.

Judgment for plaintiffs.

Solicitors: *H. C. B. Humphrys; R. S. Persaud.*

E. DEREK v. F. D'ANDRADE.

EDWARD DEREK, Appellant (Defendant),

v.

FRANCIS D'ANDRADE, Respondent (Plaintiff).

[1942. No. 231.—DEMERARA.]

BEFORE FULL COURT: VERITY, C.J. AND DUKE, J. (ACTING.)

1942. SEPTEMBER 25.

Appeal—From magistrate's court—Hearing—No appearance of appellant—Appeal struck out—Motion to reinstate appeal to list—Jurisdiction of Full, Court to hear and determine—Summary Jurisdiction (Appeals) Ordinance, cap. 16.

An appeal under the Summary Jurisdiction (Appeals) Ordinance, cap. 16, was struck out with costs by reason of non-appearance of the appellant at the hearing. The appellant moved to have the appeal reinstated to the list, and referred to *daSilva v. Camacho*, 1925 No. 25, where the Full Court reinstated to the list a similar appeal, which had been struck out for want of appearance of the appellant. The respondent submitted that the Full Court had no such jurisdiction.

Held that, following *daSilva v. Camacho* supra, the Full Court had jurisdiction to hear and determine a motion to reinstate to the list an appeal under the Summary Jurisdiction (Appeals) Ordinance, cap. 16, which was struck out for non-appearance of the appellant.

C. V. Wight, for the appellant.

A. J. Parkes, for the respondent.

No written judgment was delivered, but the effect of the judgment is as stated in the head note.

Solicitor for appellant: *T. A. Morris*.

EDITOR'S NOTE.—The appeal was reinstated to the list, and in December, 1942, it was allowed with costs

E. MARK v. O. FAUSETT AND E. ROSS.

EARNEST MARK, Plaintiff,

v.

OUTRIDGE FAUSETT AND EDWARD ROSS, As EXECUTORS
OF HARRIET SUSANNA BUTTS, DECEASED, Defendants.

[1941. No. 284.—DEMERARA.]

BEFORE DUKE, J, (ACTING).

1942. SEPTEMBER 17, 18, 22, 30.

Executor and administrator—Property of deceased person—Sale by private treaty—Application to Registrar of Supreme Court for—To be made with utmost good faith—Order made by Registrar—Failure to disclose material facts to him—Order of Registrar set aside.

Executor—Executors of executor of proving executor of deceased person—Legal personal representatives of that person.

Executor—Grant of probate—Date of death of deceased—Executorship relates back to.

Executor—Two executors—Probate granted to one—Not applied for by other—Immovable property—Sale by non-proving executor—Executors of executor of proving executor not joining in sale—Probate subsequently granted to executor who effected sale—Sale fit to be carried into effect—Sanctioned and confirmed as from date of agreement of sale—Deemed to have been made by all the legal personal representatives.

Specific performance—Sale of land—Contract for—Immovable property bequeathed to vendor—Title not vested in him by executor—Transport advertised by executor in favour of another person—Opposition by purchaser—Executor directed to pass transport in his favour.

Infant—Immovable property—Property of infant—Sale of—Contract for—Sanctioned and confirmed by Court—After infant attained majority—In proceedings instituted, before infant became of age, to enforce contract.

An application to the Registrar of the Supreme Court under section 41 of the Deceased Persons Estates' Administration Ordinance, cap. 149, is made *ex parte* and must be made with the utmost good faith.

An order of the Registrar of the Supreme Court made under paragraph (a) of the proviso to section 41 of the Deceased Persons Estates' Administration Ordinance, cap. 149, authorising the legal personal representatives of a deceased person to sell, by private treaty, immovable property the property of the estate of the said deceased, was set aside for failure to disclose to the Registrar material facts.

A., died testate, and appointed B., and C., as her executors. B., obtained probate, she died and appointed D., as her executor. D., obtained probate of B's will, he died and appointed E., and F., as his executors. E., and F., obtained probate of D's will.

Held that E. and F. were legal personal representatives of A.

Subsequent to the grant of probate in favour of E., and F., C., obtained probate of A's will.

Held that C's executorship related back to the date of A's death.

C., E., and F., were executors of A. C., agreed to sell to M. immovable property belonging to the estate of A. The Court was of the opinion that the agreement should be carried into effect.

Held that the sale would be sanctioned and confirmed as from the date of the agreement, and that it would be deemed to have been made by all the executors, and that the executors E. and F. who were parties to the present proceedings would be directed to pass transport of the immovable property in favour of the purchaser M.

A. bequeathed immovable property to N. The executors did not vest title in him. N. agreed to sell the immovable property to M. The executors of A. advertised transport in favour of O., and M., opposed.

Held that the executors would be directed to pass transport of the immovable property in favour of M.

E. MARK v. O. FAUSETT AND E. ROSS.

A. bequeathed immovable property to P. The executors did not vest title in him. P., who was a minor, agreed, with the assistance of C., his father and guardian and one of the executors of A., to sell the immovable property to M. The executors of A. advertised transport in favour of O., and M. opposed. The Court was of the opinion that the agreement of sale between P. and M. should be carried into effect. At the time of the filing of the writ opposing the passing of the transport P. was still a minor, but when the action came on hearing, P. had attained his majority.

Held (1) that the agreement of sale between P., and M., would be confirmed and sanctioned as from the date on which it was made, and that the executors would be directed to pass transport of the immovable property in favour of M; and

(2) that where the proceedings in which an order is sought approving or sanctioning a sale by a minor of his immovable property are instituted during his minority, the Court or a Judge has jurisdiction, after the minor has attained his majority, to make the order approving or sanctioning the sale.

OPPOSITION action to the passing by defendants of transport of lots 1, 2 and 3, Pln. Chester, West Coast, Berbice, in favour of Dhanwanti.

C. Shankland, for the plaintiff.

E. V. Luckhoo, for the defendant.

Cur. adv. vult.

DUKE, J. (Acting): This is an action filed by the plaintiff by way of opposition to the passing by the defendants of transport of lots 1, 2 and 3, Plantation Chester, West Coast, Berbice, in favour of Dhanwanti. The plaintiff also claimed that an order be made that the defendants pass transport of the said lots 1, 2, and 3, Plantation Chester, in favour of the plaintiff, and that, on failure to pass such transport, the Registrar be empowered to do so.

By transport dated 29th September, 1904, No. 113 (Berbice) Marian Sadath, singlewoman, acquired title for "Lots numbers 1 (one), 2 (two) and 3 (three), parts of Plantation Chester, situate, lying and being on the west sea coast of the county of Berbice, in the colony of British Guiana, the said lots numbers 1, 2 and 3 being laid down and defined on a diagram made by James Chalmers, Sworn Land Surveyor, dated 10th July, 1869, and deposited in the Registrar's Office of Berbice, on the 13th day of September, 1869, save and except a strip of land measuring 100 feet in width at present enclosed by wire fences running along the said property, the property of the Demerara Railway Company."

Marian Sadath was never married. She was also known as Wageon. She died intestate on the 15th September, 1912, leaving one child born of her body Harriet Susanna, who was only once married and then to John Ernest Butts subsequent to the 20th August, 1904.

Harriet Susanna Butts died on the 3rd August, 1923, leaving a last will and testament dated the 20th July, 1923, in which she appointed her aunt Catherine Douglas, born Fausett, guardian of her minor sons Mervyn Outridge Butts and Lloyd

E. MARK v. O. FAUSETT AND E. ROSS.

Vernon Butts and appointed John Ernest Butts and the said Catherine Douglas as her executors. Catherine Douglas applied for probate of the will, probate was granted in her favour on the 17th September, 1923, (No. 67 of 1923, Berbice), and power was reserved to the Court to grant probate to John Ernest Butts the executor named in the will, whenever he should duly apply for the same. Catherine Douglas died testate, and probate of her will was granted to George Fausett on the 14th December, 1932, (No. 86 of 1932, Berbice). George Fausett died testate, and probate of his will was granted to the defendants Outridge Fausett and Edward Ross on the 30th May, 1935, (No. 28 of 1935, Berbice). The defendants thereupon became executors of the estate of Harriet Susanna Butts, deceased. Neither they, nor their predecessors in title, vested title in Mervyn Outridge Butts and Lloyd Vernon Butts in respect of lots 1, 2 and 3, Plantation Chester, which lots were bequeathed to them under the will of their mother Harriet Susanna Butts. According to the estate duty declaration and inventory of the estate of Harriet Susanna Butts, deceased, (No. 69 of 1923, Berbice) the assets of the deceased consisted of (1) lots 1, 2 and 3, Plantation Chester then valued at \$400, and (2) cash in the Post Office Savings Bank \$58.34. The residue of the estate was bequeathed by Harriet Susanna Butts to her minor sons Mervyn Outridge Butts and Lloyd Vernon Butts. The cash in the savings bank was more than sufficient to pay testamentary expenses, and any reasonable funeral expenses. No accounts of their administration of the estate of Harriet Susanna Butts, deceased, have been filed by the defendants. There is no local authority, under the Local Government Ordinance, cap. 86, at Plantation Chester; and no rates are paid or payable under that Ordinance.

The plaintiff used to live at lot 6, Plantation Chester. In 1929 he bought a house, and with the permission of Catherine Douglas, the executrix of Harriet Susanna Butts, he erected the house on lots 1, 2 and 3, Plantation Chester. The plaintiff only occupied a house spot. When work was required to be done by the owners of lots 1, 2 and 3, Plantation Chester for the benefit of the whole estate, he performed such work. The plaintiff has had his house on lots 1, 2 and 3, Plantation Chester, up to the present time.

On the 23rd September, 1940, an agreement in writing was made between John Ernest Butts the "sole surviving executor of the estate of Harriet Susanna Butts, deceased" and Mervyn Outridge Butts, parties of the first part, and the plaintiff, party of the second part.

The agreement recited that Mervyn Outridge Butts was one of the two devisees (the other devisee being Lloyd Vernon Butts) of lots 1, 2 and 3, Plantation Chester, that Mervyn Outridge Butts was desirous of selling his undivided share in the said lots, and that John Ernest Butts was joining him as

E. MARK v. O. FAUSETT AND E. ROSS.

executor in the said sale. The parties of the first part agreed to sell and the plaintiff agreed to purchase one undivided half part or share of and in lots 1, 2 and 3, Plantation Chester, west coast Berbice for the sum of \$175. The purchase price was to be paid as follows: \$55 on the signing of the agreement, \$50 on the 16th December, 1940 and the balance on the passing of transport. The plaintiff paid Mervyn Outridge Butts, who was of age, the sum of \$55 on the signing of the agreement. The agreement contained (he following terms:—

- “2. The said John Ernest Butts hereby undertakes to apply for probate of the aforesaid will (of Harriet Susanna Butts) not later than the 26th day of September, 1940, and on Probate being obtained possession will be given immediately.
- “3. All transport expenses to be borne equally between the vendor and purchaser.
- “4. All taxes, rates and sea defence charges to be paid by the vendor up to the date of the passing of the said transport.
- “5. The said John Ernest Butts hereby further undertakes to apply to the Court on obtaining probate for a copy of a transport of the said lots 1, 2 and 3 parts of Pln, Chester aforesaid.
- “6 It is hereby further agreed that the said three lots be divided up in half and that the West half of the said lots will become the property of the said Ernest Marks (the plaintiff herein), which said lands adjoin the lands of the said Ernest Marks”.

The plaintiff did not pay the sum of \$50 on the 16th December, 1940: but, up to that date, John Ernest Butts had neither applied for probate of the will of Harriet Susanna Butts, deceased, nor for a copy of the transport of lots 1, 2 and 3, Plantation Chester, West Coast, Berbice.

The plaintiff was, as will be seen from the agreement of the 23rd September, 1940, anxious to have his undivided half of lots 1, 2 and 3, converted into a specific half, to wit, the west half. The plaintiff was not to be put into possession until John Ernest Butts had applied for probate, and he delayed in making his application.

On the 13th January, 1941, an agreement in writing was made between Lloyd Vernon Butts, then a minor, with the assistance of John Ernest Butts his father and guardian, and the plaintiff whereby Lloyd Vernon Butts, with the consent of his father and guardian, agreed to sell, and the plaintiff agreed to purchase, for the sum of \$175, one undivided half of and in loss 1, 2 and 3, Plantation Chester, together with the right, title and interest in the Crown lands situate in the rear of lots 1, 2 and 3. The purchase price was payable as follows: \$28 on the signing of the agreement, \$25 on the 28th February, 1911, and the balance on the passing of transport.

The agreement contained the following terms:—

- “3. Possession to be given on Tuesday, the 14th January, 1941.
- “4. All expenses of and incidental to the passing of the said transport to be borne equally.
- “5. Transport will be given not later than 30th April, 1942.
The vendor hereby declares that there are no rates and taxes payable to any village council or other authority”.

E. MARK v. O. FAUSETT AND E. ROSS.

On the 14th January, 1941, the plaintiff sent to the defendant Outridge Fausett, by registered post, a notice informing him of the sale to him (the plaintiff) by Lloyd Vernon Butts of his undivided half of lots 1, 2 and 3, Plantation Chester, West Coast, Berbice. In the notice it is stated "you have been in the habit of renting these lands to various persons, and have been collecting rents from time to time. I am now to call upon you to cease letting or hiring or renting either of these lands as you have hitherto been doing, having been given possession of the same. You are not authorised by me to rent or collect rents on my behalf," and that the plaintiff had been given possession of Lloyd Vernon Butts' undivided half of and in lots 1, 2 and 3, Plantation Chester, West Coast, Berbice.

On the 14th January, 1941, John Ernest Butts, went on lots 1, 2 and 3, Plantation Chester, and told Jhingoree and George Fraser who were tenants of lands on lots 1, 2 and 3, from the defendant Fausett, that they must not interfere with lots 1, 2 and 3, anymore, as his sons Mervyn Outridge Butts and Lloyd Vernon Butts had sold over lots 1, 2 and 3, to the plaintiff.

The plaintiff entered into physical possession of lots 1, 2 and 3 and cultivated them.

On the 10th March, 1941, the plaintiff paid Mervyn Outridge Butts the sum of \$17 further on account of the purchase price of \$175, leaving a balance of \$103.

On the 10th March, 1941, the plaintiff paid Lloyd Vernon Butts the sum of \$25 further on account of the purchase price of \$175. John Ernest Butts signed the receipt as executor. The balance remaining due was then \$122.

On the 13th March, 1941, probate of the will of Harriet Susanna Butts, deceased was granted to John Ernest Butts (No. 52 of 1941, Demerara).

On the 14th March, 1941, John Ernest Butts handed to the plaintiff a document in the following terms:—

"Georgetown
73 Robb St.
Bourda,
14th March, 41

I, the undersigned, hereby hand over to Ernest Marks, Lots 1, 2 and 3 of Pln: Chester W.C.B/be: With all the right title and interest in and to the Crown lands at the rear of the said Lots 1, 2, 3.

"John Ernest Butts
Executor
Estate Susan H. Butts"

On the 16th April, 1941, the plaintiff paid Mervyn Outridge Butts the sum of \$53 further on account of the purchase price of his undivided half of and in lots 1, 2 and 3, Plantation Chester. The balance then remaining due to Mervyn Butts was \$50.

On the 8th May, 1941, the plaintiff paid \$15 to Mr. H. O. Durham, Sworn Land Surveyor, According to the testimony of

E. MARK v. O. FAUSETT AND E. ROSS.

John Ernest Butts these expenses were to be borne equally, so that the balance remaining due to Mervyn Butts is \$42.50.

On the 16th May, 1941, the plaintiff paid to John Ernest Butts the sum of \$4 for or on behalf of Lloyd Vernon Butts (whether to purchase a pair of boots for Lloyd Vernon Butts or not is immaterial). The balance remaining due to Lloyd Vernon Butts in respect of his undivided half of lots 1, 2 and 3, Plantation Chester is the sum of \$118.

John Ernest Butts never took any steps to apply for a copy of transport dated 29th September, 1904, No. 113 (Berbice) for lots 1, 2 and 3, Plantation Chester, West Coast, Berbice.

According to the agreement of the 23rd September, 1940, the sum of \$42.50 was payable to Mervyn Outridge Butts on the passing of transport, and no time was fixed for such passing.

According to the agreement of the 13th January, 1941, the sum of \$118 was payable to Lloyd Vernon Butts on the passing of transport, and the transport was to be passed by or on behalf of Lloyd Vernon Butts not later than the 30th April, 1942.

In May, 1941, the defendant Outridge Fausett, while the plaintiff was absent from his home, entered on lots 1, 2 and 3, Plantation Chester and picked coconuts. On the 18th February, 1941, Outridge Fausett (who had John Downer with him) was warned by Rural Constable Shepperd, on the instructions of the plaintiff, not to "shy" rice on the land: and the defendant Outridge Fausett left the land, while the constable was still there, and went on the dam separating Plantation Chester from Plantation Britannia. Rural Constable Shepperd was present with John Ernest Butts on the 14th January, 1941, when Butts put the plaintiff into physical possession of lots 1, 2 and 3, Plantation Chester; on that day Rural Constable Shepperd delivered a warning to Jhingoree, in the presence of John Ernest Butts, that he (Butts) was giving full possession of lots 1, 2 and 3, Plantation Chester to the plaintiff, Lloyd Vernon Butts was present when his father John Ernest Butts was delivering physical possession of lots 1, 2 and 3 to the plaintiff. When the plaintiff's wife, Adriana Mark, learnt that the defendant Outridge Fausett was picking coconuts in May, 1941, she called Rural Constable Shepperd who told Fausett to give up the coconuts, Fausett refused. The plaintiff's wife took out a summons against Fausett; and Fausett sued the plaintiff for \$60 for use and occupation of the house spot from the time he had been living on the land. The Magistrate warned the defendant Fausett not to go back on the land; and he gave judgment for the plaintiff Earnest Mark on the claim by Outridge Fausett for use and occupation.

The transport, the subject matter of the present opposition suit, was advertised in the *Gazette* for the first time on the 13th September, 1941. After the transport was advertised the plaintiff's wife was picking coconuts on lots 1, 2 and 3, Plantation Chester. The defendant Outridge Fausett assaulted her, while

trying to take away the coconuts from her, and he was convicted by the magistrate and fined for the assault.

The defendants have pleaded that the agreements of sale of the 23rd September, 1940, and the 13th January, 1941, were “mutually rescinded in or about the month of August, 1941, between John Ernest Butts acting on behalf of Mervyn Butts and the plaintiff *his servant and/or agent* at Britannia, West Coast, Berbice, and the plaintiff *his servant and/or agent* agreed to accept the return of money deposited by him.” In his evidence, John Ernest Butts does not say one word as to any agreement being made with the servant or agent of the plaintiff. He states that the agreement to rescind was with the plaintiff, and that no one was present besides the plaintiff and himself.

I do not believe John Ernest Butts that any such agreement was made, and I do not believe Muchoon Chublall when he says that the plaintiff told him that he had asked John Ernest Butts to refund him his money. John Ernest Butts staged an act in the month of September, 1941, when he visited the plaintiff’s house and recited, untruthfully, that the plaintiff had asked him for the return of the money. Butts took with him the sum of \$165 which he says was the amount which the plaintiff told him was the total of the sums paid by the plaintiff to Mervyn Outridge Butts and Lloyd Vernon Butts for the purchase of lots 1, 2 and 3, Plantation Chester. The sum paid by the plaintiff was considerably in excess of \$165. The plaintiff’s wife is a lady of great strength of character, and John Ernest Butts beat a hasty retreat after he was informed that the plaintiff had lent no money to Butts, that he had bought land and that he wanted land. I have no hesitation in believing the plaintiff when he says that he never agreed to rescind the written agreements of the 23rd September, 1940, and the 13th January, 1941, or to accept the return of the moneys paid by him, or to accept the return of \$165.

From September, 1940 to May, 1941, John Ernest Butts was acting independently of the defendants, in respect of lots 1, 2 and 3, Plantation Chester.

Some time after May, 1941—the date does not appear from the evidence as the memory of witnesses for the defence is very defective as to dates—John Ernest Butts as executor named in the will of Harriet Susanna Butts, deceased (probate whereof was granted to him on the 13th March, 1941), joined forces with the defendants as executors of George Fausett who was executor of Catherine Douglas who was named in the will of Harriet Susanna Butts, deceased, (probate whereof was granted to Catherine Douglas on the 17th September, 1923). They did not join forces in order to pass title of lots 1, 2 and 3, Plantation Chester, in favour of the plaintiff, but in order to oust him from possession and to force him to accept the return of the moneys paid by him to Mervyn Outridge Butts and Lloyd Vernon Butts for the purchase of the said lots.

E. MARK v. O. FAUSETT AND E. ROSS.

A purchaser was secured in Dhanwanti for the entire interest in lots 1, 2 and 3, Plantation Chester, for the sum of \$500. The plaintiff was indebted to Muchoon Chublall, a son of Dhanwanti in a sum of money exceeding the moneys paid by him to Mervyn Outridge Butts and Lloyd Vernon Butts.

John Ernest Butts could not obtain a copy of the transport of his wife's mother for lots 1, 2 and 3, Plantation Chester. But, with the union of forces, a copy of the transport was uplifted from the Deeds Registry, New Amsterdam on or about the 11th August, 1941. Butts says it was not known that the transport was in the name of his wife's mother, and that he thought that it was in his wife's name. Before a copy of a lost transport can be obtained, a careful search, after the title has been found, is made in order to ascertain whether the property, the subject matter of the title, has been sold at execution, or transported, or encumbered, since the date of the title. The defendants tendered no evidence to show when the application for a copy of the transport was filed or when Outridge Fausett went to the Deeds Registry, New Amsterdam, Berbice to make enquiries about locating the transport. The Court presumes that Outridge Fausett paid such visit not later than the 1st August, 1941, as the copy of the transport was signed on the 11th August 1941 by the officer in charge of the sub-Registry in New Amsterdam, Berbice. The copy of the transport was not obtained for the purpose of completing the sale to the plaintiff, but for the purpose of the sale to Dhanwanti.

The defendant Dhanwanti paid the defendant Fausett the sum of \$100 on account. The date is not mentioned by the witnesses for the defence, probably because they were afraid that the date would show too clearly when John Ernest Butts actually joined forces with the defendants. Dhanwanti, according to John Ernest Butts, would not have any dealings with him (Butts). Fausett paid the sum of \$100 to John Ernest Butts; the defendant Edward Ross never saw the money. John Ernest Butts says that he handed the \$100 to Mervyn Outridge Butts and Lloyd Vernon Butts.

On the 16th August, 1941, the solicitor for the defendant Outridge Fausett signed an application to the Registrar of the Supreme Court for leave to sell, under section 41 of the Deceased Persons Estates' Administration Ordinance, cap. 149, lots 1, 2 and 3, Plantation Chester, by private treaty." On the same day Mervyn Outridge Butts and Lloyd Vernon Butts signed a consent to the sale being effected by private treaty for \$500 to Dhanwanti. The consent was witnessed by John Ernest Butts, and it was not disclosed in the consent that Lloyd Vernon Butts was a minor, nor that agreements of sale had been made on the 23rd September, 1940, and the 13th January, 1941, and that moneys were paid by the plaintiff to Mervyn Outridge Butts (\$132.50 out of \$175) and to Lloyd Vernon Butts (\$59 out of \$175), on

E. MARK v. O. FAUSETT AND E. ROSS.

account of the purchase price of their respective undivided halves of Jots 1, 2 and 3, Plantation Chester, West Coast, Berbice. I have already found that these agreements had not been rescinded. The application and the consent were filed in the Supreme Court Registry on the 18th August, 1941, and on the 19th August, 1941 the Registrar of the Supreme Court approved of leave being granted. However, before the order was drawn up and signed the solicitor for the defendants Fausett and Ross filed another application paper dated the 16th August, 1941, which was supported by an affidavit sworn to by the defendants Outridge Fausett and Edward Ross on the 30th August, 1941. In that affidavit the defendants did not disclose that Lloyd Vernon Butts was a minor at the time, although they mentioned that Mervyn Outridge Butts and Lloyd Vernon Butts had approved of the sale. The defendants also did not disclose that Mervyn Outridge Butts and Lloyd Vernon Butts had agreed to sell their respective undivided halves in lots 1, 2 and 3, Plantation Chester to the plaintiff, and had received more than one-half of the agreed purchase money. The order of the Registrar as drawn up, recites that the application was made not by Outridge Fausett alone, but by Outridge Fausett and Edward Ross: it however, bears the same date as the date upon which the application by Outridge Fausett alone was approved by the Registrar of the Supreme Court.

An application by the Registrar of the Supreme Court under section 41 of the Deceased Persons Estates' Administration Ordinance, cap. 149, is made *ex parte* and must be made with the utmost good faith. The order made by the Registrar of the Supreme Court must therefore be set aside as the defendants failed to disclose to the Registrar—

- (a) that Lloyd Vernon Butts was a minor.
- (b) that on the 23rd September 1940, Mervyn Outridge Butts, then of age, had sold his undivided half in lots 1, 2 and 3, Plantation Chester to the plaintiff for \$175 and had received the sum of \$132.50 on account;
- (c) that on the 13th January, 1941, Lloyd Vernon Butts, with the assistance of John Ernest Butts, his father and natural guardian, had sold the undivided half of Lloyd Vernon Butts, in lots 1, 2 and 3, Plantation Chester, to the plaintiff for the sum of \$175 and had received the sum of \$59 on account; and
- (d) that the said agreements were still in existence.

All this stage I may remark that John Ernest Butts as executor of Harriet Susanna Butts, deceased probate of whose will was granted to him on the 13th March, 1941, did not join in the application.

As the order of the Registrar referred to the application by Outridge Fausett and Edward Ross and to the affidavit in support (there was only one affidavit and it was sworn to by Outridge Fausett and Edward Ross on the 30th August 1941), it is clear that the copy of the Order of the Registrar was not given off before the 30th August, 1941.

E. MARK v. O. FAUSETT AND E. ROSS.

On the 30th August, 1941 the defendants and Dhanwanti swore to the affidavits leading to the transport the subject matter of this action.

On or about the 2nd September, 1941 the papers were filed in the Registry for the advertisement of intention to pass the said transport.

This being done, it then became necessary, in order to avoid opposition by the plaintiff, to get the plaintiff to accept a refund of the moneys paid by the plaintiff to Mervyn Outridge Butts and Lloyd Vernon Butts. The person selected to achieve this end was John Ernest Butts. The sum of \$165 was obtained from Dhanwanti or Muchoon Chublall and handed to John Ernest Butts. The plaintiff refused to accept the money which, according to John Ernest Butts, was subsequently handed to the defendants' solicitor for legal fees and expenses, with the exception of the sum of \$45 which he John Ernest Butts says he paid to his two children.

The transport in respect of the undivided half of Lloyd Vernon Butts was to be passed in favour of the plaintiff not later than the 30th April, 1942. He became 21 years of age on the 11th April, 1942.

No application was made to a Judge in Chambers during the minority of Lloyd Vernon Butts for leave to sell his undivided half of lots 1, 2 and 3, Chester, for \$175 and he is now of full age. I am satisfied that had an application been made to a Judge in Chambers on or about the 13th January, 1941 for leave to sell for \$175 the undivided half of Lloyd Vernon Butts in lots 1, 2 and 3, Plantation Chester, West Coast, Berbice, which was bequeathed to him under the will of his mother Harriet Susanna Butts, such an application would have been granted. The minor Lloyd Vernon Butts was then out of employment, he was largely indebted for board and lodging and he was being pressed for payment. His brother, Mervyn Outridge Butts, who was of full age, had sold for \$175 his undivided interest in the said lots, and his father John Ernest Butts who is a farmer in the neighbourhood of lots 1, 2 and 3, Chester, had concurred in the sale.

Counsel for the defendants has suggested that the value of one undivided half of lots 1, 2 and 3, Chester is \$350 but there is no evidence to support such a high figure. However in or about the month of August 1941, the entire interest in lots 1, 2 and 3, Chester was sold for \$500. True though this is, it is well-known that, although a person might be willing to pay \$500 for the entire interest in land, he may not be disposed to purchase an undivided interest, whatever may be the price. According to Muchoon Chublall, there have been many proceedings (other than the present matter) since the 27th September, 1941, in the Court and in the Registry of Court in which lots 1, 2 and 3, Chester are affected in some way or the other. In these circumstances, a person would indeed be rash in making an offer for Lloyd Vernon

Butts' undivided half in lots 1, 2 and 3, Chester, or in offering more than \$175.

Counsel for the plaintiff has submitted that the Court should, in these proceedings, approve of the sale by Lloyd Vernon Butts to the plaintiff for \$175. In *Bhudin Singh v. Ramcharan and Patia* (1915) L.R.B.G. 196 Sir Charles Major, C.J., held that, in proceedings instituted against a minor to enforce a contract made by him, the Court at the trial of the action had jurisdiction to approve or sanction the sale of a minor's interest in immovable property. I decline to express any opinion as to whether such jurisdiction exists where the proceedings are instituted after the minor has attained his majority. But I hold that where, as in this case, the proceedings in which the order approving or sanctioning a sale by a minor of his immovable property is asked for, are instituted during his minority, the Court or a Judge has jurisdiction, after the minor has attained his majority, to make an order approving or sanctioning the sale. And, in the exercise of my discretion, and on the facts of this case I make such order, and I direct that it should take effect from the 13th January, 1941,

John Ernest Butts did not obtain probate of the will of Harriet Susanna Butts, deceased, until the 13th March, 1941. His executorship, however, related back to the 3rd August, 1923, the date of her death: see *Whitehead v. Taylor* (1839) 10 A. & E. 210 and *Williams on Executors*, 11th edn. vol. 1, pages 477, 478. It therefore follows that on the 23rd September, 1940, John Ernest Butts, as a legal personal representative of Harriet Susanna Butts, deceased, joined with Mervyn Outridge Butts in the sale of of one undivided half of lots 1, 2 and 3, Chester (which was bequeathed to Mervyn Outridge Butts under her will) to the plaintiff for the sum of \$175; and that on the 13th January, 1941, the said John Ernest Butts, as a legal representative of Harriet Susanna Butts, deceased joined with Lloyd Vernon Butts then a minor in the sale of the undivided half of lots 1, 2 and 3, Chester (which was bequeathed to Lloyd Vernon Butts under her will) to the plaintiff for the sum of \$175. Up to the present time the legal personal representatives of Harriet Susanna Butts, deceased, have not vested title either in Mervyn Butts or in Lloyd Vernon Butts. The defendants Outridge Fausett and Edward Boss who were personal representative of Harriet Susanna Butts did not join with the other legal personal representative John Ernest Butts in the agreements of sale which were effected by him on the 23rd September, 1940, and the 13th January, 1941. They were, however, executors of the estate of Harriet Susanna Butts, deceased, only because they were the executors of George Fausett, deceased who was the executor of Catherine Douglas, deceased, who was the executrix under the will of Harriet Susanna Butts, deceased: whereas John Ernest Butts was named in the will of Harriet Susanna Butts as her executor. In these circumstances, the Court approves of the sales made by John Ernest Butts as

E. MARK v. O. FAUSETT AND E. ROSS.

as executor on the 23rd September, 1940, and the 13th January, 1941, as from the dates of the respective agreements, and deems them to have been made by all the personal representatives of Harriet Susanna Butts, deceased.

On the 28th July, 1942, the solicitor for the defendants wrote the solicitor for the plaintiff a letter in which it was stated: "as you are aware my clients (the defendants) are merely the executors of the estate of Harriet Susanna Butts and they are concerned only with the proper administration of that estate. Because of the steps taken by your client Mr. Mark, the sale by my clients of lots 1, 2 and 3, Chester, West Coast, Berbice, has already been cancelled."

Counsel for the defendants has stressed that neither Mervyn Outridge Butts nor Lloyd Vernon Butts is a party to these proceedings, and that he was not briefed to represent their points of view. This is, however, a suit brought by way of opposition under the Rules of the Supreme Court (Deeds Registry), 1921. The transport which the plaintiff, to protect his interests, had to oppose, was not advertised to be passed either by Mervyn Outridge Butts or by Lloyd Vernon Butts or by John Ernest Butts as one of the legal personal representatives of Harriet Susanna Butts; it was advertised to be passed by Outridge Fausett and Edward Ross the two other legal personal representatives of Harriet Susanna Butts, deceased, and they were not, in fact, parties to the sales previously made by John Ernest Butts to the plaintiff. The defendants could have advertised transport of lots 1, 2 and 3, Plantation Chester, to Mervyn Outridge Butts and Lloyd Vernon Butts, the beneficiaries thereof under the will of Harriet Susanna Butts: and then Mervyn Outridge Butts and Lloyd Vernon Butts could have advertised transport of lots 1, 2 and 3, Plantation Chester, in favour of Dhanwanti. In such case, the plaintiff would not have opposed the passing of the transport by the defendants in favour of Mervyn Outridge Butts and Lloyd Vernon Butts; he would, however, have opposed the passing of the transport by Mervyn Outridge Butts and Lloyd Vernon Butts in favour of Dhanwanti; the defendants would not have been parties to that opposition action, the defendants therein would have been Mervyn Outridge Butts and Lloyd Vernon Butts. It was through no act or default of the plaintiff that Mervyn Outridge Butts and Lloyd Vernon Butts are not, in accordance with the Rules of the Supreme Court (Deeds Registry), 1921, defendants to the opposition action by Earnest Mark. John Ernest Butts stated in evidence that Dhanwanti would not do business with him. Had title been vested in his sons, it would not have been necessary for Dhanwanti to do business with him, the business would have been transacted between his sons and Dhanwanti. The defendants, with the active aid and assistance of John Ernest Butts, Mervyn Outridge Butts and Lloyd Vernon Butts, deliberately

and of set purpose did not vest title to lots 1, 2 and 3, Plantation Chester, West Coast, Berbice, in Mervyn Outridge Butts and Lloyd Vernon Butts, by transport. They adopted the expedient of by-passing Mervyn Outridge Butts and Lloyd Vernon Butts, and to this end they made application to the Registrar of the Supreme Court for leave to sell lots 1, 2 and 3, Plantation Chester, the property of the estate of Harriet Susanna Butts, deceased; in the application they, with the active aid and assistance of John Ernest Butts, Mervyn Outridge Butts and Lloyd Vernon Butts, suppressed material facts, and the Registrar granted the leave sought and thereupon the defendants, armed with the order of the Registrar of the Supreme Court, proceeded to instruct the Registrar of Deeds to advertise transport of lots 1, 2 and 3, Plantation Chester, West Coast, Berbice, from the estate of Harriet Susanna Butts, deceased, direct to and in favour of Dhanwanti. Mervyn Outridge Butts and Lloyd Vernon Butts can have no just cause for complaint that they are not parties to this action, as they themselves actively contributed to the situation whereby and whereunder they could not be defendants herein, as the transport in favour of Dhanwanti was not advertised to be passed by them, but by two of the 3 legal personal representatives of the estate of Harriet Susanna Butts, deceased in which estate legal title for lots 1, 2 and 3, Plantation Chester, West Coast Berbice is still vested.

If the agreements of sale of the 23rd September, 1940, and of the 13th January, 1941, are treated not as having been effected by the legal personal representatives of the estate of Harriet Susanna Butts deceased, but as having been effected by Mervyn Outridge Butts himself and by Lloyd Vernon Butts himself respectively (notwithstanding that neither of them holds any legal title for any interest in lots 1, 2 and 3, Plantation Chester, West Coast Berbice), in the ordinary course of events the executors should first vest title in them, and Mervyn Outridge Butts and Lloyd Vernon Butts would then pass transport in favour of the plaintiff. Mervyn Outridge Butts and Lloyd Vernon Butts are not parties to this action, and therefore, at the present moment, the Court has no jurisdiction over them to compel them to accept transport from the legal personal representatives of the estate of Harriet Susanna Butts, deceased, and to pass transport in favour of the plaintiff. This Court, however, has jurisdiction over the defendants who are. two of the 3 legal personal representatives of the estate of Harriet Susanna Butts deceased in which estate legal title for lots 1, 2 and 3, Plantation Chester, West Coast Berbice is still vested, and will authorise, empower and direct them to pass transport in favour of the plaintiff and will restrain them from passing transport in favour of Dhanwanti or in favour of any person other than the plaintiff. If any authority is needed for this view, the judgment of Sir Charles Major, C.J. in *re Ellis* (1922) L.R.B.G. 20 is sufficient warrant therefor. As the trans-

E. MARK v. O. FAUSETT AND E. ROSS.

port by the defendant in favour of Dhanwanti has already been advertised, this Court, in order to save time and expense, will direct the Registrar of Deeds to substitute the name of the plaintiff Earnest Mark for that of Dhanwanti in the opposition book, and in the deed of transport and to cause transport to be passed to the plaintiff in obedience to the terms of this order.

The same principles would, of course, apply if the agreements of sale of the 23rd September, 1940 and of the 13th January, 1941 are treated as having been effected by the legal personal representatives of the estate of Harriet Susanna Butts deceased, and not as having been effected by Mervyn Outridge Butts himself or by Lloyd Vernon Butts (in view of the circumstance that, up to the present time, neither of them holds any legal title for any interest in lots 1, 2 and 3, Plantation Chester, West Coast Berbice).

To sum up: I hold—

- (1) that the order of the Registrar of the Supreme Court bearing date the 19th August, 1941 and made under paragraph (a) of the proviso to section 41 of the Deceased Persons Estates Administration Ordinance, cap. 149 authorising the defendants to sell to Dhanwanti by private treaty lots 1, 2 and 3, Plantation Chester, West Coast Berbice, for the sum of \$500, be wholly set aside, on ground of failure to disclose to the Registrar of the Supreme Court (i) that Lloyd Vernon Butts was then a minor; (ii) that on the 23rd September, 1940 Mervyn Outridge Butts, then of full age, had sold his undivided half in lots 1, 2 and 3, (bequeathed to him under the will of his mother Harriet Susanna Butts deceased but not yet transported to him by the legal personal representatives of her estate) to the plaintiff for the sum of \$175 and had received the sum of \$132.50 on account of the purchase price; and (iii) that on the 13th January, 1941 Lloyd Vernon Butts, with the assistance of his father and natural guardian John Ernest Butts, had sold his undivided half in lots 1, 2 and 3, (bequeathed to him under the will of his mother Harriet Susanna Butts deceased but not yet transported to him by the legal personal representatives of her estate) to the plaintiff for the sum of \$175 and had received the sum of \$59 on account of the purchase price; and (iv) that those two agreements of sale were still in existence;
- (2) that on the 30th May, 1935, the defendants Outridge Fausett and Edward Ross became the legal personal representatives of Harriet Susanna Butts deceased, they having on that day been granted probate of the will of George Fausett deceased who was executor of Catherine Douglas, deceased, probate of whose will was granted to George Fausett on the 14th December,

E. MARK v. O. FAUSETT AND E. ROSS.

1932, the said Catherine Douglas being sole executrix under the will of Harriet Susanna Butts, deceased, probate of whose will was granted in her favour on the 17th September, 1923; and John Ernest Butts became a legal personal representative of the estate of Harriet Susanna Butts, deceased on the 13th March, 1941, he having been nominated in the will as sole executor and having been granted probate on the 13th March 1941;

- (3) that the executorship of John Ernest Butts related back to the 3rd August, 1923, the date of the death of his wife, Harriet Susanna Butts;
- (4) that if the agreement of the 23rd September, 1940, (in the pleadings mentioned) be treated as an agreement by John Ernest Butts as a legal personal representative of the estate of Harriet Susanna Butts to sell one undivided half of lots 1, 2 and 3, Plantation Chester, West Coast, Berbice, to the plaintiff for the sum of \$175, it should be deemed to have been made by and on behalf of all the legal representatives of the said estate, and the agreement of sale would be confirmed and sanctioned by the Court as from the 23rd September, 1940, and the defendants would be directed to transport the said interest to the plaintiff upon the plaintiff's depositing in the Registry of Court the sum of \$42.50;
- (5) that if the agreement of the 23rd September, 1940 (in the pleadings mentioned) be treated as an agreement by Mervyn Outridge Butts in his own right to sell one undivided half of lots 1, 2 and 3, Plantation Chester, West Coast, Berbice, to the plaintiff for the sum of \$175, the defendants would be directed to transport the said interest to the plaintiff, upon the plaintiff's depositing in the Registry of Court the sum of \$42.50;
- (6) that if the agreement of the 13th January, 1941 (in the pleadings mentioned) be treated as an agreement by John Ernest Butts as a legal personal representative of the estate of Harriet Susanna Butts, deceased, to sell one undivided half of lots 1, 2 and 3, Plantation Chester, West Coast, Berbice, to the plaintiff for the sum of \$175, it should be deemed to have been made by and on behalf of the legal representatives of the said estate, and the agreement of sale would be sanctioned and confirmed by the Court as from the 13th January, 1941, and the defendants would be directed to transport the said interest to the plaintiff, upon the plaintiff's depositing in the Registry of Court the sum of \$118;
- (7) that if the agreement of the 13th January, 1941 (in the pleadings mentioned) be treated as an agreement by Lloyd Vernon Butts, then a minor, in his own right to

E. MARK v. O. FAUSETT AND E. ROSS.

sell one undivided half of lots 1, 2 and 3, Plantation Chester, West Coast, Berbice, to the plaintiff for the sum of \$175, it would be confirmed and sanctioned by the Court as from the 13th January, 1941, and the defendants would be directed to transport the said interest to the plaintiff, upon the plaintiff depositing in the Registry of Court the sum of \$118; and

- (8) that where the proceedings in which an order is sought approving or sanctioning a sale by a minor of his immovable property are instituted during his minority, the Court or a Judge has jurisdiction, after the minor has attained his majority, to make an order approving or sanctioning the sale.

There will therefore be judgment in favour of the plaintiff. The defendants will not be entitled to an indemnity out of the assets of the estate of Harriet Susanna Butts, deceased, in respect of their costs of defence. The plaintiff will recover his costs of and incidental to this action against Outridge Fausett and Edward Ross, jointly and severally, in their own right or out of the assets of the estate of Harriet Susanna Butts, deceased.

The operative part of the formal order of the Court will be as follows:—

IT IS ADJUDGED that the order of the Registrar of the Supreme Court bearing date the 19th day of August, 1941 and made on proceeding No. 472 B under paragraph (a) of the proviso to section 41 of the Deceased Persons Estates' Administration Ordinance, cap. 149, authorising the defendants Outridge Fausett and Edward Ross in their capacity as legal personal representatives of the estate of Harriet Susanna Butts, deceased, (Will No. 67 of 1923 Berbice) to sell lots 1, 2 and 3, Plantation Chester, West Coast, Berbice, (more particularly described hereunder) by private treaty for the sum of \$500 (five hundred dollars) be wholly set aside as from the said 19th day of August, 1941 *and* that in so far as the agreement of the 23rd day of September, 1940, (in the pleadings mentioned) and the agreement of the 13th day of January, 1941 (in the pleadings mentioned) are agreements by John Ernest Butts as a legal personal representative of the said Harriet Susanna Butts, deceased (probate of whose will was granted in favour of the said John Ernest Butts on the 13th March, 1941, No. 52 of 1941, Demerara) the said agreements are hereby deemed to have been made by or on behalf of all the legal personal representatives of the estate of the said Harriet Susanna Butts, deceased, and are hereby sanctioned and confirmed by the Court as from the 23rd day of September, 1940 and the 13th day of January, 1941 respectively *and* that in so far as the agreement of the 13th January, 1941 (in the pleadings mentioned) is an agreement by Lloyd Vernon Butts, then a minor, for the sale by him of immovable property being his undivided half in the aforesaid lots 1, 2, and 3 Plantation Chester, West Coast, Berbice (bequeathed to him under the will of his mother Harriet Susanna Butts, deceased but up to the date of this order not yet transported to him by the legal personal representatives of her estate) the said agreement is hereby sanctioned and confirmed by the Court as from the 13th day of January, 1941 *and* that the opposition entered by the plaintiff to the passing of the transport (advertised in the *Gazette* of the 13th, 20th and 27th days of September, 1941 as No. 9 of the 27th day of September, 1941 for the county of Berbice by the defendants in their capacity as legal personal representatives of the estate of Harriet Susanna Butts, deceased, in favour of Dhanwanti of the aforesaid lots 1, 2 and 3, Plantation Chester, West Coast, Berbice, is just, legal and well-founded *and* that an injunction is hereby granted restraining the defendants and/or their agents, and they and each of them are hereby restrained, from passing, and the Registrar of Deeds from permitting to be passed, transport of the aforesaid lots 1, 2 and 3, Plantation Chester in favour of Dhanwanti, or of

E. MARK v. O. FAUSETT AND E. ROSS.

any person other than the plaintiff *and it is further adjudged* that the defendants Outridge Fausett and Edward Ross in their capacity as legal personal representatives of the estate of the aforesaid Harriet Susanna Butts are hereby authorised and empowered, for and on behalf of all the legal personal representatives of the said estate, to pass transport, without fresh advertisement, in favour of the plaintiff Earnest Mark for the purchase price of \$350 (three hundred and fifty dollars) of "Lots numbers 1 (one), 2 (two) and 3 (three) parts of Plantation Chester situate, lying and being on the west sea coast of the county of Berbice in the colony of British Guiana, the said lots numbers 1, 2 and 3 being laid down and defined on a diagram made by James Chalmers, Sworn Land Surveyor, dated 10th July, 1869 and deposited in the Registrar's Office of Berbice, on the 13th September, 1869, save and except a strip of land measuring 100 feet in width at present enclosed by wire fences running along the said property, the property of the Demerara Railway Company", and they are hereby directed to pass such transport, without fresh advertisement, within 14 (fourteen) days from the date upon which this order is perfected, upon the plaintiff depositing in the Registry of the Supreme Court, to abide the further order of the Court, the sum of \$160.50 (one hundred and sixty dollars and fifty cents), \$42.50 (forty-two dollars and fifty cents) part of the sum of \$160.50 being the balance of purchase price payable to Mervyn Outridge Butts under the aforesaid agreement of the 23rd day of September, 1940 and \$118 (one hundred and eighteen dollars) part of the sum of \$160.50, being the balance of purchase price payable to Lloyd Vernon Butts under the aforesaid agreement of the 13th day of January, 1941, *and* that the Registrar of Deeds be directed, and he is hereby directed, to amend the Opposition Book for the county of Berbice with respect to the notice of intention to pass transport advertised in the *Gazette* of the 13th, 20th and 27th days of September, 1941, as No. 9 of the 27th day of September, 1941, for the county of Berbice and the deed of transport relating thereto, by deleting therefrom the name of Dhanwanti as the transportee and substituting therefor the name of the plaintiff Earnest Mark *and* that the Registrar of Deeds be directed, and he is hereby directed, to permit the defendants in their capacity as legal representatives of the aforesaid Harriet Susanna Butts, deceased to pass such transport of lots 1, 2 and 3, Plantation Chester, West Coast, Berbice (hereinbefore more particularly described) in favour of the plaintiff Earnest Mark, and he is further directed to permit such transport to be passed, without fresh advertisement, and in obedience to and in compliance with the terms of this order *and it is further adjudged* that if the defendants as legal personal representatives of the estate of the said Harriet Susanna Butts, deceased do not pass the aforesaid transport to and in favour of the plaintiff within 14 (fourteen), days from the date upon which this order is perfected then in such case a Sworn Clerk nominated in writing by the Registrar of the Supreme Court on the application of the plaintiff, shall be authorised, empowered and directed to appear before the Registrar of Deeds and, for and on behalf of all the legal representatives of the estate of the aforesaid Harriet Susanna Butts, deceased and in obedience to, and in compliance with, the terms of this order, to pass the aforesaid transport to and in favour of the plaintiff Earnest Mark, *and it is further adjudged* that the plaintiff do recover his costs (certified for counsel) of and incidental to this action out of the estate of the aforesaid Harriet Susanna Butts, deceased, or against the defendants Outridge Fausett and Edward Ross jointly and severally in their own right *and* that the defendants have no right of indemnity out of the estate of the aforesaid Harriet Susanna Butts, deceased in respect of their costs of defence.

And it is ordered that, if the Registrar of the Supreme Court is aware of the names and addresses of any judgment creditors of Mervyn Outridge Butts or of Lloyd Vernon Butts, he shall forthwith after this order is perfected, cause each of them to be served with a sealed and certified copy of this order *and* that, when the moneys required to be deposited in the Registry of Court under the provisions of this order have been so deposited, applications for payment out may be made, by affidavit, in these proceedings by any person claiming to be entitled thereto, whether such person is a party to this action or not.

Judgment for plaintiff.

Solicitors: *J. E. Too Chung; R. S. Persaud.*

J. YOUNG v. J. WOLFE.
 JOSEPH YOUNG, Appellant,
 v.
 JOSEPH WOLFE, Respondent.
 [W.I.C.A, 1942. No. 4.—BRITISH GUIANA.]
 BEFORE DUKE, J. (Acting):
 1942. OCTOBER 5.

Appeal—Security for costs—Motion for—Affidavit in support—No special circumstances disclosed—Motion refused—Rules of the Supreme Court (Appeals), 1924, rule 4 (1).

The respondent applied for security for costs of an appeal to the West Indian Court of Appeal. Before making the application to the Supreme Court, his solicitor had written to the appellant's solicitor asking that security be given. The affidavit in support of his application did not disclose the special circumstances in which it was made, neither did it set out the contents or the substance of the letter written by the respondent's solicitor.

Rule 4 (1) of the Rules of the Supreme Court (Appeals), 1924, provides that every application for an order for deposit of security for costs of an appeal shall be made by notice of motion, supported by affidavit, stating the "special circumstances" in which it is made.

Held that the motion must be refused for non-compliance with rule 4 (1) of the Rules of the Supreme Court (Appeals), 1924.

MOTION by the respondent for security for costs of an appeal to the West Indian Court of Appeal from a judgment of STAFFORD, J. (Acting).

C. A. Burton, for respondent, Joseph Wolfe.

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

DUKE, J. (Acting): This is a motion by the respondent Joseph Wolfe that security for costs be given by the appellant Joseph Young in respect of his appeal to the West Indian Court of Appeal from an order of the Supreme Court of British Guiana dated the 30th January, 1942, and entered on the 20th April, 1942.

The motion is made to the Supreme Court of British Guiana under the authority conferred by rule 4 of the Rules of the Supreme Court (Appeals), 1924, and by rule 18 (1) (a) of the West Indian Court of Appeal Rules as enacted by rule 5 of the West Indian Court of Appeal Amendment Rules, 1930.

The notice of appeal to the West Indian Court of Appeal was filed on the 1st June 1942, and the copies of record were filed and lodged on the 29th June, 1942. The motion for security of costs of appeal was filed 3 months later, namely, on the 29th September, 1942.

In the affidavit filed in support of the motion for security for costs, the respondent's solicitor did no more than allege that he wrote to the solicitor for the appellant Joseph Young requesting security for the costs of appeal and that the appellant did not comply with the request. He did not annex, as an exhibit to his affidavit, a copy of the letter which he wrote to the solicitor for

J. YOUNG v. J. WOLFE.

the appellant: that letter, if drafted in accordance with Form XI in the Appendix to the Rules of the Supreme Court (Appeals) 1924 would have contained the "special grounds" upon which the application was made. Rule 4 (2) provides that, before the application for security of costs of appeal is made, a written demand for the security for costs shall be made by the respondent, or his solicitor, to the appellant's solicitor. Rule 4 (1) provides that every application for an order for deposit of security for costs of an appeal shall be made by notice of motion, supported by affidavit, stating the "special circumstances" in which it is made. The affidavit filed in support of the motion does not disclose the "special circumstances" in which it is made, and there is no evidence that the letter written by the respondent's solicitor on the 23rd June, 1942, to the appellant's solicitor contained any "special grounds" for making the application. The motion is therefore refused with costs.

Motion refused.

Solicitors: *H. A. Bruton*, for respondent;

D. P. Debidin, for appellant.

CHRISTOPHER CORNELIUS BLACKETT, Plaintiff,

v.

PHILIP EDWARD EDGHILL, Respondent.

[1941. No. 243.—DEMERARA.]

BEFORE DUKE, J. (ACTING):

1942. OCTOBER 2, 3, 9.

Principal and agent—Commission agency—For sale of property subject to contract—Person able and willing to purchase—Introduced by agent—Contract not signed by intended purchaser—Through advice of agent—Agent's services terminated by principal—Sale effected by principal to person introduced by former agent—Purchaser signs contract—Agent not entitled to commission.

The defendant engaged the plaintiff, a commission agent, to sell lot 48, Lacytown for \$4,725 on the terms that the purchaser must enter into a binding contract with the defendant in which contract provision would be made for the making of the first payment of 10 per centum of the purchase money as and by way of deposit, and for the passing of transport within as short a time as possible after the date of the contract.

The plaintiff introduced to the defendant a purchaser who was able and willing to purchase lot 48, Lacytown for \$4,725. The plaintiff, however, advised the purchaser not to sign a contract containing the terms required by the defendant; and the purchaser, acting on that advice, refused to sign the contract of sale.

The defendant thereafter notified the plaintiff that his services as agent were terminated.

On a subsequent date, the defendant, without the intervention of the plaintiff, sold lot 48, Lacytown to the same purchaser for \$4,800, and the

C. C. BLACKETT v. P. E. EDGHILL.

purchaser entered into a binding contract of sale with the defendant containing the terms which the plaintiff had previously advised her not to agree to.

Held, that the plaintiff was not the effective cause of the binding contract of sale made between the defendant and the purchaser, and which contained the terms required by the defendant.

OPPOSITION action to a transport. The facts appear from the judgment.

W. J. Gilchrist, for plaintiff.

E. D. Clarke, solicitor, for defendant.

Cur. adv. vult.

DUKE, J. (Acting): This is an action brought by way of opposition to the passing of a transport which was advertised in the *Gazette* of the 9th, 16th and 23rd August, 1941. In his statement of claim, as it stood up to and including the 2nd October, 1942, the plaintiff Christopher Cornelius Blackett claimed that the defendant Philip Edward Edghill was indebted to him in the sum of \$240, being *firstly* the sum of \$125 agreed to be paid by the defendant to the plaintiff, a duly licensed house agent, under a verbal contract entered into in the month of June, 1941, as and by way of commission in consideration of the plaintiff introducing to the defendant a purchaser able and willing to purchase lot 48, Robb Street, Lacytown, Georgetown, then the property of the defendant for the agreed price of \$4,725 which said verbal contract was duly fulfilled by the plaintiff introducing to the defendant one George Lutchman as a purchaser able and willing to purchase the said property at the agreed price of \$4,725 and whom the defendant accepted as a purchaser of the said property, and *secondly*, the sum of \$115 agreed to be paid by the defendant to the plaintiff, a duly licensed house agent, under a verbal contract entered into on or about the 17th July, 1941, as and by way of commission in consideration of the plaintiff introducing to the defendant a purchaser able and willing to purchase lot 48, Bobb Street, Lacytown, Georgetown, then the property of the defendant for the agreed price of \$4,725 which said verbal contract was duly fulfilled by the plaintiff introducing to the defendant one Jane Rebecca Gouveia as a purchaser able and willing to purchase the said property at the agreed price of \$4,725 and whom the defendant accepted as a purchaser of the said property.

The letter of demand from the plaintiff's solicitor dated the 30th July, 1941, to the defendant was in complete accord with the above particulars, and the notice of opposition entered by the plaintiff on the 19th August, 1941, was in the above-mentioned terms.

At the trial of this action on the 2nd October, 1942, while the plaintiff was still under cross-examination by the solicitor for the defendant, counsel for the plaintiff abandoned his claim with respect to the first cause of action, namely for \$125 with respect

C. C. BLACKETT v. P. E. EDGHILL.

to the introduction of George Lutchman. There must therefore be judgment, on that issue, for the defendant with costs.

There was no agreement entered into between the plaintiff and the defendant whereby or whereunder the defendant was liable to pay the plaintiff a commission for the mere introduction of a purchaser able and willing to purchase lot 48, Robb Street, Lacytown, for the sum of \$4,725. Consequently the plaintiff was not entitled to commission merely because he introduced Jane Rebecca Gouveia who was able and willing to purchase for the sum of \$4,725. The plaintiff well knew that one of the terms of the arrangement between the defendant and himself was that there could be no question of the plaintiff earning commission until and unless a contract binding on both the defendant and the purchaser had been signed by both parties in which contract provision would be made for the making of a first payment of 10 per centum of the purchase price as and by way of deposit, and for the passing of transport within as short a time as possible after the date of the contract. Despite this knowledge on the part of the plaintiff of terms to which he had agreed, the plaintiff advised Jane Rebecca Gouveia on the 18th July, 1941, not to sign a contract containing the above terms. The plaintiff is therefore not entitled to commission as claimed by him in his solicitor's letter of the 30th July, 1941, and in his notice of opposition of the 19th August, 1941.

At the trial of this action on the 3rd October, 1942, the plaintiff was, however, permitted to amend his statement of claim by including therein the following "in the alternative, the plaintiff claims from the defendant the sum of \$115 as commission agreed to be paid by the defendant to the plaintiff under a verbal agreement entered into on or about the 16th July, 1941, at Georgetown, Demerara, between the plaintiff and defendant for introducing and effecting a sale to Jane Rebecca Gouveia of the aforesaid property 48, Robb Street, Lacytown".

In consequence of the acts and conduct of the plaintiff on the 18th July, 1941, when he, contrary to his duty to and to his agreement with the defendant, advised Jane Rebecca Gouveia not to sign a contract containing the terms which he well knew would be, and were, required by the defendant, the defendant informed the plaintiff either on the 19th or the 21st July, 1941, that his services as agent were terminated.

On the 30th July, 1941, the plaintiff's solicitor wrote the defendant a letter in which it was stated as follows: "My client duly fulfilled the said agreement by the introduction of one Jane Rebecca Gouveia as a purchaser able and willing to purchase the said property at the agreed price of \$4,725 and to whom you agreed to sell the said property". On the 1st August, 1941, the defendant's solicitor replied as follows to the plaintiff's solicitor: "Jane Rebecca Gouveia was unwilling to purchase except on her own terms which were unacceptable to my client. She refused to

C. C. BLACKETT v. P. E. EDGHILL.

sign a contract of sale embodying the terms on which Blackett was instructed to sell and was instigated in her refusal by Blackett himself who was apparently acting more as her agent than my client's in demanding and imposing terms inimical to my client's interest and contrary to his instructions. Your client has himself by his conduct and attitude in this matter created the situation which rendered the introduction nugatory resulting in the purchaser expressing her unwillingness to purchase the property. In the circumstances my client will resist any action your client may see fit to take against him".

On the 2nd August, 1941, the defendant sold, without the intervention of the plaintiff, lot 48, Robb Street, Lacytown, Georgetown, to Jane Rebecca Gouveia, and, without the aid of the plaintiff, he succeeded in inducing her to enter into a binding contract of sale containing the terms which the plaintiff had advised her not to agree to on the 18th July, 1941. The defendant sold the property for \$4,800. The plaintiff had introduced a person as purchaser on the 18th July, 1941, for \$4,725, and that intended purchaser did not agree to the contract for which the plaintiff well knew that the defendant had stipulated. The plaintiff was therefore not the effective cause of the binding contract of sale which was made on the 2nd August, 1941, between the defendant and Jane Rebecca Gouveia.

The plaintiff is therefore not entitled to recover on his alternative claim. I have not overlooked that on the 5th August, 1941, the defendant was willing, if the plaintiff did not oppose the passing of the transport, to pay the plaintiff the sum of \$115 on the passing of transport. The plaintiff unwisely declined to accept this offer, and opposed the transport on the 19th August, 1941, on the alleged ground that the defendant was indebted to him in the sums of \$125 and \$115 as commission. The defendant now stands upon his legal rights and I must give judgment accordingly.

The opposition is declared to be unjust, illegal and not well-founded, and there will be judgment for the defendant with costs.

Judgment for defendant.

A. CORREIA v. E. JACOBS.
ALEXANDRINA CORREIA, Plaintiff,
v.
EMILY JACOBS, Defendant.
[1942. No. 227—DEMERARA.]
BEFORE DUKE, J. ACTING.

1942. SEPTEMBER 12, 14, 19, 21, 26, 28; OCTOBER 13.

Assignment—Debt—Equitable assignment—Intention, not form, the deciding factor—How constituted—Debtor given to understand—That debt made over by creditor to some third person.

Assignment—Debt—Promissory note for—In favour of third person—Made by debtor at request of creditor—Equitable assignment of debt.

Promissory note—Consideration—Note made by debtor—In favour of payee at request of creditor—Antecedent debt or liability—Bills of Exchange Ordinance, cap, 56, s. 28 (1) (b).

Promissory note—Consideration—Part valid, part illegal—Illegal part severable from valid part—Action by payee—Amount of note recoverable—In so far as it relates to valid part of consideration—Not in so far as it relates to legal part. Aboriginal Indians—Aboriginal Indians Protection Ordinance, cap 262, Part V, ss. 27 to 35, formerly Aboriginal Indians (Intoxicating Liquors) Ordinance, 1908 (No. 10)—Governing principle of—Intoxicating liquor not to be consumed by Aboriginal Indians.

Aboriginal Indian—Owner of timber cutting tracts—Contract by trader to advance goods to her—To enable her to operate tracts—Intoxicating liquor part of goods supplied—No evidence of consumption by any Aboriginal Indian—Action to recover price of intoxicating liquor—Maintainable.

All that is necessary to constitute an equitable assignment of a debt is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril: if the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor.

An equitable assignment does not always take the form of an assignment, nor use the language of an assignment. It may be addressed to the debtor; it may be couched in the language of command; it may be a courteous request; it may assume the form of mere permission. The language is immaterial if the meaning is plain.

A. owed B. a certain sum of money. B. told A. that the debt was to be paid by A. to B's wife, whose attorney he was.

Held that there was an equitable assignment of the debt by B. to his wife.

If a creditor asks a debtor to make a promissory note for the amount of the debt in favour of a third person and the debtor consents, there is, by virtue of that consent alone, an equitable assignment of the debt by the creditor in favour of the third person, and there is an antecedent debt or liability, within the meaning of section 28 (1) (b) of the Bills of Exchange Ordinance (cap. 56), as consideration for the making of the promissory note by the debtor in favour of the third person,

As between the immediate parties to a promissory note, if the note is given partly for an illegal consideration and partly for a valid consideration, and the illegal part of the consideration can be severed from the valid part of the consideration, the payee of the promissory note can recover against the maker thereof the amount of the promissory note in so far as it relates to the part of the consideration which is valid but he cannot recover against the maker of the note in so far as the illegal part of the consideration is concerned.

The sum of \$220.22, being part of the consideration for a promissory note for \$2,296.66, related to the price of intoxicating liquor supplied to the maker of the note. It was submitted that that part of the consideration was illegal,

A. CORREIA v. E. JACOBS.

and that no portion of the amount due on the promissory note could be recovered.

Held, that if the consideration for the promissory note is illegal in so far as it relates to the price of intoxicating liquor, the plaintiff would be debarred from recovering the sum of \$220.22 but would not be debarred from recovering the whole amount of the note, \$2,296.66.

The governing principle of the Aboriginal Indians (Intoxicating Liquors) Ordinance, 1908 (No. 10), now Part V (sections 27 to 35) of the Aboriginal Indians Protection Ordinance, Cap. 262, is that intoxicating liquor should not be consumed by Aboriginal Indians. Sections 27 and 28 make it a summary conviction offence to sell, barter, supply or give to any Indian, or any person for consumption by an Indian, any intoxicating liquor.

The defendant is a business woman operating a timber cutting business. She claimed to be a full-blooded Aboriginal Indian; her husband, who at all times was the foreman and manager of the timber cutting business, claimed to be a half-caste Aboriginal Indian. By an agreement made between the plaintiff's husband on her behalf on the one hand, and the defendant on the other hand, it was agreed that goods were to be advanced to the defendant for the purpose of enabling her to operate her woodcutting tracts for which purpose she required financial aid; no goods were required to be supplied under the agreement for the use of the defendant or of her family. There was no evidence that the labourers on the woodcutting tracts, or any of them, were Aboriginal Indians within the meaning of section 27 of the Aboriginal Indians Protection Ordinance, Chap. 262. The defendant and her husband gave evidence at the trial of the action: but neither of them deposed that any portion of the intoxicating liquor supplied to the defendant from the shop or business of the plaintiff was in fact consumed by the defendant, her husband, or any Indian within the meaning of section 27 of Chap. 262.

Held, that the intoxicating liquor so supplied to the defendant was not supplied for an illegal consideration, and that the plaintiff was entitled to recover from the defendant the price of the intoxicating liquor so supplied.

ACTION by the plaintiff Alexandrina Correia, the wife of Eugene Francis Correia to whom she was married subsequent to the coming into force of the Married Persons (Property) Ordinance, cap. 144, against the defendant Emily Jacobs, a married woman, claiming \$2,296.66 on a promissory note. The facts and arguments appear from the judgment.

H. C. Humphrys, K.C., for plaintiff.

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

Cur. adv. vult.

DUKE, J. (Acting): The plaintiff Alexandrina Correia issued a specially indorsed writ on the 30th July, 1942 claiming from the defendant Emily Jacobs the sum of \$2,296.66 on a promissory note made by the defendant on the 29th June, 1942 on demand at Bartica, Essequibo in favour of the plaintiff for the said sum of \$2,296.66.

The writ was returnable for the 17th August, 1942. It was served on the defendant on the 5th August, 1942. On the 14th August, 1942 the plaintiff filed an affidavit verifying claim; it was sworn to by the plaintiff on the 10th August, 1942 at Bartica. On the 15th August, 1942 the defendant filed an affidavit of defence. On the 17th August, 1942 the Court, on the application of the solicitor for the plaintiff, granted the plaintiff leave to file an

A. CORREIA v. E. JACOBS.

affidavit in reply. The plaintiff filed such an affidavit on the 29th August, 1942. On the 31st August, 1942 the Court, granted the defendant leave to defend this action, directed that it be tried summarily and without pleadings, and made arrangements for a speedy trial.

The plaintiff is the wife of Eugene Francis Correia, to whom she was married subsequent to the 20th August, 1904. During the last 6 years she has been carrying on a general store business at Bartica in the County of Essequibo. By deed poll executed by the plaintiff on the 26th February, 1936 and registered in the Deeds Registry on the 7th March, 1986 as Power of Attorney No. 9 of 1936 the plaintiff created a power of attorney in favour of her husband Eugene Francis Correia. The power of attorney was a full power in favour of the donee thereof. The plaintiff does not superintend or look after any part of her business at Bartica. Her husband Eugene Francis Correia is in charge of the store and the business, and Victor Antonio Vieira is the assistant.

As the trial was without pleadings the utmost amount of latitude was allowed to the defendant in putting her case before the Court, and any evidence which the defendant led was admitted whether the Court thought that it was material or not.

The defence is (a) that on the 29th June, 1942 the defendant (subject to certain deductions which will be mentioned later) was in fact indebted to Eugene Francis Correia in the sum of \$2,296.66 for goods sold and delivered and for moneys paid and advanced; (b) that the defendant is not indebted to the plaintiff Alexandria Correia in any sum whatever; (c) that no consideration had passed from the plaintiff to the defendant for the making by the defendant Emily Jacobs on the 29th June, 1942 of the demand promissory note for \$2,296.66 in favour of the plaintiff Alexandrina Correia; (d) that there was no consideration for the promissory note within the meaning of section 28 (1) of the Bills of Exchange Ordinance, cap. 56, and the decided cases; (e) that, in arriving at the figure of \$2,296.66 as being the amount due by the defendant on the 29th June, 1942 Eugene Francis Correia made certain overcharges and omitted to give certain credits to the defendant.

The overcharges alleged by the defendant were as follows:—

- (1) 8.7.1941. 1 coil wire rope \$205.92

The defendant's husband states that the price should be \$103, and that Victor Antonio Vieira told him that that was the price. This wire rope was purchased by the plaintiff on the 14th June, 1941 from J. P. Santos & Co., Ltd., merchants in Georgetown for the sum of \$160.16, being 572 lbs. at 28 cents per lb. The cost of conveyance of the wire rope from Georgetown to the plaintiff's store at Bartica was about \$4. So that the cost of the coil of wire rope delivered at the plaintiff's store at Bartica was about \$164. This Court is unable to say that a profit of 25 per centum at Bartica is excessive. It cannot therefore say that the price of \$205.92 charged to the defendant is not fair and reasonable.

A. CORREIA v. E. JACOBS.

- (2) 10.10.1941. 1 carton beer \$7.68 and
 1 carton stout \$7.68 \$15.36

Counsel for the defendant suggested to Eugene Francis Correia that the price in Georgetown was then \$4.35. The witness denied this, and stated that the price in Georgetown was between \$6 and \$6.50. On this evidence it is impossible to find that the prices charged at Bartica were excessive, and not fair and reasonable.

- (3) 9.1.1942. 1 carton beer \$8.64 and
 1 carton stout \$8.64 \$17.28

In answer to Counsel for the defendant Eugene Francis Correia stated that the price in Georgetown at that time was not known to him, as Victor Antonio Vieira did most of the buying at the time. No evidence whatever was led which would even suggest that the prices charged at Bartica, were excessive.

There is absolutely no foundation for the claim made by or on behalf of the defendant that she was overcharged.

The defendant has two timber grants on the right bank of Kamahuni Creek, left bank Groete Creek, left bank Essequibo River.

Prior to the 11th June, 1941 the defendant used to deal with the store of the plaintiff at Bartica, Essequibo and was indebted to the plaintiff in respect of goods sold and delivered and moneys advanced in the sum of \$59.75 or thereabouts.

On the 11th June, 1941 an agreement in writing expressed to be made between Mrs. Emily Daniels (now Mrs. Emily Jacobs) the party of the first part and Eugene Francis Correia, the party of the second part, after reciting that the party of the first part is the owner of wood cutting grants, D.L.M. 2759/40 and D.L.M. 2760/40 over 200 acres Crown Land situate on both banks of the Kamahonie Creek, left bank Groete Creek, left bank Essequibo River and is desirous of operating these said wood cutting tracts and has approached the party of the second part for financial aid, provided as follows:—

“3. That in consideration of the sum of not exceeding three hundred and fifty dollars (\$350) advances in cash and goods to be made from time to time by the party of the second part, it is hereby agreed that the party of the first part should so operate the wood cutting tracts mentioned herein and be obligated to sell all timbers during the existence of this contract to the party of the second part at current market rates prevailing at the time of delivery at Bartica, Essequibo, plus one cent per foot.

“4. Delivery of all timbers under this contract to be made on a beach a short distance above the mouth of the Groete Creek, Essequibo River.

“5. The party of the first part agrees to have deducted twenty-five per cent (25%) out of the gross proceeds of sale of timbers for repayment to the party of the second part towards the amount advanced by him, beginning from delivery of the first shipment of such timbers until the total amount advanced is liquidated.

“6. The party of the first part also obliges herself to sell to the party of the second part ten thousand cubic feet (10,000) Greenheart timbers, such timbers to be delivered as already mentioned.

“7. The party of the first part undertakes to be responsible for all timbers purchased by the party of the second part for a period of three (3) months from the date of delivery and whilst such timbers are lying on the beach aforementioned.

“8. This agreement to terminate when 10,000 cubic feet greenheart timbers shall have been delivered and sold to the party of the second part.”

A. CORREIA v. E. JACOBS.

Although this agreement was expressed to be made by Eugene Francis Correia, it was in fact made by him on behalf of the plaintiff Alexandrina Correia. Counsel for defendant has submitted that parol evidence is inadmissible to show that this is so, but in view of the conclusions at which I have arrived, it is unnecessary for me to deal with this submission.

The defendant well knew that goods and cash supplied to her under the agreement of the 11th June, 1941 came from a store at Bartica at which Victor Antonio Vieira was shop assistant. That store belonged, and belongs, to the Plaintiff Alexandrina Correia.

On the 8th July, 1941 the defendant had already been advanced a sum exceeding the \$350 provided for in the agreement of the 11th June, 1941. The business of the plaintiff, however, continued to advance goods and cash to the defendant; and the defendant, at all material times, knew that this was so.

The defendant delivered timber under the agreement of the 11th June, 1941. No timber was delivered prior to January, 1942. Greenheart delivered by the defendant between the 20th January and the 7th February, 1942 (both dates inclusive) was credited to the defendant in the books of the plaintiff at 22 cents per cubic foot, royalty paid by the plaintiff and not debited to the defendant. Greenheart delivered by the defendant on the 20th April, 1942 was credited to the defendant in the books of the plaintiff at 24 cents per cubic foot, royalty paid by the plaintiff and not debited to the defendant. The royalty is 4 cents per cubic foot, but as there is an allowance given of 20% on the measurement of the timber when royalty is paid, the royalty, in fact is said to work out at 3.2 cents per cubic foot. The defendant has stated through her husband William Jacobs that the defendant was never credited with the current market prices of greenheart timber prevailing at the time of delivery at Bartica Essequibo, as provided in the agreement of the 11th June, 1941. William Jacobs, however, gave no evidence in support of his contention. Charles Rodrigues Nascimento gave evidence on behalf of the defendant; his evidence, however, cannot be relied upon; he brought no books in support of his evidence as to market price as to which I am satisfied that he knows little or nothing of his own knowledge. Mr. William Richard Puddicombe, clerk to Mr. O. R. Bennett who is a director of Bookers Timber Co., Ltd., which purchases greenheart timber at Bartica and in the Essequibo River gave evidence on behalf of the defendant that up to the 17th January, 1942, the company's agent at Bartica, Eustace Fraser, purchased greenheart timber at 25 cents per cubic foot, royalty of 3.2 cents per cubic foot paid by the seller; and that from the 18th January, 1942 to the 14th March, 1942 the price of greenheart timber was 26 cents per cubic foot, royalty of 3.2 cents per cubic foot paid by the seller. Eustace Fraser who was called by the plaintiff, deposed that, on

A. CORREIA v. E. JACOBS.

behalf of Bookers Timber Co., Ltd., he paid (except for faulty logs) 26 cents per cubic foot, from the 17th January, 1942, and 28 cents per cubic foot from the 31st March, 1942, in each case royalty at 3.2 cents per cubic foot being paid by the seller. So that according to the evidence of Mr. Puddicombe and Eustace Fraser the price per cubic foot for greenheart royalty paid by the purchaser, was 21.8 or 22.8 cents from the 18th January, 1942 to the 30th March, 1942, and 24.8 cents from the 31st March, 1942. The defendant was credited in the books of the plaintiff with 22 cents per cubic foot for 6398 cubic feet greenheart delivered between the 20th January, 1942, and the 7th February, 1942, and with 24 cents per cubic foot for 3,383 cubic feet of greenheart delivered on the 20th April, 1942, in each case royalty paid by the purchaser. No evidence was adduced on behalf of the defendant to show what Mrs. Willems (a greenheart purchaser mentioned in this case) paid between the 18th January, 1942 and the 20th April, 1942. On the evidence led in this case, I am not satisfied what was the current market price of greenheart timber prevailing in Bartica between the 20th January, 1942 and the 7th February, 1942, or on the 20th April, 1942. The contention of the defendant that she was not credited with the current market prices of greenheart timber prevailing at the time of delivery is not substantiated by evidence.

On the 14th April, 1942 Eugene Francis Correia, attorney of the plaintiff and the person in charge of the plaintiff's store and business at Bartica, Victor Antonio Vieira, the assistant in the plaintiff's store, the defendant and her husband went through the account of the defendant in the books of the plaintiff. The defendant and her husband took a keen interest in the proceedings, pointed out some errors in the credits and these were rectified. The following items were added to the credits relating to the greenheart timber delivered

“Difference in measurements	
15 feet at 21 cents	... \$ 3.15
By error on 6,938 cubic feet	
at 1 cent per foot	... <u>63.98</u>
	<u>\$67.13”</u>

Greenheart, as measured by the plaintiff's husband and by the defendant's husband was 15 cubic feet less than the measurements as made by Mrs. Willems the purchaser from the plaintiff. The defendant's husband pointed this out, and Eugene Francis Correia, on behalf of the plaintiff, credited the defendant with the additional 15 cubic feet. The defendant's husband also claimed that the price credited to the defendant per cubic foot should be 1 cent more than was credited; Eugene Francis Correia, on behalf of the plaintiff, conceded this point, and the defendant's account was credited accordingly. After the accounts between the defendant and the plaintiff had

A. CORREIA v. E. JACOBS.

been approved by the defendant and her husband and settled in the sum of \$2,545.17, a balance due by the defendant to the plaintiff, a pass book was opened in which the first entry was "April 4th, 1942 To balance brought forward \$2,545.17." The defendant signed the pass book, in acknowledgement of its accuracy, and she also signed a duplicate pass book. The pass books were made up from time to time, and on the 25th May, 1942 the defendant was, according to the entries therein, indebted to the plaintiff in the sum of \$2,296.66. There is no further entry after the 25th May, 1942.

In consequence of instructions received from the plaintiff, Eugene Francis Correia told the defendant that she must give a promissory note for the amount of her indebtedness which was large, and that the account of the defendant with the plaintiff would be closed. The defendant agreed to give the promissory note.

On the 29th June, 1942 the defendant and her husband spent about 2 hours going through with Eugene Francis Correia, the account of the defendant in the books of the plaintiff. Neither the defendant nor her husband raised any objection to any of the items, and no objection was raised by the defendant or her husband to the accuracy of the defendant's account which stood in the books of the plaintiff on the 25th May, 1942 at the sum of \$2,296.66.

A promissory note was made out on demand, in favour of Alexandrina Correia, the plaintiff herein for the sum of \$2,296.66. The note was handed by Eugene Francis Correia to the defendant in the presence of her husband. She read the note and signed it. Eustace Fraser, who was in the plaintiff's store, was called into the office section of the store where the defendant was. He twice asked the defendant whether the note was right and she said "Yes." When the defendant signed the demand note on the 29th June, 1942 she well knew that it was made out for the sum of \$2,296.66, she acknowledged the amount to be correct, she knew that the note was made out in favour of Alexandrina Correia, the plaintiff herein, and she acknowledged that Alexandrina Correia was her creditor in respect of the sum of \$2,296.66 which was due by her under the agreement of the 11th June, 1941 for goods sold and delivered, and cash advanced, by the store of the plaintiff at Bartica.

On the 8th July, 1942 the plaintiff wrote the defendant a letter, signed by the plaintiff herself in which she stated "With reference to the Pro note you gave me for \$2,296.66 (two thousand two hundred and ninety-six dollars and sixty-six cents) on the determination of *our* agreement, for the balance of your indebtedness to *me*. You have made no payment to me whatsoever, although you promised to liquidate the amount in cash as soon as possible. Will you please let me know how you propose to pay off the note not later than the 15th instant!"

A. CORREIA v. E. JACOBS.

Eugene Francis Correia saw the defendant Emily Jacobs who told him that she had received the plaintiff's letter of the 8th July, 1942, and that she intended to pay the money as soon as she drew out timber. Eugene Francis Correia told the defendant that she had better write that to his wife, as the plaintiff was still worrying him. The defendant told Eustace Fraser that she owed Mrs. Correia (the plaintiff) herein and that Mrs. Correia had written to her for payment. She showed Eustace Fraser the plaintiff's letter of the 8th July, 1942, she asked him to reply to the letter and she told him what to write, and the defendant signed this letter. The letter written by Fraser on the instructions of the defendant was as follows:—

“Bartica
15/7/42

“Mrs. A. Correia
Dear Madam

I have Received Your Letter dated 8/7/42 to-day. Asking about payment off my A/c, it is my intention to do so, as soon as possible. We are now drawing out logs of G.H. timbers, and then they will be brought to the Beach for sale, as soon as we get this done and the timbers are sold. I will pay my a/c. if not all some payment I will make.

Respectfully.

I remain

Yours truly

Mrs. E. Jacobs.”

At the request of the defendant, Eustace Fraser delivered by hand, the above letter to the plaintiff at her store in Bartica.

Eustace Fraser advanced the sum of \$10 to the defendant to assist her in getting out the timber so that she could pay the plaintiff. He went to Saxacalli, left bank Essequibo River to see if the defendant had any timber. There was no timber; the defendant told him that the timber had not yet arrived, and he Eustace Fraser returned to Bartica where he received the following letter from the defendant.

“Saxacallie
July 18, 1942

“Dear Ustuace

Timbers has arrive yesterday afternoon as soon as you left. I am expecting you tomorrow, positively

14 pieces G.H. 617 c ft.
2 " Sumurupa 87 c ft.

I am yours

Mrs. E. Jacobs.”

A. CORREIA v. E. JACOBS.

Eustace Fraser spent \$6.72 in going to Saxacalli, but up to now he has not got any timber from the defendant.

Counsel for the plaintiff has submitted that, assuming that the written agreement of the 11th June, 1941 constituted or created the relationship of creditor and debtor between Eugene Francis Correia and the defendant, there was an equitable assignment on the 4th April, 1942 by Eugene Francis Correia to the plaintiff of the debt which was then due by the defendant to Eugene Francis Correia, or, in the alternative, there was an equitable assignment on the 29th June, 1942 by Eugene Francis Correia to the plaintiff of the debt which was then due by the defendant to Eugene Francis Correia.

By section 3 (B) of the Civil Law of British Guiana Ordinance, cap. 7, it is provided that "the Supreme Court shall administer the doctrines of equity in the same manner as the Supreme Court of Judicature in England administers them, (on the first day of January, 1917) or at any time thereafter." In *Brandt v. Dunlop* (1905) A.C. 454, 461, 462, Lord Macnaghten stated: "At law it was considered necessary that the debtor should enter into some engagement with the assignee. That was never the rule in equity. 'It is certainly not the doctrine of this Court,' said Lord Eldon sitting in Chancery in *Ex parte South* (1818) 3 Swans, 392 . . . But, says the Lord Chief Justice in (1904) 1 K.B. 387," the document does not, on the face of it, purport to be an assignment nor use the language of an assignment." An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor." On the 29th June, 1942, before the defendant signed the promissory note for \$2,296.66 in favour of Alexandrina Correia, Eugene Francis Correia made it clear to the defendant that the debt of \$2,296.66 which was then due owing and payable by her, was to be paid to Alexandrina Correia. If therefore, the debt was due to Eugene Francis Correia, as submitted by counsel for the defendant, there was an equitable assignment of the debt, by Eugene Francis Correia by her attorney Eugene Francis Correia. That being the case, the submission of counsel for the defendant that there was no consideration for the making of the note must necessarily fail.

Counsel for defendant stressed that there was no consideration for the note within the meaning of section 28 (1) (b) of the Bills of Exchange Ordinance, cap. 56. He argued that the

A. CORREIA v. E. JACOBS.

defendant owed Eugene Francis Correia, and not Alexandrina Correia, and that the debt due by the defendant to Eugene Francis Correia was not an "antecedent debt or liability," within the meaning of section 28 (1) (b). It is clear, however, to my mind that if a creditor asks a debtor to make a promissory note for the amount of the debt in favour of a third person and the debtor consents, there is, by virtue of that consent alone, an equitable assignment of the debt by the creditor in favour of the third person, and that there is an antecedent debt or liability as consideration for the making of the promissory note by the debtor in favour of the third person.

Counsel for the defendant has submitted that as the defendant is an Aboriginal Indian it was an offence under sections 28 and 29 of the Aboriginal Indians Protection Ordinance, cap. 262, for any person to sell to her intoxicating liquor within the meaning of section 2; that there were many items in the account for \$2,296.66 showing that intoxicating liquor to the value of \$220.22 (I have not verified the accuracy of the total) had been supplied to the defendant who is an Aboriginal Indian; that part of the consideration for the promissory note was therefore illegal; and that consequently the whole consideration for the note is bad.

As between the immediate parties to a promissory note, if the note is given partly for an illegal consideration and partly for a valid consideration, and the illegal part of the consideration can be severed from the valid part of the consideration the payee of the promissory note can recover against the maker thereof the amount of the promissory in so far as it relates to the part of the consideration which is valid but he cannot recover against the maker of the note in so far as the illegal part of the consideration is concerned; see the judgment of McCardie, J. in *Robinson v. Marsh* (1921) 2 K.B. 640, and *Chalmers*, Bills of Exchange, 1927, 9th edition, page 120, note (b) and page 124, note (b).

Consequently, if the consideration for the promissory note, in so far as it relates to the price of intoxicating liquor, said by counsel for the defendant to amount to \$220.22 is illegal, the plaintiff would be debarred from recovering the sum of \$220.22 but would not be debarred from recovering the whole amount of the note, \$2,296.66.

Sections 27 and 35 (Part V) of the Aboriginal Indians Protection Ordinance, cap. 262 are the Aboriginal Indians (Intoxicating Liquors) Ordinance, 1908 (No. 10). The long title of that Ordinance is "An Ordinance to prohibit the sale and disposal of Intoxicating Liquors to Aboriginal Indians"; and the preamble is as follows: "Whereas the use of intoxicating liquors is proving highly injurious to the Aboriginal Indians of this Colony, and it is therefore deemed expedient as far as possible to prevent their use of such liquors." Section 28 of

A. CORREIA *v.* E. JACOBS.

cap. 262 provides that “no one may lawfully sell, barter, supply or give to any Indian, or any person for consumption by an Indian any intoxicating liquor.” By section 29, it is made a summary conviction offence to contravene the provisions of section 28. The marginal notes to sections 28 and 29 are as follows: “No intoxicating liquor for Indians,” and “Penalty for contravention.”

The governing principle of the Aboriginal Indians (Intoxicating Liquors) Ordinance, 1908 (No. 10) is that intoxicating liquor should not be consumed by Aboriginal Indians. The defendant is a business woman operating a timber cutting business. The Court cannot reasonably draw the inference that the labourers, or any of them, are Indians within the meaning of section 27 of the Aboriginal Indians Protection Ordinance, cap, 262. The defendant Emily Jacobs claims to be a full-blooded Aboriginal Indian, and her husband who has at all times been the foreman and manager of the timber cutting business (and to whom she was married in February, 1942) claims to be a half-caste Aboriginal Indian. Neither the defendant nor her husband has given any evidence that any portion of the intoxicating liquor supplied from the shop or business of the plaintiff to the defendant, was in fact consumed by the defendant, her husband, or any Indian within the meaning of section 27 of Chapter 262. The agreement of the 11th June, 1941 states that goods were to be advanced for the purpose of enabling the defendant to operate her woodcutting tracts, for which purpose she required financial aid: no goods were required to be supplied under the agreement for the use of the defendant or of her family.

In these circumstances, I am unable to find that the portion of the consideration for the promissory note, relating to the price of intoxicating liquors, was an illegal consideration.

The defendant’s husband stated in his evidence that the following advantages were taken of the defendant.

- (1) Mr. Correia did not credit the defendant with all the timber delivered to him by the defendant. This was definitely abandoned by counsel for the defendant during the trial of the action.
- (2) Mr. Correia never paid the current price for timber at Bartica. I have already found that the defendant has failed to prove this.
- (3) Mr. Correia overcharged the defendant for wire rope. I have already found that the defendant has failed to prove this;
- (4) Credit was not given to the defendant for the sum of \$12, the cost of cutting lines on a certain tract of land, such work having been done in March, 1942 by the defendant’s labourers at the request of Mr. Correia. This amount is not disputed by the plaintiff;

A. CORREIA v. E. JACOBS.

- (5) Credit was not given to the defendant for transportation of 4,610 cubic feet of greenheart timber from Groete Creek to Kaow island. The defendant's husband claims that the plaintiff should be credited with 3 cents per cubic foot; the plaintiff's husband says that the additional cost to the defendant should not exceed $\frac{1}{2}$ cent to 1 cent per cubic foot, and that the timber was conveyed by a tug and punts the property of Mrs. Willems the purchaser of the timber, and that when the pass book was made up on the 4th April 1942 neither defendant nor her husband asked for anything in respect of the transportation from Groete creek to Kaow island, that an offer was made to pay, but neither the defendant nor her husband insisted on a credit being given at that time. In these circumstances, I allow the defendant a credit of \$38 in respect of the cost of transportation of the greenheart timber from Groete creek to Kaow island;
- (6) The defendant was not given credit for 38 gallons of Gasolene at 60 cents a gallon borrowed by Mr. Correia from time to time. Mr. Correia admits borrowing about 20 gallons from time to time. I allow the defendant a credit of \$12 in respect of the gasolene. Credit must therefore be given to the defendant for the sum of \$12, \$38 and \$12, aggregating \$62. The sum due on the promissory note is therefore \$2,234.66, and there will therefore be judgment for the plaintiff for the sum of \$2,234.66 with costs.

Judgment for plaintiff.

Solicitors: *J. Edward deFreitas; R. G. Sharples.*

GARNETT & Co., LTD., AND ORS., v. L. SLATER.

GARNETT & Co. LTD., Appellants,

v.

LESLIE SLATER, Respondent.

[1942. No. 288—DEMERARA.]

BOOKER BROS. MCCONNELL & Co., LTD., Appellants,

v.

LESLIE SLATER, Respondent.

[1942. No. 289—DEMERARA.]

WIETING & RICHTER, LTD., Appellants,

v.

LESLIE SLATER, Respondent.

[1942. No. 290—DEMERARA.]

BEFORE FULL COURT: VERITY, C. J. AND DUKE, J. (Acting).

1942. OCTOBER 16; NOVEMBER 13.

Defence Regulations—Price control order—Made under—Sale of price controlled article by employee—Within scope of authority—Price charged by employee in excess of that allowed by order—Liability of employer for act of employee.

Defence Regulations—Competent authority—Commodity Control Board—Order made by competent authority at Commodity Control Office—Name of competent authority not mentioned in order—Order signed by controller of commodities—Controller duly authorised to sign on behalf of Board—Ample proof That order made by competent authority

Defence Regulations—Price control order—Made under—Maximum price—“At the rate of”—Meaning of—Standard of calculation—For all quantities of price controlled article—Whether greater or lesser than quantity specified in rate prescribed.

An employer is criminally liable for the act of his employee who, within the scope of his authority, sells a price controlled article at a price exceeding that fixed by an order made by the competent authority appointed under regulation 41 of the Defence Regulations, 1939.

At the time the order was made, the Commodity Control Board was the competent authority. Proof was given that the order was made at the Commodity Control Office by the competent authority, and signed by the Controller of Commodities who was duly authorised to sign on behalf of the Board. The name of the Board did not specifically appear in the Order.

Held, that there was ample proof that the order was made by the competent authority.

Paragraph 10 (2) of a price control order made on the 14th May, 1942 by the competent authority appointed under regulation 44 of the Defence Regulations, 1939, is as follows: “If the purchaser requests, or consents to, the sale of any of the articles set out in the First or Second Schedule hereto in a lesser quantity than that specified in either of the said Schedules and the proportionate amount of the maximum price as therein fixed includes a fraction of a cent the wholesaler or retailer may, in the absence of agreement to the contrary, demand payment of one cent in respect of such fraction.”

In the First Schedule to the order “Matches (Lighthouse)” are specified as an article the price of which is controlled, and the order prescribes the maximum wholesale price as being “at the rate of \$6.50 per case of 5 gross boxes” The appellants sold 1 gross boxes wholesale, not for one-fifth of \$6.50, or \$1.30, but for \$1.32.

GARNETT & Co., LTD., AND ORS., v. L. SLATER.

Held (1) that the quantity specified in the Schedule is not a minimum unit but a standard by means of which the price of any quantity, whether greater or lesser, may be calculated in numerical proportion; and

(2) that the quantity specified in this particular item is the quantity contained in a case of 5 gross boxes, that is to say, 5 gross, and the price of 1 gross is therefore one-fifth of the amount \$6.50 set out in the order.

APPEALS by Garnett & Co., Ltd., Booker Bros. McConnell & Co., Ltd., and Wieting & Richter, Ltd., from decisions of a Magistrate of the Georgetown Judicial District convicting them for breach of an Order under the Defence Regulations by which the price of certain commodities was controlled.

H. C. Humphrys, K. C., for the appellants.

S. E. Gomes, Assistant Attorney-General, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by the Chief Justice, as follows:

These are three appeals from convictions for breach of an Order under the Defence Regulations by which the price of certain commodities is controlled. For convenience the appeals were heard together by consent, the points raised thereby being identical.

In each case the appellant company involved was convicted of selling by wholesale a certain quantity of matches at a price exceeding that prescribed by Order 636 B made on the 14th May, 1942, by the Competent Authority appointed under Regulation 44 of the Defence Regulations, 1939.

It was submitted that in none of the cases should the appellant company have been charged, but rather the employee who actually conducted the transaction. This submission is without merit for it is clear that in each case the company was the legal person who sold the article by wholesale and fell within the definition of "wholesaler" contained in the Order. Moreover, had the act of sale been that of the employee only while within the scope of his authority it was held in *Buckingham v. Duck* 120 L. T. 84, that the employer would still have been liable to prosecution.

It was further submitted that there was no proof that the Order in question was in fact made by the Commodity Control Board which is the Competent Authority. This submission also is without substance. Proof was given that the Order was made at the Commodity Control Office by the Competent Authority and signed by the Controller of Commodities who is duly authorised to sign on behalf of the Board. Although the name of the Board does not specifically appear in the Order there is in the foregoing ample proof that the Order was made by the Board.

The only ground of appeal against the conviction which is

capable of being supported by reasonable argument is that which relates to the price at which the quantity of matches involved in each case should have been sold. The first Schedule to Order 636 B specifies "Matches (Lighthouse)" as the article the price of which is controlled and it prescribes the maximum price within the relevant area as being "at the rate of \$6.50 per case of 5 gross boxes." The prosecution was based upon the contention that by reason of the words "at the rate of" the price of any greater or lesser quantity than is contained in a case containing five gross boxes is to be determined by calculation of the numerical proportion. Upon this basis the price of one gross boxes would be \$1.30. Counsel for the appellant companies, while agreeing that the price of more than one case is to be calculated in that manner, argued that the unit is one case and that the Order prescribes no price for a lesser quantity than the specified unit. In support of this argument he submitted that had the item read "at the rate of \$6.50 per 5 gross boxes" then perhaps the price of a lesser quantity might have been a proportionately lesser sum, but that the use of the words "per case" implied that a case of five gross boxes is the minimum unit at which the price is controlled, for a lower quantity would not represent a "case" at all.

We are unable to agree with this contention. There is nothing in the Order to indicate that the standard at the rate of which the price is fixed is to be taken as a minimum unit, and in this view we are confirmed by reference to paragraph 10 (2) of the Order which makes specific provision for the calculation, in certain cases, of the price of quantities less than those set out in the Schedules to the Order. It is clear, therefore, that the quantity specified in the Schedule is not a minimum unit but a standard by means of which the price of any quantity whether greater or lesser may be calculated in numerical proportion. The quantity specified in this particular item is the quantity contained in a case of five gross boxes, that is to say five gross, and the price of one gross is therefore, one fifth of the amount set out in the Order. We are inclined to think, indeed, that this must obviously be so. It is certainly the interpretation that would appear to spring most readily to mind. For some reason which has not been made clear, however, the appellant companies fixed their wholesale selling price for one gross at \$1.32, or two cents more than is prescribed by the Order. It was suggested by Counsel that this price might be brought within the order by dividing the price of five gross by sixty and so ascertaining the price of one packet of a dozen boxes to be ten cents and a fraction of a cent, treating this as eleven cents under paragraph 10 (2) of the Order, and multiplying by twelve to arrive at the price of one gross. The only advantage derived from this somewhat roundabout procedure would be to secure to

GARNETT & Co., LTD., AND ORS., v. L. SLATER.

the wholesaler two cents extra on each gross but it is patently not the correct or even a fair method of calculation.

It is clear that the wholesale price of one gross of "Lighthouse" matches as prescribed by the Order is \$1.30 and that by selling at \$1.32 the appellants companies were guilty of an offence and were properly convicted.

The last point for determination is the propriety of the penalty imposed. It appears that although the price of these matches was fixed at the present level so long ago as November, 1939, they were in point of fact being sold for upwards of two years at the price in respect of which the appellants companies have now been convicted. Sale at this price was not concealed but on the contrary was publicly advertised from time to time in the press, and was known or should have been known to the authorities responsible for enforcing price control. The failure of those authorities to take any action against the sellers until the belated date of the present prosecutions might well be understood to imply tacit acceptance of the view held by the trade that the price charged was not in breach of the successive Orders by which from time to time the control price was maintained. It is submitted by Counsel that in these circumstances the learned Magistrate acted unreasonably when he imposed a substantial penalty for selling at a price to which they were not aware exception could be taken and which indeed they were entitled to assume conformed to the view held by the authorities as to the true interpretation to be placed upon the terms of the Order in relation to this item.

The learned Assistant Attorney General informed us that he was not in a position to give the Court any assistance in regard to this aspect of the matter being unaware of the reason why sales were allowed to continue for so long at an excessive price without interference.

We are of the opinion that in these circumstances there is much to be said for the submission of Counsel, although we should not be surprised if once the prosecutions were brought the attitude of the appellants companies in a measure contributed to the learned magistrate's conclusion that the cases called for the imposition of a substantial penalty. When a reputable person or firm adopts the not very reputable procedure of endeavouring to render ineffective regulations and orders devised to secure the welfare of the community in time of war by resorting to the use of the flimsiest of quibbles as to the validity of such orders or regulations or as to their own technical liability, even though they may fancy they have been hardly dealt with by the authorities, they should not be astonished if the Court should come to the conclusion that their object goes beyond the very proper aim of securing a final elucidation of the real point at issue—in these cases the rate at which the price of matches is controlled. Price control, in common with other

emergency measures embodied in Defence Regulations, arises from the urgent needs of the community in times of stress, and every such measure should command the whole-hearted co-operation of all reputable persons whose aim should be voluntarily to give effect thereto rather than seek means whereby they may by ingenuity evade the spirit and intent of the order or regulation.

As was said during the course of the hearings, however, we are of the opinion that in the present cases the appellants have done themselves less than justice by the method of defence adopted here and in the Court below. On this assumption we think that the learned magistrate erred when he imposed a substantial fine in each of the present cases for an offence openly committed, indeed publicly advertised, and ignored if not actually approved by the authorities for so long a time.

In suitable cases when the offender has deliberately and knowingly, whether openly or by artifice, sought to profit by the difficulties and misfortunes occasioned by war, the magistrate need not, and we feel sure will not, hesitate to inflict such penalties however severe as may convince the offender that such despicable conduct does not pay. Each case must be dealt with on its own merits and, while a certain measure of uniformity in penalty is desirable in like cases, yet there should be no predetermined scale or "tariff" but the penalty should be duly proportioned to the facts and circumstances of each case and in relation to the gravity of the particular offence and to the means and character of the offender.

In each of the present cases we propose to reduce the amount of the fine, for while misinterpretation of the terms of an Order is no such excuse as to vitiate a conviction nevertheless the particular circumstances of these cases do not justify the imposition of the comparatively heavy penalties which the magistrate inflicted. We would not have it thought however, that our decision in this respect rests upon the fact that the excess in respect of each sale is but a small sum, for there may well be cases in which by numerous sales a small excess brings substantial illicit profit to the offender. In the present cases it appears probable that, in view of the decision we are about to deliver in another case, no such substantial profits had in the past unlawfully accrued to the appellants. It will suffice to say that the proper penalty though not heavy should in these cases be rather more than nominal, for had the appellants sought the more ready if less profitable interpretation of the Order they would not have rendered themselves liable to prosecution.

Our decision to reduce the measure of the penalty is based as has been made clear, upon the *bona fides* of the sellers as demonstrated by their course of conduct prior to the prosecutions and

GARNETT & Co., LTD., AND ORS. v. L. SLATER.

the failure of the authorities to interfere with that course so soon as the intention to do so was made public.

The conviction in each case is affirmed, but the sentence in each case is varied by substituting the sum of fifty dollars for the sum of three hundred dollars as the amount of the fine imposed thereby. There will be no order as to the costs of these appeals.

Conviction affirmed; sentence varied.

Solicitors: *F. Dias, O.B.E.*, for Garnett & Co., Ltd., *J. Edward de Freitas*, for Booker Bros., McConnell & Co., Ltd., and Wieting & Richter, Ltd.

J. P. SANTOS & Co., LTD., Appellants (Defendants),

v.

LESLIE SLATER, Respondent (Complainant),

[1942 No, 291.—DEMERARA].

BEFORE FULL COURT: VERITY, C.J. AND DUKE, J. (ACTING).

1942. OCTOBER 16; NOVEMBER 13.

Defence Regulations—Price control order made under—Form of sale in breach thereof—Real effect in conformity therewith—Price charged in excess of that allowed by order—Discount allowed—Price actually received by seller—Not in excess of the maximum price fixed by order—No offence committed by seller.

Defence Regulations—Price control order made under—Form of sale devised to bring it within—Real effect to overcharge buyer—Offence committed.

Where the form of a sale is devised to bring it within a price control order made by a competent authority appointed under regulation 44 of the Defence Regulations, 1939, but the real effect is to overcharge the buyer, the seller has committed a breach of the order.

Where the form of a sale is in breach of a price control order made by a competent authority appointed under regulation 44 of the Defence Regulations, 1939, but the real effect is in conformity with the order, the seller has committed no breach of the order.

The appellants sold 1 gross boxes of Lighthouse Matches for \$1.32; they allowed 2 per centum discount on the purchase price, that is to say, they received \$1.30 for the gross boxes of matches. The maximum price fixed by a price control order made by a competent authority under regulation 44 of the Defence Regulations, 1939, was \$1.30 for 1 gross boxes of matches.

Held, that while the form of the sale was in breach of the order, the real effect was in conformity therewith, and, consequently, the appellants had committed no offence.

APPEAL by J. P. Santos & Co., Ltd. from a decision of a magistrate of the Georgetown Judicial District convicting the company for a breach of an order under the Defence Regulations by which the price of certain commodities was controlled.

H. C. Humphrys, K.C., for the appellants.

S. E. Gomes, Assistant Attorney-General, for the respondent.

Cur. adv. vult.

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

This is an appeal from a conviction of the appellant company for selling by wholesale a quantity of matches at a price in excess of that prescribed by Order No. 241 made on the 18th February, 1942 under regulation 44 of the Defence Regulations, 1939.

The grounds of appeal are varied and for the most part without substance and for the reasons given in the case of *Garnett & Co., Ltd. v. Slater* and two other appeals in which the facts and grounds of appeal are in most respects identical we are of the opinion that in this case the learned magistrate was right in finding that the validity of the order was established that the price of one gross boxes of matches fixed thereby was \$1.30 and that the appellant company sold one gross by wholesale.

The case is distinguished from those to which we have referred by reason of the fact that while the price charged as appears from the cash bill, was \$1.32 or two cents in excess of the controlled price, it is contended that by the allowance of a discount of two cents in each dollar the buyer did not in fact pay more than the price at which the appellant company was allowed to sell.

The learned Assistant Attorney-General in supporting the conviction nevertheless propounded the general principle that the ultimate effect of the transaction rather than its precise terms, is the governing factor in cases of this kind so that if in fact the price paid by the purchaser is not in excess of that fixed by the order there is no offence. This principle appears to have been laid down in *Buckingham v. Duck* 120 L. T. p. 84. The facts in that case differ from those now under consideration, but it is desirable to make clear that the principle is applicable both to cases in which, while the form of the sale is in breach of the order, the real effect is in conformity therewith, and to cases in which while the form is devised to bring the sale within the order the real effect is to overcharge the buyer. Those responsible for the enforcement of price control will no doubt bear in mind the distinction and its implications, for while the principle operates in defence of those who have offended in form though not in reality it is aimed more directly at the punishment of those who, under the form of compliance, in reality offend.

The learned magistrate acted on a wrong principle, however, when he held in this case that although, as he found, the transaction “resulted in the buyer not paying more than \$1.30” nevertheless the seller had committed an offence by reason of the terms of the contract of sale. If the magistrate’s finding of fact as to the real effect of the transaction is correct then the appellant company committed no offence and the charge should have been dismissed.

It was argued for the respondent, however, that this finding is

J. P. SANTOS & Co., LTD., v. L. SLATER.

not supported by the evidence, and this argument is based upon the submission that calculation discloses that had the correct price been charged in the first instance and the discount then calculated on the total amount of the bill the sum payable would have been two cents less than that actually paid. This calculation is accurate but the conclusion to be drawn therefrom depends upon the assumption that the seller, if he had charged the controlled price, would nevertheless have allowed or been required to allow discount thereon. We have no reason to think that this assumption is well-founded. The discount appears to have been a voluntary allowance and not the result of any prearranged contract applicable to all purchases. It was not in fact allowed upon one item in the account and the buyer does not appear to have been aware of the items in respect of which it was in fact allowed. It would be more reasonable to assume, therefore, that the seller, if he had been aware that he was required to sell a gross of matches at a price lower than that fixed by the trade, would have excluded this item from those upon which he allowed discount. While reducing the price of the matches he would have reduced the sum of the discount by a like figure and the buyer would then have paid that which he did in fact pay. We think, therefore, that the magistrate was right in his finding of fact but as on these facts he should have dismissed the charge the appeal will be allowed.

We would wish to make it clear that this decision while based upon principle depends for its application entirely upon the facts of the case, it being borne in mind that in this particular instance the evidence shows that the buyer was never in fact charged or made liable in any way or under any condition for a sum greater than that which he might lawfully have been charged and did ultimately pay. Persons who might think to find encouragement herein for any device which might by trickery enable them under the cloak of overcharge and fictitious discount or otherwise, to evade the order, would lay themselves open to conviction and heavy penalties, for the courts will not be hesitant in distinguishing the real nature of the transaction nor slow to punish the offender.

In this case no offence was in fact committed.

The appeal is allowed with costs and the conviction and sentence set aside.

Appeal allowed.

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

RESAUL MARAJ & Co., LTD., v. L. SLATER.

RESAUL MARAJ AND Co., LTD., Appellants (Defendants),

v.

LESLIE SLATER, Respondent (Complainant).

[1942. No. 292 —DEMERARA].

BEFORE FULL COURT: VERITY, C.J. AND DUKE, J., (ACTING).

1942. OCTOBER 16; NOVEMBER 13.

Defence Regulations—Price control order made under—Order 636 B, dated 14th May, 1942—Wholesale transaction—If sale covered by definition of “wholesale”—Buyer need not be a retailer as defined by order—Purchase from wholesaler need not be carried out in person by licensee—Price controlled articles—Sold to individual who sold goods in a market—Under licence issued in his wife’s name—Articles purchased for sale there—Actual business in market that of husband—Wholesale transaction.

Defence Regulations—Price control order—Price controlled articles—Sale of, retail or wholesale—At a price, exceeding that prescribed—Absolute prohibition.

To constitute a wholesale transaction under price control order 636 B made on the 14th May, 1942, by the competent authority appointed under regulation 44 of the Defence Regulations, 1939, it is not required that the buyer should be a retailer as defined by the order; it is necessary only that the sale should be covered by the definition of “wholesale.”

In the price control order 636 B made on the 14th May, 1942, by the competent authority appointed under regulation 44 of the Defence Regulations, 1939,—

“Wholesale” means the sale of any price controlled article to:—

- (a) any person whose premises are licensed under the provisions of the Tax Ordinance, 1939, for the sale of any of the said articles to the public, or
- (b) any person who sells any of the said articles in a market licensed under the provisions of the Tax Ordinance, 1939, or
- (c) a huckster licensed under the provisions of the Hucksters Licensing and Control Ordinance, 1936, or
- (d) any person who in the conduct of the business of a bakery uses any of the said articles for the manufacture of bread for sale to the public.

Held, that it was not necessary that the purchase should be carried out by the licensee in person.

Price controlled articles were sold to an individual who sold goods in a market under a licence issued in his wife’s name, and they were bought by him for sale there. The issue of the licence in the name of the wife was no more than a matter of form, the actual business being that of the husband.

Held, that the transaction was by wholesale within the meaning of the price control order.

Price control orders made by a competent authority appointed under regulation 44 of the Defence Regulations, 1939, involve an absolute prohibition of the sale of price controlled articles, retail or wholesale as the case maybe, at a price exceeding that prescribed.

A dealer who sells such an article at a price in excess of the controlled price to any person whatsoever does so at his own peril and if in the case of a wholesaler he would save himself from contravention of the order, he should, before the sale, satisfy himself that the transaction does not fall within the prohibition, for if it should subsequently be established that it does so fall, then he is guilty of an offence, and a plea of ignorance of the status of the buyer or the purpose for which the article was bought is of no avail.

APPEAL by Resaul Maraj & Co., Ltd., from a decision of a Magistrate of the Georgetown Judicial District convicting the

RESAUL MARAJ & Co., LTD., v. L. SLATER.

company for a breach of an Order under the Defence Regulations by which the price of certain commodities was controlled.

C. Lloyd Luckhoo, for the appellant.

S. E. Gomes, Assistant Attorney-General, for the respondent.

Cur. adv. vult.

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

This is an appeal from a conviction of the appellant company for selling a quantity of matches at a price in excess of that prescribed by order 636 B made by the competent authority on 14th May, 1942, under regulation 44 of the Defence Regulations, 1939.

In the main the grounds of appeal are identical with those raised in *Garnett & Co., Ltd., v. Slater*, and two other appeals in which this Court has already delivered judgment. For the reasons there given we are of the opinion that the learned magistrate was right in this case also when he found that the validity of the order had been established, that the price fixed by the order for one gross of matches is \$1.30 and that the appellants sold a gross for two cents in excess of the controlled price. Two further points are raised by the present appeal.

First it is submitted that the matches were not sold by wholesale within the meaning of the order in that they were not sold to a retailer or other such person as would bring the transaction within the definition of wholesale laid down by the order. It should not be necessary to point out that it is not required in order to constitute a wholesale transaction that the buyer should be a retailer as defined by the order. It is necessary only that the sale should be covered by the definition of "wholesale." The evidence goes to show that the matches were sold to an individual who sold goods in a market under a licence issued in his wife's name, and that they were bought by him for the purpose of sale there. It is not necessary that the purchase should be carried out by the licensee in person and in the present case the evidence shows that the issue of the licence in the name of the wife was no more than a matter of form, the actual business being that of the husband. Such evidence adequately supports the finding that the transaction was by wholesale within the meaning of the order.

The second contention is that it was not proved that the appellant company had knowledge that the buyer purchased for sale to the public, or was a person a sale to whom comes within the terms of that part of the order which defines "wholesale." On this point there is ample evidence to justify the conclusion that the appellant company knew or should have known these facts, but in our view it is immaterial. Orders such as these, made under the Defence Regulations, involve an absolute pro-

RESAUL MARAJ & Co., LTD., v. L. SLATER.

hibition of the sale of price controlled articles, retail or wholesale as the case may be, at a price exceeding that prescribed, as was held in *Buckingham v. Duck* 120 L. T. 84. A dealer who sells such an article at a price in excess of the controlled price to any person whatsoever does so at his own peril, and if in the case of a wholesaler, such as the appellant company, he would save himself from contravention of the order he should, before the sale, satisfy himself that the transaction does not fall within the prohibition, for if it should subsequently be established that it does so fall then he is guilty of an offence and a plea of ignorance of the status of the buyer or the purpose for which the article was bought is of no avail.

On all grounds therefore, the appeal against the conviction fails. In regard to sentence, for the reasons given and subject to the observations made in the previous judgment to which we have referred, the fine will be reduced to one of fifty dollars and the sentence be varied accordingly. There will be no order as to the costs of this appeal.

Conviction affirmed; sentence varied.

Solicitor for appellant: *A. G. King.*

R. A. BRANKER v. A. BRANKER.
 RUPERT AUDLEIGH BRANKER, Petitioner,
 v.
 ANNIE BRANKER, Respondent.
 [1942. No. 73—DEMERARA.]
 BEFORE DUKE, J. (ACTING).
 1942. NOVEMBER 17, 18, 19, 20, 23.

Husband and wife—Divorce—Domicile—Of origin—Abandonment of—Domicile of choice—Evidence of.

Husband and wife—Divorce—Evidence of petitioner—Of non-access—Child born alive—Date of conception during alleged period of non-access—Evidence of non-access—Admissible with respect to period prior to occasion of conception—Not admissible with respect to occasion of conception—Admissible with respect to period subsequent to occasion of conception.

Husband and wife—Divorce—Adultery—Condonation—Conditional reinstatement of guilty spouse—Implied condition—No further matrimonial offence to be committed—Spouse condoning adultery—Must be substantially aware of matrimonial sin committed—Otherwise no condonation—Effect of condonation—Offence obscured but not obliterated—Condoned adultery—Revived by malicious desertion on the part of guilty spouse.

Husband and wife—Divorce—Adultery—Evidence of—Married woman pregnant, or delivered of a child—Acts and conduct of—Evidencing doubt in her mind as to whether pregnant for husband, or whether child born of her body is for her husband.

Husband and wife—Divorce—Adultery—Rule in Russell v. Russell—No foundation for application of—Until birth to wife of living child proved—Pregnancy of wife—No evidence that it resulted in birth of a living child—Evidence of non-access by husband—Admissible—Adultery—Evidence of.

In 1927 A, then 22 years of age, came to this colony from Barbados, where he was born, to his uncle who was then employed by the city of Georgetown as superintendent of its transport service. A's uncle has now retired, and he resides in British Guiana. A. studied in this colony with the view of qualifying as a chemist and druggist in the colony. He was successful, and he is registered to practise here as a chemist and druggist. In 1930 he left this colony by steamer for Trinidad to see his mother, who was then ill in that island: he returned to the colony by the next steamer, and was absent from British Guiana for about 2 weeks. In 1933 he was married in this colony to a local lady. A. is the manager of a drug store in the colony. In 1939 A. went to Barbados for a holiday, and he spent 3 months there: he took his elder son with him; his wife was unwilling to go to Barbados. In 1942 A. filed a petition for dissolution of his marriage. In her answer, A's wife admitted that A was domiciled in the colony. At the trial, A. was cross-examined as to his domicile, and in re-examination he stated that he had decided to make British Guiana his permanent home, and that he had no intention whatever of returning to Barbados.

Held that A had abandoned his domicile of origin (Barbados), and that having adopted this colony as his permanent home, he is now domiciled herein.

In a petition for dissolution of marriage a child was born of the body of the respondent on the 23rd July, 1941. The petitioner gave evidence that he had not had sexual intercourse with his wife since about the end of 1937. This evidence was objected to, on the ground that it offends against the rule in *Russell v. Russell* (1924) A.C. 687 and the judgment in *Ettenfield v. Ettenfield* (1940) 1 All. E.R. 293.

Held that the evidence of the petitioner must be taken to be that he had no sexual intercourse with the respondent from the end of 1937 up to immediately preceding the occasion in 1940 when the respondent conceived with the child born on the 23rd July, 1941; and that, subsequent to the date of the said conception, he had no sexual intercourse with the respondent up to the present time.

R. A. BRANKER v. A. BRANKER.

Condonation is the conditional reinstatement of the spouse who is known to have committed a matrimonial offence, the implied condition being that no further matrimonial offence shall be committed. No matrimonial offence is erased by condonation: it is obscured, but not obliterated. It may be revived after many years. If condonation takes place, the record of the offence is not blotted out but over it is placed an obscuring veil. Until a new matrimonial sin occurs, the merciful barrier to sight remains. If, however, a further offence be committed, then the injured spouse may lawfully raise the veil and point with rigorous finger to the offence which had previously been hidden from view.

Adultery which has been condoned is revived by malicious desertion on the part of the spouse who had been guilty of adultery.

There cannot be condonation unless the spouse who condones the adultery is substantially aware of the matrimonial sin committed. For instance, there is condonation (a) where a husband is in doubt as to whether his wife is guilty of adultery but he says "whether guilty or not I will take her back and she shall be restored to my bed:" and (b) where a husband, with full knowledge that his wife has committed adultery, reinstates her to her position before the world as his wife, even though he has not forgiven her, and even though he refuses to share her bed.

A woman may be pregnant for her husband, but she may, nevertheless, have committed adultery at such time or times as would raise a doubt in her mind as to whether she had in fact conceived for her husband, or for the adulterer, or for one of the adulterers. Further, a woman may give birth to a child of whom her husband is the father, but she may, nevertheless, have committed adultery at such time or times as would raise a doubt in her mind as to whether the child was in fact the child of her husband, or the child of the adulterer, or of one of the adulterers. No chaste married woman can ever entertain any doubt in her mind as to who is the father of a child which she is bearing, or as to who is the father of the child she has given birth to. If the acts and conduct of the married woman show that she had such a doubt, then it is obvious that she has committed adultery: for otherwise she could have no possible doubt in her mind.

In a husband's petition for dissolution of marriage on the ground, *inter alia*, of adultery, the husband was the first witness called, and he gave evidence that he had not had sexual intercourse with his wife since about the end of 1937. In the petition it was alleged that the wife had given birth to a child on the 23rd July, 1941, but this allegation was "emphatically" denied by the respondent in her answer. The evidence of the petitioner as to non-access was objected to on the ground that it offended against the rule laid down by the House of Lords in *Russell v. Russell* (1924) A C. 687

Held that at that stage of the proceedings no foundation had been laid for the application of the rule that in proceedings instituted in consequence of adultery neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock.

Where there is no evidence that the pregnancy of a married woman has resulted in the birth of a living child, the husband may give evidence of non-access and thereby prove that the pregnancy was caused by the adultery of the wife.

PETITION by Rupert Audleigh Branker against his wife Annie Branker for dissolution of marriage on the grounds of adultery and malicious desertion. The Court granted leave to the petitioner to proceed without naming a co-respondent.

H. C. Humphrys, K.C., for the petitioner.

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

Cur. adv. vult.

DUKE, J. (Acting): This is a petition by Rupert Audleigh Branker against his wife Annie Branker in which he claims a dissolution of his marriage, which was contracted in this Colony on the 10th June, 1933; and custody of the children of the

R. A. BRANKER v. A. BRANKER.

marriage, Joan Avery Branker, born October, 1933, Michael Gordon Branker, born February, 1935 and Colin Peter Branker born 1st June, 1938.

The petitioner has alleged that the respondent was guilty not only of malicious desertion, but also of adultery. No co-respondent is named in the petition, but on the 13th April, 1942 the Court granted leave to the petitioner to proceed without naming a co-respondent.

The respondent in her answer admitted that the petitioner is domiciled in this Colony. The petitioner was born in the island of Barbados. He came here in 1927, when about 22 years of age, to his uncle, Gilbert McArthur Branker, who was superintendent of the Municipal Transport Service of Georgetown. The petitioner's uncle has retired from the municipal service, and he resides in this colony. The petitioner studied in this colony with the view of qualifying as a chemist and druggist in this colony. He was successful, and he is registered to practise as a chemist and druggist in this colony. In 1930 he left this colony by a Canadian National Steamer for Trinidad to see his mother, who was then ill in that island: he returned by the next Canadian National Steamer, and he was away from British Guiana for about 2 weeks. In September, 1939 he went to Barbados for a holiday, and he spent 3 months there. He took his son, Michael, with him. His wife was unwilling to go to Barbados, she belongs to this colony and apparently has no very high opinion of Barbadians in general. The petitioner and his son Michael returned from Barbados at the end of November, or early in December, 1939.

While the petitioner was under cross-examination, counsel for the respondent asked him questions which were intended to establish that the petitioner had not proved his domicile as being in British Guiana. Counsel for the petitioner thereupon pointed out that the respondent had admitted in her answer (which was verified by her affidavit) that the petitioner was in fact domiciled in British Guiana. It was suggested to the respondent's counsel that he should amend the respondent's answer by including therein a denial that the petitioner was domiciled in British Guiana. The respondent's counsel, however, omitted to make any such application. In re-examination, the petitioner stated that he had decided to make British Guiana his permanent home, and that he had no intention whatever of returning to Barbados. I believe the petitioner, and the respondent has called no evidence, and has put in no documents, which might in any way tend to indicate that the petitioner is not speaking the truth. From the evidence of the petitioner, I am satisfied that he has abandoned his domicile of origin, Barbados, and that he has adopted this colony as his permanent home. The petitioner's evidence is corroborated by the facts that he is married in this Colony, that he is work-

ing in this colony, and that he has a local qualification as a chemist and druggist. Further, it is not unusual for Barbadians to come to British Guiana and make this colony their permanent home.

In his petition the petitioner alleged that the respondent gave birth to a child on the 23rd July, 1941, at Buxton, East Coast, Demerara. In her answer, the respondent “emphatically” denied the allegation. On the 21st April, 1942, the respondent filed an application for alimony *pendente lite*: in that application (which was verified by her affidavit) she stated that there were 3 children of the marriage—Joan, Michael and Peter. She did not disclose that on the 23rd July, 1941, a child was in fact born to her.

When this trial commenced on the 17th November, 1942, the question whether on the 23rd July, 1941, a child was born of the body of the respondent, or not, was definitely in issue. Indeed, in opening the case for the petitioner, counsel stated that he had caused a subpoena to be served on Diana Perry, the midwife who, he understood, had attended to the respondent on the 23rd July, 1941, but he did not know what evidence the midwife was going to give, as she would not attend at the office of the petitioner’s solicitor to give a statement. Diana Perry was called by the petitioner, and she deposed that on the 23rd July, 1941, the respondent gave birth to a female child, Dorothy Ann.

Domestic differences arose between the petitioner and the respondent from the time of marriage. It would appear that, towards the end of 1937, the differences became more serious, and the parties agreed to occupy separate rooms. The petitioner states that, as a result of the agreement, he has not had sexual intercourse with his wife since about the end of 1937. Counsel for the respondent has submitted that the petitioner cannot, by virtue of the judgments of the House of Lords in *Russell v. Russell* (1924) A. C. 687 and of the Court of Appeal in *Ettenfield v. Ettenfield* (1940) 1 All. E.R. 293, give evidence of non-access which would have the effect of bastardising the child, Dorothy Ann, which was born on 23rd July, 1941. In conformity with these judgments, the evidence of the petitioner must be taken to be that he had no sexual intercourse with the respondent from the end of 1937 up to immediately preceding the occasion in 1940 when the respondent conceived with the child born on the 23rd July, 1941; and that subsequent to the date of the said conception, he had no sexual intercourse with the respondent up to the present time. The respondent has not gone into the witness box. I accept, and I believe, the evidence of the petitioner.

Early in 1941 the respondent (who had already had 4 children, one of them being still-born) showed signs of pregnancy. The petitioner mentioned this circumstance to the respondent who

R. A. BRANKER v. A. BRANKER.

denied that she was pregnant, said that she was getting fat, and that even her dressmaker had told her so. Again and again, the petitioner mentioned this circumstance to the respondent, who would give him a similar reply.

In the meantime, the respondent continued to show more definite signs of pregnancy. After a time, the petitioner suggested to the respondent that she should be examined by a doctor with the view of ascertaining whether she was or was not pregnant. In the end, she agreed to this. The petitioner suggested the name of Dr. R. T. Bayley as he had attended to the respondent when she had the still-born baby. The respondent agreed. She telephoned to Dr. Bayley. The petitioner is the manager of Bookers Bourda Pharmacy, and he lived over the pharmacy with his wife and children. The doctor arrived when the petitioner was in the drug store. The respondent had a sty over her eye, and when the petitioner went upstairs, he saw Dr. Bayley examining the sty. The doctor told her it would have to be cut. Dr. Bayley then sat down and was conversing with the petitioner and the respondent when he remarked to the respondent "Tossie (the respondent is known by that name) you look interesting, you looking well." The respondent smiled and said: "Oh no, doctor, not at all." The petitioner then told the doctor that he was called to examine the respondent to see whether she was pregnant or not. The doctor was willing to examine the respondent, but she refused saying that she was not pregnant.

The petitioner spoke to his uncle, who approached the respondent, telling her that the petitioner had told him that she was pregnant but that she said that she was not pregnant. The petitioner's uncle suggested to the respondent that the best way to settle the matter would be for her to be medically examined by a doctor. She agreed. She selected Dr. G. Patterson Clavier. The petitioner's uncle arranged with the respondent that he would take her to Dr. Clavier the next morning. In the afternoon of the same day, the respondent went to the petitioner's uncle and told him that she had been to Dr. G. Patterson Clavier. The next day, the petitioner's uncle took the respondent to Dr. Clavier. He told the doctor that the respondent husband said she was pregnant, but the respondent said she was not, and that he would like the doctor to examine the respondent to ascertain if she was pregnant or not. The doctor asked the petitioner's uncle to leave the room, and within about 4 minutes he called him and told him that he didn't think the respondent was pregnant. The petitioner's uncle asked Dr. G. P. Clavier whether he was sure, and he was answered in the affirmative. The petitioner's uncle then asked the doctor for a certificate to that effect. At the request of the petitioner's uncle, Dr. G. P. Clavier read the

R. A. BRANKER v. A. BRANKER.

certificate aloud in the presence of the respondent. The certificate was in the following terms:—

“I have examined Mrs. Branker. She has no morning sickness, no breast changes, and she tells me she is menstruating regularly. The uterus is large and I attribute this to a tumour, there being none of the other signs of pregnancy.

(Sgd.) G. Patterson Clavier.
24/6/41.”

The certificate was handed by Dr. G. P. Clavier to the petitioner’s uncle who paid the doctor’s fee therefor.

The certificate was shown to the petitioner who became alarmed and told the respondent that she must go to the Public Hospital, Georgetown for an operation for the tumour referred to by Dr. G. P. Clavier in his certificate of the 24th June, 1941; and the earlier the better it would be for her.

After some time, the respondent agreed to go. As the respondent had been examined by Dr. G. P. Clavier, it was deemed advisable to obtain from him a letter of introduction to Mr. D. I. C. Finlayson, the Assistant Surgeon and the Gynaecologist, Public Hospital, Georgetown. A letter was obtained and it reads as follows:—

“74, High Street,
Kingston.

Dear Mr. Finlayson,

Mr. Branker would like you to see his wife. Will you do so.

Regards,

(Sgd.) G. P. Clavier.
1/7/41.”

The respondent agreed to go to the hospital on a certain morning, but on that morning she said she was not ready. She did not indicate to the petitioner when she would be ready, and she never went to the hospital to have the tumour removed, or to be examined by the gynaecologist.

On the 17th July, 1941, the respondent, in the absence of the petitioner, left the house with her son, Colin Peter who was then 3 years old. She had not intimated to the petitioner that she was going away. The petitioner had occasion to go to the Head Office of his employers, and on his return, he found that his wife had left a note for him. The note was in the following terms:—

“July 17th, 1941,
Thursday,

“Rupert,

I am going to New Amsterdam for a few days and am taking Peter with me. Joan will stay in New Market St. with her Granny, until I return.

I have left money with Dora for house.

Tossie.”

The respondent did not go to New Amsterdam. She went to Buxton Village to the house of Diana Perry, a midwife. She told the midwife that she had been recommended to her by some

R. A. BRANKER v. A. BRANKER.

one, and that her husband was Henry Barker, a clerical man employed at a drug store of Bookers in Georgetown. The respondent stayed in the house of the midwife until the 23rd July, 1941. On the 23rd July, 1941, there was born to the respondent a baby girl, whom the respondent named Dorothy Ann. The respondent told the midwife that her Christian name was Margueriette (alleging that a relative used to call her by that name, but no evidence was led at the hearing to establish this) and that her maiden name was Fraser. The maiden name of the respondent is Mc Donnell. The name of the respondent's husband is not Henry Barker, but Rupert Audleigh Branker. It has been suggested that Diana Perry misunderstood the respondent, that the midwife thought the respondent had said "Barker" but the respondent had really said "Branker." It has not, however, been suggested that the respondent told the midwife that the petitioner's Christian names were "Rupert Audleigh" but that the midwife thought that the respondent had said "Henry." The respondent has not ventured to suggest that she told the midwife that her maiden name was "McDonnell," but the midwife thought she had said "Fraser."

When the respondent left the house of the midwife on the 28th July, 1941, she did not take her baby with her, and she left no money with the midwife for the maintenance of the child. According to Diana Perry, she was a little surprised when the respondent asked to be allowed to leave the baby at her (Diana Perry's) house, as the respondent was not a single woman and she did not tell her (Diana Perry) beforehand that she wanted to leave the baby with her.

The respondent did not write to her husband while she was away from Georgetown from the 17th to the 28th July, 1941.

On her return to the petitioner's house on the 28th July, 1941, the petitioner observed that the respondent's figure had an entirely different shape to what she had on the 17th July, 1941, and that she was smaller.

The petitioner asked his wife where she had been. She did not reply. The petitioner became annoyed at her silence, but the expression of annoyance failed to elicit from his wife any reply.

The respondent carried on with her domestic duties in the petitioner's house as before, and as if nothing whatever had, happened. The respondent would try to carry on general conversation with the petitioner, but the petitioner was unwilling.

On the 5th August, 1941, Diana Perry, acting on information supplied to her by the respondent, registered the birth of the girl child born of the body of the respondent on 23rd July, 1941, at Buxton Village as follows:—

Name if any: Dorothy Ann.

Name and Surname of Father and other Description;

R. A. BRANKER v. A. BRANKER.

HENRY BARKER, Mixed, Native of British Guiana.
*Name and Surname and Maiden Surname of Mother and other
 Description:*

MARGURIETTE BARKER, nee Fraser, Mixed, Native of British
 Guiana.

Rank or Profession of Father:
 Clerical Assistant.

The registration was false in many particulars, and these false particulars were supplied by the respondent as follows:

- (1) the name of the petitioner (who in law is presumed to be the father) is not Henry Barker, it is Rupert Audleigh Branker;
- (2) the petitioner is not a native of British Guiana, he is a native of Barbados;
- (3) the Christian name of the respondent is not Marguriette, it is Annie. There is evidence that she was known as and called Tossie, but none whatever that she was ever called Marguriette;
- (4) the surname of the respondent is not Barker, it is Branker; and
- (5) the maiden name of the respondent is not Fraser, it is McDonnell.

When the respondent returned from Buxton on the 28th July, 1941, she omitted to disclose to the petitioner, and up to the present moment she has not told the petitioner——

- (1) that she well knew all the time that she was pregnant;
- (2) that she deceived Dr. G. Patterson Clavier and made him believe that she was not pregnant, but, on the other hand, had a tumour;
- (3) that she never at any time had any intention of going to the Public Hospital, Georgetown for removal of a tumour;
- (4) that some one had recommended her to go to Buxton to Diana Perry, the midwife of the Lusignan—Nooten Zuil district (which includes Buxton Village) to have the baby delivered by Diana Perry at Buxton Village;
- (5) the name of the person who so recommended her;
- (6) why she wrote the note on the 17th July, 1941 informing her husband that she was going to New Amsterdam, when at that time she was going not to New Amsterdam but to Buxton Village;
- (7) why, on this occasion, the respondent selected as her midwife a person who was not known to her, and a person who resided not in Georgetown but in Buxton Village;
- (8) that she had been to the house of Diana Perry in Buxton Village where she remained for 11 days;

R. A. BRANKER v. A. BRANKER.

- (9) that, during that period, she was delivered of a female child on the 23rd July, 1941, whom she named Dorothy Ann;
- (10) that she had told the midwife, with a view to registration of particulars of the birth required by law—
- (a) that the name of her husband was Henry Barker;
 - (b) that her husband was a native of British Guiana;
 - (c) that her name was Margueriette Barker; and
 - (d) that her maiden name was Fraser;
- (11) that the baby had been born alive;
- (12) that she had left the baby with the midwife at Buxton; and
- (13) that she had left no money with the midwife for the support of the child.

In the month of September, 1941, one Mrs. Dumont who lived in a house next to Bookers Bourda Pharmacy called out to the respondent. The petitioner at the time was downstairs in the drug store, and he went to the top of the steps of Mrs. Dumont's house. He saw Diana Perry in the house. He came down the steps, and while at the gate of Mrs. Dumont's house, he met the respondent who was then going up the steps. The respondent, in a vexed tone of voice, said to the petitioner "what are you doing over here, nobody wants you."

According to Diana Perry the respondent had told her during the period 17th to the 28th July, 1941, that her husband was unkind and mean to her, and that she would look for work; that she (Diana Perry) had called on Mrs. Dumont to offer her sympathy, with her in a recent bereavement; that at the same time she wanted to get into touch with the respondent to find out what she was doing about the child, and if she had succeeded in getting work; that on that day the respondent argued with her that she had told her that her name was Branker; that she Diana Perry told the respondent that was not so, that she (the respondent) had told her that her name was Barker; that the respondent told Diana Perry that she had not succeeded in getting work; that her husband continued in being unkind and mean to her; that she had no money to "assist" Diana Perry in the upkeep of the child; and that she had no money to give Diana Perry for the upkeep of the child. On that date Diana Perry knew who was the husband of the respondent.

Diana Perry and the respondent left the house of Mrs. Dumont together. Up to the present moment the respondent has not disclosed to the petitioner what happened between Diana Perry and herself on that day.

There is no foundation whatever for the suggestion that the petitioner was ever unkind to the respondent, or that he was mean to her. Diana Perry stated that a man is

mean if he does not give his money freely. The petitioner is at present earning a net salary of \$74.92 per month, after provision is made for the payment of insurance. He used to give his wife \$42.50 to run the house, but of the balance of \$32.42 per month, the petitioner had to pay for clothes and other necessaries for the respondent and his children, he paid the milk bill, and he had to provide necessaries for himself. It is wicked for the respondent to suggest that the petitioner was mean, and then not go into the witness box and repeat her suggestions on oath. In paragraph 4 of her answer the respondent pleaded that "consistently during their married life the petitioner denied the respondent the ordinary necessities of life and did not allow her a reasonable sum of money to carry on the home and properly maintain herself and their children." There is absolutely no evidence whatever in support of this allegation. In giving her solicitor instructions to make this allegation the respondent has indicated that she has failed to understand or to appreciate that she is properly maintained, if she is maintained, according to her husband's salary.

The petitioner had his three children in his house. He was in a difficult situation. He suspected that his wife had committed adultery, but it was only a suspicion: he had no evidence in support. Even if the rule in *Russell v. Russell* (supra) did not exist, he did not even know that the respondent had given birth to a child. The respondent had always denied that she was pregnant, and she deceitfully, and with a degree of *sang froid* which might have been devoted to better service, deliberately concealed from her husband that she had given birth to a living child on the 23rd July, 1941, and that she had caused Diana Perry to make a false registration of the birth of the child.

The Court is being asked to draw the inference, from the facts and circumstances of this case, that the respondent has committed adultery with a person or persons unknown to the petitioner. The main witness for the petitioner is Diana Perry, and, according to the petitioner's counsel, prior to her (Diana Perry) going into the witness box on the 19th November, 1942, the petitioner did not know what her evidence was going to be.

Counsel for the respondent has submitted that if the respondent committed any adultery, the same was condoned by the petitioner. In *Cramp v. Cramp and Freeman* (1920) P. 163, McCardie, J. pointed out that "it is necessary that the spouse who condones should be substantially aware of the matrimonial sin committed. There cannot be condonation without knowledge." When the respondent returned to the petitioner's house on the 28th July, 1941, the petitioner had no knowledge that his wife had committed adultery. Consequently, there can be no suggestion that the petitioner

R. A. BRANKER v. A. BRANKER.

condoned the adultery of the respondent, when, up to the present moment, the Court has not determined whether on the facts as known to the petitioner, and on the additional facts and circumstances as proved to this Court, a fair inference can be drawn that the respondent has committed adultery.

Counsel for the respondent has further submitted that there was condonation, as after the respondent returned to the petitioner's house on the 28th July, 1941, she was reinstated to her former position. He points out that the respondent continued to look after the petitioner's house, that she pledged his credit for goods to some extent, and that the petitioner has paid for them. Counsel has submitted that these circumstances, notwithstanding that there was no sexual intercourse between the petitioner and the respondent subsequent to the 28th July, 1941, conclusively show that there was, in law, a reinstatement of the guilty spouse.

There was no reinstatement in fact. If the petitioner had turned the respondent out of his house, the respondent would have summoned him before the magistrate for desertion, and she would have obtained an order for maintenance; the magistrate might even have made an order which would have had the same effect as an order for judicial separation. The petitioner never at any time treated his wife unkindly, yet she pleaded in paragraph 6 of her answer, untruthfully, that the petitioner "ill-treated her and threatened to kick her out of the said house if she did not leave." One can therefore imagine what the respondent would have done if, on a mere suspicion that she had committed adultery, the petitioner had asked her to leave.

Instead of unwisely asking the respondent to leave, the respondent waited for something to turn up. And something did turn up, Diana Perry visited Mrs. Dumont in September 1941, and the respondent was called to the house of Mrs. Dumont. The petitioner saw Diana Perry. The respondent and Diana Perry left Mrs. Dumont's house together. The false registration of the birth, however, proved to be a tremendous stumbling block to the early solution of the mystery.

The relationship between the petitioner and the respondent after the 28th July, 1941, was even more strained than it was prior to the 17th July, 1941. There was no reinstatement of a guilty spouse (if the respondent is indeed guilty of adultery) as submitted by counsel for the respondent. This is not the type of case referred to by Mc Cardie, J. in *Cramp v. Cramp and Freeman* (1920) P 164 where a husband may be in doubt as to his wife's guilt, but may say "whether guilty or not I will take her back and she shall be restored to my bed." In the present case, the petitioner did not have any sexual intercourse with the respondent; and he was making enquiries to ascertain whether there was any evidence of adultery or whether his suspicion that the respondent had given

birth to a child was justified. This is also not the type of case referred to by McCardie, J., in *Cramp v. Cramp and Freeman* (1920) P. 166, of a man who has *full knowledge* that his wife has been guilty of adultery and who says to her, "For the sake of our children you shall remain at the head of my house, you shall manage domestic affairs, you shall appear to the world as my wife, no one shall know that I have discovered your sin, but I cannot forgive you and I will no longer share your bed." In such case, asks McCardie, J., could he, after such a measure of restoration had continued for a *substantial* period turn to his wife and say, "I will now petition for a divorce for I have never really forgiven you." In my opinion, says McCardie, J., the answer is clearly "No," as the absence of the state of mind which is called forgiveness would not outweigh his actual conduct of restoration and the Court would surely look to acts rather than words. In the present case there was no knowledge on the part of the petitioner that his wife had committed adultery; the petitioner was doing his best to ascertain the truth which his wife had deceitfully and carefully designed to conceal permanently from him; and by reason of her deceitful acts and conduct the enquiries could not have been completed within a few days.

In view of the foregoing I am of the opinion that there was no condonation, express or implied, of the adultery of the respondent (if indeed she has committed adultery).

An outstanding feature of the doctrine of condonation is that condonation is always conditional. Condonation is the conditional reinstatement of the spouse who is known to have committed a matrimonial offence, the implied condition being that no further matrimonial offence shall be committed. In *Cramp v. Cramp and Freeman* (1920) P. 161, McCardie, J. said: "By the matrimonial law of this country the offence of every married person is recorded on Tablets which do not perish. If condonation takes place the record is not blotted out but over it is placed an obscuring veil. Until a new matrimonial sin occurs, the merciful barrier to sight remains, If however, a further offence be committed, then the injured spouse may lawfully raise the veil and point with rigorous finger to the record of offence which had previously been hidden from view. No matrimonial offence is erased by condonation. It is obscured, but not obliterated. It may be revived after many years, Such is the doctrine which has been impressed on the matrimonial law of England, and the principle is one which deepens the duty of continued good behaviour on the part of the spouse who has once offended."

In this colony there are two matrimonial offences, adultery and malicious desertion. Assuming, therefore, for the sake of argument that the respondent was known by the petitioner to have been guilty of adultery and that subsequent to such know-

R. A. BRANKER v. A. BRANKER.

ledge she had been reinstated by her husband and had continued to live with him "as a wife, although a degraded wife," the adultery thereby condoned would be revived by malicious desertion on the part of the spouse whose adultery was condoned.

In December, 1941, the child Dorothy Ann who was born of the body of the respondent at Buxton on the 23rd July, 1941, became ill; and Diana Perry sent for the respondent. Up to that time, the child was not yet baptised. The respondent went to Buxton, and saw the child for the first time since the 28th July, 1941.

According to Diana Perry, at the December visit, she asked the respondent about the child, and if she didn't get work; that the respondent told her that her husband and herself were "amending" matters in the home, and that if it wasn't for some girl in Barbados with whom he was corresponding, things would be better; that she Diana Perry decided, at the December visit, to adopt the child; and that the respondent told her that she hoped that she would be able to pay her (Diana Perry) all her expenses when she was ready to take over the child.

After the return of the petitioner from his holiday in Barbados in or about December, 1939, he did receive letters from ladies in Barbados. There is, however, no evidence whatever of the contents of the letters, or that the letters indicated that the petitioner had committed adultery, or that the respondent committed adultery (if she did commit adultery) in the year 1940 or in the first half of the year 1941 in consequence of shock received by her when she read the letters.

The respondent had possession of certain letters written to the petitioner; and the petitioner had possession of certain letters written to the respondent. The petitioner's uncle obtained from the petitioner possession of the letters belonging to the respondent, and from the respondent possession of the letters belonging to the petitioner. The petitioner and the respondent went to the house of the petitioner's uncle, who handed to the petitioner and to the respondent the letters which respectively belonged to them. The petitioner destroyed the letters which were addressed to him. The respondent did not go into the witness box to give evidence in support of her suggestion that the letters contained certain statements put by counsel for the respondent to the petitioner and denied by him.

Diana Perry also deposed in evidence that she never thought of bringing the child to Georgetown to the respondent's husband, or of speaking to him about the child; that the respondent never paid her (Diana Perry) any money for the maintenance of the child; that she never asked the respondent whether she had told her husband about the baby; that the

R. A. BRANKER v. A. BRANKER.

child was baptized at Malgre Tout Roman Catholic Church, West Bank, Demerara, in March, 1942; that the respondent was not present at the Baptism; that she had not seen the respondent since December, 1941; that when she was passing through Georgetown she didn't take the child to the respondent; that she didn't think that the respondent had any interest in the child; that she didn't conceive the thought of taking the child to the respondent; and that she felt that if the respondent had any interest in the child, she would have come to Buxton to see it.

The respondent did not disclose to the petitioner, and up to the present time she has not informed him, that she visited her child at Buxton in December, 1941.

On several occasions subsequent to the respondent's return on the 28th July, 1941, to the petitioner's house, the petitioner told the respondent that when she went away on the 17th July, 1941, she was pregnant, and he asked her what she had done with the baby. The respondent never made any reply to the petitioner.

The petitioner continued to make his own enquiries, but obviously the progress of those enquiries was considerably delayed and hampered by the false registration of birth which the respondent had caused to be made.

On the 3rd January, 1942, the petitioner's solicitors wrote to the respondent as follows:—

“Madam,

We are instructed by our client—Mr. R. A. Branker—to write you in connection with your married life.

Our client informed us that since the latter part of 1937 he has ceased cohabiting with you notwithstanding the fact that you have occupied the same house.

Our client instructs us that in the month of April, 1941, he accused you of being pregnant, which you denied. It has now come to his knowledge that on the 23rd July, 1941, you were delivered of a female child on the East Coast of Demerara, the birth of which was registered on the 5th August, 1941, under a false name in the Buxton District Registry.

Our client instructs us to enquire from you whether you admit or deny the above stated facts.

Yours faithfully,

Cameron & Shepherd.”

The respondent did not reply to that letter, and she never spoke to the petitioner about its contents.

On the 26th January, 1942, while the petitioner was at work in the drug store, the respondent moved away all the furniture and household effects from the dwelling house which was over the drug store. She, however, did leave the petitioner's cot, his clothes and his trunk. The respondent took the three children, Joan Avery, Michael Gordon and Colin Peter with her.

On the night of the 7th February, 1942, (a Saturday night) at about 8 o'clock the respondent walked through the drug

R. A. BRANKER v. A. BRANKER.

store, and went upstairs, through the internal staircase from the drug store, to the dwelling house upstairs. She was accompanied by the 3 children. The 3-year-old boy, Peter, said "Daddy, we have come to stay with you."

When the petitioner closed up the drug store, he went upstairs, and he saw his wife and 3 children. The petitioner asked the respondent what she came for, and he told her that she had no business there. The respondent said: "Well, you can't put me out."

That remark is very significant. If the petitioner could not put the respondent out, after she had left the petitioner's house, it will be appreciated how very difficult it would have been for the petitioner to have put the respondent out, before she had left his house.

The petitioner and one child slept in his cot on the night of Saturday, the 7th February, 1942, while the respondent and the other 2 children slept on the floor in a different room.

The next day the petitioner obtained breakfast from the Ice House Hotel for the 3 children and himself; and he provided milk for the children. Nothing was obtained for the respondent.

On Sunday night and on Monday, the 9th February, 1942, the same arrangements were made as on Saturday night and Sunday, the 8th February, 1942.

On Monday night a cart load of furniture arrived at the back gate. The respondent was present, the petitioner refused to let the furniture come into his house. The cart remained outside until nearly midnight: eventually, a mounted policeman came and cleared the Cartman off the premises.

The respondent and the 3 children slept in the house on the Monday night in the same manner as they did, on the Saturday night.

On Tuesday morning, the 10th February, 1942, the respondent left the petitioner's house, and she went next door to the house of Mrs. Dumont, the daughter-in-law of the Mrs. Dumont previously mentioned. She took the 3 children with her. The respondent returned to the petitioner's house with a Cartman. When the respondent removed on the 26th January, 1942, a table was downstairs, and an old chair had been sent to be repaired. On the 10th February that table was upstairs, and the old chair (not yet repaired) had been returned to the petitioner's house. The respondent instructed the Cartman to remove the table and the chair; she told him that she would let him know where to take it; she showed the cartman a receipt, and boasted that she had paid for a house. The Cartman left with the table and the old chair. The respondent subsequently left the petitioner's house.

Thereafter, the petitioner barred and locked the door, and put a strip of wood across. The respondent, however, got on a zinc roof; jumped through a window; broke the bar of the door

which the petitioner had put; unlocked the door with the key which had been left in the door; pulled the key out of the door; and walked away with the key saying that the petitioner had put a piece of wood which she could easily break.

The petition for dissolution of marriage is dated the 28th February, 1942, and was filed on the 4th March, 1942. The citation was served on the respondent on the 11th March, 1942. On the 29th April, 1942, the petition was set down for hearing, and on the 20th May, 1942, the respondent tiled her answer to the petition for dissolution.

The petition was fixed for hearing on the 1st September, 1942. But, owing to the absence of Diana Perry from the colony, it was, on the application of the petitioner, not proceeded with on that day, and it was ordered to be refixed for hearing in November, 1942.

On the 14th October, 1942, the Registrar of the Supreme Court, at the request of the respondent, made an order that the petitioner give security in the sum of \$150 to cover the respondent's costs of and incidental to the hearing of the petition.

When the solicitor made his application to the Registrar, he intimated that "not more than five witnesses will be called on behalf of the respondent." The respondent was present in Court throughout the whole hearing on the 17th, 18th, 19th and 20th days of November, 1942. She did not give evidence, and she called no witnesses to testify on her behalf.

A woman may be pregnant for her husband, but she may nevertheless have committed adultery at such time or times as would raise a doubt in her mind as to whether she had in fact conceived for her husband, or for the adulterer or one of the adulterers. Further, a woman may give birth to a child of whom her husband is the father, but she may nevertheless have committed adultery at such time or times as would raise a doubt in her mind as to whether the child was in fact the child of her husband, or the child of the adulterer or of one of the adulterers. No chaste married woman can ever entertain any doubt in her mind as to who is the father of a child that she is bearing, or as to who is the father of the child she has given birth to. If the acts and conduct of the married woman show that she had such a doubt, then it is obvious that she has committed adultery; for otherwise she could have no possible doubt in her mind.

After a careful consideration of the admissible evidence adduced in this Court (which has not been denied or explained by the respondent who preferred to keep away from the witness box) I have arrived at the conclusion that the acts and conduct of the respondent from the month of April, 1941, show that the respondent had a doubt in her mind as to whether or not, between April, 1941 and the 23rd July, 1941, she was pregnant for the petitioner; and, further, that the respondent had a doubt in her mind as to whether or not the child born on the 23rd July, 1941,

R. A. BRANKER v. A. BRANKER.

(which child the petitioner has never been permitted to see, and the existence of which child has been concealed by the respondent from the petitioner up to the present moment, and by the respondent from the Court in a document verified by oath of the respondent and filed by her in this cause on the 21st April, 1942) was the child of the petitioner. The acts and conduct of the respondent are based on deceit and suppression of the truth, and were continually being clothed with new manifestations of deceit and concealment. I do not propose to refer in detail to the evidence in this respect, but why has the respondent abandoned the child of the marriage born on the 23rd July, 1941, in favour of an utter stranger, Diana Perry, without even letting her husband know that the child had been born? In the course of the address of counsel for the respondent, I indicated to him that there was a possibility of my finding, on the evidence adduced on behalf of the petitioner, that the respondent had a doubt in her mind as to whether or not she was pregnant for her husband, and as to whether or not the child to which she gave birth on the 23rd July, 1941, was the child of the petitioner. However, the respondent preferred not to seek to explain her acts and conduct, in the witness box.

I find that the respondent Annie Branker born McDonnell, prior to the presentation of the petition by her husband Rupert Audleigh Branker against her for dissolution of marriage, committed adultery with a person or persons unknown to the petitioner.

The petitioner is, therefore, granted a decree *nisi* for dissolution of his marriage with the respondent which was contracted on the 10th June, 1933, at the Catholic Cathedral, Georgetown.

The custody of the following children of the marriage, Joan Avery Branker, Michael Gordon Branker and Colin Peter Branker, is committed to the petitioner. Liberty is given to the respondent to apply, by summons in this cause, for access to those children, and also for custody of the girl child born on the 23rd July, 1941, at Buxton Village and registered in Division No. 5, District Buxton in the County of Demerara on the 5th August, 1941 No. 452 on the information of Diana Perry, midwife, Buxton, E.C., under the name of "Dorothy Ann" as being the child of "Henry Barker, Mixed, Native of British Guiana, Clerical Assistant" and of "Marguriette Barker, nee Fraser, mixed, Native of British Guiana," the said Marguriette Barker being Annie Branker, born McDonnell, the respondent herein.

At the trial the petitioner was the first witness called. Shortly after the commencement of his evidence, counsel for the respondent objected to evidence being led by the petitioner to prove non-access during the relevant period stated in the petition, and he cited *Russell v. Russell* (1924) A.C, 687. in support. I reserved the point until the conclusion of the case.

At that time, no foundation had yet been laid for the application of the rule in *Russell v. Russell* which is that “the rule of law that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock applies to proceedings instituted in consequence of adultery.” The petitioner had in fact pleaded that on the 23rd July, 1941, the respondent was delivered of a female child, but this allegation was “emphatically” denied by the respondent in her answer filed on the 20th May, 1942. The rule in *Russell v. Russell* could only have been applied after the birth of the child had been established as a fact. Diana Perry did in fact give such evidence, and the manner of her cross-examination by counsel for the respondent indicated that, although on the 20th May, 1942, the respondent “emphatically” denied the birth of the child, she could not dispute the evidence of Diana Perry: in other words, if the petitioner was unable to secure the attendance of Diana Perry in Court, the emphatic denial would have persisted, but as the petitioner was able to secure the attendance of Diana Perry in Court, the emphatic denial dwindled to nothingness, and the respondent gave no evidence. In the earlier part of this judgment, I have applied the rule in *Russell v. Russell*.

I should, however, remark that had the petitioner been unable to secure the attendance of Diana Perry in Court, there would have been no ground whatever for the application of the rule in *Russell v. Russell*; and if the Court was satisfied that the respondent was pregnant (notwithstanding the terms of the certificate of Dr. G. Patterson Clavier of the 24th June, 1941, the contents of which certificate counsel for the respondent submitted were inadmissible as proof of the matters stated herein) and that there was non-access by the petitioner, adultery with a person unknown would have been inferred and proved, and a decree *nisi* for dissolution of marriage made, on the ground of adultery, unless the respondent had gone into the witness box and the Court, on the whole evidence, found that adultery was not established.

The petitioner also claims that the respondent maliciously deserted him and that a decree *nisi* for dissolution of marriage should also be granted to him on that ground. The respondent has given no evidence in this case, and I am not convinced that her return to the petitioner’s home on the 7th February, 1942, (in view of the degree and extent of the deceit practised by the respondent on the petitioner in relation to their married life from April, 1941), was *bona fide*, or for the purpose of resuming married life in which good faith, trust and mutual confidence are the very essence of its continuance, I find that when the respondent Annie Branker, born McDonnell, left the petitioner’s house on the 26th January, 1942, she did so because, on consideration, she intended per-

R. A. BRANKER v. A. BRANKER.

manently to desert the petitioner who had ascertained certain facts, (as contained in the letter to her of the 3rd January, 1942, from the petitioner's solicitors), which, coupled with other facts, might be accepted by the Court as proof that she had committed adultery. The petitioner will therefore be granted a *decree nisi* of dissolution of marriage, on the ground of malicious desertion as well.

There remains the question of the respondent's costs. The respondent did not give evidence. I am bound to draw the inference that she was as untruthful to her solicitor as she had been to her husband, because I cannot conceive that any solicitor of this Court, if possessed of the knowledge of the acts and conduct of the respondent now possessed by the Court, would have permitted his client, the respondent, to file a document (verified by her affidavit) in this cause on the 21st April, 1942, in which she did not disclose that a child was born to her on the 23rd July, 1941; or would have permitted his client, the respondent, to file a document in this cause on the 20th May, 1942, "emphatically" denying that a child was born to her on the 23rd July, 1941. In these circumstances, the respondent's solicitor will be awarded costs, but costs to a limited extent. I order that the respondent's costs of and incidental to the attendance on the respondent's solicitor with the citation and petition, to the entry of appearance filed the 20th March, 1942, to the answer of the respondent filed the 20th May, 1942, to the order of the Registrar of the Supreme Court dated the 14th October, 1942, and of and incidental to the hearing of the petition for dissolution of marriage on the 17th, 18th, 19th, and 20th days of November, 1942, and on this day, be taxed as between party and party, and paid by the petitioner to the respondent or to her solicitor, such costs, however, not to exceed, in the aggregate, the sum of \$150 (one hundred and fifty dollars). And I order that the respondent's costs of and incidental to her application made the 20th day of March, 1942, by way of summons, that the proceedings in this cause be struck out or wholly set aside for non-compliance with section 9 (4) of the Matrimonial Causes Ordinance, cap. 143, and rule 6 of the Rules of Court (Matrimonial Causes), 1921, be borne by the respondent and not by the petitioner.

Decree nisi of divorce.

Solicitors: *H. C. B. Humphrys; D. P. Debidin.*

P. HO AND J. P. LUCK v. O. OCTIVE.

PETER HO AND J. P. LUCK, Appellants (Defendants),

v.

OLINGTON OCTIVE, P.C. No. 4349, Respondent (Complainant).

[1942. No. 293.—DEMERARA.]

BEFORE FULL COURT: VERITY, C.J., AND DUKE, J. (ACTING).

1942. NOVEMBER 13, 27.

Defence Regulations—Price control orders—“Sell”—How to be construed—Not with reference to niceties of law of contract of sale, or to distinction between sale and agreement to sell, or to question as to whether property in goods has passed—To be construed in a popular sense—Purchase of price controlled articles—Payment therefor in full—Articles not then in stock—Vendor to make delivery within a few days—Sale transaction constituted.

The word “sell” in price control orders made by the competent authority under regulation 44 of the Defence Regulations, 1939, is not to be construed with reference to the niceties of the law of contract of sale, or to the distinction between a sale and an agreement to sell, or to the question of whether the property in the goods has passed, but it is to be understood in a popular sense.

The appellants were convicted of selling certain wallaba staves at a price exceeding that fixed by order of a competent authority under regulation 44 of the Defence Regulations, 1939.

A detective member of the police force purported to buy 100 wallaba staves from the appellant Lock, a selling clerk in the employment of the appellant Ho. He was told that the price was \$4.50 which he paid, receiving a cash bill, however, for \$3 only, the price fixed for such staves by the order in question. He was informed that no such staves were in stock, but that he should return 2 days later for delivery. No staves were delivered, but it appeared from the evidence that, immediately after the conclusion of the transaction, the appellant Luck was informed that he would be prosecuted for the offence for which he was subsequently convicted.

Held, that any ordinary person would say that there had been a sale, and that there was such a sale as was contemplated by a true interpretation of the price control order made by a competent authority under regulation 44 of the Defence Regulations, 1939.

APPEAL by the defendants from convictions for a breach of Order 636B made by the competent authority under regulation 44 of the Defence Regulations, 1939.

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

S. E. Gomes, Assistant Attorney-General, for respondent.

Cur. adv. vult.

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

This is an appeal from convictions for breach of Order 636B made by the competent authority under regulation 44 of the Defence Regulations, 1939. The appellants were convicted of selling certain wallaba paling staves at Georgetown at a price exceeding that fixed by the order for that area.

It appears from the findings of fact made by the learned magistrate that the alleged buyer, a detective member of the police force,

P. HO AND J. P. LUCK v. O. OCTIVE.

purported to buy from the appellant Luck, a selling clerk in the employment of the appellant Ho, 100 wallaba paling staves 5' 6" by 4½/5 inches. He was told that the price was \$4.50 and paid this sum, receiving a cash bill, however, for \$3 only, the price fixed for such staves by the order in question. He was informed, as appears from the evidence, that no such staves were in stock but that he should return two days later for delivery. No staves have in fact been delivered but it appears also from the evidence that immediately after the conclusion of the transaction the appellant Luck was informed that he would be prosecuted for the offence for which he was subsequently convicted.

It was submitted in the first place that there was no sufficient evidence upon which the learned magistrate could reasonably have found that the transaction related to the sale of staves of the dimensions provided for in the order, in that the sole evidence thereof is to be found in an isolated statement by the witness Abel in reply, counsel informs us, to a question put by the magistrate at the conclusion of the examination of this witness without objection by counsel who states that he did not appreciate at the time the significance of the evidence on this point. Nevertheless, the evidence is there and it was open to the magistrate to accept it. It was further urged, however, that the transaction could not have related to staves of these dimensions notwithstanding this piece of evidence inasmuch as staves of such dimensions are unknown to the trade. The appellants themselves testified to this effect and called in support two witnesses who claimed long experience of the trade. It is to be observed however that the price of staves of no other dimensions was then controlled in this area by the order, that a copy of the order was then in the possession of the appellant Luck, and that he displayed knowledge of the provisions thereof, firstly by his delivering a cash bill at the price fixed by the order for such staves and secondly by his statement that the alleged purchaser was foolish to pay \$4.50 when he knew the government price was \$3. The bill and this remark are to be understood only if the, appellant Luck was aware that the staves bargained for were those of which the price was then controlled, that is to say of the dimensions referred to by the witness Abel. On this evidence we cannot say that the learned magistrate acted unreasonably in coming to the conclusion that the transaction related to the staves referred to in the charge and in the order.

It was further submitted on behalf of the appellant that the facts as found by the learned magistrate do not disclose a sale but merely an agreement for sale. This argument is based upon well-known principles not contested on behalf of the respondent and to be found in what has been described as "the ordinary law of the land" and more particularly that law as it is expressed in the Sale of Goods Ordinance (Chapter 65). In this contention, we think, resides the misapprehension under which counsel has

laboured and which may strike at the root of his submission. The learned magistrate in determining this matter was not required to consider the ordinary law of contracts for the sale of goods. He was required to interpret an order made under the Defence Regulations, an edict of a different nature and promulgated for a different purpose. It is always dangerous to attempt the interpretation of one edict, whatever its form, by reference to the terms of another unless the two are specifically related, and where they are brought into force for different purposes and with a different intent any argument based upon such a reference may indeed be entirely fallacious. The Sale of Goods Ordinance was enacted for the purpose of clarifying the law by which was defined the nature of a contract for the sale of goods as between buyer and seller and of the rights and liabilities of the parties thereto under the many and varying conditions which may affect the working out of such a contract between party and party. It partakes therefore of a highly technical and at times almost artificial nature. An order such as that to which this charge relates made under Defence Regulations is not concerned with and does not necessarily affect any such rights but is intended to secure for the benefit of the community as a whole in time of war that those articles which come within its control shall not bring to the seller or take from the buyer a higher price than that fixed by the competent authority.

The danger and indeed the fallacy of attempting in all cases to apply the principles of a general enactment to the interpretation of the terms of a special enactment have received judicial recognition from time to time and the particular instance of the use of the word "sell" in such a special enactment has been the subject of a number of decisions in the English courts. The principle as applied to the use of this word was set out with sufficient clarity by Ridley, J. in *Lambert v. Rowe* (1914) 1 K.B. 38, when referring to the Markets and Fairs Clauses Act, 1847 he said "The question 'arises upon an Act of Parliament the use of the word 'sell' in which is, 'according to previous decisions, not to be construed with reference to the 'niceties of the law of contract of sale or to the distinction between a sale 'and an agreement to sell or to the question of whether the property in the 'goods has passed, but it is to be understood in a popular sense.'" In the same case Scrutton, J., summarised his conclusions in the following words "I think the cases at present decide that such an agreement of sale as would 'popularly be called a sale . . . is to be treated as a sale for the purposes of 'this Act.'" This principle has been applied to the interpretation of orders such as that to which this appeal relates, more particularly in *Buckingham v. Duck* 120 L. T. R. 84 when, in a case arising out of an Order controlling the price of milk, Avory, J., said "the word 'sell' in this Order ought not to 'be construed with the same technicality as in the Sale of Goods Act" and made

P. HO AND J. P. LUCK v. O. OCTIVE.

reference to similar simplicity of construction in regard to the use of the word in Licensing Acts.

It is in the light of these authorities that the word "sell" should be interpreted where it appears in such orders as that now under consideration and the test to be applied was illustrated by Ridley, J., in *Lambert v. Howe* when he said in reference to the facts of that case "although if a lawyer were asked where the sale of these pigs took place he might say that in the legal sense it took place in the butcher's shop because until they were delivered there and weighed the sale was not complete, any ordinary person, not a lawyer, who was asked the same question would unhesitatingly say that the sale took place at the farmhouse."

Upon the application of this test to the facts of the present case it becomes apparent that in the circumstances disclosed by the evidence "any ordinary person" would reply that there had been a sale and no matter what arguments might be addressed to the point by a lawyer relying upon such questions as the distinction between a sale and an agreement for sale or whether the property had passed or other niceties of the law of contracts for the sale of goods, such questions are not to be taken into account. With this principle in mind we have no doubt that there was in the present case such a sale as is contemplated by a true interpretation of the order. That such an interpretation is consistent with the intention of the order as disclosed by its terms appears from the use of the words "sell or offer or expose for sale" for if this Court were to introduce into the order any distinction between a sale and an agreement to sell then there would arise so extraordinary an interpretation that while an offer to sell would be an offence, the next stage in the negotiations, an agreement to sell, would be no offence, but the last stage, a completed sale, would again bring the parties within the operation of the order. By construing the word "sell" in its popular sense and declining to introduce any such technical distinction an absurdity of this kind is avoided and, without any infringement of rules of construction which have in the past received judicial sanction, effect can be given to the obvious intention of the order.

We have arrived therefore at the conclusion that there is proof of sale within the meaning of the order and that the sale of certain articles the price of which was controlled was effected at a price exceeding that fixed by the Order. The appellants were properly convicted and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *R. G. Sharples.*

U. L. G. PEREIRA v. J. WEEKES.

ULRIC LEO GOMES PEREIRA, Plaintiff,

v.

JOHN WEEKES, Defendant.

[1942. No. 369.—DEMERARA.]

BEFORE VERITY, C.J.:

1942. DECEMBER 8, 9, 14.

Landlord and tenant—Rent restriction—Recovery of possession—Real, main and substantial purpose for which tenant hired premises—Boarding house, not dwelling house—Carried on as a business—Rent Restriction Ordinance, 1941—No application to premises or to tenancy.

Landlord and tenant—Boarding house business—Nature of—Conducted by tenant—Utterly inconsistent with use of demised premises by any respectable person as a dwelling house for a family with children—Termination by landlord of tenancy forthwith by landlord—Justified.

The plaintiff let certain premises to the defendant for use as a boarding house. The premises were in fact so used, only a small part being utilised by the defendant as a residence for his family and himself. The real reason why the defendant rented the premises was not in order to obtain a dwelling house for himself and his family, but in order that he might there carry on a boarding house as a means of livelihood, his more normal occupation as the holder of timber grant being, at any rate for the time being, unproductive and having necessitated his borrowing money, not only for business purposes, but for living expenses.

The proviso to section 3 (3) of the Kent Restriction Ordinance, 1941 (No. 23) is as follows: "The application of this Ordinance to any house or part of a house shall not be excluded by reason only that part of the premises is used for business, trade or professional purposes."

Held (1) that the real, main and substantial purpose for which the defendant hired the premises was not for a dwelling house, but to carry on a boarding house which the defendant carried on as a business; and

(2) that the Rent Restriction Ordinance, 1941 therefore had no application to the premises, or to the tenancy thereof, in this case.

Where the nature of a "boarding house" business conducted by a tenant is utterly inconsistent with the use of the demised premises by any respectable person as a dwelling house for a family with children, the landlord would, in any event, be justified in putting an immediate end to the tenancy.

ACTION by the plaintiff to recover possession of a building let by the plaintiff to the defendant.

Lionel A. Luckhoo, for the plaintiff.

S. L. van B. Stafford, K.C., for the defendant.

Cur. adv. vult.

VERITY, C.J.: In this case the plaintiff claims possession, arrears of rent and *mesne* profits in respect of the occupation of certain premises in Georgetown. The tenancy at an agreed rental is admitted by the defendant, but it is submitted on his behalf that the premises fall within the scope of the Rent Restriction Ordinance, 1941, that the amount claimed for rent exceeds the increase over the standard rent permitted by that Ordinance and that the notice to quit was given in circumstances other than those for which the Ordinance provides. It is further submitted that if the tenancy falls within the Ordinance these proceedings should have been

brought in the Magistrate's Court and that even if this Court has jurisdiction to hear the matter the plaintiff, if successful in obtaining judgment, should be deprived of costs.

The applicability of the Ordinance depends in the first instance upon the facts, and upon this question there is a conflict of evidence. The plaintiff avers that the premises were let by him to the defendant for use as a boarding house and were, in fact, used by the defendant for that purpose. In this he is supported by the evidence of the immediately preceding tenant, who took some part in the letting. The defendant, on the other hand, avers that he hired the premises as a dwelling house and used it as such, apart from permitting the use of one room from time to time by casual boarders. He is unsupported by the testimony of any other witness. I have no hesitation, in view of the respective demeanour of these witnesses and the nature of their evidence, in accepting that of the plaintiff and his principal witness, which is further supported by the evidence of two chauffeurs, who testify as to the user of the premises, and in rejecting that of the defendant, whose evasive manner and frequent inconsistency assure me that he is one upon whose unsupported word no reasonable person would be wise to rely. Not only am I satisfied that the plaintiff's version is the more reasonable of the two by reason of the improbability of a man of the plaintiff's admitted means hiring such a building at so high a rental as a place of residence in the circumstances of this case, but I also accept the direct evidence as to the avowed purpose of the hiring and of the actual use of the premises by the defendant as a boarding-house of which but a small part only, was utilised by him as a residence for himself and family.

On his behalf it is submitted that even if the plaintiff's evidence be accepted as to the facts, as I have accepted it, nevertheless while, as is admitted, the premises were used by him as a dwelling place for himself and his family the fact that there was joint user both as a boarding-house and a dwelling house does not preclude the application of the Ordinance by virtue of the proviso to subsection 3 of section 3 of the Ordinance. Counsel for the defendant cited a number of cases in support of this contention and relied largely upon *Colls v. Parnham* (1922) 1 K.B., 325 as laying down the principle upon which his argument is based. The decision in that case, while resting upon a statutory enactment similar to the local Ordinance, follows in principle the earlier decision in *Epsom Grand Stand Association, Ltd. v. Clarke*, 35 T.L.R., 525, where in the Court of Appeal Lord Justice Bankes said, in reference to certain licensed premises "the premises . . . were let for occupation under an agreement. The defendant and his family had continually lived on the premises in accordance with the terms of the agreement. Was this a dwelling house? The house was dwelt in and it was let to the defendant for that purpose. In the fullest sense it was a dwelling-house and none-the-less so because it was also a public house." Those terms are apparently so wide

in their possible application that it might be thought they laid the question to rest, but certain other cases would appear to imply a modification of the general principle. In *Earle v. Bradley* an unreported case referred to by the learned author of Stone's Justices Manual, 74th Edition, p. 2574, Russell, J., appears to have held that a boarding house was not a dwelling house, the test being the dominant purpose for which the premises were used, and this principle was approved in *Callaghan v. Bristowe* (1920) W.N., 308. In *Greig v. Francis and anor.*, 38 T.L.R., 519, Swift, J., in drawing a distinction between business premises which could not be described as a dwelling-house and a dwelling-house part of which is used for business purposes, said: "It had to be determined as a question of fact what was the real, main and substantial purpose of the premises," and he added "I think the purpose for which the building is let is quite properly taken into consideration . . . in determining . . . the true facts as to whether it is a dwelling house or not."

It is to be observed that in reaching this conclusion, with which Acton, J., concurred, His Lordship cannot have been unmindful of either the *Epsom* case or *Colls v. Parnham*, to which reference had been made in the course of the argument.

That some such modification of what might at first appear a wider rule is contemplated by the enactment may be gathered from the precise terms of the proviso to which I have referred, which reads: "The application of this Ordinance to any house or part of a house shall not be excluded by reason only that part of the premises is used for business, trade or professional purposes." The significance of the word "only" is not to be overlooked for it implies that while such reason alone shall not exclude application of the Ordinance, yet such user if coupled with some other reason is to be taken into consideration. The decision in *Greig v. Francis* would appear to make it clear that another such reason is to be found in the "real main and substantial purpose of the premises."

The facts, as I have found them, disclose that the real reason why the defendant rented these premises was not in order to obtain a dwelling place for himself and his family, but in order that he might there carry on a boarding-house as a means of livelihood, his more normal occupation as the holder of a timber grant being, at any rate for the time being, unproductive and having necessitated his borrowing money, not only for business purposes, but for living expenses. In these circumstances, it cannot be said that the "real, main and substantial purposes" for which the defendant hired these particular premises was a dwelling-house, but there can be no doubt that he did so for the purpose of carrying on a boarding-house.

The sole remaining point in regard to this aspect of the case is whether this is to be held to be a "business, trade or professional purpose." There, is authority for saying that the carrying on of a

U. L. G. PEREIRA v. J. WEEKES.

boarding-house is a “business” and there can be no doubt that in this case the defendant carried it on as such.

In view of these findings, I am of the opinion that the Rent Restriction Ordinance has no application to the premises or to the tenancy thereof in this case. No part of the defence goes to the merits of the claim, if the provisions of the Ordinance are excluded and there will therefore, be judgment for the plaintiff for possession of the premises forthwith and for the amount of rent and *mesne* profits claimed together with an order for costs.

I would add that the nature of the “boarding-house” business conducted by the defendant, as disclosed by the evidence, which I accept, is utterly inconsistent with the use of the building by any respectable person as a dwelling-house for a family with children and would in any event, entirely justify the landlord in putting an immediate end to the tenancy.

I am indeed astounded at the effrontery of the defendant in defending this action, no matter what may have been the view of the law taken by his advisers, from whom, of course, he concealed the true facts. His conduct in this respect is only to be explained upon the assumption that he valued the profits of this business more highly than his own reputation, or that of the woman described as his wife.

Judgment for plaintiff.

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

C. C. BLACKETT v. W. S. JEBOO.
 CHRISTOPHER CORNELIUS BLACKETT, Plaintiff,
 v.
 WILLIAM S. JEBOO, Defendant.
 [1942. No. 2.—DEMERARA..]
 BEFORE DUKE, J. (ACTING).
 1942. DECEMBER 16, 17.

Practice—Statement of claim—Application to strike out—Should be made by way of summons—Not at trial of action—Except in special circumstances.

Principal and agent—House agent—Nature of agency—To find a purchaser—Meaning of—To find a person who at least enters into a binding contract to purchase.

Principal and agent—House agent—Nature of agency—To find a purchaser—Introduction by agent to principal—Of person ready, willing and able to purchase at price assented to by principal—Not implied term of contract of agency—That principal shall enter into a contract with that person to sell at the agreed price—If principal refuses to enter into contract—Agent not entitled to commission or damages.

Principal and agent—House agent—Mere introduction of one who offers to purchase at specified or minimum price—Commission to agent for—Agreement by property owner to pay—Clear and unequivocal language required

An application by a defendant that a statement of claim should be struck out as disclosing no cause of action should, ordinarily, be made by way of summons, and not at the trial of the action. No special circumstances having been urged as to why such an application should be permitted to be made at the trial of the action, the application was not entertained.

Where an agent is employed to find a purchaser, that means he is employed to find a person who at least enters into a binding contract to purchase.

Where an owner of property employs an agent to find a purchaser, it is not an implied term of the contract of agency that, alter the agent has introduced a person who is ready, willing and able to purchase at a price assented to by the principal, the principal shall enter into a contract with that person to sell at the agreed price.

A mere promise by a property owner to an agent to pay him a commission if he introduces a purchaser for the property at a specified price or at a minimum price, does not tie the owner's hands, and does not compel him (as between himself and the agent) to bind himself contractually to sell to the agent's client who offers that price. If the property owner refuses such an offer, he is not liable to pay the agent a sum equal to or less than the amount of the commission either (a) on a *quantum meruit*, or (b) as damages for breach of a term to be implied in the commission contract.

It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price; but such a construction of the contract between the property owner and the agent would require clear and unequivocal language.

On the 29th October, 1941, the defendant instructed the plaintiff to find a purchaser for his property lot 43, Bourda, Georgetown; the defendant said that he would accept \$7,000 for the property; and it was agreed that the plaintiff's commission was to be 3 per centum of the purchase price. On the 11th November, 1941 he induced someone to agree to offer \$7,000 for the purchase of the property; and on the following day he notified the defendant accordingly. On the 13th November, 1941 the plaintiff saw an advertisement in a daily newspaper of the 12th November, 1941, inserted by the defendant notifying the public and agents that he was not selling any of his properties in Georgetown.

Held, (1) that there was no clear or unequivocal language to the effect that the defendant had bound himself to pay a commission of 3 per centum of the purchase price for the mere introduction of one who offered to purchase at the specified price of \$7,000;

(2) that the plaintiff did not "find a purchaser", as the person introduced by him did not enter into a binding contract with the defendant to purchase

C. C. BLACKETT v. W. S. JEBOO.

the property from him; further, the defendant was not prohibited, by the terms of his arrangement with the plaintiff, from refusing to enter into a contract to sell the property to the person so introduced, at the specified price of \$7,000;

(3) that, according to the express terms of the contract, the plaintiff did not earn his commission, as the person introduced by him did not enter into a binding contract with the defendant to purchase the property from him;

(4) that the plaintiff could not recover on a *quantum meruit* in the face of the express provision for remuneration which the contract contained;

(5) that there was no necessity which compelled the implication of a term in the contract that the defendant would be liable to pay damages to the plaintiff, if the defendant exercised his rights and refused to enter into a contract, with the person introduced by the plaintiff to sell at the price previously specified by the defendant;

(6) that the plaintiff could not recover damages for breach of a term to be implied in the commission contract.

ACTION by the plaintiff Christopher Cornelius Blackett against the defendant William Sirju Jeboo, claiming the sum of \$210 as remuneration as a house agent for finding a purchaser in respect of lot 43, Robb Street, Bourda, Georgetown, Demerara.

The plaintiff appeared in person.

E. D. Clarke, solicitor, for the defendant.

Cur. adv. vult.

DUKE, J. (Acting): The plaintiff, in his writ of summons, sought to recover from the defendant the sum of \$210 as remuneration as a house agent for finding a purchaser in respect of lot 43, Robb Street, Bourda, Georgetown, Demerara.

In his statement of claim the plaintiff alleged that on the 29th October, the defendant engaged the plaintiff in his capacity as a house agent to find a purchaser for the defendant's property at lot 43, Robb Street, Bourda for the sum of \$7,000; that the defendant offered to pay the plaintiff, and the plaintiff agreed to accept, a commission of 3 per centum on the said purchase price of \$7,000 if the plaintiff succeeded in so finding a purchaser ready and willing to buy at the agreed price; that, in pursuance of the said agreement, the plaintiff on the 12th November, 1941, found a purchaser, namely, one Andrew James who was ready and willing to purchase the said lot 43, Robb Street, Bourda, for the sum of \$7,000; that the defendant cancelled the sale, and repudiated the agreement, and advised the plaintiff that he was no longer prepared to pay the said commission; and that by reason of the said conduct of and by the defendant the plaintiff has suffered damages and was deprived of his commission as a house agent. The plaintiff claimed the sum of \$210, being a commission of 3 per centum on the purchase price of \$7,000; and costs.

On the action coming on for hearing, the solicitor for the defendant objected that the statement of claim disclosed no cause of action, and submitted that the action should be dismissed. He relied upon the judgment delivered in appeal No. 160 of 1942, (Demerara) on the 11th September, 1942, by the Full

C. C. BLACKETT v. W. S. JEBOO.

Court in *Sattaur v. Schroeder*, (1942) L.R.B.G. I did not entertain this objection as, in my opinion, any such objection should ordinarily, be taken by way of an application made on summons, and not in Court at the trial of an action. No special circumstances were urged as to why the application should be permitted to be made at the trial of the action.

The plaintiff deposed that on the 29th October, 1941, the defendant instructed him to find a purchaser for his property lot 43, Robb and Light Streets, Bourda; that the defendant said that he would accept \$7,000, for the property; and that it was agreed that the plaintiff's commission was to be 3 per centum of the purchase price. Such was the sole evidence of the contract or arrangement alleged by the plaintiff to have been entered into between the defendant and himself.

The plaintiff further deposed that on the 11th November, 1941, he induced one Andrew James to agree to offer \$7,000, for the purchase of the property; that on the 12th November, 1941, he notified the defendant by telegram that he had closed the deal with Andrew James for \$7,000; that on the 13th November, 1941, he saw in the *Daily Chronicle* newspaper of the 12th November, 1941, an advertisement by the defendant notifying the public and agents that he was not selling any of his properties in Georgetown.

The plaintiff claims that he is entitled to a commission of 3 per centum of \$7,000; or, in the alternative, to damages to the extent of the said commission.

In *Luxor, Ltd. v. Cooper* (1941) I. A.C. 129, Lord Russell of Killowen stated that "it is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price: but such a construction of the contract would in my opinion require clear and unequivocal language." In the terms of the contract as alleged, and relied upon, by the plaintiff there is no clear or unequivocal language to the effect that the defendant had bound himself to pay a commission of 3 per centum of the purchase price for the mere introduction of one who offered to purchase at the price of \$7,000 which the plaintiff alleges was the price specified by the defendant. The defendant was not therefore liable to pay a commission for the mere introduction of one who offered to purchase lot 43, Robb and Light Streets, Bourda at the price of \$7,000.

According to the arrangement relied upon by the plaintiff, he (the plaintiff) was to "find a purchaser" for the property at the specified or minimum price of \$7,000. In *Luxor Ltd. v. Cooper* (1941) 1 A.C. 154, Lord Romer, said: "Where an owner of property employs an agent to find a purchaser, which must mean at least a person who enters into a binding contract to purchase, is it an implied term of the contract of agency that, after the agent has introduced a person who is ready, willing and able to

C. C. BLACKETT v. W. S. JEBOO.

purchase at a price assented to by the principal, the principal shall enter into a contract with that person to sell at the agreed price subject only to the qualification that he may refuse to do so if he has just cause or reasonable excuse for his refusal? . . . In my opinion the question must be answered in the negative.” In other words, according to Lord Romer, (1) where an agent is employed to find a purchaser, that means he is employed to find a person who at least enters into a binding contract to purchase; and (2) where an owner of property employs an agent to find a purchaser, it is not an implied term of the contract of agency that, after the agent has introduced a person who is ready, willing and able to purchase at a price assented to by the principal, the principal shall enter into a contract with that person to sell at the agreed price.

The plaintiff did not find a purchaser, as the person Andrew James whom he says that he introduced to the defendant, did not enter into a binding contract with the defendant to purchase the property from him. Further, the defendant was not prohibited, by the terms of his arrangement with the plaintiff, from refusing to enter into a contract to sell the property to Andrew James at the specified price of \$7,000.

In *Luxor Ltd. v. Cooper* (1941) 1 AC. 125, Lord Russell of Killowen said: “I do not assent to the view . . . that a mere promise by a property owner to an agent to pay him a commission if he introduces a purchaser for the property at a specified price, or at a minimum price, ties the owner’s hands, and compels him (as between himself and the agent) to bind himself contractually to sell to the agent’s client who offers that price, with the result that if he refuses the offer he is liable to pay the agent a sum equal to or less than the amount of the commission either (a) on a *quantum meruit* or (b) as damages for breach of a term to be implied in the commission contract. As to the claim on a *quantum meruit*, I do not see how this can be justified in the face of the express provision for remuneration which the contract contains . . . I do not favour the view that an agent who has not earned his commission according to the express terms of the contract is entitled to damages for breach of some term to be implied. I see no necessity which compels the implication.” And (at p. 139) Lord Wright said: “I cannot think that a property owner can be held, in virtue of a commission contract like this, to have bound himself by mere implication to complete the sale or to pay damages to the agent. Express words are in my opinion necessary to effect this result.”

According to the express terms of the contract, as alleged and relied upon by the plaintiff, the plaintiff has not earned his commission, inasmuch as the person alleged to have been introduced by him did not enter into a binding contract with the defendant to purchase the property from him. The plaintiff cannot recover on a *quantum meruit* in view of the express provisions for

C. C. BLACKETT v. W. S. JEBOO.

remuneration contained in the contract. There are no express words in the contract which would indicate that if the defendant failed to enter into a binding contract of sale with the person introduced by the plaintiff, the defendant would be liable to pay damages to the agent. Such a term cannot be implied. The defendant was legally entitled, under the commission contract, to refuse to sell to any person introduced by the plaintiff. In the absence, therefore, of express provision to the contrary, the defendant cannot be held liable in damages for doing something which he was legally entitled to do under the contract entered into between the plaintiff and the defendant.

The case as set up by the plaintiff is not maintainable in law, and there must therefore be judgment for the defendant with costs.

I should, however, mention that the defendant did not appoint the plaintiff as his sole agent: indeed, he had previously appointed 2 other agents, and on the 29th October, 1941, they were still his agents. Subsequent to the 12th November, 1941, the property was sold by one of those 2 agents for \$7,500. Further, Andrew James was not called as a witness, and there was therefore no admissible evidence that the plaintiff introduced to the defendant a person able and willing to purchase the property for \$7,000. And again, I cannot, in the circumstances of this case, accept the testimony of the plaintiff that the defendant specified \$7,000 as the purchase price of the property: I prefer to accept the evidence of the defendant that a sum exceeding \$7,000, to wit, the sum of \$8,000, was the sum so specified.

Judgment for defendant

A. RAHAMAN AND ANR. v. E. B. CHAPMAN.

ABDOOL RAHAMAN AND FAZLAHEEM RAHAMAN,
Appellants. (Defendants),

v.

ERIC BASIL CHAPMAN, Respondent (Complainant).

[1942. No. 265.—DEMERARA].

BEFORE FULL COURT: VERITY. C.J., AND DUKE, J. (Acting).

1942. NOVEMBER, 27, DECEMBER, 18.

Criminal law and procedure—Customs—In any way knowingly concerned in any fraudulent evasion of customs duties That person charged fraudulently evaded duties of customs—Not necessary to prove—In any way knowingly concerned—Construction of—Customs Ordinance, cap. 33, s. 168 (i).

By section 163 (i) of the Customs Ordinance, cap. 33, “every one who. . . is in any way concerned in any fraudulent evasion of duties of customs” is punishable.

Held that the question was not whether a person fraudulently evaded payment of duties of customs, but whether he was in any-way knowingly concerned in the evasion.

The means adopted to evade payment of duties of customs included the false report that a number of logs was lost, and concealment from the authorities that all logs which broke away had been recovered. On the 5th December the duties of customs on the logs admitted to be recovered were paid, but there was no evidence that the appellant knew of this payment. With the means adopted to evade payment the appellant was intimately concerned.

Held that proof that he was knowingly concerned with the course of events which led up to and culminated in the evasion on the 5th December, is sufficient even though on that particular date he took no active part. His continued concealment of the truth up to and including that date is proof of his continued concern in the evasion to which his previous misrepresentations had contributed.

APPEAL by Abdool Rahaman and Fazlaheem Rahaman who were convicted by the Magistrate of the Berbice Judicial District upon a joint charge of being knowingly concerned in the fraudulent evasion of the duties of customs on certain timber.

H. C. Humphrys, K.C., for the appellant Abdool Rahaman

S. I. Cyrus, for the appellant Fazlaheem Rahaman.

Cur. adv. vult.

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

This is an appeal by two defendants who were convicted upon a joint charge of being knowingly concerned in the fraudulent evasion of the duties of customs on certain timber. The facts alleged by the prosecution and found by the Magistrate are that certain logs were purchased on behalf of the first-named appellant in Dutch Guiana and shipped to Skeldon in this Colony by raft. Owing to bad weather some difficulty was experienced in landing these logs at Skeldon and of 289 logs shipped it was reported that only 197 logs were landed and that 92 were lost. Duty was paid on 197 logs but the Magistrate has found that no logs

were in fact lost, that this was known to the appellants at the time duty was paid and that they by this means fraudulently evaded the payment of duty on 92 logs.

It was submitted on behalf of both appellants that there was insufficient credible evidence upon which the learned Magistrate could reasonably reach these conclusions, and counsel for the second-named appellant laid particular stress upon the unreliability of the witness Hamid who had in the first place reported that only 197 logs were landed but who subsequently testified for the prosecution to the effect that none of the 289 logs was lost. This witness is on his own showing an accomplice and the learned Magistrate properly directed his mind to this fact and to the appropriate rule of law. It was submitted, however, that the learned Magistrate gave no weight to the consideration that Hamid's evidence is in contradiction of his original statements to the authorities. While it is true that in the absence of a satisfactory explanation the value of the evidence of such a witness is negligible, it is not necessary that the explanation should be virtuous. If the learned Magistrate was satisfied that Hamid had in the first place joined in making a false statement but subsequently told the truth even though his motive for doing so was ill-feeling for the appellants, then his evidence may be accepted for the variance is explained. There is in the evidence of Dick ample corroboration of Hamid's story even though there may be certain material differences in particular instances. The learned Magistrate, who saw these witnesses, found their testimony more credible than that adduced by the appellants. This Court will always hesitate to differ on a question of credibility in the face of contradiction. On consideration of the evidence as a whole we see no reason to hold that the learned Magistrate erred in his finding that there was a false representation as to the number of the logs landed, nor do we think that, had we heard the witnesses, we would have reached any other conclusion.

In regard to knowledge of this misrepresentation on the part of the appellants there is ample evidence of such knowledge in the second-named appellant and the only reasonable conclusion to be drawn from the evidence is that he was knowingly concerned in the evasion and was properly convicted.

As regards the first-named appellant the position is not so clear, but his two visits to the customs authorities, his personal representations that a number of logs had been lost when in fact all had been recovered and his statements as to his financial loss and his feelings when, as he alleged, he saw "so many logs drifting away," all involve him in falsehoods which when taken together can only be explained on the ground of guilty knowledge.

It was argued on his behalf, however, that in view of the absence of evidence that he knew of the payment on 5th December, 1941, of the duty on 197 logs only, he cannot properly be convicted, it being an essential ingredient of the offence that he

A. RAHAMAN AND ANR. v. E. B. CHAPMAN.

should have guilty knowledge of the actual evasion. It is to be observed, however, that the section under which he was charged uses the words "everyone who is in any way concerned in any fraudulent evasion" is punishable. The question is not, therefore, whether this appellant himself fraudulently evaded payment but whether he was in any way knowingly concerned in the evasion. In this case the means adopted to evade payment include the false report that a number of logs was lost and concealment from the authorities that all logs which broke away had been recovered. With these means the first-named appellant was intimately concerned and proof that he was knowingly concerned with the course of events which led up to and culminated in the evasion on 5th December is sufficient, even though on that particular date he took no active part. His continued concealment of the truth up to and including that date is proof of his continued concern in the evasion to which his previous misrepresentations had contributed.

The learned Magistrate was right, therefore, in convicting the first-named appellant also, and the appeal is dismissed with costs.

Appeal dismissed.

E. SEWDIN AND ANR. v. A. M. EDUN AND ORS.
 ELEANOR SEWDIN AND HARRI BARRON, Plaintiffs,
 v.
 AYUBE M. EDUN, JOHN LUCIE GRIFFITH *et al*, Defendants,
 [1942. No. 404.—DEMERARA.]
 BEFORE DUKE, J. (ACTING): IN CHAMBERS.
 1942. DECEMBER 14, 19, 21.

Practice—Interim injunction—Application for—On affidavit filed—Writ of summons not filed—Writ not prepared—No evidence that—Not possible to file writ before filing of affidavit—Application refused.

AN interim injunction is only applied for, when the matter is urgent. But a judge would be acting improperly if, merely because the application before him is for an interim injunction, he were to hear and determine it prior to the issue of a writ of summons. If, however, the judge is satisfied that, at the time when the affidavit asking for an interim injunction is placed before him, it was not possible for a writ of summons to have been filed he may, if the circumstances of the case so warrant, hear and determine the application on an undertaking being given by the applicant's solicitor that the writ of summons would be filed at the earliest possible moment.

An application was made, by affidavits, for an interim injunction. The affidavits were filed, but no writ of summons was filed. There was no evidence that, prior to the filing of the affidavits, the writ of summons was in fact prepared; and there was no evidence that it was not possible to file the writ of summons before the affidavits were filed.

Held, that the application must be refused.

APPLICATION for an interim injunction. No writ of summons was filed, but affidavits were filed in which the injunction was asked for.

S. I. Cyrus, for the applicants.

Cur. adv. vult.

DUKE, J. (Acting): This is an *ex parte* application for an interim injunction restraining the defendants, their servants and agents, (a) from performing any of the acts named in certain resolutions passed at a Special General Meeting of the Man-Power Citizens' Association held on the 6th December, 1942; (b) from making any appointments whatsoever in connection with the Association or the Association's newspaper "The Labour Advocate"; (c) from printing and publishing or causing to be printed and published anything whatsoever on the Association's premises or in the name of the Association. An injunction is also asked for, restraining Ayube Mohamed Edun from continuing in office as President of the Association and as Editor of "The Labour Advocate"; John Lucie Griffith and Amos A. Rangela from continuing in office as Members of the Committee of Management of the Association; and Joseph N. Butler from continuing in office as printer and publisher of "The Labour Advocate", the official organ of the Association.

No writ of summons has been filed in this matter, and the application is based on two affidavits sworn to by Harri Barron on the 12th and 14th days of December, 1942, respectively, and filed on the 14th December, 1942. The affidavits were placed

E. SEWDIN AND ANR. v. A. M. EDUN AND ORS.

before me on the 14th December, 1942 when I pointed out to counsel for the applicants that no writ of summons had been filed. The application was adjourned to the 15th December, 1942 for argument, and, at the further request of counsel, it was again adjourned. On Saturday, the 19th December, 1942, counsel again appeared before me, and submitted that a Judge has jurisdiction to grant an injunction, in urgent matters, where a writ of summons has not been filed in the Supreme Court Registry.

An interim injunction is only applied for, when the matter is urgent. But a judge would be acting improperly if, merely because the application before him is for an interim injunction, he were to hear and determine it prior to the issue of a writ of summons. If, however, the judge is satisfied that, at the time when the affidavit asking for an interim injunction is placed before him, it was not possible for a writ of summons to have been filed, he may, if the circumstances of the case so warrant, hear and determine the application on an undertaking being given by the applicant's solicitor that the writ of summons would be filed at the earliest possible moment.

For instance (and this is only one illustration of the application of the rule), the Supreme Court Registry is closed between Good Friday and Easter Monday (both days inclusive). If, during this period, something happens which necessitates an application for an interim injunction, a writ of summons can be prepared, and an affidavit can be prepared and sworn, but it would not be possible to file the writ of summons (or the affidavit) as the Supreme Court Registry would be closed. In those circumstances, if the applicant for the interim injunction is able to persuade a judge to listen to him, the applicant's solicitor will place before the judge the proposed writ of summons and the sworn affidavit applying for the injunction, and will give an undertaking to file the writ of summons at the earliest possible moment; and, if the judge is satisfied, he will then grant the interim injunction.

In this proceeding, the applicants have failed to explain why a writ of summons was not filed prior to the filing of the affidavits herein. No draft writ of summons has been produced to me. The Supreme Court Registry was open on Saturday, the 12th December, 1942, from 8 a.m. to 12 noon; and on Monday, the 14th December, 1942, from 9 a.m. to 4 p.m. There is no evidence that the writ of summons was in fact prepared prior to the filing on the 14th December, 1942, of the affidavits herein: and there is no evidence that it was not possible to file the writ of summons prior to the filing of the affidavits herein.

The application for an interim injunction must therefore be refused.

Application refused.

Solicitor for applicant: *H. A. Bruton.*

BHAGWANDIN v. M. N. FERNANDES.

BHAGWANDIN, Appellant (Defendant),

v.

M. N. FERNANDES, Respondent (Complainant).

[1942. No. 358.—DEMERARA.]

BEFORE DUKE, J., (ACTING).

1942. DECEMBER 14, 23.

Appeal—From magistrate's court—Special leave to appeal—Application for—To be made to Full Court—Not to a judge of the Supreme Court—Summary Jurisdiction (Appeals) Ordinance, cap. 16, ss. 2, 14 (1)—Rules of Supreme Court (Appeals) 1924, rule 25 (1)—Inoperative in respect of tribunal to which application is to be made—Since Magistrates' Decisions (Appeals) Ordinance, 1893 (No. 13) as amended by Appeals Regulation Ordinance, 1922 (No. 33) was repealed by Ordinance No. 6 of 1929, now cap. 16.

Notwithstanding rule 25(1) of the Rules of the Supreme Court (Appeals), 1924 (which rule was made in conformity with the then existing law, namely, section 11(1) of the Magistrates' Decisions Appeals Ordinance, 1893 (No. 13), as amended by section 10(2) of, and the Schedule to, the Appeals Regulation Ordinance, (No. 33 of 1922) an application under section 14(1) of the Summary Jurisdiction (Appeals Ordinance, cap. 16, must be made to the Full Court and not to a judge of the Supreme Court.

Since the repeal of the Magistrates' Decisions Appeals Ordinance, 1893, (No. 13) by Ordinance No. 6 of 1929, now the Summary Jurisdiction (Appeals) Ordinance, cap. 16, rule 25(1) of the Rules of the Supreme Court (Appeals) 1924 is inoperative in so far as it relates to the tribunal to which an application for special leave to appeal is to be made.

MOTION by Bhagwandin to the Supreme Court of British Guiana, for leave to appeal against a conviction by a magistrate.

R. S. Miller, for the applicant.

Cur. adv. vult.

DUKE, J. (Acting): This is a motion to the Supreme Court of British Guiana, in its criminal jurisdiction, by Bhagwandin for an order granting him leave to file his notice of the grounds of appeal from a certain conviction by a magistrate within 14 days from the date of such order.

The motion is wrongly intitled in the Criminal Jurisdiction of this Court. That jurisdiction is entirely an original, and not an appellate, jurisdiction.

The motion is made under section 14 (1) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16. Under that sub-section, an application for special leave to appeal is to be made to "the Court," which by section 2, means the "Full Court of the Supreme Court of British Guiana" and does not include a judge of the Supreme Court. The motion is made to a judge of the Supreme Court of British Guiana, and not to the Full Court of the Supreme Court of British Guiana. The motion has therefore been made to the wrong tribunal; this tribunal has no jurisdiction to entertain it and therefore makes no order on it.

Counsel for the applicant has, however, urged that the motion has been made to a judge of the Supreme Court in conformity

BHAGWANDIN v. M. N. FERNANDES.

with rule 25 (1) of the Rules of the Supreme Court (Appeals), 1924; and that I should therefore not hold that I have no jurisdiction to hear it.

Section 11 (1) of the Magistrates' Decisions (Appeals) Ordinance, 1893 (No. 13), was as follows: "In any case where a person who is entitled to appeal from any decision of a magistrate's Court is unavoidably prevented from appealing in the manner and within the time hereinbefore specified, it shall be lawful for such person to apply by *petition to the Court* for leave to appeal from such decision." By section 10 (2) of, and the Schedule to, the Appeals Regulation Ordinance, 1922 (No. 33), the expression "the Court" in section 11 (1) of Ordinance No. 13 of 1893, meant a single judge of the Supreme Court.

Rule 25 (1) of the Rules of the Supreme Court (Appeals), 1924, provides that an application for leave to appeal under the provisions of section 11 of the Magistrates' Decisions (Appeals) Ordinance, 1893 (No. 13) shall be made by *motion* to a judge of the Supreme Court. This sub-rule did not purport to make any alteration in the tribunal to which the application should be made: it merely simplified the procedure by providing that it shall not be made by way of petition, but by way of motion.

The Magistrates' Decisions (Appeals) Ordinance, 1893 (No. 13) was repealed by Ordinance No. 6 of 1929, now the Summary Jurisdiction (Appeals) Ordinance, cap. 16. Section 11 (1) of Ordinance No. 13 of 1893, has been replaced by section 14 (1) of cap. 16 which is as follows: "If any one entitled to appeal is unavoidably prevented from so doing in the manner or within the time specified he may apply to the Court for special leave to appeal." In section 14 (1), and in the whole of Chapter 16, the expression "the Court" means the Full Court of the Supreme Court of British Guiana. Rule 25 (1) of the Rules of the Supreme Court (Appeals), 1924, was not saved when Ordinance 13 of 1893, was repealed by Ordinance 6 of 1929: it is therefore inoperative in so far as it relates to the tribunal to which the application is to be made.

I might mention that a motion was made to the Full Court in *Balkissoon et al v. Williams* (1938) L.R.B.G. 187 under section 14 (1) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16, for leave to appeal.

Motion not entertained.

Solicitor for applicant: *H. A. Bruton.*

E. A. C. TIAM FOOK v. M. HUSSAIN AND ANR.
 EDWIN ADOLPHUS CHUNG TIAM FOOK, Appellant,
 v.
 MOHAMED HUSSAIN AND JOHN GILBERT CHOONG,
 Respondents.
 [W.I.C.A. 1942. No. 6.—BRITISH GUIANA.]
 BEFORE DUKE, J., (ACTING).
 1942. DECEMBER 14, 21, 23.

Appeal—West Indian Court of Appeal—Poor Person—Application to prosecute appeal as—Refused on merits—West Indian Court of Appeal Rules, rule 18 (1) (b); West Indian Court of Appeal (Amendment) Rules, 1930, rule 5.

Application to prosecute an appeal to the West Indian Court of Appeal as a poor person refused on its merits.

APPLICATION by the appellant Edwin Adolphus Chung Tiam Fook to be admitted as a poor person to prosecute his appeal to the West Indian Court of Appeal as a poor person. A judge in chambers directed that the application be heard in Court, and that the appellant should serve the respondent with copies of the application and of the documents in support.

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

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

Cur. adv. vult.

DUKE, J. (Acting): This is an application by the appellant Edwin Adolphus Chung Tiam Fook to be admitted as a poor person to prosecute his appeal from the judgment of Mr. Justice Duke, dated the 13th day of July, 1942, in the action No. 74 of 1942, Demerara. That judgment was in favour of Mohamed Hussain also known as and called Hashim Sankar and John Gilbert Choong, the plaintiffs in that action.

On the 5th March, 1942, the plaintiffs issued a specially indorsed writ, No. 74 of 1942, against the defendant Edwin Adolphus Chung Tiam Fook claiming possession of certain premises let by the plaintiffs to the defendant, \$700 being 10 months' rent, mesne profits and costs. This writ was returnable for the 23rd March, 1942. It was served upon the defendant on the 12th March, 1942.

The defendant filed a writ, No. 76 of 1942, against the plaintiffs claiming, *inter alia*, relief against the forfeiture for non-payment of rent. On the 21st March, 1942, the defendant filed an affidavit of defence in action No. 74 of 1942, in which he stated, *inter alia*, that he was advised that the plaintiffs were not entitled to exercise the right of forfeiture for non-payment of rent.

Terms of settlement were agreed between the parties, and were made an order of Court on the 30th March, 1942.

E. A. C. TIAM FOOK v. M. HUSSAIN AND ANR.

It is truly stated in paragraph 3 of the grounds in support of the appellant's application to prosecute his appeal as a poor person that "under the terms of settlement filed in this action (No. 74 of 1942, Demerara), on the 30th day of March, 1942, (the appellant) was required to pay the costs set out in paragraph 4 of the said Terms of Settlement on or before the 30th day of April, 1942, and to accept transport (from the respondents of the premises which had been let by the respondents to the appellant) and pass mortgage (in favour of the respondents) on or before the 15th day of May, 1942, and failing this the sale (by the respondents to the appellant of the said premises) was to be rescinded, and an order for possession was to be made forthwith in this Action (No. 74 of 1942, Demerara)."

The appellant did not comply with the conditions specified in the Terms of Settlement (made an order of Court on the 30th March, 1942); and, therefore, *prima facie*, the respondents were entitled to an order for possession forthwith. The onus was on the appellant to prove otherwise.

On the 10th June, 1942, the respondents took out a summons against the appellant for possession of the premises. This summons was heard before Mr. Justice Duke in Chambers on the 6th, 7th and 10th days of July, 1942. On the 13th July, 1942, the judge made an order for possession of the premises. An application was made for a stay of execution of the order: this was refused. An application was made for leave to appeal, and the judge made the following order; "Leave to appeal, if necessary."

Possession of the premises has been duly delivered to the respondents in accordance with the terms of the order of the 13th July, 1942.

The order was perfected on the 15th July, 1942.

On the 27th August, 1942, (the day after the time limited for appealing to the West Indian Court of Appeal had expired) Edwin Adolphus Chung Tiam Fook filed a motion "for an order granting an extension of time to file notice of appeal motion within 21 days from the date of such order and further for an order for an extension to file his notes of evidence herein within 42 days of such order." On the hearing of the motion, counsel for Edwin Adolphus Chung Tiam Fook admitted that his client was financially embarrassed, and that he would have to give security for costs. No suggestion was made, at that stage, that Edwin Adolphus Chung Tiam Fook might be applying for leave to appeal in *forma pauperis*. On the 9th September, 1942, the Court, in the exercise of its discretion, and on the authority of *Gatti v. Shoosmith* (1939) 3 All E.R. 916, granted to Edwin Adolphus Chung Tiam Fook 21 days from the 26th August, 1942, to file his notice of appeal motion to the West Indian Court of Appeal, despite the fact that the time limited for bringing

an appeal to that Court had expired on the day before the motion was filed.

If it had been indicated on the hearing of the motion that Edwin Adolphus Chung Tiam Fook would have been applying, at a later stage, for leave to appeal in *forma pauperis*, or that there was a possibility of an application being made to apply for leave to prosecute the appeal as a poor person, I would have refused the application for an extension of time to bring the appeal. The application was granted by me, because I believed that Edwin Adolphus Chung Tiam Fook would be providing security for costs of the appeal.

On the 15th September, 1942, the notice of appeal motion was filed. On the 13th October, 1942, the required number of copies of the record was filed: these copies contained many inaccuracies and omissions.

On the 22nd September, 1942, the solicitor for the respondents wrote to the solicitor for the appellant demanding security in the sum of \$720 for the costs of the appeal. The solicitor for the appellant has never replied to that letter, even though on the 7th September, 1942, counsel for Edwin Adolphus Chung Tiam Fook had stated in Court that security for costs of the appeal would be given. The solicitor for the appellant never stated that the security demanded was too large, and he never stated what security he considered reasonable.

On the 21st October, 1942, the respondents filed a motion for security for costs of appeal in the sum of \$720. No affidavit was filed in opposition. On the 16th November, 1942, the Court ordered security in the sum of \$360 to be furnished within 10 days failing which the appeal would stand dismissed out of Court without further order. Counsel for the appellant had submitted that the Court should not make an order dismissing the appeal if the security was not furnished within the specified time. I disagreed with him, and I made the order accordingly; see *Wille v. St. John* (1910) 1 Ch. 701.

The time prescribed by the order of the 16th November, 1942, for furnishing security was due to expire on the 26th November, 1942. On the 26th November, 1942, the appellant filed an application under rule 18 (1) (b) of the West Indian Court of Appeal Rules, as enacted by rule 5 of the West Indian Court of Appeal (Amendment) Rules, 1930, to be admitted as a poor person to prosecute his appeal. The application was placed before the Chief Justice in Chambers (I was sitting in Court at the time), and on the *ex parte* application of counsel for the appellant, an order was made "that the time limited for providing security for costs by the order of Mr. Justice Duke dated the 16th day of November, 1942, be extended until such time as this application (for leave to prosecute the appeal as a poor person) can be heard and disposed of by the said Judge or a Judge of the Supreme Court or until the hearing of an application on

E. A. C. TIAM FOOK v. M. HUSSAIN AND ANR.

notice to the respondents for a further extension of time can be heard and determined.”

The application of the appellant for leave to prosecute the appeal as a poor person was then placed before me, and on the 27th November, 1942, I fixed it for hearing before me in Court on the 14th December, 1942, and I directed that the appellant should serve the respondent with copies of the application and of the documents in support.

On the 14th December, 1942, I reduced, from \$360 to \$200, the amount of the security required to be furnished under the order of the 16th November and I extended, until the 19th December, 1942, the time prescribed for furnishing security. I reduced the amount of the security, not because I considered \$360 to be unreasonable, but because the appellant had stated in his application “that at the time of the tiling of (the) notice of appeal motion (the 15th September, 1942) he had obtained a promise from Mr. William Correia (of the Astor Theatre, one of the references submitted by the appellant as to his character and means) that he would be security for costs of appeal to the extent of \$200, but on his being informed that (he) had to provide security in the sum aforementioned (\$360) he refused to secure such sum”. I wished the appellant to have every opportunity to secure the sum for which he alleged he was able to provide security.

The time limited by the order of the 14th December, 1942, for providing security in the sum of \$200 for the costs of appeal was due to expire on the 19th December, 1942. On that day the appellant filed an affidavit in which it was stated that he had been unable to get William Correia, or any other person, to stand security for him in the sum of \$200; and that he had been unable to obtain loans so as to be able to find the security in cash. At this time the order of Court of the 14th December, 1942, had not been drawn up: the appellant probably intended, at a later stage, to rely upon the actual decision of the Court of Appeal in *Wille v. St. John* (1910) 1 Ch. 703. The affidavit was placed before me, but I refused to deal with it until the order of the 14th December, 1942, had been entered. On this being done, I thereupon made an order “that the time limited for providing security for costs by the order dated the 14th December, 1942, be extended until such time as the appellant’s application to be admitted to appeal in *forma pauperis* can be heard and determined.”

That application was heard before me on the 21st December, 1942.

Counsel for the appellant submitted that it should be granted because (a) the appellant is a pauper; and (b) counsel has certified that the grounds of appeal set forth in the notice of appeal motion were drawn by him, and disclose a fit case for appeal.

The grounds of appeal were filed on the 15th September, 1942, that is to say, at a time when counsel for Edwin Adolphus Chung

Tiam Fook thought that if the West Indian Court of Appeal were disposed to relieve Edwin Adolphus Chung Tiam Fook from the forfeiture of his rights under the terms of settlement, his client would be ready, willing and able to fulfil any terms which might be imposed by the Court. Otherwise, counsel could not have advised an appeal. The forfeiture arose by reason of the failure and inability of Edwin Adolphus Chung Tiam Fook to comply with those conditions in the terms of settlement which he had agreed to perform, and the terms of settlement were made an order of Court on the 30th March, 1942. Relief against forfeiture is only granted upon terms. The terms that would be ordered in this case would involve the payment, by the appellant to the respondents of a sum of money far in excess of \$200. The circumstance that the appellant is a pauper and that he can get no one to stand security for him in the sum of \$200, or to lend him the sum of \$200, shows that, if he is successful in his appeal, he would not be able to comply with any terms which may be imposed by the Court of Appeal. When the notice of appeal motion was filed on the 15th September, 1942, the appellant's counsel was unaware that it would not be possible for the appellant to furnish security for costs in the sum of \$200. From the knowledge that I have acquired in these long drawn out proceedings, I am, however, satisfied that the appellant himself well knew that he would not have been able to furnish security for costs.

If the appellant, in his motion filed the 27th August, 1942, for an extension of time to bring the appeal had included in the motion an application for leave to appeal in *forma pauperis* I would have refused both applications.

Edwin Adolphus Chung Tiam Fook, however, waited until after the order was made on the 9th September, 1942, granting him an extension of time to bring the appeal; until after the appeal was brought on the 15th September, 1942; until after the 22nd September, 1942, when the respondents demanded security for the costs of appeal in the sum of \$720; until after the 13th October, 1942, when the copies of the record were filed; until after the 21st October, 1942 when the respondents filed a motion that security for costs be ordered; until after the 16th November, 1942 when the Court ordered security for the costs of the appeal in the sum of \$360 to be furnished within 10 days; and he waited until the 26th November, 1942, the last day for furnishing the security, before he filed his application for leave to prosecute his appeal as a poor person. If, on or before the 15th September, 1942, William Correia had really promised Edwin Adolphus Chung Tiam Fook that he would stand security for him in the sum of \$200, why did not his solicitor write the respondents' solicitor to that effect as soon as he had filed the notice of appeal motion on the 15th September? Why was no reply sent to the respondents' solicitor's letter of the 22nd

E. A. C. TIAM FOOK v. M. HUSSAIN AND ANR.

September? Counsel for Edwin Adolphus Chung Tiam Fook had stated in Court on the 7th September, 1942, that security for the costs of the appeal would have to be furnished by his client, and it is remarkably strange that the appellant's solicitor did not enter into negotiations with the respondents' solicitor as to the amount of the security; and also that the appellant's solicitor remained silent after receipt of the respondents' solicitor's letter of the 22nd September, 1942 demanding security. The only inference that I can draw is that the appellant never really believed that William Correia would stand security for him.

The application of the appellant for leave to prosecute his appeal as a poor person is refused, because—

- (1) on the 27th August, 1942 (after the time for appealing to the West Indian Court of Appeal had expired), the appellant applied for an extension of time to bring the appeal, and in the exercise of my discretion and on the authority of *Gatti v. Shoosmith* (1939) 3 All. E.R. 916, I made an order on the 9th September, 1942, granting the application;
- (2) on the hearing of that application, counsel for the appellant clearly stated that the appellant knew that he would have to give security for costs;
- (3) if an application for leave to appeal as a poor person had been included in the application for an extension of time to bring the appeal, both applications would have been refused;
- (4) if I had known that there was any possibility of an application being made, at a later stage of the proceedings, for leave to prosecute the appeal as a poor person, I would have refused the application for the extension of time, which application was filed after the time limited for appealing had expired;
- (5) the appellant knew on the 27th August, 1942, that, at some stage of the proceedings, he would have to make an application to prosecute the appeal as a poor person, but he did not file such application until the 26th day of November, 1942, on which date his appeal would have automatically stood dismissed for failure to comply with an order of the 16th November, 1942, for security for costs;
- (6) the appellant did not file his application for leave to prosecute his appeal *in forma pauperis* until more than 4 months after the order appealed from was perfected;
- (7) even if the appellant were successful in his appeal and the Court of Appeal relieved him from the forfeiture of his rights under the terms of settlement (made an order of Court on the 30th March, 1942) which forfeiture arose by virtue of his failure to comply with the condi-

E. A. C. TIAM FOOK v. M. HUSSAIN AND ANR.

tions thereof on his part to be fulfilled and performed, the Court of Appeal would only do so upon terms, and the appellant has shown that he would be financially unable to comply with any such terms.

The respondents' costs of and incidental to this application, save and except the costs of and incidental to the hearing on the 14th December, 1942 (which by that order are to be costs in the appeal) are to be paid by the appellant.

The order of the 19th December, 1942, is now spent, and it is not extended.

The order of the 16th November, 1942, as amended by the order of the 14th December, 1942, provides that the appellant shall furnish security for the respondents' costs of appeal in the sum of \$200, on or before the 19th December, 1942: failing which, the appeal shall stand dismissed out of Court. The appellant has failed to furnish such security within the specified, or extended, time, and so the appeal stands dismissed with costs to be paid by the appellant to the respondents.

Application refused.

Solicitors: *H. A. Bruton; J. Edward de Freitas.*

G. DOOBAY v. MOULAI.

GHARBHARAN DOOBAY, Appellant (Plaintiff),

v.

MOULAI, Respondent (Defendant).

[1942. No. 248.—DEMERARA.]

BEFORE FULL COURT: VERITY, C.J., AND DUKE, J. (ACTING).

1942. DECEMBER 22, 31.

Sale of goods—Contract for—Purchase price—Payment on account—At time of conclusion of contract—Guarantee of due performance on part of purchaser—By way of deposit—Contract repudiated, by purchaser—Deposit remains property of vendor—Irrecoverable.

Appeal—Magistrate's court—From decision of—Not from reasons for decision—Decision correct—Reasons wrong—Decision affirmed.

The appellant agreed to purchase from the respondent, and the respondent agreed to sell to the appellant, 224 bunches of plantains at 25 cents per bunch. The contract of sale was made on a Friday for delivery on the following Monday. The respondent had never sold 224 bunches of plantains before; the greatest number of bunches he had previously sold was 60. The appellant advanced the sum of \$20 to the respondent, and the balance of the purchase price was to be payable on delivery. The respondent, in performance of the contract, tendered to the appellant delivery of a launch load of plantains which were in conformity with the contract. The appellant, without ascertaining the quality of the plantains so tendered, rejected the whole launch load of plantains, and he thereby repudiated the contract of sale. The appellant sought to recover from the respondent the sum of \$20 advanced to him.

Held (1) that the payment of the sum of \$20, while it was to be taken on account of the purchase price if the contract of sale were performed, also partook of the nature of a guarantee of due performance on the part of the purchaser, and thus was made by way of deposit; and

(2) that the contract of sale having been repudiated by the purchaser (the appellant herein), the sum of \$20 paid by him by way of deposit at the time of the conclusion of the contract of sale remains the property of the vendor (the respondent herein), and the appellant was not entitled to recover from the respondent the sum of \$20 so paid.

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

The reasons for decision given by a magistrate did not justify the decision which he gave. There was, however, evidence on the record upon which his decision could be upheld upon other, and legal, grounds.

Held that the decision of the magistrate must be affirmed.

APPEAL by the plaintiff from a decision of the Magistrate of the Georgetown Judicial District dismissing his claim against the defendant for damages for breach of contract.

A. J. Parkes, for the appellant.

H. B. S. Bollers, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by Duke, J. (Acting) as follows:—

This is an appeal by the plaintiff from a decision of the magistrate of the Georgetown Judicial District dismissing his claim against the respondent for damages for breach of contract. The appeal, however, only relates to the claim for the return of the sum of \$20 alleged to have been advanced by the appellant to the

respondent on account of the purchase price of certain plantains which the respondent agreed to sell and to deliver to the appellant. The facts as found by the magistrate were as follows. On the 24th January, 1941, the appellant agreed to purchase from the respondent, and the respondent agreed to sell to the appellant, 224 bunches of plantains at 25 cents per bunch. The plantains were required by the appellant for shipment to Trinidad. Delivery was to be made on the 27th January, 1941, at Bookers No. 1 Wharf, Georgetown. In his evidence the appellant stated: "I advanced him (the respondent) \$20, balance payable on delivery." The respondent, in performance of the contract, tendered to the appellant at Bookers No. 1 wharf delivery of a launch load of plantains which were in conformity with the contract. The appellant, without ascertaining the quality of the plantains so tendered, rejected the whole launch load of plantains. The reason for the appellant's rejection of the load of plantains was his inability to obtain barrels for shipping the plantains to Trinidad, and the fact that the steamer by which the plantains were to be shipped was not due to leave before the 30th January, 1941.

While under cross-examination, the respondent stated: I had never sold 224 bunches of plantains before. The greatest number of bunches I sold is 60."

The evidence in the magistrate's court was taken on the 24th October, 1941, and decision was reserved on that day. On the 16th June, 1942, the magistrate delivered his decision in favour of the respondent with costs.

The magistrate found that the contract was broken by the appellant himself; and that it was so broken because it was inconvenient to the appellant to take delivery on the 27th January, 1941, of the plantains which he had agreed to purchase from the respondent. There is no appeal against this finding.

The magistrate held that the appellant, having repudiated the contract, could not recover the sum of \$20 which was paid to the respondent on the 24th January, 1941, on account of the purchase price. The magistrate did not state in his reasons for decision that he had found that the sum of \$20 was paid by way of deposit. The magistrates finding that the contract was repudiated by the appellant is not contested in this Court. Counsel for the appellant, however, submits that as the magistrate did not find that the sum of \$20 was paid by way of deposit, the appellant was entitled to recover from the respondent the sum of \$20, paid on account of the purchase price, less any damages and expenses which the respondent may have suffered and incurred by reason of the failure of the appellant to perform and complete his contract; and that there was no evidence led in the magistrate's court as to such damages or expenses.

If the sum of \$20 was not paid by way of deposit, then the

G. DOOBAY v. MOULAI.

appellant would be entitled to recover from the respondent the sum of \$20 less any damages and expenses suffered and incurred by the respondent by reason of the failure of the appellant to perform and complete his contract. And, as in this case, there is no evidence of any such damages or expenses, the appellant would be entitled to recover the entire sum of \$20 from the respondent.

It is settled law, however, that where a payment on account of purchase price is made by way of deposit, the sum so paid is forfeited to the vendor if the contract of sale is repudiated by the purchaser.

An appeal is from the decision, and not from the reasons for decision. So that if the sum of \$20 was indeed paid by way of deposit, we could not reverse the decision of the magistrate inasmuch as, although his reasons for so deciding would be erroneous, his decision, which was that the appellant was not entitled to recover from the respondent the sum of \$20, would be correct. It is therefore necessary for us to determine whether the sum of \$20 was paid by way of deposit or not.

The respondent did not state in his evidence that the sum of \$20 was paid by way of deposit, but, as was pointed out by de Freitas, J. (Ag.) in *Bhola Persaud v. van Tull* (1922) L.R. B.G. 44, 49, the Court is not precluded from holding that it was in effect paid by way of deposit, and subject to the same consequences as if it had been paid *eo nomine* as a deposit, if the evidence justifies the Court in so holding. In *Nadim Antar v. John G. Valverde*, 24th August, 1942, West Indian Court of Appeal, the appellant had brought a claim against the respondent to recover the balance \$143.96 of a sum of \$500, advanced by him to the respondent (after deducting therefrom the value of certain cedar supplied by the respondent and accepted by the appellant), and damages for breach of a contract entered into between the parties for the sale and purchase of timber. The respondent counterclaimed for damages for breach of contract. The trial judge found that the respondent had been guilty of no breach of the contract, and dismissed the plaintiff's claim with costs; he also found that the appellant had broken the contract but the respondent having suffered no loss, he entered judgment for the respondent on the counterclaim for one shilling and costs. The appellant and the respondent had entered into a contract for the sale to the appellant by the respondent of certain timber by description, and by one of the terms of the contract the appellant advanced to the respondent \$500 on account thereof, at the time the contract of sale was concluded. The respondent supplied certain timber which was rejected by the appellant without good cause, and the appellant thereby broke and repudiated his contract. In his evidence the respondent stated: "I asked for an advance because order was large and wood would have to be got from the forest . . . I do not as a rule get \$500

advance on contracts. When such an advance is made it means that he wants wood." In the course of their judgment the West Indian Court of Appeal said that "those words would appear to indicate that the respondent asked for this payment as some guarantee that the appellant really wanted the timber and that the getting of this large quantity of wood from the forest would not be thrown away." And the Court held that "the inclusion of the payment of this sum on account in the terms of the contract, its payment then and there, and the evidence as to the manner in which it came to be made, all justify the conclusion that this payment, while it was to be taken on account of the purchase price if the contract was carried out, yet also partook of the nature of a guarantee of due performance on the purchaser's part. That being so, the authorities are abundantly clear that it cannot be recovered by a purchaser who is in default."

In this appeal, the contract of sale was in respect of 224 bunches of plantains at 25 cents a bunch; and it was made on a Friday for delivery on the following Monday. The appellant advanced the sum of \$20 to the respondent and the balance of the purchase price was to be payable on delivery. The payment of \$20 was made at the time of the conclusion of the contract. The respondent had never sold 224 bunches of plantains before; the greatest number of bunches he had previously sold was 60.

In our view, this circumstance would appear to indicate that the respondent obtained the payment of the sum of \$20 as some guarantee that the appellant really wanted 224 bunches of plantains; and we are of the opinion that the payment of \$20, while it was to be taken on account of the purchase price if the contract of sale were performed, also partook of the nature of a guarantee of due performance on the part of the purchaser, and thus was made by way of deposit.

The contract having been repudiated by the purchaser (the appellant herein), the sum of \$20 paid by him by way of deposit at the time of the conclusion of the contract of sale remains the property of the vendor (the respondent herein), and the appellant is not entitled to recover from the respondent the sum of \$20 so paid.

The appeal is therefore dismissed, and the decision of the magistrate is affirmed, with costs.

Appeal dismissed.

J. C. TIAM FOOK v. L. SLATER.

JOHN CHUNG TIAM FOOK, Appellant (Defendant),

v.

LESLIE SLATER, Respondent (Complainant).

[1942: No. 314.—DEMERARA.]

BEFORE FULL COURT: VERITY, C.J., AND DUKE, J. (ACTING).

1942. DECEMBER 22, 31.

Criminal law and procedure—Police trap—Detection of offences by—Agent of police—Evidence of—Corroboration—Not required in law.

Defence Regulations—Price control order—Retail transaction—Sale of 200 pounds fine salt—Not sale by retail—Order 636 B of 14th May, 1942.

Defence Regulations—Price control order—Order 636 B of 14th May, 1942, paragraph 11—Only offence thereunder in so far as selling is concerned—Selling a price controlled article at a price exceeding the maximum price prescribed by the Order.

Criminal law and procedure—Offence—Particulars of offence—Amendment of—Criminal Justice Ordinance, 1932 (No. 21), s. 7—Summary Jurisdiction (Procedure) Ordinance, cap. 14, s. 94 (2)—Conviction for offence as described in particulars—Appeal—Particulars held not proved—Conviction set aside.

Those who aid the police in the detection of offences by means known as a “police trap” are not to be held to be accomplices, a word which is considered as involving a wicked complicity in the breaking of the law so as to make the party thereto guilty of such moral turpitude that it is unsafe to accept his sworn testimony without corroboration. The conduct of an agent of the police even though in most cases it may involve him in the technical commission of some breach is not to be placed in the same category, and the rule as to corroboration does not apply.

The sale of a 200 lbs. bag of such a commodity as fine salt is not a retail transaction within the meaning of Order 636 B dated the 14th May, 1942 made by a competent authority under regulation 44 of the Defence Regulations, 1939.

In so far as selling is concerned, there is one offence only which is created by paragraph 11 of Order 636 B dated the 14th May, 1942 made by a competent authority under regulation 44 of the Defence Regulations, 1939, and that offence is that of selling a price controlled article at a price exceeding the maximum price prescribed by the Order.

In a complaint for selling above the fixed price contrary to paragraph 11 of the Order, it was alleged in the particulars of offence that the defendant “did sell by wholesale . . . one 200 lbs. bag of salt (imported fine) for seven dollars which price exceeded the maximum wholesale price of this article which is at the rate of \$4.35 per bag of 200 lbs. as set out in List A to the first Schedule of the said order.” While the second witness for the prosecution was being cross-examined, application was made for an amendment of the charge so that the word “retail” should be substituted for “wholesale” where it appeared in the complaint, and so that the price fixed by the Order should appear therein as “3 cents per pound”. The magistrate granted the amendment.

Held that the magistrate had power to grant the amendment. The magistrate found that the 200 lbs. bag of salt (imported fine) was sold for \$7, that the transaction was a retail transaction, and he convicted the defendant accordingly. On appeal it was held that the transaction was not a retail transaction.

Held (1) that the prosecution having determined upon the particulars of the offence alleged, the conviction if based thereon must stand or fall by their proof or lack of proof, for otherwise an accused person lies open to conviction on a charge the nature of which has not been communicated to him and to which he has been enabled to lead no defence; and

(2) that there was no amendment which the Court of Appeal could make with propriety, and the conviction and sentence must therefore be set aside.

J. C. TIAM FOOK v. L. SLATER.

APPEAL by the defendant from a decision of a Magistrate of the Georgetown Judicial District convicting him of selling by retail a certain price-controlled article, to wit, one 200 lbs. bag salt (imported fine) for \$7 a price exceeding the maximum retail price, to wit, at the rate of 3 cents per pound; prescribed by Order No. 636 B made by the competent authority pursuant to regulation 44 of the Defence Regulations, 1939.

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

S. E. Gomes, Assistant Attorney-General, for respondent.

Cur. adv. vult.

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

This is an appeal from a conviction for selling a price-controlled article at a price exceeding the maximum price fixed by Order 636 B made by the Competent Authority under Regulation 44 of the Defence Regulations, 1939.

The complaint upon which the appellant was summoned in the first place stated the offence to be that of “selling above the fixed price contrary to paragraph 11” of the order and in the particulars of offence it was alleged that the appellant “did sell by wholesale . . . one 200 lbs. bag of salt (imported fine) for seven dollars which price exceeded the maximum wholesale price of this article which is at the rate of \$4.35 per bag of 200 lbs. as set out in List A to the first schedule of the said Order”

While the second witness for the prosecution was being cross-examined application was made for an amendment of the charge so that the word “retail” should be substituted for “wholesale” where it appeared in the complaint and so that the price fixed by the Order should appear therein as “3 cents per pound.” This application arose from certain evidence given by this witness from which it may have appeared that the premises used by him for his business on the day of his purchase were not licensed and that the transaction might not, therefore, fall within the definition of the word “wholesale” laid down by the Order. The learned Magistrate heard argument and considered his decision upon this application, which he ultimately allowed on the ground that the substantive offence created by para. 11 of the Order is selling a price-controlled article at a price exceeding the maximum price prescribed by the Order and that particulars relating to the kind of sale merely indicate the manner of committing the offence and the column of the Order which must be looked at for ascertaining the maximum prescribed price, He further held that the particulars might have been stated by reference to the relevant column and any error in stating the column might have been amended. Considering this to be merely a variance between complaint and evidence as contemplated by Sec. 94 (2) of the Summary Jurisdiction (Procedure) Ordinance, Cap. 14 he allowed

J. C. TIAM FOOK v. L. SLATER.

the amendment and the hearing proceeded upon the basis that the particulars of the offence were that the appellant had sold the article by retail, The appellant was convicted and the conviction as drawn up by the Magistrate repeats the particulars as amended. In the first place it is submitted on behalf of the appellant that the learned Magistrate had no power to make the amendment in that by the Order two distinct offences were created, (1) by selling by wholesale at a price exceeding the maximum wholesale price, and (2) selling by retail at a price exceeding the maximum retail price. It is argued that in such case the amendment substituted a different offence for that with which the appellant had been charged, that this exceeded the powers of the Court and the appellant could not properly be so convicted.

We are unable to agree with the basis upon which this argument rests. Paragraph 11 creates one offence and one offence only in so far as selling is concerned, that of selling a price-controlled article at a price exceeding the maximum price prescribed by the Order. It is necessary by reason of Section 7 of Ordinance 21 of 1932 that the complaint should contain such particulars as may be necessary for giving reasonable information as to the nature of the charge. These particulars in the present case disclose the price at which the article was alleged to have been sold and the maximum price fixed by the Order. The Order provides for a variety of maximum prices in respect of price controlled articles, falling under four different heads and to be found in four different columns, but this does not create four different offences. In order to determine which of the fixed prices is applicable to any given case it is necessary to prove the circumstances of the sale: the kind of goods sold, the quantity sold, the price at which they were sold and the nature of the sale. If the particulars allege that the price exceeded is a maximum wholesale price then it may be necessary to prove that the transaction falls within the definition of "wholesale" laid down in the Order, for so only can it be determined whether the maximum wholesale price applies and whether it has been exceeded. There is, in our view, nothing in all this which can be held to create more than one offence. It is a matter of particulars and of proof only and naturally the particulars and the evidence necessary to establish them will differ in different cases. Such differences however do not constitute different offences.

We are satisfied therefore that the learned Magistrate had the power to make the amendment and had there been grounds which justified him in doing so we should not have hesitated to uphold the conviction for we see upon the record nothing which would lead us to believe that he took a wrong view as to the price charged or that he failed to direct himself correctly thereon as is submitted by counsel for the appellant. There is nothing in the circumstances of the present case to distinguish it on principle

from those in which it has been held that those who aid the police in the detection of offences by means known as a "police trap" are not to be held to be accomplices, a word which is considered as involving a wicked complicity in the breaking of the law so as to make the party thereto guilty of such moral turpitude that it is unsafe to accept his sworn testimony without corroboration. The conduct of an agent of the police even though in most cases it may involve him in the technical commission of some breach is not to be placed in the same category and the rule as to corroboration does not apply.

In the present case however a further point has to be considered. The particulars of the offence alleged set out that the sale in question was a sale by retail and that the offence involved selling at a price exceeding the maximum retail price prescribed. It is in accordance with these particulars that the appellant has been convicted. Although such particulars do not in themselves constitute what, for the sake of clarity, we will call a different class of offence they do, once they have been determined, constitute the particular nature of the offence which the defendant is alleged to have committed and by the proof of such particulars, if material, the conviction must stand or fall if it purports to have been founded thereon.

It is to be observed that in the Order the term "wholesale" has received a definition by reason of which throughout the Order, unless the context otherwise requires, the term is to be given a restricted and in certain cases no doubt an artificial meaning. It may be open to question, therefore, whether the Court would be justified in going beyond the definition in order to determine whether or not a transaction is a wholesale transaction. There is no such definition of the word "retail" however, and this word must therefore be construed according to its ordinary meaning. It was suggested on behalf of the respondent that in the Order this word means any sale other than wholesale and indeed the power of definition is so untrammelled that the Competent Authority could very easily so have defined "retail" had that been the intention. If has not been so defined, however, and we know of no rule of construction which would enable us to apply such a method of defining a word which in itself is clear and without ambiguity. There may be difficulty in applying the word to any given case as the learned Assistant Attorney-General suggested in the course of argument and no doubt a particular definition if embodied in the Order might have removed this difficulty but nevertheless the word itself in its ordinary use means no more, according to the Shorter Oxford Dictionary, than the sale of commodities in small quantities. It appears to us that to apply the word retail as so defined to the sale of a 200 lbs. bag of such a commodity as fine salt would be placing an illegitimate strain upon the language of the Order, a strain which is only aggravated by the evidence given by the prosecution as to the

J. C. TIAM FOOK v. L. SLATER.

nature and purpose of the transaction. That this is so is clearly shown, moreover, by the conduct of the prosecution which in the first place conceived that this transaction was wholesale and resorted to a different view only when a technical flaw in the evidence appeared to bring it outside the artificial definition of "wholesale" laid down by the Order.

While it may be that the evidence did not establish a wholesale transaction within the meaning of the Order we are clearly of the opinion that it was not a retail transaction within the ordinary meaning of that term. The learned Magistrate erred in finding that it was a retail transaction and in this respect the conviction is wrong.

As we have already said the prosecution having determined upon the particulars of the offence alleged the conviction if based thereon must stand or fall by their proof or lack of proof, for otherwise an accused person lies open to conviction on a charge the nature of which has not been communicated to him and to which he has been enabled to lead no defence. There is no amendment which this Court could make with propriety and the conviction and sentence must therefore be set aside. The success of this appeal does not indicate any approval of the appellant's conduct as disclosed by the evidence. From the point of view of public morality the penalty inflicted by the learned Magistrate would have been well deserved had the appellant been properly convicted. While he has succeeded in evading breach of the terms of the Order he has shown himself capable of flagrant departure from its spirit. His appeal is allowed but there will be no order as to costs.

It is desirable that we should make two further observations on this case. Firstly, it may well be that as the result of the investigation of an alleged offence which has been reported to the police, proceedings may be instituted which fail for some such reason as that which appears to have led to the change of front presented by the prosecution in this case. It is difficult to understand why such a situation should be allowed to arise in the course of proceedings based upon circumstances selected by the police themselves. Secondly, we would draw the attention of the Competent Authority to difficulties which have arisen and may arise in variant form from a restrictive definition of the word "wholesale", no definition of the word "retail" and the possibility therefore of a gap between the two, a situation which if exploited with sufficient ingenuity might open the way to the worst possible form of "black marketing".

Appeal allowed.

L. SLATER v. WIETING & RICHTER, LTD.

LESLIE SLATER, Appellant (Complainant),

v.

WIETING & RICHTER, LTD., Respondent (Defendant).

[1942 No. 296.—DEMERARA.]

BEFORE FULL COURT: VERITY, C.J., AND DUKE, J. (ACTING)

1942. DECEMBER 22, 31.

Appeal—From magistrate's court—Extension of time—Motion for—To file additional copies of record for use of Court—No jurisdiction to grant—If copies not lodged within statutory time—Default in due prosecution of appeal—Summary Jurisdiction (Appeals) Ordinance cap, 16, ss. 13 (2), 16 (1).

The Full Court has no jurisdiction to extend the time limited by section 13 (2) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16, for lodging with the Registrar the two additional copies of the record for the use of the Court at the hearing of an appeal.

If an appellant fails to lodge with the Registrar, within the time specified in section 13 (2) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16, the two additional copies of the record for the use of the Court at the hearing of an appeal, the appellant has made default in the due prosecution of his appeal, and by virtue of section 16 (1) the appeal is deemed to have been abandoned.

MOTION by the appellant for an extension of time to lodge with the Registrar the two additional copies of the record for the use of the Court at the hearing of the appeal, as required by section 13 (2) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16.

S. E. Gomes, Assistant Attorney-General, for the appellant.

H. C. Humphrys, K.C., for the respondent.

Cur. adv. vult.

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

In this matter the applicant moves the Court for an order allowing an extension of time in which to lodge with the Registrar the additional copies of the record in an appeal required by section 13 (2) of the Summary Jurisdiction (Appeals) Ordinance, ch. 16, he having failed through inadvertence to do so within the time specified.

It is unnecessary to refer specifically to any of the numerous cases in which it has been clearly laid down, as is indeed admitted by the applicant that the right of appeal depending entirely upon statute it is conferred only upon those who comply strictly with the conditions imposed by the statute which creates it

The learned Assistant Attorney-General has been persuasive in his submission that such conditions may be divided into two classes, the essential and the non-essential, and that the requirements of the statute may therefore be considered as obligatory or merely directory as they relate to the two classes of condition.

L. SLATER v. WIETING & RICHTER, LTD.

The argument is attractive from the practical point of view but we are unable to find any authority for its adoption either in the decided cases or in the statute.

The requirement that two additional copies of the record be lodged within a specified time is a statutory condition precedent to the entering of the appeal for hearing. That the appeal be so entered is a condition precedent to hearing. Failure to take the steps necessary to secure that the appeal be entered for hearing is therefore default in the due prosecution of the appeal and by virtue of section 16 (1) the appeal is deemed to have been abandoned.

The question arises whether this Court has power to extend the statutory time, so as to enable the intended appellant to rebut the presumption of abandonment by now taking the prescribed step in which he is in default. It does not appear that the Court has such power. There are two provisions in the Ordinance for the extension of time: one under section 6 relating to appeals in certain cases and within which the present appeal does not fall, and the other under section 14 whereby if anyone entitled to appeal is unavoidably prevented from so doing in the manner or within the time prescribed he may apply to the Court for special leave to appeal. The present matter does not fall within this section nor is it indeed suggested that it does so.

The statute has, therefore, made provisions for the allowance of extensions of time in certain cases, and, in our view, by so doing has precluded extension in all other cases.

This motion must therefore be refused with costs and the Registrar will doubtless take the appropriate action under section 16 of the Ordinance.

We have come to this conclusion with reluctance and regret. Statutory provision for the supply of additional copies of the record within a specified and limited time for use of the Court as a condition precedent to the prosecution of an appeal is, we believe, unusual and is, in our view, undesirable. While it is convenient and desirable that such should be supplied before hearing, the Court may, by its rules, prescribe the time within which the step is to be taken and where such time is so prescribed may always for sufficient cause grant an extension. It is otherwise when the time is prescribed by statute and no provision made for its extension. We would draw this aspect of the matter to the attention of the proper authorities for we are of the opinion that it is most undesirable that an appellant should lose his right of appeal by reason only of failure to comply with a requirement aimed solely at securing the convenience of the Court.

Motion refused.

THE WEST INDIAN COURT OF APPEAL.

REPORTS OF DECISIONS

OF

THE COURT

SITTING IN

TRINIDAD AND TOBAGO

[1942]

AND IN

BRITISH GUIANA.

[1942.]

JUDGES OF THE COURT:

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

ERNEST ALLAN COLLYMORE, C.J., Barbados.

JAMES HENRY JARRETT, C.J., Leeward and Windward Islands.

JOHN VERITY, C.J., British Guiana.

M. DIN v. BOODHOO AND TETRY.
 IN THE WEST INDIAN COURT OF APPEAL.
 ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.
 MOHAMED DIN, Appellant (Plaintiff),
 v.
 BOODHOO AND TETRY, Respondents (Defendants).

[1941. No. 3.]

Before GERAHTY, C.J., Trinidad and Tobago (President); JARRETT, C.J.,
 Windward and Leeward Islands; and VERITY, C J., British Guiana.

1942. MAY 26, 27.

Evidence—Right of way—Action claiming—Whether prima facie case made out.

The plaintiff claimed against the defendants a right of way over a strip of land, an injunction restraining the defendants from obstructing the Said way, and damages. When the case for the plaintiff was closed, there was evidence that in accordance with the plan mentioned in his transport there was a dam leading from his land to a road; that the transport by the first named defendant to the second named defendant was passed in accordance with the said plan, and that there was a user of the disputed area (the dam) by the plaintiff and his predecessors in title for 20 years or more. The plaintiff's action was dismissed, without the defendants being called upon for a defence. The plaintiff appealed to the West Indian Court of Appeal.

Held (1) that the evidence adduced must be deemed to have placed upon the defendants the onus of showing by evidence that the intention and effect of the transport which had been passed in favour of the first named defendant, was lawfully to exclude the plaintiff from user of the dam; and

(2) that there must be an order for a new trial.

APPEAL by the plaintiff from the judgment of Camacho, C.J., British Guiana, reported at (1941) L.R.B.G. 116. The trial judge dismissed the action without calling on the defendants for a defence.

C. A. Burton, for the appellant,

C. Shankland and *L. M. F. Cabral*, for the respondents.

Cur. adv. vult.

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

In this case this Court sees no alternative but to order a new trial. For this reason we refrain from expressing any opinion on the merits of the dispute between the parties in order not to prejudice the trial of any of the issues which may arise for determination.

This Court is adopting this course because, in its opinion, the learned trial Judge erred in not calling upon the defence to answer the *prima facie* case made out by the plaintiff-appellant (1) on the production by him of his transport made in accord-

M. DIN v. BOODHOO AND TETRY.

ance with the plan of the 11th December, 1908, which conformed with the requirements of section 27 of Chapter 84, (2) in the production of evidence of the transport of lot 24, from defendant-respondent Tetri to defendant-respondent Boodhoo in accordance with the same plan, and (3) by uncontradicted evidence of user for 20 years or more of the disputed area by the appellant and his predecessors in title.

In our view these factors must be deemed to have placed upon the defendants the onus of showing by evidence that the intention and effect of Tetri's transport from the New Colonial Company, Limited, was lawfully to exclude the appellant from user of the dam marked on the plan referred to in his transport.

Costs of this appeal to appellant. Costs in Court below to abide the event of the new trial.

Appeal allowed; new trial ordered.

Solicitors: *Vivian C. Dias; Carlos Gomes.*

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

DEMERARA COMPANY, LIMITED, Appellants (Defendants),

v.

MATILDA DOUGLAS, Respondent (Plaintiff).

[1942. No. 2.]

Before GERAHTY, C.J., Trinidad and Tobago (President); JARRETT, C.J., Windward and Leeward Islands; and VERITY, C.J., British Guiana.

1942. MAY 29; JUNE 1.

Appeal—Question of fact—Finding of trial judge on—Against weight of evidence—Reversed by Court of Appeal.

Where the finding of a trial judge on a question of fact was against the weight of evidence, his decision was reversed by the Court of Appeal.

APPEAL by the defendants from a judgment of Stuart, J. reported at (1941) L.R.B.G. 123.

H. C. Humphrys, K.C. for the appellants.

A. J. Parkes, for the respondent.

Cur. adv. vult.

DEMERARA COMPANY, LTD., v. M. DOUGLAS.

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

This Court thinks no useful purpose would be served by reserving this judgment, as the determination of this appeal merely involves a question of fact. Is there any evidence to support the learned trial Judge's findings of fact set out on pages 50 and 51 of this record?

The learned Judge found *inter alia* that the fire was started by Ramgolam or one of his gang by his orders or with his permission and further that Ramgolam and/or his gang used fire. This Court has searched the record in vain to find evidence to support these two vital findings. There is, in our opinion, no such evidence or proof of facts upon which the learned Judge could reasonably draw the inferences which he did. All that the evidence disclosed is that a fire started on Prosperity estate, the property of the defendants (appellants) where a gang of labourers in the employ of the appellants was working.

We agree that this raised a presumption for the appellants to answer and they have sought to answer it by showing that the fire was not in fact started or used through their agency. We cannot help feeling that the learned Judge approached the evidence of the appellants and their witnesses in a wrong manner.

Having regard to his erroneous findings referred to above and in the circumstances, we think that this Court is justified in basing its conclusions upon the weight of evidence as disclosed by the record.

In this case there is no conflict of evidence on the vital question of the negligent use of fire by the appellants' servants, for the respondent, as far as the evidence is concerned, has allowed her case to rest upon that of the appellants and a presumption arising from the fact that the fire originated on the appellants' land. On this question, therefore, the evidence for the appellants stands uncontradicted and we consider it would be against the weight of evidence to come to a contrary conclusion as the learned Judge has apparently done.

In our opinion, any presumption which may have arisen on the respondent's case has been rebutted by the defence and the appellants cannot be held liable for the results of a fire which has originated from some external cause and without proof of negligence.

In the result the appeal must be allowed with costs. The judgment of the lower Court is set aside and we order that judgment be entered therein for the defendants with costs.

Appeal allowed.

Solicitors: *J. E. deFreitas; T. A. Morris.*

J. MUNROE v. U. M. DIAS.
 IN THE WEST INDIAN COURT OF APPEAL
 ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.
 JAMES MUNROE, Appellant, (Defendant).
 v.
 URSULA MENDES DIAS, Respondent (Plaintiff).

[1942 No. 1].

Before GERAHTY C.J.; Trinidad and Tobago, (President); JARRETT, C.J.; Windward and Leeward Islands; and VERITY, C.J.; British Guiana.

1942. MAY, 28, 29; JUNE, 3.

Evidence—Unregistered money-lender—Defence of—Onus of proof—That plaintiff carrying on business as money-lender—On defendant.

Money-lender—“Holding out”—Meaning of—Representation, canvassing or the like—Willingness to lend money as a business—Money-lenders Ordinance, cap. 68, s. 2.

Money-lending—Mortgage transactions—Not evidence of—Unless taken in course of business as money-lender—Transfer of mortgage—Not in itself a loan transaction—System, repetition and continuity of dealings—Before person can be deemed a money-lender.

Where a defendant pleads the Money-lenders Ordinance, cap. 68, the onus is on him in the first instance to prove that the plaintiff was carrying on business as a money-lender.

“Holding out” as used in section 2 of the Money-lenders Ordinance, cap. 68, must be construed to denote some form of representation, canvassing or the like, by a person of his willingness to lend money as a business.

No inference of money-lending can properly be drawn from mortgage transactions as such unless it is substantiated that they were taken by the mortgagee in the course of his business as a money-lender.

A transfer of a mortgage cannot in itself be deemed to be a loan transaction, unless it be shown that the form of the transaction is in fact a device to conceal that it was a loan transaction by the transferee.

System, repetition and continuity of dealings must be proved before a person can be deemed to be a money-lender within the meaning of the Money-lenders Ordinance, cap. 68.

APPEAL by the defendant from a judgment of Stuart, J., reported at (1941) L.R.B.G. 107.

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

S. L. van B. Stafford, K.C.; for the respondent.

Cur. adv. vult.

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

This is an appeal from the judgment of Stuart, J., upon two consolidated actions in which he gave judgment for the plaintiff in claims to foreclose certain mortgages and to bring the mortgaged properties to sale at execution.

By the defences respectively the amounts of the loans and mortgages were admitted. It was however contended that the plaintiff at the material dates was a money lender within the meaning

J. MUNROE v. U. M. DIAS.

of the Money Lenders Ordinance, Chapter 68, and was not registered under the Ordinance. Accordingly it was contended that the plaintiff is precluded in law from recovering against the defendant on the mortgages and from enforcing payment of capital and interest as provided in the Mortgage Deeds and that the transactions are illegal and void.

The learned judge found on the admitted facts that the plaintiff was not carrying on the business of a money lender as defined in the Ordinance.

On a consideration of the admitted transactions as a whole, this Court finds itself in entire agreement with the finding of the learned judge and is satisfied that the plaintiff was not a money lender under the Ordinance at the material dates. An analysis of the transactions in their entirety shows that they consisted of:

- (1) 4 promissory notes for small amounts between 1924 and 1927.
- (2) 2 purchases of mortgages in 1933 and 1934.
- (3) 4 promissory notes, two bills of sale, 7 mortgages and 1 purchase of mortgage between 1935 and 1938.

No transactions have been shown to have been made between 1927 and 1933 and in the year 1937.

In the opinion of this Court the three transactions involving purchase and transfers of mortgages cannot be deemed to be loan transactions in themselves unless it be shown by the defendant that the form of each transaction is in fact a device to conceal that it was a loan transaction by the transferee.

Furthermore we consider that no inference of money lending can properly be drawn from the seven mortgage transactions as such unless it is substantiated that they were taken by the plaintiff in the course of his business as a money lender. See *In re Robinson's Settlement: Gant v. Hobbs* (1912) 1 Ch. 717.

In our view, however, regarding these mortgages together with and in the light of the remaining transactions between 1924 and 1927 and between 1935 and 1938 the plaintiff's dealings during these periods do not disclose that system, repetition or continuity necessary to bring the plaintiff within the ambit of the Money Lenders Ordinance. See *Edgelow v. Mac Elwee* (1918) L. T. 177 and *Newton v. Pyke* (1908) 25 T. L. R. 127.

In this Court it has been argued that the plaintiff was holding herself out as carrying on the business of a money lender as shown by the admitted transactions. In our view "holding out" as used in section 2 of the Ordinance must be construed to denote some form of representation, canvassing or the like by a person of his willingness to lend money as a business. There is no evidence at all of this in the present case.

The onus was clearly upon the defendant in the first instance to prove that the plaintiff was carrying on business as a money lender. (*See Fagot v. Fine* (1911) 105 L. T. 583). This Court

J. MUNROE v. U. M. DIAS.

agrees with the learned judge that the defendant failed to discharge that onus and we see nothing in the admissions made by the plaintiff to shift the onus as contended by counsel for the defendant-appellant.

As the decision in the Court below did not rest upon the question of estoppel and as a decision on the question is not necessary in the determination of this appeal, we refrain from any comment on this aspect of the case.

For the reasons given the appeal is dismissed with costs.

Appeal dismissed.

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

EVA T. DA SILVA v. SUKHRAJ.

EVA T. DASILVA, Plaintiff,

v.

SUKHRAJ, Defendant.

[1940. No. 73.—DEMERARA.]

BEFORE STAFFORD, J. (ACTING).

1941. DECEMBER 8, 15, 18; 1942; FEBRUARY 20.

Opposition to transport or mortgage—Grounds of—Since 1893—Right to or in property—Liquidated demand.

Transport or mortgage—Right to oppose—Principles—As laid down in 1892 and 1893—Whether those principles should have been judicially declared as the law.

Practice—Joiner of causes of action—Rules of Court, 1900, Order 16, as enacted in 1932—Supreme Court of Judicature Ordinance, Cap. 10, s. 33—Opposition to transport or mortgage—Action to enforce—Independent causes of action may be joined with—Subject to power of Court to order separate trials where necessary.

Practice—Independent cause of action joined with opposition action—Trial of—Relief or remedies granted—Only such as appropriate to each cause.

As a result of the judgments delivered in *Administrator General re DaCosta v. Willems* (1892) 2 L.R.B.G., 130, and in *Hogg v. Butts* (1893), 3 L.R.B.G., (N.S.) 88, opposition does not lie in respect of an unliquidated demand.

Discussion by Stafford, J. (Acting) as to whether those cases were rightly decided.

The plaintiff in an opposition suit may, subject to the power of the Court to order separate trials of causes which it may appear inconvenient to try together, include, by virtue of Order 16 of the Rules of Court as enacted by paragraph VIII. of the Rules of Court, 1932, in his statement of claim a cause of action which could not have been the subject of an opposition to the passing of a transport or mortgage.

The plaintiff entered opposition to the passing of a transport on the ground that there was an agreement between the plaintiff and the defendant, and certain liquidated amounts had become due to the plaintiff thereunder at the time of the entry of the opposition. The plaintiff alleged that when the statement of claim was delivered, she was entitled to further relief under the agreement as a result of continuing breaches thereof, and she included in her statement of claim a claim for such relief. The defendant objected that the claim for additional relief should be struck out, as no leave had been obtained under rule 9 of the Rules of the Supreme Court (Deeds Registry), 1921. That rule reads as follows: "Unless by leave of the Court, the opponent may not, in the action to be brought as aforesaid, allege in his statement of claim, or rely upon, any reason for opposition other than those contained in the statement thereof filed in the registry. An application to the Court under this rule shall be made on summons." The defendant further objected, that, in so far as the claim for the additional relief related to unliquidated damages, it could not form the subject of, or be associated with, an opposition action. The plaintiff contended that the claim for the additional relief was properly joined in accordance with the provisions of Order 16, as enacted in 1932.

Held (1) that although a plaintiff under rule 9 of the Rules of the Supreme Court (Deeds Registry), 1921, may not add to, or rely upon, grounds of opposition other than those alleged in his notice of opposition, there is no valid objection (bearing in mind the provisions of section 33 of the Supreme Court of Judicature Ordinance, cap. 10, and of Order 16 of the Rules of Court as enacted in 1932) to independent causes of action being joined with causes of action brought in pursuance of and coupled with opposition claims, subject to the power of the Court to order separate trials of causes which it may appear inconvenient to try together;

EVA T. DASILVA v. SUKHRAJ.

(2) that the plaintiff was really asking for all the additional relief to which she had become entitled, since opposition, on the same causes of action on which her opposition was founded: continuing breaches of a contract of tenancy by reason of which claims for rent and for damages accrued to the plaintiff. She was not seeking to add a claim on a new and totally different cause of action; and

(3) That the claims were therefore properly joined.

Where in an action brought to enforce an opposition the plaintiff joins other causes of action, the Court will only grant in respect of each cause of action so brought, the relief or remedies appropriate to it, and no remedy or relief applicable to one cause can be obtained merely on the success of another cause.

Action by the plaintiff to restrain the passing of a transport. In her statement of claim the plaintiff claimed relief which had accrued since the entry of opposition, and she joined causes of action not included in the reasons for opposition. The defendant applied to have struck out of the statement of claim all reference to causes of action or relief not contained in the reasons for opposition.

L. M. F. Cabral, for plaintiff.

J. L. Wills, for defendant.

Cur. adv. vult.

STAFFORD, J. (Acting): In the indorsement of claim on the writ in this action, the plaintiff claimed (a) a declaration that an opposition founded on a liquidated claim for debt entered by the plaintiff against the passing of transport by the defendant of a certain property of the defendant's was just legal and well founded; (b) an injunction restraining the defendant from transporting or otherwise dealing with the said property; (c) \$145 arrears of rent or alternatively, damages for breach of a contract of tenancy for hire of a factory; (d) such other relief as the Court deemed fit.

In her Statement of Claim, at paragraph 2, the plaintiff set forth verbatim a Notice of Opposition, which she had entered on the 16th March, 1940, omitting the claim for relief therein. It appears from the notice so recited that, having stated the defendant's indebtedness for rent up to March, 1940, at paragraph (iii), the plaintiff proceeded in paragraph (iv) to set forth certain fixed and liquidated sums amounting to \$900 which would further accrue to her between March, 1940 and October, 1940 under the same agreement of lease, but not accrued due, owing or payable at the date of opposition. In paragraph 3 of the Statement of claim, the plaintiff repeated and relied upon the allegations in the notice of opposition and in paragraph 4 alleged service thereof on the defendant.

In paragraph 5 of her Statement of Claim the plaintiff alleged that the defendant's failure to pay rent had continued down to the month of October, 1940 (when the statement of claim was filed). Paragraphs 6 to 10, inclusive alleged further terms of the agreement of lease and breaches thereof which had not been stated in the notice of opposition; and in her claim for relief,

EVA T. DASILVA v. SUKHRAJ.

after asking for a declaration as to the justice and legality of her opposition and for an injunction—as set forth in her Writ—the plaintiff claimed the enhanced amount of rent due to October, 1940, and she further claimed damages in the sum of \$40 for the breaches of contract. Alternatively, she claimed, in lieu of the rent and damages aforesaid, \$500 as damages for breach of agreement.

The defendant in his defence denied the allegations in the notice of opposition as repeated in the statement of claim and took exception to paragraphs 5 to 10, inclusive, of the Statement of Claim, on two grounds, which were later elaborated in the submissions of his counsel as set forth hereinafter. With the remainder of the defence and with the defendant's counterclaim, for the purpose of this ruling, the Court is not presently concerned.

On the action coming on for hearing on the 15th December, 1941, counsel for the plaintiff applied to amend the indorsement of claim on the writ in accordance with a notice sent by plaintiff's solicitor to defendant's solicitor on the 2nd December, 1941. The amendment was aimed at bringing the indorsement into conformity with the additional amounts of rent to October, 1940, and damages, as claimed in the Statement of Claim. Counsel for the defendant opposed the amendment, and during the argument it was agreed by counsel for both parties that all submissions *re* the amendment should be considered as addressed also to the defendant's contention set forth in paragraph 2 of his defence aforementioned; and the matter was then argued as an application to strike out certain allegations in the statement of claim.

Counsel for the defendant submitted, shortly, (a) that paragraphs 5 to 10 of the statement of claim were "grounds" other than those set forth in the Reasons and the plaintiff not having asked for leave under r. 9 of the Rules of the Supreme Court (Deeds Registry), 1921 (published at p. 129 of Rules and Regulations, 1923), could not add to or vary the grounds set forth in his notice of opposition: (b) that the proposed amendment to the writ and the said paragraphs 5 to 10 were an attempt by the plaintiff to allege in his claim a tort (counsel cannot seriously mean this) or a breach of contract involving a claim for an unliquidated sum of money, which could not found an opposition, or be included in an opposition action. For both these reasons, counsel for the defendant asked that paragraphs 5 to 10 of the statement of claim be struck out and that the proposed amendment of the writ be disallowed.

Counsel for the plaintiff in answer asked the Court to distinguish between the various amounts claimed in the prayer and to consider (a) rent due to date of opposition as a debt on which Opposition was founded; (b) further amounts falling due between date of opposition and the month of October, 1940, as a liquidated sum founding additional grounds of opposition; (c) alternatively,

that the claim for the additional sum, if regarded as damages for breach of contract together with the general damages of \$40, should be considered together with paragraphs 5 to 10, introducing them as claims, to be additional causes of action properly joined by the plaintiff to the opposition action by virtue of Order XVI, r. 1 of R.S.C. 1900; whether such were proper grounds of opposition or not.

The application and objection raise (1) the time-honoured question: can one oppose a transport or, a mortgage on the ground of an unliquidated claim? (2) the further question: can one, at the present day, in an action to enforce an opposition to a transport or a mortgage on foot of a liquidated claim, join all other causes of action arising from the same facts and circumstances and ask for the remedies or relief, liquidated or unliquidated, consequent thereon, without infringing the rule as to adding to one's grounds of opposition?

As to the first question, counsel for the defendant cited and relied upon the judgments in *Ajuban v. Amir*, (1931-37) L.R.B.G. 348, and in *Peroo v. Dooknie*, (1919) L.R.B.G., 151. Perusal of the original record in *Peroo v. Dooknie*, No. 128 of 1918, shows that the plaintiff opposed the sale at execution of four parcels of land on grounds that disclosed the plaintiff to have an interest (a judgment of specific performance) in only two, although the plaintiff attempted to justify the whole opposition on the ground that the sale of all four parcels was fraudulent and collusive. The court held that the opposition was valid as to the two parcels, the subject of the judgment for specific performance, and declared it invalid as to the other two. The principle of that judgment is not applicable to the present case in which the plaintiff seeks really to add a new cause of action. In *Ajuban v. Amir* Savary, J., bases his judgment upon that of Sir David Chalmers, C.J., in *Administrator-General re da Costa v. Willems* and upon a succession of judgments, all, more or less, following that one. Savary, J., is reported as quoting Matthaëus' *de Auctionibus* as "*de Actionibus*", which report can hardly be correct, as such a mistake would lead one into the initial error of thinking the work to be a treatise upon actions, and of course upon the procedure therein, rather than one dealing peculiarly with auction sales, and confined, so far as the text of caput XI. is concerned, to interventions or oppositions to execution sales, which are by auction. Unfortunately too, neither to Chalmers, C.J., nor to Savary, J., were the cases of *John v. Rankin*, and another of similar import, with which I shall deal hereafter, cited.

The two judgments which have had the greatest effect upon the law and procedure in oppositions to voluntary alienations, and encumbrances were those delivered by Chalmers, C.J., in *Adm. Gen., re da Costa, v. Willems*, supra, in which Atkinson and Sheriff, JJ., concurred, and in *Hogg v. Butts*, (1893) 3 L.R.B.G. (N.S.) 88, in which Sheriff and Nicoll, JJ., concurred. In the

EVA T. DA SILVA v. SUKHAJ.

former, the Chief Justice laid it down that opposition to a mortgage of immovable property did not lie in respect of an unascertained claim of damages for alleged torts by the owner of the property. In the latter, he dealt with the proposition affirmatively (p. 96) stating that a simple contract creditor can oppose a voluntary alienation or encumbrance of his debtor's property giving an undue preference, with the qualification that the creditor's claim is not contingent or uncertain. The authorities upon which the learned Chief Justice founded his proposition must now be considered, and it is also necessary to enquire whether there were any judgments in his day of which he was unaware and which might have had some bearing upon the matter.

At the very opening of his judgment in *Adm. Gen. v. Willems*, the learned Chief Justice complained of the lack of assistance from the advocates of the parties. In this absence of any cited authorities, he was forced to look to the text books, and had the reference to only two cases, *Clark v. Watson* and *Colonial Co.*, and *Alt v. Booker Bros. & Co.* to assist him. He examined the works of *van der Linden*, *van Leeuwen*, *Matthaeus*, and the English writer *Burge* (all of whom, however, deal with oppositions to execution sales only), and came to the conclusion that the faculty to oppose sales at execution "arose in virtue of some right to or in the property sought to be disposed of, and in no case did it arise upon a personal claim against the owner of that property." One can hardly see how the learned Chief Justice could have come to any other conclusion in so far as opposition to sales at execution is concerned. Short of a right or interest in the property at execution, or some bond, for so I understand "nexus", whereby the property has been bound as security for some obligation to be performed by the owner, one cannot imagine any other claim that could successfully compete with the judicial pledge of a creditor in execution. Surely no lesser contractual obligation, and still less a claim arising *ex delicto*, could compete with that pledge. His Honour proceeds: "It has not been suggested in the argument that there is any difference in the principle applicable when the transaction opposed is not a judicial sale but the creation by the owner of an encumbrance on his property." But this passage, which accepts an opposition to voluntary conveyances and encumbrances as "*un fait accompli*" in no way tells one how such oppositions arose, or why, or in respect of what remedies or claims they would lie.

The passages in *Matthaeus* referred to by Chalmers, C.J., occur in Chapter XI which is entitled "*de Intercessionibus quos oppositiones vocant*," and one at once notices that the legal term as *Matthaeus* knew it was "intercessio," intervention. The chapter is constantly quoted in local opposition cases, and I have therefore been at pains to read it. It opens by dividing interveners to sales at auction into three described classes, the

descriptions of which the author then paraphrases: “*Aut opponimus fine annullandi: aut fine distrahendi, rectius separandi; aut fine conservandi.*” Thus only the first class consists of persons seeking to prevent the sale; those in the second class are really claimants in interpleader; while in the third class the persons intervening, are not restraining the sale, but ensuring that it take place subject to their claims or interests. “*Tertio quasi domini et creditores*”. . . That third class is discussed in detail in paragraph 47, *Nunc tertiam ordinem persequamur, eorum qui non quidem domini, jus tamen aliquod obtinent in rebus subhastatis*”, and onwards. From these paragraphs one learns that “*quasi domini*” were persons having servitudes and such like over the property at auction, and that by “*creditores*” the author did not intend persons merely having claims against the owners of the property to be sold—in fact, nowhere in the chapter are claims against the owner as a person discussed—but rather persons to whom the property was bound by some instrument or deed, legally recognised, it is true, in security for the performance of some obligation, pecuniary or otherwise, on the part of the owner. Further on, at paragraph 82, *Matthaeus* relates how these “*creditores*” might intervene after the execution sale and right down to the day “when the judge’s decision fixes the dispute amongst creditors”—referring to the well-known Roman-Dutch practice, which also pertained in British Guiana and was inveighed against by Jabez Henry in the Report hereinafter mentioned, of keeping the proceeds of the execution sale in the hands of an officer of Court for a certain time during which all interested creditors of the nature described above might give notices of their claims and be ranked for distribution. We still have a survival of this in that the Registrar holds the proceeds of execution sales for 14 days, receives preferent claims, and pays out according to a statutory ranking, *vide s. 4 of Ord. 4 of 1936*. Such interventions cannot be considered part of opposition proceedings as we understand them to-day, and I consider that it would be impossible to draw any inference or analogy between the “*creditors*” of *Matthaeus*, and our simple contract creditors entering oppositions to transports or mortgages prior to the passing thereof.

How oppositions to transports and mortgages arose may for ever be a matter of speculation. None of the Dutch text-book writers referred to in the learned Chief Justice’s judgment refers to such oppositions. All their remarks are confined strictly to oppositions to sales at execution. *Burge* in his Commentaries, 1838, says the Chief Justice, records them as being part of the existing practice in British Guiana; but so did Jabez Henry, ex-President of the Superior Court of Demerara, in the Second Report of the Commissioners on the Administration of Justice in the West Indian and South American Colonies (report on Demerara and Berbice), published in 1828; and *Burge* may have obtained his information from the said Report. Henry also

EVA T. DASILVA v. SUKHRAJ.

mentions the right of opposition to voluntary conveyances in the Appendix to his report of the case of *Ogden v. Forbes*

The pertinent questions and answers contained in the said Report and Henry's remarks on them are as follows:—

Transports (p. 70)—Question 59—Are there any difficulties in the transfer of Real or Personal property in this Colony, by deed, will, or otherwise?—Answer—Berbice— “it requires to be previously notified that *any creditor* of the party proposing to alienate or burthen his property may have the opportunity of noting his opposition, and securing his debt.” Henry's abstract of the above answer appears at p. 7, and is in similar terms. With regard to mortgagee, Henry (Q. 340, p. 158 of the Report) put the following leading question: “When a mortgage is about to be passed have the simple contract creditors any and what means of preventing any fraudulent or undue preference in this respect?”—The answer, both from Demerara and from Berbice, was, of course, “Yes, the mortgages are advertised, and the simple contract creditors may oppose”. From these answers, Henry drew the violent presumption that the reason, for the “previous public notification” was “in order that any creditor of the party proposing to alienate or burthen it” might “have an opportunity of noting his opposition and securing his debt”; *vide* his Abstract of Answers, p. 7, Ans. 59; p. 35, Ans. 340.

Wessels, in his History of the Roman-Dutch Law, in Chapter VI on the Alienation of Property, Immovables, pp. 490 *et seq.* gives a far more satisfactory account of the growth and reasons for advertisement, and according to him, oppositions (to execution sales) were only a development induced by the advertisements, which preceded them historically, and which were designed primarily to give publicity to the alienation or encumbrance, not to invite opposition, but so that the property might not be alienated or encumbered twice.

One has a glimpse of the earlier history in British Guiana of oppositions to voluntary conveyances and encumbrances at Appendix I. of the abovementioned Report of the Commissioners, (p. 232)—“Extract from the Essequibo and Demerara *Royal Gazette*, 9th May, 1807, The Commissioners of the Court of Justice will not in future witness the passing of any transports of, or of mortgage deeds, or of any real properties under their jurisdiction, unless it be certified that the intention has been thrice publicly advertised, and that *no caveat* has been entered there against. In case of *such caveat or opposition*, the Secretary shall give notice thereof to the party opposed, in order that the *debtor* may then, if he thinks proper, take legal steps to have cause shown for such oppositions;” This promulgation, which must have had the same effect as a modern “direction,” clearly adopts in the case of opposition to transports and mortgages in British Guiana, similar procedure to that

enunciated by *Van der Linden* (*Judic. Practicq*, Bk. iii, cap, vi, s. 20) as having been prescribed for oppositions to execution sales in Holland by the 18th Article of the Rules of the Supreme Court of Holland of the 28th March, 1680, which passage of that author when translated from the Dutch reads: "Thus when a person wants to stop the proceeding of the execution, he has to do nothing else but to put himself against this execution and oppose by way of Legal Insinuation . . . with the offer to give reasons for the opposition on the Court day, which is to be served (of which notice is to be served) upon him by the writ-server (messenger or marshal)—and in that case further go to law in the way of the Court. The effect of this opposition is, that the execution is at once surcharged and the writ-server is obliged to stay the execution until the opposition shall have been settled" *van Leeuwen* (*Kotze*) Vol. ii, lib. v. cap. 26, s. 18, describes the procedure in similar terms. It would seem then that the early procedure in opposition to execution sales was akin to our modern interpleader: *Nathan*, in his *Common Law of South Africa*, p. 2,214, s. 2,240, calls the modern opposition "interpleader and this procedure was adopted in British Guiana in the case also of opposition to transports and mortgages, probably because of its convenience and summariness.

Opposition to execution sales is a recognised practice in South Africa, *vide Nathan supra*, but in such time as I have had at my disposal I have been unable to trace any process by way of "opposition" to voluntary conveyances in the judicial system of either South Africa or Ceylon, the other two "Roman-Dutch" colonies. The procedure invoked in South Africa *in securitatem debiti* would seem to be by way of interdict followed by an action: *vide Edwards v. Cross*, (1894) 8 E.D C. 140; Bell's Digest 842 and *Liebertrau v. Liebertrau* (1895) 12 S.C. (S.A.) 274. In the former case the plaintiff obtained an interdict against a third party disposing of the proceeds from the sale of live-stock belonging to the defendant pending an action for the recovery of the plaintiffs unascertained share of the proceeds of his mining transactions with the defendant, and in the latter the plaintiff's wife obtained an interdict prohibiting her defendant husband alienating certain property pending an action by her for divorce and the repayment of certain moneys loaned by her to him to purchase the property the subject of the interdict. The former case certainly shows that an interdict *in securitatem debiti* in South Africa is not confined to claims for what we call "liquidated amounts."

Apparently, in the early days in British Guiana, an opposer only "shewed cause" for his opposition. If the "cause" were a right or interest in the property or nexus upon it, on this being established, there would hardly have been any necessity to proceed further; but in the case of creditors and persons having money claims, these might wish to obtain judgment to crystallise

EVA T. DASILVA v. SUKHRAJ.

their claim and to make it capable of being recovered by execution. In such latter case, it would seem that, in British Guiana, as in South Africa, an ordinary action at law, *rau actie*, was at first instituted for this purpose. But by s. 215 of the Manner of Proceeding in the Supreme Court of British Guiana Ordinance, No. 26 of 1855, and also by s. 28 of the Inferior Court of Civil Justice Ordinance, No. 2 of 1856, an opposer was given liberty in opposition suits “to set forth in the same cause of opposition, the claim in virtue of which opposition is enteredand in the event of proving, the Court may give sentence for the same *as well as* sentence in the opposition itself”. This enactment would seem to have originated the true action in opposition as we understand it to-day, the object of which action might, thereafter, be two-fold—to have the opposition declared just and the conveyance interdicted, and to obtain a sentence of the Court in respect of which the claim on foot of which the opposition had been launched.

Now to enquire in respect of what claims oppositions to transports and mortgages would lie, *i.e.*, into the substantive law involved by the right of opposition thereto as apart from the adjectival law of procedure to enforce such opposition. Rights of opposition to transports and mortgages in British Guiana seem to fall naturally into two classes: Rights of opposition founded on a claim or interest in the property itself and rights founded on a claim against the owner of the property. The former would always found an action, so the fact that they founded oppositions in the nature of interpleaders to execution sales, as well as oppositions by way of injunction proceedings or interdicts against transports and mortgages scarcely calls for comment. But claims against the owner of the property sought to be transported or mortgaged offer a wider field for enquiry. One of the classifications one might use in Roman-Dutch law would be to consider such claims as liquid or illiquid. A liquid claim was one founded upon some instrument or some writing signed by the proposed defendant, such as a promissory note, bond, I.O.U., “good” (called in S. A. a “good-for”), or a merchant’s accounts if signed as correct by the defendant. On such claims provisional sentence might be obtainable; *vide Nathan*, Common Law of South Africa, vol. 4, p. 2,230 *et seq.* An illiquid claim was one founded on damages or even on debt, such as a merchant’s accounts if not signed by the debtor in acknowledgement of their correctness and its recovery necessitated an action and trial, *rau actie*, *vide Nathan*, C.L. of S.A., vol. iv, p. 2094; *Kruger v. van Vuuren’s Executrix* (1816) 5 S.C. (S.A.) 162, where de Villiers, C.J., at p. 168 shows the distinction. From these authorities, one may fairly conclude that although every liquid claim was for a liquidated amount or remedy as we understand the term liquidated to-day, every liquidated amount did not found a liquid claim. To consider “liquid” and “liquidated”

as synonymous terms, as some of the judgments of the Supreme Court have done, is incorrect, and leads to confusion.

A cursory examination of the Minutes of the Supreme Court of British Guiana prior to 1892 discloses that the majority of opposition proceedings were in respect of some right in property subjected to execution sale or to voluntary alienation, and even these were not many. The minority were in respect of claims against a transporter or mortgagor personally, and, as far as these were concerned, I am unable to say, like Chalmers, C.J., and Savary, J., that opposition proceedings in respect of unliquidated claims, as we understand the term unliquidated, were unknown. On the contrary, they seem to have been well known and recognised by both the Supreme Court and the Inferior Court of Civil Justice. I cite three instances, and I have no doubt that search would disclose more.

In the Minutes of the Supreme Court for the years 1855 and 1856, one finds the first instance, the three cases of *Hector John v. Adam Rankin*. In action No. 6, the plaintiff, on the 28th November 1855, instituted an action against the defendant for three acts of malicious prosecution and for one act of conversion, and claimed damages, which in those days were always for a named sum, in respect of occurrences alleged to have taken place at the defendant's Pln. Bladen Hall, East Coast, Demerara. While the above action was pending, the defendant on the 15th December, 1855, advertised transport, subject to a mortgage, of Pln. Maria Johanna *cum annexis*, Essequebo, and the plaintiff opposed this transport on the 28th December, on the ground of his claim for damages for tort pending as aforesaid, alleging the defendant's inability to transport until such claim were secured. Thereafter the plaintiff instituted an action, No. 9, in pursuance of his said opposition. The defendant again advertised transport of Maria Johanna, but not subject to mortgage, rather there was an advertisement of a mortgage in his favour by the transportee, on the 12th January, 1856. The plaintiff again opposed on the 18th January, and instituted another action to establish this opposition, and in respect of the same claim for damages. Appearances were entered in all three actions, and on their coming on for hearing on the 7th July, 1856, there are Minutes to the effect that "evidence in Action No. 6 should be considered evidence in Nos. 9 and 10." After a contested trial, judgement in No. 6 was delivered on the 26th July 1856 in favour of the plaintiff for damages totalling \$126.00 on ail the four causes of action. Thereafter appear the Minutes of the same date in Nos. 9 and 10:—"Both the plaintiff's and defendant's counsel have declared that a sentence in this case must follow such sentence as might be given in cause No. 6. The sentence in No. 6 being in favour of the plaintiff is sufficient ground for the sentence being in his favour and none other need be assigned." The Court (Arrindell, C.J., Beete and Alexander JJ.) then passed formal sentences, or orders as they would be called to-day

EVA T. DASILVA v. SUKHRAJ.

in causes 9 and 10, decreeing the oppositions just, legal and well-founded, and interdicting the defendant from passing the aforementioned transports, until he had paid or secured the amount of the judgment aforementioned. One can hardly imagine that Chief Justice Arrindell (who had himself practised at the bar in British Guiana, as he recorded in a report to the Privy Council in re the Appeal of *Forte et al*—Minutes of the Supreme Court of 5th December 1853) and his two puisnes, together with counsel engaged, a total of five lawyers, would all concur in a sentence unfounded in law or practice; and one must conclude that at that date both the law and the practice recognised oppositions to transports on foot of unliquidated claims, even for torts.

But *John v. Rankin* does not stand alone. In *Gomes v. Gomes and de Govia*, recorded in the Minutes of the Inferior Court of Civil Justice, 1st September 1877, Hampden King, Senior Puisne Judge, declared an opposition on foot of a claim for \$240 damages for trespass to land just, legal, and well-founded, gave judgment for \$160 damages on the adjoined claim in trespass and condemned the defendant to pay the same or give security “as prayed.” *Watson v. Sproston* orig. defendant, and *Little and Drysdale* co-defendants. Supreme Court, 8th May 1872, is another instance of an opposition to two mortgages on the ground of an unliquidated claim for accounts joined to an interest in the property—that the original defendant was trustee of the said property on behalf of the plaintiff. This claim was unsuccessful, but on other grounds. It is possible that search among the records of both the Supreme Court, and the Inferior Court of Civil Justice would disclose other similar proceedings. It is a matter for regret that these judgments were not drawn to the attention of Sir David Chalmers and his Court.

For all the above reasons, I am forced to the conclusion that there was no right of opposition to transport or to mortgage peculiarly inherent in a liquidated creditor by reason of his relationship as such to the transportor or mortgagor but that, originally, opposition proceedings in British Guiana by persons not relying on a right or interest in the property, were like their kindred proceedings in interdict in South Africa, open to any person wishing to secure payment of his claim, whether liquid and liquidated, or illiquid and liquidated, or even unliquidated, and whether founded upon contract or upon tort. After the judgments in *Adm-Gen. v Willems* and in *Hogg v. Butts* no oppositions to transports or mortgages on foot of unliquidated claims were successful, and in consequence, we have to day the ridiculous anomaly of a claimant for five cents, if his claim be “liquidated,” having the magic right to enter opposition to the alienation of property, no matter what its value, while one, whose claim may be both genuine and vast, has, if

his claim be for an unliquidated amount, and whether in contract or in tort, to stand by and see the proposed defendant divest himself of all immovable property, and not to say his movable property, in preparation for defending the claimant's suit.

Prior to 1900, the procedure in opposition actions had been dealt with as part of the substantive law, and had been prescribed by Ordinance as before mentioned, and by the Rules of the Court. But when new Rules were made in that year, the procedure was for the first time dealt with adjectively in Part II, Order II. By rule 6 of that Order one finds that the liberty of joinder allowed by s. 215 of Ord. 26 of 1855 and by s. 28 of Ord. 2 of 1856, becomes changed to an imperative order to join: "the plaintiff in opposition shall seek to enforce such claim as well as to restrain the passing of the transport or mortgage". Now the Rules of Court, 1900, Order XVI, r. 1, like the earlier Rules of 1898, provided for the joinder in one action of several causes of action, but required that all causes joined should belong to one only of the several classes enumerated in the rule. Under these Rules an attempt to add another cause to the cause upon which an opposition to a voluntary conveyance was founded could hardly have been made, having regard to the fact that these oppositions, after the judgments in *Adm.-Gen. v. Willems* and *Hogg v. Butts* had been confined to claims of a liquidated nature at the date of opposition. But the Rules of Court were again amended in 1932, and the amended Order XVI, rule 1 imposed no limitation upon the nature of the causes of action which might be joined, but provided merely for separate trials of any causes the trials of which together might appear to the Court inconvenient. With all limitation upon joinder of causes of action under Order XVI removed, and having regard to the fact that the claim for the pecuniary or other remedy was itself only a joinder of a cause of action to the opposition claim for an interdict or injunction, and having also in mind the power of the Court under s. 33 of Chapter 10 to grant all the remedies or relief to which a party might be entitled in any cause or matter before the Court, although a plaintiff may not add to or rely upon grounds of opposition other than those alleged in his notice, I can find no valid objection to independent causes of action being joined with causes of action brought in pursuance of, and coupled with, opposition claims; subject, of course, to the power of the Court to order separate trials of causes which it may appear inconvenient to try together, The Court will only grant in respect of each cause of action so brought the remedies or relief appropriate to it, so that no remedy or relief applicable to one cause be obtained merely on the success of another cause.

In this case the plaintiff is really asking for all the additional relief to which she has become entitled since opposition on the same causes of action on which her opposition was founded—continuing breaches of a contract of tenancy by reason of which claims for rent and for damages accrued to the plaintiff. This she

EVA T. DASILVA v. SUKHRAJ.

is entitled to do on the authority of *Large v. Large* (1877) W.N. 198. She is not, in my opinion, seeking to add a claim on a new and totally different cause of action, as was done in *Cave v. Crew* 62 L.J. Ch. 530.

For the above reasons the Court declines to strike out paragraphs 5 to 10, inclusive, or any of them, of the plaintiff's Statement of Claim and gives liberty to the plaintiff to amend her Indorsement of Claim on the Writ of Summons herein, if the plaintiff be still advised to amend.

The hearing will proceed.

Preliminary objection overruled.

Solicitors: *F. I. Dias; W. D. Dinally.*

EDITOR'S NOTE.—*Clark v Watson* (1877) and *Altt v. Booker Bros. & Co.* (1861), vol. 2, L.R.B.G. O.S. 61, both of which were referred to by Chalmers, C.J. in *Administrator Generals Willems* (1892) 2 L.R.B.G. 130 in delivering the judgment of Atkinson and Sheriff, JJ. and himself, were each decided by a full bench of three judges: in the first case by Snagg, C.J., Hampden King and Lovesey, JJ., and in the second case by Arrindell, C.J., Beete and Alexander, JJ.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL BY WAY OF CASE STATED FROM THE SUPREME
COURT OF BRITISH GUIANA.

IN THE MATTER OF:—

WILLIAM GRAHAM, Appellant

AND

HIS MAJESTY THE KING, Respondent.

Before Sir CHARLES CYRIL GERAHTY, Knight, Chief Justice of Trinidad and Tobago, (President); JAMES HENRY JARRETT, Chief Justice of Windward and Leeward Islands; and JOHN VERITY, Chief Justice of British Guiana.

1942. MAY 26; JUNE 3.

Criminal law and procedure—Fraudulent conversion—General deficiency extending over a period of time—No duty in accused, on the date specified, to hand over the lump sum received—Conviction quashed.

A count in an indictment for fraudulent conversion alleging a general deficiency extending over a period of time is insufficient in law unless it is the duty of the accused, on the date specified, to hand over the lump sum received.

Case stated by Stuart, J., under sections 174 and 175 of the Criminal Law (Procedure) Ordinance, Cap. 18.

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

S. E. Gomes, Assistant Attorney-General, and *E. W. Adams*, for the Crown.

Cur. adv. vult.

W. GRAHAM AND HIS MAJESTY THE KING.

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

This matter comes before this Court for consideration by way of a case stated by the learned trial judge in pursuance of his powers under the Criminal Law (Procedure) Ordinance, Cap. 18, sections 174 and 175.

The accused was tried before a jury at the Criminal Sessions of the Supreme Court of British Guiana on the 14th, 15th and 16th days of May, 1941, for the fraudulent conversion of property contrary to sec. 197 (1) (b) of the Criminal Law (Offences) Ordinance, Chapter 17, The indictment charged him for that he having “in the year of Our Lord one thousand nine hundred and thirty-eight, received certain property, namely, one hundred and five dollars and eighty-eight cents for and on account of the Burial Guild of Saint Joseph of Arimathea, Plaisance, fraudulently converted to his own use and benefit, the said property.”

The material facts set out by the learned judge may be summarised as follows:—

The Guild in question is a Friendly Society within the ambit of Chapter 214. By its rules its affairs are managed by a committee, including a treasurer, elected to serve for one year commencing from 1st January. At the end of his period of office, the outgoing treasurer is required to hand over to the new treasurer the balance of cash in hand. The accused was elected to this office in December, 1936, for the year 1937, and was reelected for 1938 and 1939.

Under the rules the accused’s duty was to receive all moneys collected by the secretary and deposit the same in the banking account of the society in the General Post Office and not keep in his possession more than two funeral allowances (maximum \$60) of the society’s money.

The accounts of the society for each year were audited early in the succeeding year.

In May, 1939, when the accounts for 1938 were audited, a shortage of \$116.89 was discovered.

Subsequently the accused paid over to the president of the society \$11.01 which he said was all the cash in hand.

This balance of the deficiency, \$105.88, although alleged by the indictment to have occurred in 1938, represented a general deficiency over the whole collections during the period 1st January, 1938, to 31st December, 1938, of which the December collections amounting to \$25.88 only reached the accused on or about January, 1939.

No amendment of the indictment was sought by the prosecution or made.

At the close of the case for the prosecution, counsel for the defence raised the objection that the evidence, having disclosed only a general deficiency of account without disclosing a duty

W. GRAHAM AND HIS MAJESTY THE KING.

upon the accused to pay over the lump sum to any person on any specified date, did not sustain the offence for which the accused was indicted, and counsel after citing *R. v. Sheaf* referred to later herein, asked the learned trial judge to direct the jury to return a verdict of not guilty.

The learned judge refused so to rule, holding that “it would have been the accused’s duty to hand over at the end of 1938 to a new treasurer if one were appointed, and that having been reelected, there was a constructive handing over by him to himself.”

The learned judge called upon the defence, offering, however, to state a case on the question.

In his summing up to the jury, the learned judge did not further direct the jury on the point raised by Counsel, but pointed out to them as follows—“that in the event of their finding against the accused, their proper verdict might well be that he converted the sum of \$82.00 that is to say, the sum of \$105.88 in respect of which he was charged, less the sum of \$26.84, the actual cash balance of the amount of the December collections not handed over to him until January, 1939. I told them that perhaps they could not convict for conversion of the whole amount charged, and told them they could find the accused guilty, but only for the smaller amount.”

The jury returned a verdict of guilty with no qualification. The accused was convicted and sentenced to 18 months hard labour, being allowed bail pending the decision of this Court on a case to be stated.

The learned judge puts the questions for the consideration of this Court as follows:—

“The question for consideration is whether upon the facts proved as afore stated the accused was guilty of the offence charged against him.

In short, he clearly stole \$82 in 1938. Has the finding of the jury that he stole \$105.88 (if that was their finding) in any way defeated the ends of justice?

Alternatively he stole from the 1938 balance the sum of \$105.88. Does the fact that \$25.88 of this came into his hands too late to be covered by the charges, make a verdict of guilty invalid”?

The learned judge then proceeds to put two further questions:—

1. Am I right in holding that there is *traditio brevi manu* or constructive passing of the money in hand from accused as Treasurer for 1937 at midnight on Old Year’s Night to accused as Treasurer of 1938?
2. If I am *cadit quaestio*.
3. If I am wrong, what is the true position?

In the view of this Court, however, there are only two actual points for the consideration of this Court:—

1. Can the conviction be sustained in that the indictment is founded upon a general deficiency of account?

W. GRAHAM AND HIS MAJESTY THE KING.

2. If yes, can the conviction stand having regard to the verdict of the jury?

To turn to the first question, this Court is of opinion that the authorities show quite clearly that a count in an indictment alleging a general deficiency extending over a period of time is insufficient in law unless it is the duty of the accused on the date specified to hand over the lump sum received. In *R. v. Sheaf* (1925) 28 Cox 86, where the prisoner was charged on the First Count with fraudulently converting on a named date a certain sum received for and on account of a clothing club, and on a Second Count for fraudulently converting on a named date a certain sum received for and on account of the said club and where the first count related to what was alleged to be a general deficiency extending over seven or eight years, and the second count over a period between 31st October, 1923 and 31st October, 1924, Avory, J. in giving judgment states: "No point, unfortunately, appears to have been taken at the trial that these two counts were insufficient in law. If the point had been taken, especially in view of the fact that Counsel for the Crown has to-day said quite frankly that, if these two counts stood alone, he would not be prepared to support the conviction of the appellant, it is probable that the judge would have quashed these counts. Reference to the authorities relating to embezzlement, in which it has been made clear that it is not sufficient to charge the embezzlement of a general deficiency unless it appears that by the conduct or course of business it was the duty of the defendant on the date specified to hand over the lump sum which he had received, makes it clear, to my mind, that these two counts in the circumstances of this case were bad in law and ought to have been withdrawn from the jury."

For the earlier authorities relating to embezzlement see *Reg. v. Moah*, (1856) 7 Cox 60, where the question of a general deficiency was discussed and in which it was decided upon the facts that the conviction was right because there was evidence of the receipt of a particular sum and a misapplication of a part of it; and also *Reg. v. Wolstenholme*, (1869) 11 Cox 313, in which it was decided that to support a charge of embezzlement against the secretary of a company, whose duty it was to receive moneys and pay wages, &c., out of the said moneys, and to account for the balance, proof must be given of a specific appropriation of a particular sum of money. The first count charged the prisoner with embezzling £3. 19s. 4d. the proceeds of a post office order. The sum charged in the first count consisted of small amounts collected from time to time and out of which he had to pay wages, directors' allowances and his own salary. Brett, J., said, *inter alia*: "You must show that he received certain amounts; that it was his duty to account for them; that he did not do so All you can prove is that he has not properly accounted for the balance, and that will not do." The learned

W. GRAHAM AND HIS MAJESTY THE KING.

judge then directed the jury to return a verdict of not guilty on the first count.

It may be observed that one of the difficulties in the way of a conviction for a general balance is that the general deficiency may represent any indefinite number of distinct embezzlements and it is contrary to principle to permit a man to be put upon his trial for a vast number of different offences at the same time.

It is to be observed, however, that in some colonies steps have been taken to legislate out of the established rule to meet cases of this kind. As an example see sec. 20 of the Trinidad Larceny Ordinance, Cap. 9, which reads as follows:—

“In an indictment against a person for larceny or embezzlement, the accused person may be charged and proceeded against for the amount of a general deficiency in account, notwithstanding that such general deficiency is made up of any number of specific sums of money the taking of which extended over any space of time, and without showing any particular sums received and not accounted for.”

Lastly, in *R. v. Morris*, 1933, 24 Cr. A. R. 105, where the prisoner was charged on three counts for embezzlement and on a fourth count charging fraudulent conversion of a general balance, Hewart, L.C.J., in regard to the latter said: “It is quite obvious that the appellant was charged with the fraudulent conversion of a general balance alleged to be due and that is a course which cannot properly be taken.” The conviction was quashed.

In the present case the charge admittedly relates to a general balance on the year's transactions, there is no evidence that it was the duty of the accused to hand over a lump sum on any date specified and the charge is one which could not properly be laid. Even if a handing over to himself could be conceived as falling within the rule there is no proof that he did not have the sum charged in his possession on 31st December, 1938.

In the circumstances disclosed by the case stated the first question must be answered in the negative and the other does not therefore arise.

The judgment of conviction given on the indictment at the trial is reversed and the conviction quashed.

Conviction quashed.

J. W. MAHASTESINGH AND L. MAHARAJ AND ANR.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

BETWEEN:—

JOHN WILLIAM MAHASTESINGH, Appellant,

AND

LUTCHMAN MAHARAJ AND POONWASSIE, Respondents.

Before GERAHTY, C.J., Trinidad and Tobago (President); JARRETT, C.J.,
Windward and Leeward Islands; and VERITY, C.J., British Guiana.

1942. AUGUST 24.

Contract—Sale of land—Consideration for—Past debt—Due by vendor to purchaser—Valuable consideration.

Undue influence—By child on parent—What is not undue influence.

Undue influence—Grantor of deed—Old and infirm—In impecunious circumstances—Without professional advice—No imposition practised upon grantor of deed—Deed will not be set aside—Consideration inadequate—But that wanted by grantor—Deed will not be set aside.

The appellant J. W. M. and the first named respondent L. M. are brothers, sons of M., a woman of 90 years of age. By a certain deed of conveyance, M. purported to convey to the first named respondent L. M. and to his wife P. her interest in a piece of land in consideration of the sum of \$100 paid by L to M.

In or about 1925 L.M. had advanced to his mother M. certain sums totalling \$100 to enable her to pay off a mortgage debt secured on this piece of land which was then the joint property of M, and a third son R. In 1934, after R's death, M., who took his share by survivorship, conveyed the land to herself and the appellant J. W. M. as joint tenants in fee simple. In August, 1937, M. and the appellant J. W. M. conveyed to K., a fourth son, one quarree of the land for the sum of \$125. The respondent L. M., having asked his mother M, on several occasions for repayment of the debt of \$100, M. said that she would convey the land to L. for the \$100 she owed him as she had no money. There was evidence to show not only that the proposal to sell this land to her son L. M. in consideration of release from the past debt originated in her M., but that this was no sudden decision forced upon her by pressure for payment but one which had been in her mind at an earlier date and to which she had more than once adverted.

The first named respondent L. M. arranged for a deed of conveyance from M. to him to be prepared by his solicitor, with whom a doctor visited M. and formed the impression that she was in a fit state to sign a will or deed

The deed was executed by M. in October, 1937. The trial judge found as a fact that M. was mentally capable of transacting the business of the deed and that she knew what she was doing when she executed it. On the whole of the evidence, he was moreover satisfied that it was not shown that M. did not know what she was doing, or that she did not intend of her own independent will to do what she did.

M. was an old and infirm woman who apparently depended upon one or the other or both of her sons for her support. She had at the date of the deed no other property. At the time of executing the deed she was living in her own house on the land concerned; and the respondent was living in another house on the same land some 70 feet away.

No question was raised as to the competency of M. when she executed the deed of 1934, or as to her competency and independence when she executed the deed of August 1937. The first named respondent L. M. had no concern with the execution of the deed of 1934, or the deed of August, 1937; and, at the times of the execution of those two deeds, there could be no question of his standing in

a position of dominion over M. in relation to those transactions. There was no evidence to show that there was any change in the relationship of the appellant and the first named respondent to their mother during the 6 weeks which intervened between August, 1937 and October 1937 when M. executed the deed in favour of her son, the first named respondent.

The interest in the land which was conveyed by M. to L. M. was worth about \$200, or twice the value of the expressed consideration.

L. M. used to supply M. from time to time with food; his children at times slept in the house of their grandmother M.; and L. M. alleged that his mother M. trusted him.

M. did not have independent professional advice in respect of the execution of the deed in favour of L.M

Shortly after the execution M., through the influence of the appellant, made a statutory declaration inconsistent with the deed and commenced an action to have the deed of October, 1937, set aside.

Held (1) that there was insufficient material in the circumstances disclosed by the evidence to justify the inference that M. was under the dominion of her son L.M. in October, 1937;

(2) that the relationship of mother and son would in itself be sufficient to explain an apparent inadequacy of consideration, and coupled with the particular circumstances disclosed by the evidence as to the mother's previous disposition of her property, in relation for instance to the appellant J.W.M. and of her intention in relation to the respondent L.M. the mother's action in regard to this transaction including her acceptance of the repayment of the debt of \$100 as sufficient consideration, was both natural and reasonable; and that the inadequacy of the consideration was more apparent than real and should not operate unfavourably against the deed if on other grounds there was no just cause to set it aside:

(3) that there was no evidence that undue influence was in fact exerted on M., but, on the contrary, the evidence went to show that M. entered into the transaction deliberately and advisedly of her own free will and with a full understanding of the nature and effect of her deed;

(4) That the appellant had failed to prove either that the first respondent was in such a position of dominance that undue influence must be presumed, or that there was such inequality of footing that, coupled with the other incidents of the transaction, it is one which the Court should in equity have set aside.

There is no rule of law that a parent, if of advanced age, on good terms with a child, receiving from him the usual treatment to be expected and having some degree of trust in him, must necessarily be presumed to act under his influence.

A past debt due by the vendor of a parcel of land to the purchaser is valuable consideration for the conveyance of the land by the vendor to the purchaser.

Although the grantor of a deed may be old and infirm, in impecunious circumstances and without professional advice, yet if no imposition was practised upon him and it is not shown that he thought that the transaction was not what it was or that he did not fully understand the effect of the act he was engaged in, then the absence of independent professional advice does not in itself justify the Court in setting aside the deed. Further, this is so even when the consideration may appear inadequate provided that it is the consideration which the grantor wanted.

The judgment of the Court was delivered by VERITY, C.J., British Guiana, as follows:—

In this case the appellant who was plaintiff in the Court below sought to have a certain deed set aside on the ground of fraud and/or undue influence, or in the alternative to have the deed rectified.

The learned trial judge found that the appellant had failed to discharge the onus of proving either fraud or undue influence and gave judgment for the respondents with costs. At the

hearing of this appeal the allegations of fraud were not pressed in view of the trial judge's findings of fact.

It is desirable in the first place to ascertain what are the facts disclosed by the evidence in so far as the same are accepted either expressly or impliedly by the learned judge in the course of his judgment.

It appears that the appellant and the first named respondent are brothers, sons of Moortee, a woman of some 90 years of age, who, by the deed which is the subject of this appeal purported to convey to the respondent Lutchman and his wife, the second named respondent, her interest in a parcel of land in consideration of the sum of \$100 paid by Lutchman to Moortee. The facts accepted by the learned Judge in regard to this consideration are that in or about 1925, Lutchman advanced to his mother certain sums totalling one hundred dollars to enable her to pay off a mortgage debt secured on this piece of land, which was then the joint property of herself and a third son Ramlal. In 1934 after the death of Ramlal, Moortee, who took his share by survivorship, conveyed the land to herself and the appellant as joint tenants in fee simple. In August, 1937, she and the appellant conveyed to Kooarsingh, a fourth son, one quarree of the land for the sum of \$125. The respondent having asked his mother on several occasions for repayment of the debt of \$100, Moortee, if one is to accept the evidence of Lutchman, of Poonwassie and Neeran John, said that she would convey the land to Lutchman for the \$100 she owed him as she had no money. On this point the learned judge said that, in view of his finding as to another sum in regard to which he did not believe Lutchman, he would have been much inclined to reject his story as to this debt, but that he does not disbelieve the evidence of Mr. Farrell, the solicitor who prepared the deed in question, and having found corroboration in this evidence of the existence of the debt he accepted Lutchman's story. It must be taken therefore that the facts in regard to this debt are as stated above.

In those circumstances Lutchman arranged for a deed to be prepared by his solicitor, with whom a doctor visited Moortee and formed the impression that she was in a fit state to sign a will or deed. The learned judge has found as a fact that Moortee was mentally capable of transacting the business of the deed and that she knew what she was doing when she executed it. On the whole of the evidence he was moreover satisfied that it was not shown that Moortee did not know what she was doing or that she did not intend of her own independent will to do what she did.

We have no doubt that there is evidence to justify these conclusions.

There are other facts which must be taken into consideration in determining whether or not this is a case in which the Court should have interfered and set aside the deed so executed.

Moortee was an old and infirm woman who apparently depended upon one or the other or both of her sons for her support. She had at the date of the deed no other property. She had disposed of a certain parcel by conveyance to her son Kooarsingh, and an undivided half share in the remainder was vested in the appellant as joint tenant. By the deed in question she purports to vest her own undivided half share in the respondent, the remaining surviving son. At the time of executing the deed she was living in her own house on the land concerned and the respondent was living in another house on the same land, some 70 feet away. It is also to be observed that in 1934 she executed the deed by which the appellant acquired his interest in the land and there is no question raised as to her competence at that time. Moreover in August, 1937, she executed the deed whereby a parcel of land was conveyed to the third son, aided in so doing by the appellant, and no question is raised as to her competency and independence on this more recent occasion. Whether or not the appellant is to be believed when he himself states that he supported his mother up to within a month of her death, the fact remains that Lutchman had no concern with the execution of these former deeds or either of them and that at those times there could be no question of his standing in a position of dominion over her in relation to these transactions.

There is no evidence to show that there was any change in the relationship of these sons to their mother during the six weeks which intervened between August and October when the deed to Lutchman was executed but the learned judge finds that it was due to the influence of the appellant that shortly thereafter she was induced to make a certain statutory declaration inconsistent with the deed and to commence an action to have the deed set aside.

It is admitted by the respondent Lutchman that the interest conveyed to him was worth about \$200, or twice the value of the expressed consideration.

In these circumstances it is urged on behalf of the appellant that the evidence discloses that Moortee and Lutchman did not meet on equal footing but that Lutchman was in a dominant position in relation to his mother and that the burden falls therefore upon the respondent to prove that he did not exercise undue influence in order to induce her to part with her property for inadequate consideration. Apart from the proved facts, the appellant relies upon that part of the judgment in which the learned judge says: "While there is no presumption that a son has influence over his mother I think that considering Moortee's age there exists a possibility that her son Lutchman was in a position to exercise undue influence over her." Counsel for the appellant urged that this statement is equivalent to a finding that owing to the relationship between the parties and the age of the grantor, the grantee was in fact in a position of dominance from

which the Court should have inferred that undue influence was exercised unless the contrary were proved conclusively. We do not agree that this is the meaning of the words used by the learned judge. They mean no more than they say, that is, that in the circumstances it is possible that Lutchman was in such a position, not that in fact he was so—a matter for the proof of which the burden lay upon the plaintiff before any inference unfavourable to the due execution of the deed could properly be drawn.

It is nevertheless submitted that the facts themselves disclose circumstances amounting to proof of Lutchman being in such a position, and we were referred to the evidence as to Moortee's age, the proximity of her residence to that of Lutchman, the fact that he supplied her from time to time with food, that his children at times slept in her house, and that, as he alleges, she trusted him. In our view there is insufficient material in these circumstances, or in any others disclosed by the evidence, to justify the inference that Moortee was under the dominion of her son Lutchman. So to find would draw perilously near to establishing a rule that a parent, if of advanced age, on good terms with a child, receiving from him the usual treatment to be expected and having some degree of trust in him, must necessarily be presumed to act under his influence. No such rule exists nor is it a rule which it would be reasonable to establish.

Such authorities as were cited therefore, bearing upon the presumptions arising from proof of dominion, would appear to be inapplicable, but the argument arising from the existence of an alleged inequality of footing has still to receive the consideration which it undoubtedly merits. The main argument in this regard rests upon the allegation that there was no valuable consideration or that the consideration was inadequate and upon the admitted facts that Moortee was old and infirm and that the transaction was entered into by her with no independent professional advice.

In regard to the question of consideration it is submitted that the sum of \$100 not having been paid at the time and in respect of the present transaction but having been paid to Moortee years before as an advance to enable her to complete an entirely distinct transaction, is not in law valuable consideration for this conveyance. No authority was cited for so general a proposition as that a past debt cannot be good or valuable consideration nor do we think that it is well founded. We are satisfied that the learned trial judge was right when in the circumstances of this case he held that there was valuable consideration.

The question of the adequacy thereof raises different considerations. It is urged that it being admitted that the value of the interest conveyed is twice that of the consideration expressed, the fact of inadequacy is established and that no evidence can be adduced to show that there was any further or

other consideration. It may be that this latter contention is untenable in view of such decisions as in *Clifford v. Turrell*, 14 L.J. Eq. 390, but this question does not arise in the present case. What the respondent has sought to show and what the learned judge has found is not that there was any further consideration but that in the circumstances of the case a sum less than the actual value of the interest conveyed is not in fact so inadequate as to imply undue influence, oppression or anything in the nature of an improvident transaction or unconscionable bargain. The relationship of mother and son would in itself be sufficient to explain an apparent inadequacy and coupled with the particular circumstances disclosed by the evidence as to the mother's previous disposition of her property, in relation for instance to the appellant, and of her intention in relation to the respondent, we agree with the learned trial judge that Moortee's action in regard to this transaction including her acceptance of the repayment of this debt as sufficient consideration is both natural and reasonable. The inadequacy of the consideration is more apparent than real and should not operate unfavourably against the deed if on other grounds there is no just cause to set it aside.

The next consideration is that of the absence of independent professional advice. The effect which this admitted fact should have upon the validity of the conveyance depends entirely upon the surrounding circumstances as well as upon the equality of footing upon which the parties stand in relation to one another. It was submitted on behalf of the appellant that when as in *Baker v. Monk*, (1864) 146 R.R. 361, the parties do not meet on equal terms and the inferior party is without independent professional advice then the Court will not allow the transaction to stand even though the grantor is mentally capable of understanding and does in fact understand the nature and effect of the deed, for, it is argued, the will of the inferior party may yet have been influenced and the grant induced by the superior position of the other party.

It is to be observed that in *Baker v. Monk*, the inequality of footing arises from other factors in addition to disparity of age, but even so it does not appear that the principle laid down in that case is quite so wide as is suggested, and moreover in that case there was proved an inadequacy of consideration which we have not found to exist in the present instance. This factor was indeed that which proved fatal for in the words of Lord Justice Knight Bruce: "The parties to the contract were in such relative positions that (a case of under-value being on the evidence affirmatively deposed to) it lay on the purchaser to show affirmatively that the price he had given was the value and on the evidence he had failed in so doing."

In the present case the inequality of footing arises merely from disparity of age, coupled with infirmity and a measure of

impecuniosity and we are of the opinion that the case of *Harrison v. Guest*, (1855) 43 E.R. 1298, is more readily applicable. The principle there laid down appears clear: that although the grantor may be old and infirm, in impecunious circumstances and without professional advice, yet if no imposition was practised upon him and it is not shown that he thought that the transaction was not what it was or that he did not fully understand the effect of the act he was engaged in, then the absence of independent professional advice does not in itself justify the Court in setting aside the deed. Further this is so even when the consideration may appear inadequate provided that it is the consideration which the grantor wanted.

The learned trial judge in this case has found and we accept his finding that Moortee was mentally capable and that she knew what she was doing. There is, moreover, evidence to show not only that the proposal to sell this land to her son in consideration of release from the past debt originated in her, but that this was no sudden decision forced upon her by pressure for payment but one which had been in her mind at an earlier date and to which she had more than once adverted. It was moreover, as the learned judge has found, a very natural and reasonable thing for a mother to do in the particular circumstances of this case.

We are satisfied on the whole case that the appellant failed to prove either that the first respondent was in such a position of dominance that undue influence must be presumed or that there was such inequality of footing that, coupled with the other incidents of the transaction, it is one which the Court should in equity have set aside. There is no evidence that undue influence was in fact exerted. On the contrary the evidence goes to show that Moortee entered into the transaction deliberately and advisedly of her own free will and with a full understanding of the nature and effect of her deed.

The learned judge was therefore right in entering judgment for the defendants, and this appeal is dismissed with costs.

Appeal dismissed.

NADIM ANTAR AND J. G. VALVERDE.
IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

BETWEEN:—

NADIM ANTAR, Appellant (Plaintiff),
AND
JOHN G. VALVERDE, Respondent (Defendant).

BEFORE GERAHTY, C.J., Trinidad and Tobago (President); COLLYMORE,
C.J., Barbados and VERITY, C.J., British Guiana.

1942. AUGUST 24.

Sale of goods—Contract for—Payment on account of purchase price—At time of contract—As guarantee of due performance on part of purchaser—Paid by way of deposit—Contract repudiated by purchaser—Amount paid forfeited to vendor—In absence of express agreement to contrary.

Costs—Discretion of Court—Not exercised on wrong principle—Appeal from order of Court as to costs—Order not interfered with.

The appellant brought a claim against the respondent to recover the balance \$443.96 of a sum of \$500 advanced by him to the respondent (after deducting therefrom the value of certain cedar supplied by the respondent and accepted by the appellant), and damages for breach of a contract entered into between the parties for the sale and purchase of timber. The respondent counterclaimed for damages for breach of contract. The trial judge found that the respondent had been guilty of no breach of contract, and dismissed the plaintiff's claim with costs; he also found that the appellant had broken the contract, but the respondent having suffered no loss, he entered judgment for the respondent on the counterclaim for one shilling with costs.

The appellant and the respondent had entered into a contract for the sale to the appellant by the respondent of certain timber by description, and by one of the terms of the contract the appellant advanced to the respondent \$500 on account thereof, at the time the contract of sale was concluded. The respondent supplied certain timber which was rejected by the appellant without good cause, and the appellant thereby broke and repudiated his contract. In his evidence the respondent stated: "I asked for an advance because order was large and wood would have to be got from the forest . . . I do not as a rule get \$500 advance on contracts. When such an advance is made, it means that he wants wood".

Held, (1) that those words would appear to indicate that the respondent asked for this payment as some guarantee that the appellant really wanted the timber, and that the getting of this large quantity of wood from the forest would not be thrown away;

(2) that the inclusion of the payment of the sum of \$500 on account in the terms of the contract, its payment then and there, and the evidence as to the manner in which it came to be made, all justified the conclusion that that payment, while it was to be taken on account of the purchase price if the contract was carried out, yet also partook of the nature of a guarantee of due performance on the purchaser's part, was made by way of deposit, and was therefore irrecoverable by the appellant who had repudiated the contract.

In the absence of express agreement to the contrary, when a payment by way of deposit is made to a vendor by a purchaser at the time of the contract for sale, then, in the event of due performance the sum so paid is taken into account as part of the purchase money; in the event of the contract being rescinded by mutual consent, then the sum so paid is recoverable by the purchaser, but when the contract is repudiated by the purchaser the amount so paid is forfeited and remains in the hands of the vendor.

Where costs are in the discretion of the trial judge, a Court of Appeal will not interfere with his order unless he can be shown to have exercised his discretion on some wrong principle.

NADIM ANTAR AND J. G. VALVERDE.

The plaintiff claimed damages against the defendant for breach of contract for the sale of goods. By way of defence, the defendant alleged that he was guilty of no breach; and, by way of counterclaim, he pleaded that the contract had been terminated by person of the breach of the plaintiff. The trial judge not only found that the defendant had been guilty of no breach of contract, but he found also, on the defendant's counterclaim, that the plaintiff had broken his contract; and he entered judgment on the defendant's counterclaim for one shilling damages and costs. On appeal against the order for costs.

Held, that when the defendant succeeds on his counterclaim it is always in the discretion of the trial judge whether or not he should get his costs; that there was nothing in the present case to indicate that the judge did not exercise his discretion or that he exercised it wrongly; and that it must be assumed, in the absence of anything shown to the contrary, that the trial judge had reason for the order he made.

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

This is an appeal from a judgment dismissing a claim by the appellant to recover the balance of a sum advanced by him to the respondent and damages for breach of a contract entered into between the parties for the sale and purchase of timber.

The learned trial judge not only found that the respondent had been guilty of no breach of the contract but he found also, on the respondent's counterclaim, that the appellant had broken the contract, and, the respondent having suffered no loss, he entered judgment on the counterclaim for one shilling damages and costs. Against this order for costs the appellant further appeals.

The learned judge found as a fact that the parties entered into a contract, as evidenced by two written documents, for the sale to the appellant by the respondent of certain quantities of timber by description and that by one of the terms of the contract the appellant advanced to the respondent \$500 on account thereof. He further found that the respondent supplied certain timber which was rejected by the appellant without good cause and that the appellant thereby broke the contract. The learned judge made no reference in the course of his judgment to the balance of the sum advanced but by entering judgment for the respondent on the appellant's claim he found in effect that the appellant was not entitled to recover the sum which amounts to \$443.96, nor to recover the damages which the appellant sought.

Upon consideration of the whole of the evidence as accepted by the learned judge in regard to the negotiations and conversations between the parties from which the contract of sale emerged, we see no reason to differ from his finding that there was one contract which included as one of its terms the payment of a sum of \$500 by the purchaser to the vendor on account of the contract at the time it was concluded. Upon that evidence also we have no reason to differ from the finding of the learned judge that the contract contained no warranty that the wood described as crappo should be supplied free of sap and cracks, nor do we differ from his finding that the timber supplied was fit for the purpose for which the appellant required it. In our opinion, therefore, the learned judge was right in his finding that by his rejection thereof

the appellant was the party in breach of the contract. We agree also that the respondent was on the evidence guilty neither of breach in supplying timber not up to the description required nor by dilatoriness in delivery. In the result the final conduct of the appellant amounted to a repudiation of the whole contract and in such circumstances the appellant was not entitled to damages and the respondent was entitled at least to nominal damages. We are not asked to say that the learned judge was wrong in finding that the respondent was entitled to more than nominal damages although it is suggested that there is evidence upon which he might have found that the respondent had suffered actual loss.

The first question that remains for consideration in the light of these findings is whether or not the appellant in these circumstances is entitled to recover the balance of the advance of \$500 after deducting therefrom the value of certain cedar supplied by the respondent and accepted by the appellant.

It is unfortunate that this aspect of the matter was not fully argued at the trial and that the judgment makes no specific reference to it. There is nevertheless sufficient in the findings and upon the evidence to enable us to reach a conclusion.

It was argued on behalf of the appellant in the first place that this advance formed no part of the contract, but that it was a separate and distinct transaction, and it was further submitted that, if this be so, then it could not be held to take the nature of a deposit by way of guarantee such as would render it irrecoverable by the purchaser in the event of his own default. As has been said, however, the learned judge did not take this view of the evidence which depends upon a severance of the negotiations into two parts, so that at the moment the parties were agreed on the quantity and price, the contract is to be held completed and the further negotiations as to the advance deemed to bear relation to a second and independent transaction. We think that the learned judge was right in declining to divide the transaction into two separate parts, and indeed on the evidence in chief of the appellant himself no such severance could be founded, for in his relation of the circumstances there is, prior to the agreement as to quantity and price, no reference to such essential element of the contract as time and place of delivery, which appear for the first time in the document which evidences the advance.

It would appear to be clear, therefore, that the payment of this advance was a condition or term of the contract itself and was in fact made at the time of its conclusion. The question has then to be considered: what was the nature of this payment and upon what conditions was it made? There is no express stipulation in the agreement in this regard, but on the authority of *Howe v. Smith*, 27 Ch. D. p. 89, it is for the Court to determine from the whole of the transaction what condition in regard to this payment may properly be implied.

NADIM ANTAR AND J. G. VALVERDE.

In any event, however, when the defendant succeeds on his counter-claim it is always in the discretion of the judge whether or not he should get his costs and there is nothing in the present case to indicate that the judge did not exercise his discretion or that he exercised it wrongly. It must be assumed, in the absence of anything shown to the contrary, that the judge had reason for the order he made.

For the reasons given, the appeal must be dismissed on all points with costs.

Appeal dismissed.

SOOKLALL v. GAURISANKAR.

SOOKLALL, Plaintiff,

v.

GAURISANKAR AND LACHU, Defendants.

[1940. No. 260—DEMERARA.]

BEFORE LUCKHOO, J. (ACTING).

1942. JANUARY 5, 6, 7; FEBRUARY 16, 17, 18, 23.

Opposition to transport—Grounds of—Thirty years' continuous possession—Right to oppose.

Opposition to transport—Action to enforce—Not pursued to finality—Transport not passed—Advertisement withdrawn or abandoned—Advertisement in favour of another person—Opposition to By original opposer—In order—Rules of Supreme Court (Deeds Registry), 1921, rule 7.

Opposition to transport—Reasons for opposition—Amendment—Application for—By way of summons—Rules of Supreme Court (Deeds Registry), 1921, rule 9—Measurements of land opposed—Not reasons for opposition.

Thirty years' continuous possession of land gives the person in possession a right to successfully oppose a transport of the land by the owner with the legal title who has been out of possession for that period.

A person, who fails to prosecute to finality an action which he has instituted to enforce an opposition entered by him to the passing of a transport loses the right which, by virtue of the entering of the opposition, he acquired to restrain the passing of that transport. But if the advertisement of that transport is withdrawn or abandoned, and transport is subsequently advertised to be passed in favour of another person, the person who had entered opposition to the first transport is at liberty to enter opposition to the second transport.

Wills v. Eleazar (1941) L.R.B.G. 12, explained.

A. was in possession of certain land. He claimed to have purchased it from B. who had purchased it from C., the legal owner. On the death of C., the legal title to the land devolved on D., and E.

In 1921 D. and E. sold the land to F. and advertised transport accordingly. A. entered opposition, and instituted an action to enforce it. The defendants in the action entered appearance, but A. took no further steps in the action and allowed the action to become abandoned. F. did not complete the purchase from D. and E. and no transport was passed to him.

In 1940 D. and E. sold the land to G., and advertised transport accordingly. A. entered opposition, and instituted an action to enforce it. On the action coming on for hearing, it was objected that, the plaintiff having allowed his previous action to be abandoned, the plaintiff's right to oppose was extinguished, and he could no longer sustain any action with respect to the alleged claim by him to the land.

Held (1) that what was extinguished by reason of A.'s failure to pursue to finality the opposition action which he had instituted in 1921 was the cause of opposition which was founded upon the grounds of opposition stated in that suit, and not the right of the plaintiff in respect of the land; and

(2) that as the advertisement of the transport in 1921 was withdrawn or abandoned, and transport was advertised in 1940 in favour of another person, the plaintiff was not precluded from opposing the latter transport.

When opposition was entered to the passing of transport of a piece of land 10 roods facade by the whole depth (300 roods) the land claimed by the opponent, alleged to be 10 acres (equivalent to 10 roods facade by 300 roods in depth) was stated to be 10 roods by 300 feet. At the trial, the plaintiff applied for amendment to read 10 roods by 300 roods. The defendants objected that such an application could only be made by summons, as it was an application for an amendment of the "reasons for opposition" within the meaning of rule 9 of the Rules of the Supreme Court (Deeds Registry), 1921.

Held (1) that the amendment did not relate to the "reasons for opposition" but to the measurements of the land, the subject matter of the opposition; and

(2) that the amendment must be granted.

SOOKLALL v. GAURISANKAR.

Action by the plaintiff to restrain the defendants Gaurisankar and Lachu from passing transport of certain land to Ramautar.

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

C. Shankland, for defendants.

Cur. adv. vult.

LUCKHOO, J. (Acting): The subject matter in dispute is a piece of land ten (10) acres in extent, part of Grant No. 1,766, situate at a place called "Wash Clothes" on the left bank of the Mahaicony Creek, in the county of Demerara.

In the month of August, 1897, one Dookhy, the father of the defendants purchased from the Government of this colony a tract of 50 acres of Crown land and received from them a grant No. 1,766 therefor. In those days Grants of Crown lands so purchased were made absolute after beneficial occupation for a period of ten years. Dookhy died on the 26th day of January, 1911, testate, and left as his executrix, his daughter Lachrania, but before his death it would appear from two transports hereinafter mentioned passed to and in favour of one Beedesseah and one Adhin that he sold at least two portions of the land comprised in the said Grant. These portions or parcels of land are as to Beedesseah's, the most northerly 25 roods in facade of the tract by the full depth, and as to Adhin's, 10 roods in facade commencing 35 roods from the northern boundary of the said tract and extending thence in a southerly direction by the whole depth of the same. Transports were duly passed to these persons on the 3rd day of May, 1913, of the portions so purchased by them by the said Lachrania and are numbered in the register of Transports in the Deeds Registry as Nos. 361 and 362 respectively.

The portion of land in dispute, in which the plaintiff claims an interest and the right to oppose the Transport advertised by the defendants as the residuary legatees under the last will of their father Dookhy, is that portion of 10 acres which is situate between Beedesseah's and Adhin's. The claim of the plaintiff is based upon the purchase by one Gurdeen his brother on the 11th day of March, 1905, from one Haripersaud who in turn had purchased from Dookhy 25 acres of land, the southern half of the said tract and that the said piece of land is that portion of the tract described under *Firstly* in paragraph 1 of the Statement of Claim.

The plaintiff stated in support of his claim and right to oppose that he is 52 years of age and knew when his brother Gurdeen in whose house he lived purchased from Haripersaud the piece of land and obtained possession thereof. The land at that time was covered with thick bush, and his brother and he gradually cut and cleared portions of the same for the purpose of planting rice thereon. After the death of his brother, in the year 1909 or 1910, he took possession of the land as one of his heirs *ab intestato*, cut and cleared further portions and continued to cultivate the same

SOOKLALL v. GAURISANKAR.

with rice and later kept cattle on a portion of the said land, until, owing to ill health, he rented the same at first to one Manoo, to Ajodiah Persaud in the year 1929 for a period of 7 years, and then to one Bissoon who is his tenant up to the present time. That during all these years of his occupation of the said land only once, in 1926, was any attempt made to interfere with his possession, although he admits that in the year 1921, the defendants advertised transport to one Brijmohan for the said piece of land to which he entered opposition, filed and caused to be issued a writ of summons No. 594 of 1921 but took no further steps, after the defendants had entered an appearance, and allowed the action to be abandoned. Brijmohan, however, did not complete the purchase from the defendants and no transport was passed to him. The evidence does not disclose that Brijmohan ever went into possession of this piece of land.

It might be well to observe at this stage that the tract of 50 acres purchased by Dookhy from Government was all jungle land, and before the same could have been used for cultivation and even for depasturing cattle, it had to be cleared of a great deal of bush which grew from the bank of the Greek inwards.

The defendants supported their case to the ownership of the land and the right to dispose of the same on the ground that their father and testator Dookhy never disposed of that piece of land in his lifetime to any one and as the residuary legatees under his will the property in it vested in them and that they were free to sell the same first to Brijmohan in September, 1921, and then to Ramautar in August, 1940.

They alleged in their defence and led evidence in support thereof that after the death of Dookhy on the 26th January, 1911, his executrix Lachrania took possession of his estate including 15 acres of land part of the tract described in Grant No. 1766 of which the ten acres claimed by the plaintiff are included, and beneficially occupied it, fenced it in, kept cattle on it and was in the sole and undisturbed possession of it from January, 1911 to 1918 in which latter year she died: and that thereafter they took possession and have remained in the sole and undisturbed possession of it up to the present time and exercised rights of ownership thereover to the exclusion of any other person.

It was under those circumstances that they advertised transport to Ramautar in the months of August and September, 1940 when the plaintiff entered the present opposition to the passing of the transport and filed the action in which a decision of the Court is sought.

During the opening of the case by Mr. Woolford for the plaintiff Mr. Shankland on behalf of the defendants objected to the action being heard on the ground that the plaintiff having admitted in paragraph 5 of his Reply that he had allowed his

SOOKLALL v. GAURISANKAR.

action No. 594 of 1921 above referred to be abandoned, his right to oppose was extinguished, and he could no longer sustain any action with respect to the alleged claim by him to the 10 acres of land. Learned counsel relied for his submission on the authority of *John Eleazar Wills v. Joseph Eleazar* (1941) L.R.B.G. 12 in which case the late learned Chief Justice, Sir Maurice Camacho enunciated certain legal obligations on a person who opposed a transport to fulfil; and under what circumstances a cause of action is extinguished.

Mr. Shankland also raised an objection to an application by Mr. Woolford for an amendment of the description of the piece of land opposed "to read 10 roods in facade by the full depth of the said tract," as plaintiff had limited his opposition both in his reasons and the endorsement on his writ to 10 roods by 300 feet, and that no application had been made under rule 9 of the Rules of the Supreme Court 1921 relating to business in the Deeds Registry to amend.

Mr. Woolford answered this objection by submitting that the proposed amendment was not an alteration of the grounds or reasons of opposition, but was in the nature of a correction of the description of the piece of land opposed.

I dealt on the following day briefly with these two objections but as the former of the two points raised by Mr. Shankland is an important one which is sure to recur under our system of transports in this Colony I will now deal with it at length.

A "right of action" should be distinguished from a "cause of action." Whilst a cause of action may be extinguished under certain circumstances, yet the right in a person to claim might still remain. A "cause of action" has been held to mean every fact which is material to be proved to entitle a plaintiff to succeed every fact which a defendant would have a right to traverse.

The pith of the decision of the late learned Chief Justice in the case of *Wills v. Eleazar* lies in the following statement "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." The learned Chief Justice never meant in that statement to convey that a *right of action* in any one shall be wiped out. He did not decide that if the land is advertised again and the right of action is still in the whilom opposer, that opposer cannot enforce his right by opposing again. What it did say is, you *cannot use the same grounds* in a fresh suit (not by way of opposition) because those very grounds you used in the former suit and rule 7 of the Rules of the Supreme Court (Deeds Registry) 1921 compels you to bring your action within a certain time. The learned Chief Justice went on to explain "If an action *founded upon* a notice of opposition to

SOOKLALL v. GAURISANKAR.

the passing of transport is not brought within the time prescribed by rule 7 of the rules, *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." In my view, and I can find nothing to the contrary to be inferred from the decision in the above mentioned case, if the *right of action*, in other words the right in a person to claim as distinguished from the *cause of action* is still extant an opposition to a fresh advertisement of the transport gives another cause of action to the person in whom that right exists.

This must necessarily be so, because of the wording of rule 7 which is as follows:—

"Within ten days after the registrar has certified as required by rule 3 of these rules, the opponent shall bring an action to restrain the conveyance or mortgage *to which the notice of opposition relates*, and if he has opposed by virtue of any claim in respect of which a right of action has then accrued to him, to enforce that claim also."

Take a case in which a person opposes a conveyance on the ground that the transporter is indebted to him in the sum of \$1,000 on a promissory note but such person fails to bring an action within the time fixed by rule 7, or having filed an action does not take any further step to bring it to trial and allows the cause of action to be abandoned. Would that necessarily mean that the debt is extinguished, or only the cause of action founded upon the stated grounds of opposition? It is, in my opinion, clear that only the latter takes place, and such person would still have a right to oppose either a fresh advertisement of the transport if it were withdrawn and advertised again to some other person as has happened in the present case, or if the transporter advertises transport of any other property belonging to him. The right to claim is not extinguished: see *Joseph & Anor. v. Abbott*, L.J., 31.10.1911.

The objection taken by Mr. Shankland on that ground therefore fails, and I hold, as I did during the trial, that the plaintiff's action is maintainable.

With respect to the second objection, the ordinary rule is that the Court has wide powers of amendment in order to correct what in this case Mr. Woolford contended was a misdescription of the portion or parcel of land opposed. I agree with him, unless such power was trammelled by the rule under consideration by clear and explicit language. That rule, rule 9 of the Rules of the Supreme Court (Deeds Registry) 1921, reads as follows:—

"Unless by leave of the Court, the opponent may not, in the action to be brought as aforesaid, allege in his statement of claim, or rely upon, *any reasons* for opposition other than those contained in the Statement thereof filed in the Registry. An application to the Court under this rule shall be made on summons."

SOOKLALL v. GAURISANKAR.

Having been satisfied on the evidence of the plaintiff that the error as to the extent of the land described in the reasons of opposition and the writ of summons was a *bona fide* one and on reference to paragraph 3 of the reply filed by him it is clear that the extent of the parcel of land opposed is 10 roods by 300 roods equal to 10 acres.

I accordingly allowed the amendment to be made just before the plaintiff's case was closed.

In order for the plaintiff to succeed in this action he must establish his right to oppose the transport advertised by the defendants in so far as the property firstly described is concerned (opposition to the property secondly described having been withdrawn by him on the 15th day of July, 1941). How does he seek to establish that right? He gave evidence that on the 11th day of March, 1905, his brother Gurdeen purchased from one Harripersaud of Esau and Jacob, 10 acres of land and he knew that Harripersaud bought the land from Dookhy.

[His Honour reviewed the evidence, and continued:]

A strong point made by Mr. Shankland in his address was the neglect on part of the plaintiff to sue the defendants for transport of the said parcel of land. Mr. Woolford's answer was that the plaintiff was content with his occupation of the land, and on each occasion when any attempt was made to oust him of that possession he acted.

Having found as a fact that the plaintiff has satisfied me as to the identity of the land purchased by his brother Gurdeen and of the exercise of right of ownership thereto jointly with him and then in his own right as one of his heirs for a period of over 30 years he (plaintiff) has established a right to oppose the transport advertised by the defendants in favour of Ramautar: see *Persaud v. Fraser* (1931-1937) L.R.B.G. 37 where Savary, J., following the decisions in *South African Association v. Van Staden* (1892) 9 Juta 95, and *Jones v. Town Council of Capetown* (1896) 13 Juta 43 at pp. 51, 52 held that 30 years' continuous possession gives the person in possession a right to successfully oppose a transport of the property by the owner with the legal title who has been out of possession for that period.

In these circumstances the pleas raised by the defendants in paragraphs 11 and 12 of their Defence, as to laches and acquiescence, and limitation of action do not arise for decision.

I accordingly make an order restraining the defendants in their capacity as the residuary legatees under the last will of Dookhy, deceased, from passing Transport of the property first mentioned and fully described in paragraph 1 of the Statement of Claim, I declare, the opposition entered on the 14th day of September, 1940, by the plaintiff to the passing of transport of the said property to be just, legal and well founded.

I award the plaintiff the costs of this action.

Judgment for plaintiff.

C. C. BLACKETT v. G. C. POLLARD.

CHRISTOPHER CORNELIUS BLACKETT, Plaintiff,

v.

GEORGE CECIL POLLARD and FRANCIS C. HINDS.

Defendants.

[1940. No. 197.—DEMERARA.]

BEFORE LUCKHOO, J. (ACTING).

1942. FEBRUARY 19, 24, 25, 26; MARCH 5.

Principal and agent—House agent—For sale of property—Commission—For introducing purchaser—Not earned—Unless agent causa causans of sale going through.

Opposition to transport or mortgage—Reasons for—Claim on express contract—Trial of action—Claim on quantum meruit—Opponent cannot rely upon—Rules of Supreme Court (Deeds Registry), 1921, r.9.

Where a property owner promises an agent to pay him a commission if he introduces a purchaser for his property, the agent is not entitled to receive any remuneration unless he is the *causa causans* of a sale of the property being made.

Where a person enters opposition to a transport or mortgage on the ground of a claim under an express contract for work and labour done and performed and services rendered, he is precluded, by rule 9 of the Rules of the Supreme Court (Deeds Registry), 1921, from relying at the hearing of the action on a claim upon a *quantum meruit*.

Action by the plaintiff to enforce an opposition to a mortgage. The necessary facts and arguments appear from the judgment.

H. B. Bollers, for plaintiff.

J. L. Wills, for defendants.

Cur adv. vult.

LUCKHOO, J. (Acting): Although the amount involved in this claim is a small one, and could have been the subject of a suit in a Court of Summary Jurisdiction were it not the fact that it was instituted as a result of an opposition to a mortgage being passed by the defendants in favour of the British Guiana and Trinidad Mutual Fire Insurance Company, Limited, yet there arose during the hearing of the action certain matters of importance to house agents and other agents who work on commission.

The plaintiff, a licensed house agent, claimed from the defendants the sum of \$60 for work done and services rendered by him as their agent on the 22nd day of May, 1939, and for commission and reward due by them to him.

Particularising his claim he stated that both defendants and one “Gerald Robinson” employed him to find a purchaser for lot 69, Public Road, Kitty, for a commission of two (2) per cent. on the purchase price, and in pursuance thereof he found a purchaser, one Pitamber Doobay, a Dentist, of Plantation De Kinderen, West Coast, Demerara, who, on the 6th day Of June 1939, purchased the said property for the sum of \$3,000 and paid the sum of \$200 on account of the said purchase price,

C. C. BLACKETT v. G. C. POLLARD.

but which said agreement of sale was rescinded by consent of all the contracting parties.

It will be well to set out in whom the ownership of the said property vested on the 22nd day of May and on the 6th day of June, 1939, the important dates for the plaintiff's case.

One James Adolphus Pollard, a retired Sergeant Major of Police, by Transport No. 978 of the 29th day of September, 1924, became the owner of this property.

Pollard was married in the year 1897, in community of property, to his wife Catherine Sophia Pollard, and at the time of his death, on the 23rd day of July, 1931, his widow and his children, George Cecil Pollard, Frances Celestina Hinds (born Pollard) and Gusilda Robertson (born Pollard) were alive.

By his last will dated the 23rd day of February, 1929, he appointed his widow and his son George Cecil Pollard, executors *jointly* to whom Probate was granted by the Supreme Court on the 19th day of August, 1931.

By his will in which he clearly stated he was dealing with his estate he made the following bequest under the head "thirdly,"

"My land at lot 69, Alexander Village, Kitty, East Coast Demerara is left for my wife and children, *then after death* to my grand-children share and share alike, *the same not to be sold.*"

This is the property for which, the plaintiff alleges, he was to find a purchaser.

It is clear that on the 22nd day of May, 1939, *one half* of the said lot of land was vested in Catherine Sophia Pollard (widow) as having been married in community of property, and the *other half* was, subject to the life interest in the widow and the children abovementioned, to descend to the grand-children of the testator and was not to be sold.

The widow in those circumstances was free to dispose of her own half interest, but, apart from the specific direction of the testator that his interest in the lot should not be sold, neither the widow nor her children could properly have disposed of that interest.

The evidence discloses that after the death of James Adolphus Pollard, his widow erected two cottages on the said lot, her daughter Gusilda Robertson, one, and two lessees of the premises, one each, in all five buildings were on the lot at the material times in this case.

That the plaintiff is a property agent and was so in the year 1939, is admitted. He knew the defendants for about a year prior to the month of May, 1939, and on the 22nd May, 1939, one Robertson, a brother-in-law of the defendants, spoke to him in consequence of which he went to 69, Public Road, Kitty, where he met the defendants and their mother. Robertson was also present. There he alleges the request to find a purchaser was made.

C. C. BLACKETT v. G. C. POLLARD.

It is necessary and important to set out the exact words which passed between the parties in order to determine:—

- (a) Whether or not there was a contract binding upon the parties.
- (b) What were the terms of that contract, and
- (c) Whether the plaintiff fulfilled his obligation under that contract to entitle him to the commission he claims.

Plaintiff's evidence on this point is as follows:—

“Defendant George Pollard spoke to me and said he will be glad if I would find a purchaser for the property situate at lot 69, Public Road, Kitty. He further stated that the price they would like to have for the property was \$3,500 and that they would pay me a commission of 2 per cent. on the purchase price, *if I found a purchaser.*”

“I had asked the question in whose name was the property. Both defendants (meaning George Pollard and Frances Hinds) stated that they were *the executors* of their father Pollard, deceased, in whose name title was vested.”

He, plaintiff, at this stage was shown the boundary line of the property and the number of buildings belonging to the estate of Pollard.

“I said to the defendants that it was very difficult to obtain a purchaser for \$3,500. Hinds said ‘Well Mr. Blckett whatever price you get submit it.’ I said I will try my best to see what I can do. I then left.”

In answer to the Court after being re-examined by his Counsel, the plaintiff said: “they instructed me as executors of the estate, to find a purchaser. I was told by them they were heirs of the property. I was going to look to the executors in their capacity as executors for the commission.”

Apart from the question of the right of the defendants in their alleged capacity to instruct the plaintiff to find a purchaser, and defendant Hinds had no such capacity, or their rights as heirs to their father's property and their authority to bind any of the other heirs, no evidence has been given by the plaintiff that the widow *qua* executor or individually took part in the above request to the plaintiff, nor does the plaintiff attempt to justify these proceedings against the defendant as the heirs *ab intestato* of their mother's estate, she having died on 16th day of June, 1939, intestate.

The defendant Frances Hinds denied that she ever instructed the plaintiff to find a purchaser or to sell lot 69 for the sum of \$3,500 or to pay commission at the rate of 2 per cent., on the price realised or that she spoke to the plaintiff about the sale of the property; but George Pollard on the other hand admitted that the plaintiff saw him in the month of March, 1939, at the Fire Station, Charlotte, Street, Georgetown, where he then worked, and informed him that his brother-in-law (Robertson) had told him (plaintiff) the property was for sale. This defendant also

C. C. BLACKETT v. G. C. POLLARD.

stated that his mother and he accepted the office of executors (joint) under the will and were administering the estate of James Pollard, deceased. His version of what occurred is as follows:—

“I said I would consult my mother and let him know later on. He returned about 4 or 5 days after and I told him mother said he could sell if he obtained a buyer offering \$3,300. He left, He returned within a week after saying that he got a buyer who was willing to pay \$2,700. I told him I was not interested in that price. On two occasions subsequently he came. He presented to me as his highest offer \$2,900. I told him I was not interested. He said one Pitamber Doobay had offered \$2,900.”

This witness agreed that the plaintiff’s remuneration was to be 2 per cent., on the purchase price.

These two versions of what occurred differ as to time, place and the amount fixed, otherwise they are not substantially different.

I am inclined to and do accept the version of the plaintiff on this point supported to a great extent by the entries he made at the time in his notebook Ex. “B”.

There he records the date, the price of \$3,500 and particulars of the revenue and expenditure of the property and the names of the persons whom he said were present at the interview at Kitty on the 22nd day of May, 1939.

Has the plaintiff on his story on that point satisfied the requirements of the law as to a contract binding upon the parties (defendants)?

There is a long line of cases following *Miller v. Beal* (1879) 27 W. R. 403 which decided that the mere fact of employment of a professional agent in *itself raises a presumption* of a contract to remunerate him. If a person had no employment to sell express or implied, he could have no claim to be remunerated.

“When a proprietor, with the view of selling his estate goes to an agent (and it makes no difference if the agent goes to him) and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, *although the price paid* should be less than the sum named at the time the employment was given”: *per* Lord Watson in *Toulmin v. Miller* (1887) 58 L.T. 97, C. A.

I am satisfied that the plaintiff was employed to sell by the defendants, to find a purchaser for the property at an agreed commission.

What were the terms of that contract?

It has been repeatedly stated in decided commission cases in England that there is no fixed rule of construction. Each case depends upon the precise wording of the agreement.

Unfortunately in many of these cases there is a tendency on part of property owners and commission agents to leave the terms of the agreement at large, to make oral agreements where their

C. C. BLACKETT v. G. C. POLLARD.

respective recollections differ materially each deposing to facts in order to suit his side of the matter, a most unsatisfactory state of things. In many instances neither owners of property nor agents ever care to put their agreements in writing leaving room for the purpose of fencing with any legal liability which might attach to their respective actions.

Commission contracts, as was stated by Lord Russell of Killowen in the case of *Luxor, Ltd., v. Cooper* (1941) 1 A.E.R., at p. 43, are subject to no peculiar rules or principles of their own. The law which governs them is the law which governs all contracts and all questions of agency. Each case must depend upon the exact terms of the contract in question, and upon the true construction of those terms.

Contracts by which owners of property desiring to dispose of it, put it in the hands of agents on commission terms, are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything. *The contracts are inertly promises binding on the principal* to pay a sum of money which involves the rendering of some service by the agent.

I believe, as I stated above, the version of the plaintiff of what the defendant George Pollard said to him, in other words the terms of the contract in question, but the true construction of those terms has still to be determined.

Did the defendants mean that if a person was introduced by the plaintiff and *eventually* that person purchased the property that the plaintiff in any event would be entitled to a commission on the purchase price?

Did it exclude any other competing house agents bringing about a sale of that property to the person who is introduced by the plaintiff? Did such a contract which imposed no obligation on the plaintiff to do anything prevent the employment of any other agent by the defendants? If such was intended, then clear words should have been used.

In my view the terms of the contract as I find them did not, and it was open to the defendant Pollard or his mother Sophia Pollard, as the evidence discloses, to employ Henry Carthy, another licensed house agent, simultaneously with the plaintiff with similar conditions. They were exercising their undoubted rights of ownership, at least such right of ownership which the mother possessed, unless the plaintiff as a term of his agreement expressly stipulated that they should not exercise such a right. There was nothing in the agreement with the defendants and there is nothing in law which prevented them from employing another agent.

The question then would be who was the effective cause by which the property was sold?

As was said by Erle, C.J., in *Green v. Bartlett* (1863) 32 L.J.C.P. 261, 263, "there has been a sale by the agent which

C. C. BLACKETT v. G. C. POLLARD.

would entitle him to such commission, if the *relationship of buyer and seller* has been really caused and brought about by what he has done," if, in other words, he was the immediate cause, *the last link in causation by which the property was sold.*

Let us examine the evidence on which counsel for the plaintiff relied in bringing his client's case within that rule, and to place in juxta-position the evidence the defendants submitted that another agent forged the last link in the chain of causation.

The plaintiff gave the following story. "On the morning of the 23rd day of May, 1939, I went to Dr. J. B. Singh's house in Lamaha Street and I met Mr. Pitamber Doobay there. I spoke to him about lot 69, east of Queen Street, Kitty. He decided at once to go with me to inspect the property. We left by his car for Kitty. Before we got to the property we stopped, and Pitamber Doobay spoke to Dr. Bissessar. We arrived at the lot and whilst there Dr. Bissessar came. We (Doobay and I) inspected the property. In consequence of what Doobay told me I went to Dr. Bissessar the next morning, 24th May, 1939, I spoke to him. He said I could offer \$2,900. I thereupon left and met Pollard in Charlotte Street at the Fire Station. I told him I had got an offer from Dr. Bissessar for Doobay for \$2,900. He told me he could not say anything then, he would have to consult the others. I saw him on the 25th, 26th and 28th May at the Fire Station and he told me on the last occasion (28th May) that if I got Doobay to offer \$3,000 it would be alright. I went back to the Doctor on the 28th day of May and told him the defendant would accept \$3,000. Dr. Bissessar said, give them a chance, I will hear from them later.

"I went out of town. On the 6th June, I went to Dr. Bissessar and he told me he had bought the property from the defendants for Doobay for \$3,000.

It would appear that one Henry Carthy, a licensed house agent and a friend of the Pollard family, was requested by the widow, Sophia Pollard, at or about the same time to find a purchaser for lot 69, east of Queen Street, Kitty (the said lot) of which she was the owner of an undivided half with two buildings thereon erected by her subsequent to the death of her husband, and that Carthy on the 1st or 2nd day of June spoke to Dr. Bissessar with whom he had previous business transactions and succeeded on the 5th day of June in getting the Doctor to purchase the said property along with a cottage thereon belonging to Gusilda Robertson for the sum of \$3,000. On that day a written agreement of sale was drawn up and executed between the purchaser, Dr. Bissessar and the defendant George Pollard, in his capacity as executor of the estate of his father, Sophia Pollard (widow) and Gusilda Robertson, In that agreement Dr. Bissessar did not disclose the fact that he was purchasing for Doobay. That in my view makes no difference and I hold it was a purchase by him for

C.C. BLACKETT v. G. C. POLLARD.

Doobay, On this evidence Mr. Bollers contends on the authority of *Mansell and anor v. Clements* (1874) L.R. 9 C.P. 139 and *Jansen v. Ferreira* 1938) L.R. B.G. p. 17 and on a passage in *Powell on Agency* 1933 edition at p. 49 that the plaintiff brought about the effective cause of the transaction, and had earned his commission, although he did not make the contract of sale or adjust its terms. Mr. Wills, on the other hand, submitted that the case of *Mansell and anor v. Clements* whilst being good law can be distinguished from the facts of the instant case, inasmuch as in Mansell's case no price for the property was fixed, but in this case, on plaintiff's own evidence he was told to find a purchaser for \$3,500. The real test is, in order to found a legal claim for commission, *there must also be a contractual relation between the introduction and the ultimate transaction of sale.*

The plaintiff Blackett took no part whatsoever in the independent negotiations between Dr. Bissessar, on the one hand, and the defendants George Pollard, Sophia Pollard and Gusilda Robertson on the other, which led to that result, and the sale of Dr. Bissessar was made with different parties (except George Pollard) and on conditions not contemplated when the plaintiff received his instructions from George Pollard.

The plaintiff took no part in negotiating this bargain which included new parties and a property belonging to Gusilda Robertson. As *Viscount Simon L.C. in Luxor, Ltd., v. Cooper* in his speech in that case observed "the respondent was not appointed sole agent, and there might have been half a dozen competitors for the proffered commission. If the respondent's introduction of his nominee had been immediately followed by a better offer through another agent, would the appellants have been bound to refuse the latter, or to accept it only with the consequence of paying two commissions?.....The contrary has been held, I think correctly, by McCardie, J., in *Bentall, Horsley & Baldry v. Vicary* (1931) 1 K.B. 253. The contract contains no express words at all indicating a prohibition against a sale by the defendants themselves. If the parties intended such a prohibition nothing would have been easier than to insert the appropriate words."

Mr. Bollers has placed his proposition on too wide a ground that his client is entitled to a commission, if he can prove that he introduced to the defendants the person who afterwards purchased the property of the defendants, and that his introduction became the cause of the sale. This general proposition is subject to the limitation I have indicated above. Property agents are too prone to seize upon such generalities in their endeavour to substantiate their claim against a vendor of property.

One can hardly apply case law in these contract cases. The terms which are generally oral are so diversified, although the framework in each seems to give them a similar appearance that one is apt to be misled in the application of decided cases not

C. C. BLACKETT v. G. C. POLLARD.

realising that each must depend on the consideration of the language of the particular contract. And I agree with the remarks made by the Master of the Rolls in the over-ruled case of *Trollope & Sons v. Caplan* (1936) 2 A.E.R., p. 842," "that the authorities as to the right and obligations of house agents and their clients with regard to such questions are not in a very satisfactory condition." This calls, in my opinion, for express legislation in this colony to regulate the conduct of business between owners of property and house agents. It is regrettable to note that in almost all the cases which have occupied the attention of the Courts the alleged contracts were orally made necessitating the investigation whether or not a contract was made and the terms thereof. Hundreds of dollars in some cases are claimed as commission, and it would be wise if legislation could be introduced in order to deem such contracts unenforceable unless the same be in writing setting forth all the terms, the conditions under which the same would become payable, and to be signed by both parties. Many contracts of far less importance are required to be in writing.

I cannot therefore hold that the plaintiff has fulfilled the obligation under his contract to entitle him to the commission he claims.

I regret that I have to make such a finding as it is clear that the plaintiff was instrumental in putting Pitamber Doobay in touch with the property, but he was not the immediate cause, the last in causation by which the property was sold. He stopped short of being the direct or efficient cause.

It is well settled that, in order to earn his commission, the agent must be the *causa causans* of the transaction going through: see *Coles v. Enoch* (1939) 3 A.E.R. 327.

Had I so found I would have held that the plaintiff had discharged the onus that he had introduced a purchaser ready, willing and able to complete. The evidence of Pitamber Doobay and Dr. Bissessar satisfies me that Pitamber Doobay was in no way financially embarrassed at the time and could have found the sum \$3,000: although for some reason not disclosed to the Court, Dr. Bissessar, acting for Doobay, secured a rescission of the contract by the payment of \$200 on the 5th day of October, 1939, yet at the time he signed the contract he was willing, ready and able to complete. That stage seems from the current of authorities to be the determining period.

Lord Atkin in the unreported case of *James v. Smith* heard in the Court of Appeal on the 7th day of June, 1921, said "in my opinion the purchaser must be willing and ready, that is to say, able, up to the time of signing the contract."

Mr. Bollers as a last resort contended that the defendants in their personal capacity are liable to pay to the plaintiff for the work done and service rendered by him on a *quantum meruit*

C. C. BLACKETT v. G. C. POLLARD.

and cites the well known and oft quoted case of *Prickett v. Badger* (1856) 26 L.J.C.P. 36 as his sheet anchor.

He argued that an executor is personally liable upon all contracts into which he enters and for all debts which he incurs in carrying on his testator's business, notwithstanding that he avowedly contracts as representative. He is personally liable upon his own contracts, and cannot limit his liability to the extent of assets in his hands. In those circumstances he invites the Court to find that the defendants, or at least the defendant George Pollard, would be liable to pay the plaintiff an amount equal to the commission he would have earned.

This point raises a question of interest and importance to all agents who rely on the payment of commission as their means of income.

I pointed out to Mr. Bollers that the claim of the plaintiff was based on an express contract set out in his reasons of opposition to the mortgage, and that there were certain insurmountable difficulties in the way of pronouncing judgment in his client's favour much as I would like to do as I felt then and still feel that the agent Carthy, with knowledge of the fact that Doobay had inspected the property, during the plaintiff's absence from Georgetown between the 28th day of May and the 6th day of June, 1939, stole a march, interviewed Dr. Bissessar acting for Doobay and concluded a contract on the 5th day of June, 1939.

Lord Russell in the *Luxor* case made these remarks in his speech before the other law lords:—

“I do not assent to the view which I think was the view of the majority in *Trollope & Sons v. Martyn Bros.* (1934) 2 K.B. 486 that a mere promise by a property owner to an agent to pay him a commission if he introduces a purchaser for the property at a specified price, or at a minimum price, ties the owner's hands and compels him, as between him and the agent to bind himself contractually to sell to the agent's client who offers that price, with the result that, if he refuses the offer he is liable to pay.....either (a) on a *quantum meruit*, or (b) as damages for breach of a term to be implied in the commission contract.....As to the claim on a *quantum meruit* I do not see this can be justified in the face of the express provision for remuneration which the contract contains.....My Lords, for myself, I do not favour the view that an agent who has not earned his commission according to the express terms of the contract is entitled to damages for breach of some term to be implied..... I see no necessity which compels the implication. The view is, as I read the authorities, founded in its origin upon the observations of Willes, J., in *Prickett v. Badger*. I have carefully considered those observations and the view which has been founded upon them. The case was one purely of a *quantum meruit* claim. It was not a claim for damages for breach of any contract, express or implied. It was an action on the com-

C. C. BLACKETT v. G. C. POLLARD.

mon counts for work and labour, on the footing that because, owing to the principal's action, the promised commission could not be claimed, the plaintiff was entitled to be remunerated on a *quantum meruit* for the work and labour actually done."

The right of the plaintiff is on the agreement, and so the parties intended. The rule *expressum facit cessare tacitum* applies. There could be no avenue open for the application of the *quantum meruit* principle. The claim of the plaintiff is based upon an express contract and he must stand or fall by its terms.

In any case, to incorporate such a claim would be in direct violation of rule 9 of the Rules of Court (Deeds Registry), 1921. Even if such were permissible the plaintiff would have had to bring his case within the common sense rule which Salter, J. in the case of *Scott v. Pattison* (1923) 92 L.J.K.B. 888 applied. "If a party to a contract which is unenforceable under the statute of Frauds has rendered services under that contract to the other party, and the other party has accepted and benefited by those services, then I think the party who has rendered the services *can sue* in debt on an implied contract to pay him according to his deserts."

For the above reasons the plaintiff cannot succeed.

I therefore declare the opposition entered by the plaintiff on the 11th day of July, 1940, to the mortgage advertised by the defendants in the favour of the Insurance Company to be unjust and not well founded.

In view of the circumstances of this case I make no order as to costs.

Judgment for defendant.

MILDRED ROSE v. B. G. NURSES ASSN.

MILDRED ROSE, Plaintiff,

v.

BRITISH GUIANA NURSES ASSOCIATION, Defendants.

[1939. No. 336.—DEMERARA.]

BEFORE LUCKHOO, J. (Acting).

1941. DECEMBER 16, 17, 18, 19, 22; 1942. JANUARY 5.

Friendly society—Officer—Removal from office—Rules of society—By resolution—Meeting specially summoned for purpose—All members to be summoned—In notice convening meeting, object to be stated with sufficient particularity—Otherwise proceedings at meeting null and void.

Friendly society—Disputes—Rules of society—To be referred to arbitration—Procedure in rules—For electing arbitrators and conducting arbitration—To be followed in matters of substance—Otherwise, arbitration ineffective—Rules of society—Arbitrators to be appointed by society—Arbitrators appointed by president—Decision of arbitrators on dispute—Null and void.

Friendly society—Determination of disputes—Rules of society—Dispute not determinable by arbitration—Under Friendly Societies Ordinance, cap. 214 or under rules of society—No jurisdiction in arbitrators to hear—Even where parties consent.

Friendly society—Determination of disputes—Dispute—Meaning of—Dispute between Treasurer and society—Whether a dispute—Claim by society against Treasurer for misappropriating and withholding property of society—Whether a dispute—Friendly Societies Ordinance, chapter 214, s. 43.

Where the rules of a society provide that an officer of the society may be removed from office by resolution passed at a meeting specially summoned for the purpose, all the members of the society must be summoned, and the notice convening the meeting must state the object of the meeting with sufficient particularity; otherwise, the proceedings at the meeting are null and void.

If the rules of a society provide that disputes shall be referred to arbitration, the provisions of the rules for electing arbitrators and conducting the arbitration must be followed in all matters of substance as opposed to matters of mere form: otherwise, the decision arrived at will not be a decision according to the rules and so protected from review by virtue of section 43 of the Friendly Societies Ordinance, chapter 214.

Where the rules of a friendly society provide that disputes shall be determined by arbitrators appointed by the society, and arbitrators are appointed by the President of the society, and not by the society, the decision of the arbitrators on the dispute is null and void.

The parties themselves cannot give arbitrators jurisdiction to deal with a dispute not provided for by the Friendly Societies Ordinance, chapter 214, or by the rules of a friendly society.

Obiter dicta by Luckhoo, J. (Acting): (1) Section 43 of the Friendly Societies Ordinance, chapter 214 (which relates to the mode of determination of disputes) applies only to disputes between members of a society, as such, on the one hand, and the society or any one or more of its officers, on the other hand. It does not apply to a dispute between the Treasurer of a society, as such, on the one hand, and the society or any one or more of its officers, on the other hand.

(2) The claim of a society upon its Treasurer for misappropriating and keeping in his hands the moneys of the society is not a dispute between the Society and one of its members within the meaning of section 43 of the Friendly Societies Ordinance, chapter 214.

Action by the plaintiff claiming, among other things, that in August or September, 1939, she was wrongfully removed from her office as Treasurer of the defendant Association. The Secre-

MILDRED ROSE v. B. G. NURSES ASSN.

tary stated that on August 8, 1939, she had delivered to the plaintiff 1,103 tickets to be sold at 12 cents each, and 303 tickets to be sold at 6 cents each, and that the tickets were counted in the plaintiff's presence: the sum of \$150.54 ought to have been realised from the sale of the tickets. The plaintiff stated that the tickets were not counted when they were delivered to her, that all the tickets delivered to her were sold, and that the total proceeds amounting to \$137.96 were handed over by her to the Secretary. The Secretary stated that she took the money home without counting it, and put it in her bedroom; that she did not count it until 2 days later when it was found to be only \$122.44.

Rule 8 (a) of the Rules of the defendant association provides that the President "shall have power to interdict any officer for any irregularity." At a committee meeting of the defendant association held on August 15, 1939, the committee, by a majority, expressed the opinion that the plaintiff should not remain as Treasurer of the Association. On August 16, 1939, the Secretary wrote the plaintiff that, she was directed by the President to inform her that, as a result of the Committee meeting held on August 15, 1939, the plaintiff was interdicted from duty as Treasurer of the Association under the authority of the said Rule.

The Secretary further informed the plaintiff that in accordance with rule 30 a special meeting of the general body would be held on August 17, 1939, for the purpose of deciding whether the plaintiff should be removed from office, expelled or suspended. Rule 30 is as follows. "Should any member (*sic*) of the Committee of Management conduct be found detrimental to the working of the Association, at the request of any two members to the Secretary, a special meeting of the general body shall be called, and should the member be found guilty of the charge, she shall be removed from office, expelled or suspended according to the nature of the offence."

On August 16, 1939, the Secretary wrote four persons requesting them to become arbitrators for the Association in accordance with Rule No. 28, and requesting them to attend a meeting on August 17. In the letter it was stated that it was written by the direction of the Executive Committee, but it was in fact written on the instructions of the President. Rule 28 is as follows: "If any dispute shall arise between any member (or any person claiming through or on account of any such member, or under the rules of the Association) and the Association or any one or more of the officers of the Committee of Management, it shall be referred to arbitration. Two or more arbitrators shall be appointed by the Association, none of them being beneficially interested in the funds of the Association. They shall decide the matter in dispute and their decision, or the decision of two, shall in all cases be a final settlement of the dispute."

On August 17, 1939, the defendant association met for the

MILDRED ROSE v. B. G. NURSES ASSN.

special purpose of "Action under Rule 30 in respect to the Treasurer." Mr. T. Lee, one of the arbitrators nominated by the President, was present. He suggested that the matter be referred to arbitration under Rule 28. The plaintiff raised no objection to any one of the arbitrators who had been named by the President. The arbitration was fixed to take place on August 21, and the plaintiff asked for permission for some one to follow the proceedings in her interest.

On August 21, 1939, the Secretary wrote the plaintiff informing her that the meeting at which she would be tried by arbitration for defalcation of the Association's funds would take place on the same evening.

The arbitration commenced on August 21 before 4 arbitrators. Three of them had been nominated by the President, and the other was substituted for the fourth nominee of the President. The plaintiff was represented by counsel who objected to the proceedings on the ground that the plaintiff could not be properly tried by arbitration. This objection was overruled.

The arbitrators decided by a majority of 3 to 1 (the dissenting arbitrator was the substituted arbitrator) that the plaintiff had received the sum of \$150.54 from the sale of the tickets delivered to her by the Secretary and \$4.20 from 35 tickets which were resold; and that she had only delivered to the Secretary the sum of \$137.96.

The Secretary called a special meeting of the Association for September 1, 1939. The agenda was (1) Delivery of decision by arbitrators and (2) Election of a Treasurer (3) Any other important business. The Secretary wrote the plaintiff requesting her to be present for the delivery of the arbitrators' decision. The Secretary did not summon all the members of the Association to attend the meeting. Rule 6 is as follows: "An officer who fails to perform her duty to the satisfaction of the general body may be removed from office at any time by a resolution of a majority of financial members present and voting at a meeting specially summoned for that purpose."

The majority report of the arbitrators was approved by the meeting, the plaintiff was removed from office as Treasurer, and another Treasurer was appointed for the remainder of the year 1939.

The defendants' main contentions were: (1) that the plaintiff was properly removed by the society from the office of Treasurer in pursuance of rules 6 and 30 of the Association; (2) that the plaintiff was properly removed from the office of Treasurer by the majority verdict of the arbitrators acting in pursuance of a reference made under rule 28 of the Association and section 43 of the Friendly Societies Ordinance, chapter 214, or, in the alternative, of a reference by consent. The plaintiff's main contentions were: (1) that the removal of the plaintiff from office under rules 6 and 30 was null and void, inasmuch as the notice convening the

MILDRED ROSE v. B. G. NURSES ASSN.

meeting did not state the object of the meeting with sufficient particularity and all members of the Society were not summoned; (2) that the arbitrators had no jurisdiction to hear the dispute inasmuch as they were appointed by the President, and not by the society as required by rule 28; and (3) that the arbitrators, even if properly appointed, had no jurisdiction to hear a dispute in which the Treasurer was accused of defalcation of the moneys of the society.

L. A. Hopkinson and R. S. Miller, for plaintiff.
S. I. Cyrus and G. M. Farnum, for defendants.

Cur. adv. vult.

LUCKHOO, J. (Acting): This is an unusual type of action in which the plaintiff Mildred Rose, a nurse-midwife, and late Treasurer of the defendants' Association, asks the Court for—

1. A declaration in her favour of the following orders:—

(a) that the arbitration proceedings resulting in the findings and award dated 29th August, 1939, of the majority report of the arbitrators appointed by the committee of management of the defendants are null and void;

(b) that all resolutions passed at meetings of the defendants' association or of its Committee of management adopting the said findings and report and consequent thereon are null and void;

(c) that the plaintiff is not accountable to the defendants or at all, for the sum of \$15.52 or \$16.78 mentioned in the said report or any sum whatever; and

(d) that the plaintiff still is the treasurer of the defendants' association.

2. An injunction restraining the defendants from acting on the said report and on any resolution of its members or committee of management, consequent on the said report.

3. In the alternative, an order setting aside the said award.

4. Such other order as the Court may deem fit and just.

The defendants in their defence put in issue several matters raised in the Statement of Claim, and invite this tribunal to reject, first of all, the consideration of the plaintiff's claim on the following ground, namely, that the award was and is binding upon the plaintiff and that it is not competent for her to maintain this action, or to seek to set aside the award, the defendants having dealt with a dispute under rule 28 of their Rules

They contend on the pleas hereinafter set forth that the plaintiff is not justified in instituting these proceedings and should be refused the right to obtain the abovementioned declaration and the order for injunction.

When the matter reached the Court on Tuesday the 16th day of December last, Mr. Farnum for the defendants raised a preliminary objection to the action being entertained. On the following day I gave my ruling against such objection and stated my reasons which I need not now repeat for doing so.

The main pleas in the defence are:—

1. that the plaintiff as Treasurer of the Association was solely in charge of and was responsible for the sale and collection of tickets at the entrance to the fete and fair promoted by the Association on the 8th day of August, 1939;

MILDRED ROSE v. B. G. NURSES ASSN.

2. that she had not accounted for all the monies from the sale of tickets entrusted to her;

3. that in consequence of that fact an investigation by the Association under rule 28 of its Rules was held with the consent of the Plaintiff, by four arbitrators, three of whom made an award that the plaintiff had not accounted for the sum of \$16.78 and

4. they (the three Arbitrators) recommended that the Treasurer should relinquish her position and repay the said amount.

The defendants' main contentions are set out in paragraphs 18, 19 and 20 of their defence

18. At the special general meeting of the Association held on the 1st of September, 1939, the Association by a majority vote adopted the aforementioned majority award or report of the arbitrators, and removed the plaintiff from her office as Treasurer, and a new Treasurer was elected immediately thereafter. The above vote was taken after the plaintiff had asserted at the said meeting that she had relinquished the office of Treasurer. The defendants deny that any member present who was entitled to vote was prevented from voting.

19. The defendants will contend that the said removal of the plaintiff from office was *intra vires* rule 30 of the Association, and it is not competent for the plaintiff to seek to set it aside on the grounds alleged in the Statement of Claim.

20. In the alternative, the plaintiff herself voluntarily relinquished office at the said meeting, and it is not competent for her to seek to obtain her re-instatement in the said office by means of this action.

The case raises very important matters in relation to the administration of the rules of Friendly Societies in this Colony, made under the provisions of the Friendly Societies Ordinance, Chapter 214. The British Guiana Nurses' Association (hereinafter referred to as the Association) was founded in the month of June, 1928, and duly registered under the Friendly Societies Ordinance in the month of August of the same year. Among the objects of the Association are—(a) to raise and maintain funds by Entrance fees, subscriptions, fines, levies, sale of goods, *Entertainments*, etc. (b) to provide a hostel for the use of the members, etc. Membership it would appear from the rules is open to certified Nurses, Midwives and Health Visitors.

By sections 12 of the said Ordinance application has to be made for the registration of the said Association when two copies of the rules and two lists of the names of the Officers (if any) have to be transmitted to the registrar together with the application. This must have been done for on the 25th day of July, 1939, Miriam Eldeca Clarke a member of the Association lodged with the registrar amended rules on the 25th day of July, 1939.

The rules which will require consideration hereafter are rules 6, 7, 8, 28 and 30. The plaintiff Mildred Rose who is certified and registered as a Nurse Midwife since the year 1917, and a certified Red Cross Nurse since 1921, was admitted to membership of the Association in the year 1931.

By rule 7 of its rules the management of the Association is vested and controlled by a Committee comprising of the following officers, viz.: President, two Vice-presidents, a Secretary and an Assistant, a Treasurer and an Assistant and five ordinary Members from the general body.

MILDRED ROSE v. B. G. NURSES ASSN.

Rule 8 (a) prescribes that “the President shall preside at all meetings of the Association, and at Committee Meetings, sign the minutes, receive Members for admission, preserve order, *administer* the rules impartially and inflict fines. She shall have power to *interdict* any officer for any *irregularity*, and none other but a fully certified nurse shall be eligible for the office of President.”

During the year 1931, the plaintiff was elected on the Committee of Management—a very early appointment—and acted as Treasurer in the year 1936. From the 1st day of January, 1937, she became the Treasurer of the Association until the 15th day of August, 1939, when she was relieved of that post in the circumstances hereinafter narrated.

As Treasurer of the Association she is required by rule 8 (d) to give a monthly statement of receipts and expenditure to the members at the first monthly meeting, and twice in each year render a true account of all monies received and paid out by her for the Association. “She shall keep a sum not exceeding five dollars in her possession for emergency.”

In the month of August, 1939, the following members of the Association, Nurses Wilson, Clarke and Rose (the plaintiff) held the offices of President, Secretary and Treasurer, respectively.

In that month, the eleventh anniversary of the Association, a “fête and fair,” promoted by the Association in order to raise funds was held at the Promenade Gardens, the main entrance to which is in Middle Street, in the city of Georgetown.

Admission to that form of entertainment was by printed tickets consecutively numbered and put up in books of twelve. To each ticket there was a counterfoil or “stump” as it was labelled throughout the hearing of the action. These tickets were of two denominations, adults and children. Prior to the 8th day of August, 1939, the date of the “fete and fair”, tickets were delivered to several nurses to be sold beforehand, and what remained were delivered by the Secretary to the Treasurer at about 4 o’clock on the afternoon of the “fête and fair”, the Treasurer having been detailed by the President at a general meeting held on the 3rd day of August to be at the garden gate. Middle Street entrance, that afternoon to assist in the sale of tickets.

The entertainment began at about 4 p.m. and continued until 10.45 p.m. It would appear from the evidence that the worthy cause for which the entertainment was given and the prize, a bicycle, which was offered by Mr. A. Pestano, proprietor of Pestano’s Outfit Stores, drew a large crowd, and that it was not possible for the plaintiff herself to dispose of all the tickets which were handed to her by the Secretary, Nurse Clarke, at the gate, and perforce had to obtain the assistance of Nurse Martin and one Isaacs to sell tickets at the gate. In addition, several persons assisted in the disposal of tickets elsewhere than at the main entrance some of whom were not members of the Association.

MILDRED ROSE v. B. G. NURSES ASSN.

The plaintiff stood by a table containing a drawer and as the tickets were being sold by her and her assistants the money for the same was placed in that drawer.

The plaintiff stated in her evidence that the tickets handed to her by the Secretary that afternoon were never counted, and that she was not aware of the number of tickets she received, but that at the end of the entertainment she sent for the Secretary in order to count the cash she had from the sale of tickets. For some reason, not definitely stated, Nurse Craig, the Assistant Secretary of the Association was sent to do so, and that Nurses Craig, Martin and the plaintiff counted the cash which amounted to \$137.96. After this was done the money was replaced in the drawer of the table which was lifted and taken to a shed in the gardens where they met one Sandiford and one Sharples, that the money was emptied from the drawer into a grip or valise, and a note made on a slip (piece of card-board) of the amount and delivered to the Secretary. The object for this being done was to give the Secretary an opportunity to check the cash with the number of tickets she had delivered to the plaintiff, enter the amount in a book of the Association and hand same back to the plaintiff to be deposited in the bank to the account of the Association as provided for by rule 8 (e) "The Treasurer shall deposit in one of the Savings Banks of the Colony all monies over five dollars and she shall present the Bank Deposit book for inspection by the members of the Committee every meeting night."

The evidence of the Secretary, Nurse Clarke, is to the effect that she gave the plaintiff on the afternoon of the "fête and fair" 1,103 adult tickets and 303 children's tickets, that no ticket was returned to her and that the plaintiff should have accounted for the sum of \$150.54. She further stated that the President provided the plaintiff with three assistant ticket sellers, Nurse Martin and two gentlemen (Kirton and Davis) to assist the plaintiff to dispose of the 1,406 tickets handed to her, that these three persons would get tickets from the plaintiff and were to account to the plaintiff for the monies received by them.

There is therefore a conflict of evidence between the plaintiff on the one hand and the Secretary on the other as to the number of tickets delivered to the plaintiff, whether or not they were counted, as to the number of assistants employed in the sale of same and as to the amount of cash which the sale of all the tickets should have produced.

But to proceed to narrate the events of what occurred after the delivery of the amount which was placed in the grip and delivered to the Secretary, and which preceded this unfortunate affair. It has been admitted by the Secretary that this large sum of money was taken home by her that evening and left in the bedroom of her home where she then resided without the amount being checked by her until the evening of

MILDRED ROSE v. B. G. NURSES ASSN.

the 10th August, a lapse of two days. It was then for the first, time she (the plaintiff) was told, by the President and the Secretary who in company with one Davis called her home at 9.30 p.m., that she had short delivered the sum of \$15.52 and that she had stolen that sum. They said that the money had been counted that afternoon by one Mrs. Quelch and Nurse Warren and found to be only \$122.44.

This was the first accusation made against her according to the plaintiff's version of what happened.

To pause for a moment, it is evident, and the Secretary, Nurse Clarke, admitted at the hearing, that she was very negligent in not counting the cash handed over to her on the evening of the 8th August and to leave such a large sum of money in a grip, in her bedroom where other persons had access to the same.

What was the course of events after this and how did the Association act towards the plaintiff in investigating the alleged shortage of cash delivered by her to the Secretary.

On the 14th August the plaintiff received a letter from the Association to attend a meeting of the Committee of Management on the 15th August.

"BRITISH GUIANA NURSES' ASSOCIATION,

178, Alexander & Charlotte Sts,

Georgetown,

August 12th, 1939.

"Dear Nurse,

A Special Committee meeting of the Association will be held at 5 p.m. on Tuesday, 15th inst., 1939.

You are requested to attend.

AGENDA:

Discussion—Re Fair and Fete.

Nurse M. Rose.

Nurse M. E. Clarke,
Secretary."

At that meeting this is what took place according to the minutes which were transcribed by the Secretary from notes taken by the Assistant Secretary and amplified from her own recollection.

Minutes of the meeting held on Tuesday the 15th August, 1939. The Treasurer said that long after the Fair began the Secretary took a newspaper parcel of tickets and said to her, Nurse Rose these are the balance of tickets to be sold. The President interrupted her stating that *that was not true* because she was present when the Secretary gave them to and checked them over with her.

The Assistant Secretary stated that herself and Martin checked up with the Treasurer, the amount was \$137.96 including at least one \$5 and a few \$2 bills. Nurse Martin substantiated that. The Secretary asked Mr. Sandiford to find out from the Treasurer who was the man that she had handed something to in a *clandestine manner* under the table at the gate on the Fete night. The Treasurer said that no strange man apart from those selling tickets had gone near to her

Mr. Sandiford in summing up said that from the evidence the Treasurer *had lost the confidence* of some of the Committee and he would suggest that voting should be done by ballot to decide if she (Rose) should remain as the Treasurer or not. The Secretary had suggested that the matter be referred to Arbitration. Mr. Sandiford asked what she thought was going on all the time and proceeded. Four voted for and eight against her, Mr. Sandiford

MILDRED ROSE v. B. G. NURSES ASSN.

announced the result of the voting and *told Nurse Rose* that *she had been struck out of office* by the majority of the Committee and would therefore ask her to hand over all of the Association's property as soon as possible *and to leave the meeting*. She said she was not surprised because this new Committee had made five attempts to put her out of office. Mr. Sandiford asked her to leave telling her that she would be written to. After she left he proceeded to the next matter.

The plaintiff's version of what occurred during the time she was permitted to remain in the room where the meeting was held is as follows:—

"I attended as requested on the 15th day of August. Mr. Sandiford who acted as Chairman stated that the President and Secretary said I had not accounted for the sum of \$137.96 but only \$122.44, and that some extra tickets which had been given to me were sold and that I had not accounted for the money. The Secretary said she had given me 1,103 adult tickets and 303 children's tickets at the gate and that I had not accounted for all the money I told them the tickets were not counted. I told them if I had known of that I would have brought witnesses to show the tickets were not counted to me. She said "why you did not bring them"? Mr. Sandiford said having stolen the Association's money I could no longer be Treasurer and he ordered me out of the hall. I was there and then interdicted. I left."

I will assume that the minutes set out correctly what transpired at the meeting. Under what authority did Mr. Sandiford act as Chairman of the meeting? There is none. The latter part of Rule 6 reads as follows:—

"An officer who fails to perform her duty to the satisfaction of the general body may be *removed* from office at any time by a resolution of a majority of financial members present *and voting at a meeting specially summoned for the purpose.*"

Why was this special meeting summoned on the 15th August? It was to investigate whether or not the amount of \$137.96 was handed over to the Secretary on the evening of the "Fête and Fair," and what was the total amount plaintiff should have accounted for, the 1,406 tickets handed to her having been sold out. But the evidence discloses that another matter arose thereat, the extra tickets which have been referred to above.

There can be no doubt that a serious charge had been made against the plaintiff who held a responsible office in the Association. No opportunity was then given her to explain what occurred at the gate. Both the minutes of the meeting of the 15th August and the plaintiff's evidence show that she was dealt with in a most perfunctory and summary manner.

If the Association purported to deal with her under rule 30 and that rule reads as follows:—

"Should any member or all of the Members of the Committee of Management conduct be found detrimental to the working of the Association at the request of any two members to the Secretary, a special meeting of the general body shall be called and should the member or members be found *guilty of the charge*, she or they shall be *removed from office*, expelled or suspended according to the nature of the Crime"—

Was this rule observed? Was any meeting called at the request of any two members? The minutes do not disclose this fact. What was the precise nature of the charge made? The stigma which would attach to a person, in this case the Treasurer of the Association, who was struck out from office having lost the confi-

MILDRED ROSE v. B. G. NURSES ASSN.

dence of some of the Committee is a very serious matter. She was required under rule 9 (c) to hand over and deliver all the property of the Association in her possession and under her control. This she did, having been deprived of the status of her office.

If the plaintiff was not dealt with under rule 30, then the only other rule under which such a drastic step could have been taken was under rule 8 (a) "She (the President) shall have power to interdict any officer for any irregularity" but this can only mean, proved irregularity, and not a bare charge, if any, and no opportunity given to meet it. To sum up the position.

By the resolution of the meeting of the 15th August that she (plaintiff) be struck off as Treasurer and a request that all books, etc., be handed up to the Association by her, the *plaintiff went before the Arbitrators* later in that month *with the stigma, of guilt* upon her. Before formulating a charge and giving the plaintiff an opportunity to answer the same the defendants condemned her and balloted for her removal.

On the 17th day of August the plaintiff received a letter dated the 16th day of August signed by the Secretary in which she was requested by the Association to attend a meeting on the said 17th day. The letter being an important one I shall set it out *in extenso*—

"Madam,

I am directed by the President of the abovenamed Association to inform you that as a result of the Committee meeting held on 15th inst., she interdicts you from duty as Treasurer of the Association under the authority of sect. 8 (a) of the Association's rules.

In accordance with rule 30 a special meeting of the general body will be held on the 17th inst. at 8 p.m. at the Association's Hall, for the purpose of deciding whether you should be removed from office, expelled or suspended according as the meeting shall decide.

I should be glad if you would attend that meeting, and bring with you all the Association's records, vouchers, monies, bank books, etc., for disposal according to the decision of the meeting.

Thanking you in anticipation,

Yours faithfully,

M. E. CLARKE,
Secretary."

"Mrs. M. Rose,
Hardina and Bent Sts.,
Wortmanville."

The plaintiff attended the meeting as requested. There she saw the Honourable Theophilus Lee, a Barrister-at-law, who said he had been summoned there by the President as an Arbitrator. Mr. Sandiford who was again present said to Mr. Lee that they had met there to take action under rule 30 of the rules, but Mr. Lee said he was summoned as an arbitrator under rule 28, and he refused to act under rule 30. Mr. Lee then said the matter will be fixed for arbitration on the 21st August.

Rule 28 (the construction of which proved a "*pons asinorum*" to the Association) reads as follows:—

"If any dispute shall arise between any member (or any person claiming through or on account of any such member, or under the rules of the Associa-

MILDRED ROSE v. B. G. NURSES ASSN.

tion) and the Association or any one or more of the officers of the Committee of Management, it shall be referred to arbitration: Two or more arbitrators shall be appointed by the Association, none of them being directly beneficially interested in the funds of the Association." They shall decide the matter in dispute and their decision, or the decision of two, shall in all cases be a final settlement of the dispute."

It would appear from the evidence of the Secretary that she wrote the plaintiff and the arbitrators Messrs. Lee, Bowling, Sandiford and Lashley on the same day 16th August. Whilst the letter addressed to the plaintiff was on the instruction of the Committee of Management of the Association apparently given on the evening of the 15th August, those to the Arbitrators were sent on the express instructions of the President although stated to be on the instruction of the Committee. The wording of each one of those letters to the Arbitrators is as follows:—

"Hon. T. Lee,
Barrister-at-Law,
Chambers,
Croal Street.
Dear Sir,

I am directed by the Executive Committee of the abovenamed Association to write asking you to be kind enough to become an Arbitrator for the Association, in accordance with Rule No. 28 of the Association.

Enclosed please find a Rule Book.

An immediate reply is requested, because an important matter is on the agenda to be settled on Thursday, 17th inst. at 8.30 p.m. at which meeting we will like you to be present. If necessary I will call and explain everything before the meeting.

Thanking you in anticipation,

Yours faithfully,
M. E. Clarke,
Hony. Secretary."

During the hearing of this action before the luncheon interval was taken on the 19th December, 1941, Miriam Eldeca Clarke, the Secretary, made this statement—

"The letters sent to the Arbitrators were sent on the express instructions of the President, not the Committee. The letter summoning Nurse Rose (meaning plaintiff) to attend on the 17th day of August was on the instructions of the Committee. That letter was written by me. The letters to the arbitrators were worded by me and sent to a friend to have the four letters typed. All the letters are signed by me as Secretary and worded by me. I did not write Nurse Rose that I had sent letters to the Arbitrators to be present at the meeting of the 17th August. On the evening of the 15th August at the request of many members present a meeting was fixed for the 17th August to consider the matter against the plaintiff under rule 30."

It is very strange and unexplainable that whilst on the one hand plaintiff was informed and led to believe an investigation under rule 30 was going to be held, yet on the other, without the consent of the general body of members the President selected arbitrators and directed the Secretary to write to each one of them to be present at the meeting of the 17th August for the purpose of dealing with an important matter under rule 28. Little did the plaintiff suspect that when she attended the meeting she would be confronted not by members of her own calling but by men among whom was a trained lawyer of nearly twenty-

MILDRED ROSE v. B. G. NURSES ASSN.

five years standing. Did Mr. Sandiford receive the letter which the Secretary alleged she sent to him. If so, it is rather strange that the minutes of the meeting of the 17th August should read as follows:—

“Minutes of a meeting of the 17th August.

Agenda:—Action in respect to the Treasurer (*past*).

At this juncture the Hon. T. Lee was introduced by the President. *Mr. Sandiford then outlined* what they were specially met for “Action under Rule 30 in respect to the Treasurer.”

Lee suggested matter be referred to arbitration after hearing the facts and as Nurse Rose said that she would prefer that, he asked her whether or not she was in favour of the Arbitrators asked, calling one name at a time. She said she was against none. Mr. Lee then fixed the special inquiry for Monday night 21st. Nurse Rose asked for permission for someone to follow the proceedings in her interest.

The Secretary, realising the inconsistent conduct on her part and that of the President, conduct which can fairly be interpreted as misleading the plaintiff, lulling her into the belief that the matter would be dealt with under rule 30, on the resumption of the hearing that day endeavoured to explain away that inconsistency. This is what she said

“On the morning of the 16th August, 1939, Mr. Sandiford called at my home. He said if I had already written a letter to the plaintiff as instructed by the Committee. I told him no. He said I should write it then as he was there. He dictated to me what I should write. I wrote it at his dictation. It was posted. The President then arrived and instructed me to write to the arbitrators. She further said they would be present on that evening so that if the plaintiff did not consent to be tried by the general body, the Arbitrators would be there and she will see them and they will fix a time provided she had consented. From what I say, it was not intended to try her on the 17th August. The above facts I only remembered since the adjournment to-day.”

In the absence of Mr. Sandiford and the President from the witness box I cannot accept this last minute explanation by the Secretary. It is not consistent with the date on the letters to the Arbitrators or with the minutes of the meeting of the 17th August to which I have already referred.

There is a conflict of testimony between the plaintiff and the defendants. On the point whether or not the plaintiff subsequently agreed to be tried by arbitration on the 21st August I am inclined to accept the evidence of Mr. Lee that she did. She was then unrepresented by Counsel and most likely yielded to the charming personality of that gentleman. The minutes of the meeting of the 17th August, also lead me to the conclusion that she did. On Monday the 21st August the plaintiff received from the Association the following letter—

“Madam,

This is to officially inform you that the meeting—at which you will be tried by arbitration for defalcation in the Association’s funds—takes place to-night (Monday, 21st August) at 7 p.m. sharp at the Association’s hall.

You are requested to attend.

Yours faithfully,

M. E. CLARKE,
Secretary.”

The Arbitrators met at the hall of the Association, Mr. A. Pestano displacing Mr. Sandiford who was required to give

MILDRED ROSE v. B. G. NURSES ASSN.

evidence before the Arbitrators. At that meeting, the plaintiff attended with her Counsel, Mr. R. S. Miller, and the following are the several versions of what happened.

On behalf of the plaintiff.

Mr. Pestano: "The plaintiff was represented by Counsel. We were to enquire into a *written charge* against the plaintiff. The Chairman said we were to enquire into a shortage of money \$15.52, called on the plaintiff to account for that sum. Her Counsel, Mr. R. S. Miller, objected to the proceedings on the ground that she could not be properly tried by arbitration. I noted Mr. Miller's objection. Chairman over-ruled the objection. Plaintiff's Counsel said he will proceed under protest. Evidence taken on that evening—enquiry adjourned from that day to Sunday, 27th August. After hearing of the charge then before the Arbitrators the meeting was adjourned to make enquiries from the Commissary's Office as to the return of the number of tickets on which tax was paid. On the 27th August we resumed our enquiries. Plaintiff was represented by Counsel. Mr. Miller objected to the proceedings on the ground that what she was called upon to answer was the charge against the plaintiff. The Chairman took no notice. We proceeded with the enquiry."

The plaintiff: "after charge read Mr. Miller stated that they were not capable of trying me for defalcation of the Association's funds and that if they did they would be doing it *under protest*. On Sunday the 27th August, Mr. Lee said he was going into the matter of the tickets—Miller objected and said that did not constitute the charge. They proceeded."

Dorothy Stokes: "I attended. Plaintiff with Mr. Miller. Mr. Miller objected to the proceedings by arbitration. Mr. Lee said it must be so tried. Mr. Miller said if tried by arbitration it will be under protest."

Angelina Barton: "I attended on the 21st August, Mr. Miller present. Lee said he was the arbitrator. Miller objected. Lee persisted. Miller said if you are going through this matter as an arbitrator I must protest."

On behalf of the defendants.

Miriam Eldeca Clarke: "Mr. Miller who represented the plaintiff said he did not agree to the proceedings by way of arbitration. Lee then said that plaintiff need not be tried by arbitration if she did not desire it. She said she wanted the arbitration and again repeated that she would like to be tried by men instead of by women. I never heard Miller say he would proceed under protest."

Theophilus Lee: "On the 21st August I arrived and found nurses as well as the plaintiff, the President, the Secretary and other Executive members. I found Lashley, Bowling, Sandiford and Pestano. Mr. Miller, Barrister-at-law, with the plaintiff who having agreed on the previous occasion to arbitration, I started. Mr. Miller objected to arbitration and quoted from Rule 30 of the rules. He said he was objecting to the proceedings by arbitration. I then turned to Nurse Rose and asked if she did not desire any arbitration. If not I would be relieved of my responsibility and in that case I would leave. I spoke to Mr. Miller to the same effect. Then Nurse Rose said she would like an arbitration. Mr. Miller said he was representing her and objected to the arbitration. As far as I remember Mr. Miller and plaintiff discussed the matter. She then said she would prefer the arbitration by the men."

From the two different versions given above and giving due weight to the evidence of Mr. Lee I have come to the conclusion that on the 21st August the plaintiff and her Counsel *vigorously protested* to the proceedings by arbitration. Mr. Lee has honestly mixed what happened at the meeting of the 17th August with that of the 21st August. Apparently he did not take any notes or make any record of what I consider a very important part of the proceedings on the 21st August.

It is true that the plaintiff as I have already found on the 17th August agreed to the matter being tried by arbitration but after she had consulted counsel and retained him to appear for her on

the 21st and then again on the 28th August she was advised against arbitration and placed her cause in the hands of her counsel.

In the absence of something on record that plaintiff resiled from the strong objection of her counsel to the proceedings by way of arbitration, and there is no evidence even from Mr. Lee that Mr. Miller withdrew his objection, I cannot find on that issue for the defendants.

But were the arbitrators properly appointed and in accordance with the rule regulating such appointment? Before there could be any arbitration the arbitrators must be properly appointed. Part of rule 28, is as follows: "Two or more arbitrators shall be appointed by the Association" The Association never appointed these arbitrators. It was the President who, at the home of the Secretary on the 16th August, made her selection.

The rule must be strictly followed. As was said in the case of *Andrews v. Mitchell* (1905) A.C. 78, if the rules provide that disputes shall be referred to arbitration, the provisions of the *rules for electing arbitrators* and conducting the arbitration *must be followed*, at any rate, in all matters of substance as opposed to matters of mere form, otherwise the decision arrived at will not be a decision according to the rules and so protected by the Act from review.

I find, therefore, that the arbitrators were not properly appointed.

But assuming they were, was it competent for them to deal with a matter with which they purported to have dealt between an officer of the Association and the Association?

Is rule 28 already fully set out applicable to such a case?

Let us examine the wording of this rule made under the authority of the Friendly Societies' Ordinance. Section 43 of the said Ordinance provides the mode of deciding disputes and 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: *and application for the enforcement thereof may be made to the Magistrate's Court.*"

The corresponding English enactment is the Act of 1896 (59 and 60 Vict.) c. 25, s. 68 (1), the older enactments being 10 Geo. IV. c. 56, s. 27 and 18 and 19 Vict. c. 63, s. 40. "Every dispute

MILDRED ROSE v. B. G. NURSES ASSN.

between a member or person claiming through a member or under the rules of a registered society or branch, *and* the society or branch or an officer thereof shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law or restrainable by injunction; and application for the enforcement thereof may be made to the county court.”

Rules were made at the respective times under the provisions of those Acts the wording of which is similar to that of rule 28 of the Association.

“If any dispute shall arise between any member (or any person claiming through or on account of any such member, or under the rules of the Association) *and* the Association or any one or more of the officers of the Committee or Management, it shall be referred to arbitration.”

Rules made under the authority of an Ordinance can only regulate the working of such Ordinance but cannot widen its scope, or be in excess of the statutory power authorising them.

What therefore the arbitrators enquired into is not such a dispute, the rule and enactment applying only to disputes between *members* of the Society, *as such*, and the *Association* or any one or more of its officers.

As was said by CROMPTON, J., in the case of *Sinden v. Banks (1861) 3 Ell. & Ell. reports p. 623 at p. 630*. “Now statute 10 Geo. IV. c. 56, s. 27 speaks of disputes between any such society, or any person acting under them, *and* any individual member thereof, or person claiming on account of such member.” These words appear to draw a distinction between the Society and its officers on the one hand, and its individual members on the other. I think that we should be straining their meaning if we held that the description “individual member” and “member” includes the Treasurer.”

Similar remarks apply to statute 18 and 19 Vict., 63, s. 40, the language of which, if anything, still more clearly than that of the previous Act, refers to disputes *between the Society and its members as such* as distinct from the Society’s officers. As HILL, J., in the said case stated: “I think that we should strain the language of the Legislature far beyond its natural meaning if we held that the claim of a society upon its Treasurer for misappropriating and keeping in his hands the moneys of the Society, is a dispute between the Society and one of its members, within the meaning of either enactment.”

Section 31 of the Friendly Societies’ Ordinance in this Colony contains very strong provisions directed at frauds by officers of a Society, the Treasurer amongst others. Part of that section reads: “Or having the property in his possession, *withholds* or misapplies it” This section empowers a Court of Summary Jurisdiction to fine or imprison both officers and members of a Society guilty of certain specified frauds, clearly *show-*

ing that section 43 does not exhaustively provide for all cases of dispute between the Society and its members. Section 31 also contains a proviso that nothing therein contained shall prevent the Society from proceeding by indictment or complaint against the party complained of.

The above Ordinance was passed in order to make clear the laws relating to Friendly Societies a great number of which exist in this colony. It contains provisions for the cheap and easy settlement of disputes between their members, in reference to matters *within the scope of their* operations; and, if we were dealing with such a dispute as to such a matter, *the rule in question*, if properly framed according to the Ordinance, would be of binding force.

The arbitrators in this matter dealt with the Treasurer of the Society in her capacity as Treasurer for withholding the sum of \$16.78 the property of the Association. In cross-examination by learned leader for the plaintiff Mr. Lee stated “The enquiry was into the sale of tickets. We found as a fact that she had received \$154.64 and had only paid over \$137.96, that she had in her possession for the Association the sum of \$16.78 and she failed to pay over money belonging to the Association to the extent of \$16.78”—clearly a matter not within the purview of rule 28 of the rules of the Association, for two reasons, one of which is now being discussed and the other of which I shall deal with later in this judgment.

The majority report of the arbitrators is fully set out in the pleadings and reflects the evidence given by Mr. Lee.

The objection which Mr. Miller made on behalf of the plaintiff before the arbitrators is in my opinion sound in law. It went to the intrinsic character of the rule. They were without legal authority to deal with the matter before them. Whatever they did, and the subsequent acts of the Association in relation to the plaintiff, were *ultra vires* the rules and enactment. This view which I have formed is fully supported by the various English enactments and rules made thereunder quoted above and fortified by the authorities decided by the Courts in England: *Sinden v. Banks* quoted above. See also the cases of *Municipal Permanent Investment Building Society v. Richards* (1889) 39 Ch D. 372 and *Heard v. Pickthorne* (1913) 3 K.B. 299.

The above finding is sufficient to dispose of this action in favour of the plaintiff but, as the matter is one of some importance to the administration of the affairs of Friendly Societies, I will endeavour to read into the rule the interpretation which Mr. Farnum at one time asked me to place on the word “Member” to include one of the officers of the Association and to find that the matter before the Arbitrators was a dispute within the meaning of the rule. Mr. Farnum contends that the plaintiff was asked to account for all the monies she received from the sale of tickets, that she only handed over to the Association the sum of

MILDRED ROSE v. B. G. NURSES ASSN.

\$137.96 instead of \$154.64, and, therefore, a dispute arose as to the difference. If the plaintiff had admitted the collection of the greater sum, in other words, that she had short paid to the Secretary the sum of \$16.78 the matter would have been very simple. But the plaintiff had always put in issue the number of tickets handed to her, the extra tickets (stumps) alleged to have been sold by her, her liability to account for all the cash from those tickets in view of the fact that she alone did not sell them the president having chosen her own assistants, and that others including non-members had been given tickets to sell other than at the main entrance; that the tickets which were handed to her by the Secretary were never counted and the charge of having delivered to the Secretary on the evening of the Fair the sum of \$122.44 only.

Does the rule contemplate the investigation of a matter which required trained minds to weigh evidence and come to a conclusion on facts and the application of legal principles in a particular set of circumstances whether or not the plaintiff would be liable to make good the deficit?

This is how Mr. Lee puts the position that arose during the investigation. "There was an entire difference in the evidence between the plaintiff and her witnesses, and the Association and its witnesses—a conflict in evidence which required sifting out and called for an investigation by a person or persons competent to weigh evidence and who have had experience in matters of Fête and Fair. There was some difficulty in arriving at our conclusions in view of the figures submitted to us on both sides. I could not accept all the figures even those supplied by the Commissary. The matter in my opinion *qua* Arbitrator *qua* Barrister—a complicated one." Such was Mr. Lee's evidence.

Are matters of such complexity within the purview of rule 28? Clearly that rule was only intended to deal with simple matters to provide a cheap and summary tribunal for the settlement of disputes between the members. The rule sets up a domestic tribunal by which all such differences might be speedily decided and at a very small expense.

In my opinion, it was not intended to be used for a dispute of the one described above by Mr. Lee. The machinery provided by that rule—the appointment of Arbitrators not clothed with any special powers—the taking of evidence not on oath—no record of the proceedings taken—is ill adapted to deal with the finding of facts in a doubtful matter and the payment of money which cannot be enforced by the Arbitrators. That body was not competent to deal with a matter which carried with it a stigma of crime.

Apart from the above, the evidence of persons not members of the Association had to be taken and the document from a Government Department had to be produced, matters entirely outside of the conception of the rule. I am not attempting to

blaze a new trail in the history of Legislation relating to Friendly Societies nor am I taking an untrodden path for the conclusion to which I have arrived.

In the House of Lords in the case of *Mulkern v. Lord* reported (1878) 4 App Cases 182 Lord Hatherley in his speech at page 192 of that report stated: "When you come to look into the authorities which were cited, they amount to this, *that where the case went beyond the internal arrangements of the Society, and introduced something which might be within their functions in the ordinary course of their business but yet still outside the whole scheme and scope of the Society itself*, then a person who had a much larger interest than any of those contemplated among the ordinary members, could not be deprived of recourse to the ordinary tribunals of the land."

How in the circumstances stated above could the Association in spite of the objection taken by the plaintiff through her counsel as I have already found as a fact deprive her of that right.

The burden is upon the defendants to satisfy the Court that the plaintiff has no right to sustain her action, and unless they can show by clear and express legislation that that right is taken from her, or expressly forbidden by law to bring it, they cannot succeed. The privilege of appeal to a Court of justice remains with her, unless its jurisdiction is statutorily superseded.

Lord O'Hagan in the case of *Mulkern v. Lord* said that where a matter "may involve long and laborious calculations, the difficult application of legal principles, and the *authoritative interference* of a tribunal competent to adjust the complicated relations of the parties, and *carry into effect* their relative rights" that is *not* a matter within the contemplation of the rules.

The claim of the Association to the payment of money by the plaintiff in the circumstances deposed to in this case may raise nice questions as to her *civil liability to pay* based on negligence in the performance of her duties, or that she had withheld or appropriated to her own use the money she received from the sale of tickets, *which belongs exclusively* to a Court of Justice.

This as I find, being the nature of the transaction, what is the machinery which the defendants seek to apply to it? Arbitration under a rule which manifestly from the very theme of the other rules was intended to deal with small affairs and with simple issues which can easily be brought to a short and *final* issue. Rules the scheme of which was intended to regulate and adjust disputes of a domestic kind.

It is clear from the letter which the plaintiff received on the 21st August, 1939, after the Arbitrators had been selected that she was accused of defalcation—a criminal offence of a very grave nature. The finding of Mr. Lee the Chairman of the Arbitrators who prepared the report of the majority is that the plaintiff had received moneys belonging to the Association and failed to pay over a certain sum. Section 31 of the Friendly Societies' Ordi-

MILDRED ROSE v. B. G. NURSES ASSN.

nance makes it a criminal offence so to do, punishable by fine or imprisonment, or such person might be proceeded against by indictment. Even if the defendants were able to establish that the plaintiff had consented to a trial by the Arbitrators would she be bound by their findings if the rule did not apply to her—*qua*, Treasurer—and the subsequent acts of the Association in consequence thereof? I am of the opinion that all the proceedings will be *ultra vires* the Ordinance and the rule, and that this Court has jurisdiction to consider the dispute, or to review any resolution of the Association which is not made in accordance with its rules. See the clear inference to be drawn from the decision in the case of *Catt v. Wood* (1910) A. C. 404.

The parties themselves cannot give the arbitrators jurisdiction to deal with a dispute not provided for by the Ordinance or the rule. In the case of *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co., Ltd.*, (1923) 39 T. L. R. 253 there the question arose whether an arbitrator acted within his jurisdiction. It was held it was for the Court to decide, but whether the Arbitrator acted within his jurisdiction or not depended solely upon the clause of reference. It is therefore for the Court to decide in this case whether the alleged dispute which arose is a dispute covered by rule 28 of the Rules of the Association. Apart from this rule there was no independent order of reference by consent.

The law makes provision for cases, where the rules of the Society do not expressly forbid it, for the Registrar with the consent of the Governor in Council to hear and determine. This is contained in the proviso to section 43 of the Ordinance and an elaborate machinery is there provided for the administering of oaths, the attendance of witnesses, the production of books, etc.

In the case of *Andrews v. Mitchell* cited above, Lord Robson at 83 of the report said “The Act of 1896 has not given *carte-blanche* to the tribunals of these societies to pronounce decisions which shall be exempt from examination in Courts of Law. The decisions protected from review are constitutional decisions—decisions pronounced according to the rules, which, as we know, are registered under the Friendly Societies’ Acts.”

Counsel for the defendants contends that the ground on which the Arbitration is challenged by the plaintiff is set out in the first reason to paragraph 20 of the Statement of Claim. He argues that the plaintiff is confined to the one point that she could not be tried for defalcation by arbitration, and that if I found, and he refers me particularly to the evidence of Mr. Lee, that in fact there was no trial for defalcation plaintiff’s objection would fail, and the proceedings for arbitration cannot be attacked.

The first reason to *paragraph 20* reads as follows:—

“Because the trial of the plaintiff for defalcation was a matter which could not be referred to arbitration, nor did it come within section 43 of the Friendly Societies’ Ordinance, chapter 214.”

MILDRED ROSE v. B. G. NURSES ASSN.

Reading that paragraph carefully I cannot come to the conclusion that she is so limited. The words “*nor did it come within section 43 of the Friendly Societies’ Ordinance, Chapter 214,*” is wide enough to embrace the rule—rule 28—made by the authority of that section which I have already found could not refer to a dispute between the Association and one of its officers.

It is not necessary for me to find for the purpose of deciding this case, but there was a definite charge in writing, made against the plaintiff for misappropriating or not accounting for the sum of \$16.78 the monies of the Association, criminal in its nature: see *section 31* of the Friendly Societies’ Ordinance.

That was the charge submitted to the Arbitrators who were without jurisdiction to entertain the same not being a matter within the rule under which they purported to act.

Learned counsel for the defendants further submitted as an alternative argument that even if the proceedings did not fall within the “hide-bound” character of the Ordinance, the plaintiff having submitted the alleged dispute to Arbitration, which I do not find as a fact she did, and having consented to the several persons to be the Arbitrators was bound by their findings under the common law rule.

But on reference to the defence of the Association it is clear that it dealt and dealt only with the alleged dispute under rule 28. Nowhere can I find in the pleadings any background for that contention. Such contention only exists in the realm of metaphysics and calls for no further comment.

Apart from this I am of the opinion that in view of the relationship (Treasurer) of the plaintiff to the Association and the circumstances under which the monies were collected at the gate by the Treasurer from the sale of tickets and the Ordinance and rules which regulate the working of the Association, Arbitration under the Common Law was not permissible.

Apart from these facts I do not find any independent order of reference by consent.

Mr. Farnum in another submission puts the case for the defendants this way—If Rule 28 applied there is a written submission. Even if Rule 28 does not apply and plaintiff agrees to an arbitration it amounts to an oral submission and the Common Law applies. And that once a party chooses a tribunal and the arbitrators he is bound by it, whether by Common Law or Statute and cites the case of *Re Hohenzollern et al and the City of London Contract Corporation* (1856) 54 L.T. 596. On examination of that authority it only decided that if an arbitrator had jurisdiction to try a matter, his decision cannot be disputed however wrong his finding may be. If his decision is *intra vires* the Court will not interfere.

An important point and well presented by learned Counsel for the defendants was whether Nurse Rose (plaintiff) resigned or was removed from the office of Treasurer.

MILDRED ROSE v. B. G. NURSES ASSN.

Counsel directed my attention to the minutes of the meeting of the 1st September, 1939, in which the following statement is recorded—

“Mr. Sandiford then read the minority report signed by Mr. Pestano, who by the way was not officially asked, therefore was not regarded as an Arbitrator, when finished he asked Nurse Rose what she had to say why the majority report should not be adopted. She started to speak about the last Committee meeting and after being cut short by Mr. Sandiford said that the report was a biased one and that she had nothing to say. Mr. Sandiford then asked if any Nurse present had anything to say.

Nurse Boyer said that if Nurse Rose would refund the deficient amount the Committee and members might allow her *to regain* office as Treasurer again. Asked if she would repay the amount Nurse Rose said “No let them take me to the judge for it” asked again if she was willing to relinquish the office as Treasurer, she said yes, that she had already done so. Mr. Sandiford then asked any member to move that the majority report be adopted. This was done by the Senior Vice-President and seconded by the Junior Vice-President. It was then put to the vote by ballot, adopted gaining 14 votes, not adopted 8 votes whilst there were *six spoilt votes*. The report was therefore adopted and ratified by the members.”

I have set out at length part of the minutes of that meeting as a few other points to be dealt with require reference to them.

Mr. Farnum pressed his argument and relied to a great extent on the words “asked again if she was willing to relinquish the office as Treasurer, she said yes, that she had already done so” as meaning that she had voluntarily done so and the fact that no ballot was taken for her removal.

He contended that the committee at their meeting on the 15th August, 1939, had no authority to ballot for plaintiff’s removal from office as they purported to do and such act on their part was *ultra vires* the rule, and the same must be treated as a nullity which he said they regarded as such in view of the letters sent to the plaintiff on the 17th August (Ex. D) that she was only interdicted from her post in accordance with the provisions of Rule 8 (a).

I pointed out to Mr. Farnum the minutes were not evidence of the truth of the facts therein stated but only a record of what is supposed to have occurred at that meeting and was a transcript from the notes taken by the Assistant Secretary and amplified by the Secretary from her general recollection. That if the plaintiff had written a letter to the Association in which those words appear his submission that she voluntarily gave up her post as Treasurer would have come with greater force. The expression “No; let them take me to the judge for it” is clothed with inverted commas and in the first person. The expression on which counsel relies is in the third person.

Learned counsel for the plaintiff attacks this plausible inference in this manner. He says you yourself have pleaded that the plaintiff remained as Treasurer up to the 1st day of September, 1939, the statement “she said she had already done so,” done so when? There could be no answer to that query. He argues if plaintiff made such a statement it is consistent with

MILDRED ROBE v. B. G. NURSES ASSN.

being forced to do so as a result of the decision of the meeting of the Association on the 15th August.

Counsel further contends that you cannot give that strained meaning to those words because you yourself have pleaded in paragraph 18 of the Defence.

“At the special general meeting of the Association held on the 1st of September, 1939, the Association by a majority vote adopted the aforementioned majority award or report of the arbitrators, and removed the plaintiff from her office as Treasurer, and a new Treasurer was elected immediately thereafter. The above vote was taken after the plaintiff had asserted at the said meeting that she had relinquished the office of Treasurer. The defendants deny that any member present who was entitled to vote was prevented from voting.”

I have no doubt whatever from the catena of circumstances beginning with the meetings of 15th August and 17th August (note the wording of the agenda:—action in respect to the Treasurer (past) the form of pleadings both by the plaintiff and the defendants—that plaintiff did not voluntarily give up her position, but she was removed from office, and I accordingly so find. As the learned Lord Justice Greene, M.R., in the very recent case of *Laurie v. Raglan Building Co., Ltd.*, (1941) 3A. E.R. at p. 335 said “The admission in the defence is *evidence*, against the party on whose behalf that pleading is put in.” The alternative plea in paragraph 20 does not in any way affect the admission in the previous paragraph.

Having found that the plaintiff did not of her own accord relinquish her post as Treasurer, was she properly removed under the Rules of the Society?

Rule 30 set out in the earlier part of the judgment is the only rule under which the Association could take action, rule 6 being complementary to that rule.

Rule 6 is as follows:—“An officer who fails to perform her duty to the satisfaction of the general body may be removed from office at any time by a resolution of a majority of financial members present, and voting at a meeting *pecially summoned* for that purpose.”

Was such a meeting properly summoned in order that a resolution passed by it should have a binding effect on the plaintiff?

Let us assume that it was at the request of two members.

The Secretary stated in her evidence that at that time there were about 100 members residing in the Counties of Berbice, Demerara and Essequibo but she did not summon all of them.

The notice convening the meeting stated that

“a special meeting of the Association will be held at 8 p.m. on Friday, 1st September, 1939.

You are requested to attend.

AGENDA.

- (1) Delivery of decision by Arbitrators *re* Fair and Fete dispute,
- (2) Election of a Treasurer,
- (3) Any other important business,

and was signed by M. E. Clarke, Secretary, and it was only sent to those members residing in the City of Georgetown. None

MILDRED ROSE v. B. G. NURSES ASSN.

was sent to those residing in the Counties of Berbice and Essequibo or up the Demerara River.

The letter to the plaintiff which is dated the 30.8.1939 is as follows:—
Madam,

I am directed to request you to be present at a specially summoned meeting for *the delivering of the Arbitrators' decision, re the Fair and Fete dispute*, on Friday, 1st September, 1939, at 8 p.m.

This letter was also signed by M. E. Clarke, as Secretary.

Rule 30 in my opinion was not complied with. Rules made under the Friendly Societies Ordinance must be strictly carried out—note the words of part of that rule—“a special *meeting of the general body shall be called.*”

Every member within summoning distance ought to have been summoned. It cannot be said that it was impossible, and no evidence led to show it was so, for the summons to attend a meeting of the Association within a reasonable time of such summons being sent out to have reached the members in the above mentioned districts. It seems to me that there was too much haste to dispose of a matter, if it could have been properly disposed of at that meeting, of such importance to the plaintiff.

As Lord Sterndale, M.R. in the case of *Young v. Ladies Imperial Club* (1920) 2 K.B. at page 527 of his judgment in dealing with a matter not dissimilar to the present case, said: “I cannot entertain any doubt that, with certain very limited exceptions where a special meeting of a Committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of and a summons to that meeting.”

This was clearly not done in the instant case, therefore there was no valid meeting according to the rules, and the resolution passed at that meeting would be invalid.

Later on in his learned judgment the Master of the Rolls in discussing the case of *Young v. The Ladies Imperial Club*, and in coming to the conclusion as I have that the meeting was an invalid one said: “It was argued that to hold this would be dangerous because it might interfere with the internal management of clubs. In my opinion it would be far more dangerous to hold otherwise, because that would be leaving it to the discretion of the Secretary or some other person to omit to summon people.”

What did the Secretary Clarke depose to on this point.

“I wrote all the members to attend on the 1st September, except Nurse Barton, because I had not her address. The membership in August, 1939, was about 100. I did not write all of them, some of them lived in Berbice, Essequibo and Demerara River.”

Mr. Hopkinson pointed out in course of his able argument that the notice of the business to be transacted at the meeting was not sufficient. The agenda read “Delivery of decision by

MILDRED ROSE v. B. G. NURSES ASSN.

Arbitrators *re* Fair and Fête dispute,” and therefore there was no reference to action under rule 30. A few of the members might have known of the intention of the Association to move against the plaintiff under rule 30, but it was necessary to state this fact.

In my view that notice was not a sufficient notice.

The meeting convened in accordance with it was not a meeting specially convened for the purpose of removing the plaintiff from office.

I therefore come to the conclusion as the learned Lord Justices did in the *Ladies Imperial Club* that (a) the omission to summon all the members of the Association invalidated the proceedings of that body; (b) that the notice convening the meeting did not state the object of the meeting (removal of plaintiff as Treasurer) with sufficient particularity. See also the case of *Smyth v. Darley* (1849) 2 H.L.C. 789 and in *re Portuguese Consolidated Copper Mines Co.*, (1889) 42 Ch. D. 160.

I have endeavoured to deal as fully as possible with the facts in, and the law applicable to this case and if the reasons which I have given in coming to the several conclusions at which I have arrived appear to be somewhat lengthy I have done so because the very worthy objects of the Association call for a full consideration of its case.

I therefore find—

(a) that the arbitration proceedings resulting in the findings and award dated 29th August, 1939, of the majority report of the Arbitrators appointed by the Committee of Management of the defendants are null and void;

(b) That all resolutions passed at meetings of the defendants' Association or of its Committee of Management adopting the said findings and report and consequent thereon are null and void;

(c) That the plaintiff was wrongly removed from her office as Treasurer, and steps should be taken by the Association to reinstate her.

I accordingly make an order in terms of the above findings and an injunction restraining the defendants from acting on the said report and on any resolutions of its members or Committee of Management, consequent on the said report.

It is a great pity that the Association did not take any steps, (if they did, it was not disclosed at the hearing) to consider the terms of the letter dated the 17th October, 1939, Ex “L” sent by the plaintiff's counsel on her behalf in which he mentioned that the proceedings taken by the Association were irregular from the beginning and hinted at the grounds of such irregularity. No reply was sent to that letter.

The plaintiff took proper steps to get a wrong righted before instituting these proceedings, which, in view of the above circumstances, she was justified in doing; and although it is with regret

MILDRED ROSE v. B. G. NURSES ASSN.

that I have to find against such a body and to make an order which will encroach upon its funds it has to be done. The law is on the side of the plaintiff.

Judgment must be entered for the plaintiff in terms of the above findings and costs must follow the event.

I certify this action as fit for counsel.

Judgment for plaintiff.

Solicitors: *Carlos Gomes; W. D. Dinally.*

S. M. FERROZE v. F. JAMES.

SHEIK, MOHAMED FERROZE, Appellant (Defendant),
 v.
 FREDERICK JAMES, P.C. No. 3836, Respondent (Complainant).
 [1941. No. 347—DEMERARA.]
 BEFORE FULL COURT: VERITY, C.J., AND FRETZ, J.
 1942. MARCH 13, 20.

Evidence—Article—Placed in proper police custody—No evidence that it was tampered with while in such custody—Presumption—That it remained unchanged.

Evidence—Analyst—Report of—Admissible in evidence—For any of purposes—Named in Evidence Ordinance, cap. 25, s. 44 (1)—General law modified to that extent.

Evidence—Persons employed by police to detect commission of offence—Testimony to be viewed with caution—Does not require corroboration.

Appeal—Magistrate's court—Reasons for decision—Evidence of Police spy—Not necessary for magistrate to state he viewed it with care.

Where an article has been placed in proper police custody, the presumption is, in the absence of evidence to indicate that it was tampered with, that it remained unchanged while in such custody.

The true meaning of section 44 (1) of the Evidence Ordinance, cap. 25, is, not that the article should be submitted for analysis for the purpose named in the subsection, or that the report should be made by the analyst for such a purpose, but that the report of the analyst is admissible in evidence for any of the purposes named in the subsection: that is to say, the general rule of law is modified for the purposes of certain proceedings in the magistrate's or coroner's Court only.

While the evidence of persons employed by the police for the purpose of detecting the commission of an offence should be regarded with caution, and it would be proper at the trial of an indictment to warn the jury to observe such caution, there is no rule of law or practice such as exists in regard to the uncorroborated testimony of accomplices requiring a specific direction to this effect in all cases.

It is not essential that a magistrate should state in his reasons for decision that he has observed such caution.

Appeal by the defendant from the decision of Mr. A. V. Crane, Senior Magistrate, Georgetown Judicial District, convicting him for selling, contrary to the Defence Regulations, an article at a price exceeding the maximum retail price fixed by order.

J. L. Wills, for appellant.

S. E. Gomes, Assistant Attorney-General, for respondent.

Cur. adv. vult.

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

In this appeal from a conviction under the Defence Regulations for selling an article at a price exceeding the maximum retail price fixed by order, three main grounds were argued.

In the first place it was submitted that there was no evidence of the nature of the article sold by reason of failure to identify the coconut oil purchased with that examined by the Analyst. This argument was based upon the fact that while the Constable

S. M FERROZE v. F. JAMES.

who seized the article testified to its being placed in a safe at the police station and on a subsequent date handed back to him for delivery to the Analyst, the N.C.O., who had custody of the safe, was not called to prove that the contents of the bottle were not tampered with between these dates. We are of the view that this contention is unsound. The article was throughout this period in proper police custody and in the absence of evidence to indicate that it was tampered with, the proper presumption is that it remained unchanged while in such custody.

The second ground argued was that there is no proof of the nature of the article because the certificate of the Analyst was wrongly admitted it not showing upon its face that it was a report made for the purpose of a prosecution in the Magistrate's Court. This argument appears to rest upon a misconception of the meaning of section 44 (1) of the Evidence Ordinance, Cap. 25. The true meaning of this provision is, not that the article should be submitted for the purpose therein named or that the report should be made for such a purpose, but that the report is admissible for such purposes, that is to say, the general rule of law is modified for the purposes of certain proceedings in the Magistrate's or Coroner's Court only.

The third ground argued dealt with the learned Magistrate's findings of fact. It was submitted firstly, that the learned Magistrate did not direct his mind to the caution which should be observed in cases dependent upon the testimony of persons employed by the police for the purpose of detecting the commission of an offence, a procedure sometimes described as a "police trap", and secondly, that in a case of this nature when there is available testimony independent of that of the person so employed and this testimony is not adduced such failure may vitiate a conviction as tending to discredit the *bona fides* of the prosecution and the reliability of the testimony actually adduced.

As regards the first part of this submission while it is true that such evidence should be regarded with some degree of caution and it would be proper at the trial of an indictment to warn the jury to observe such caution there is no rule of law or practice such as exists in regard to the uncorroborated testimony of accomplices requiring a specific direction to this effect in all cases. Still less can it be laid down that it is essential that a magistrate should state in his reasons that he has observed such caution. It may be taken for granted that a learned magistrate trained and experienced in the law will do so in like manner as it must be assumed that he has borne in mind such a fundamental principle as that the onus of proof rests upon the prosecution in criminal matters.

As regards the second part of the submission, while it may well be that the effect of the authorities cited is as stated there is nothing to show in the present case that any such independent testimony ever existed, that it was available at the hearing or

S. M. FERROZE v. F. JAMES.

that it was withheld by the prosecution. The conclusion to be drawn from such premises does not therefore arise. We see no reason in this case to differ from the learned magistrate's findings of fact, and for this reason and those given in regard to the other grounds, the appeal is dismissed with costs to be taxed.

Appeal dismissed.

BOODHOO AND TETRY, Appellants,
v.
MAHAMAD DIN, Respondent.
[1942. No. 20.—DEMERARA]
BEFORE FULL COURT: VERITY, C.J., AND FRETZ, J.
1942. MARCH 13, 20.

Appeal—West Indian Court of Appeal—Rules of 1920 as amended in 1930—Jurisdiction delegated to Supreme Court—Order made by virtue of—Not made in exercise of civil jurisdiction of Supreme Court—No appeal therefrom to Full Court—Supreme Court of Judicature Ordinance, cap. 10, s. 89.

An order made by a judge of the Supreme Court by virtue of the delegated jurisdiction under the West Indian Court of Appeal Rules, 1920, as amended by the Rules of 1930, is not made in the exercise of the civil jurisdiction of the Supreme Court. Consequently, it does not fall within section 89 of the Supreme Court of Judicature Ordinance, cap. 10, and no appeal therefrom lies to the Full Court.

Appeal from an order made by a Judge in Chambers granting a stay of execution and an extension of time for filing papers in a matter pending in the West Indian Court of Appeal.

L. M. F. Cabral (*C. Shankland* with him), for appellants.

C. A. Burton, for respondent.

Cur. adv. vult.

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

This is an appeal against an order made by a Judge in Chambers granting a stay of execution and an extension of time for filing papers in a matter pending in the West Indian Court of Appeal.

BOODHOO v. M. DIN.

The respondent takes the preliminary objection that no appeal lies to the Full Court against the order of a Judge acting under powers granted to him by the West Indian Court of Appeal under the Rules of that Court.

The question appears to resolve itself into the simple issue as to whether such an order is made by a Judge of the Supreme Court in exercise of its civil jurisdiction within the meaning of section 89 of the Supreme Court of Judicature Ordinance (Cap. 10). If it is not so made then no appeal will lie for by this section is the right of appeal created.

It should be made clear that the matter in question is an appeal brought in the West Indian Court and is so entitled. It does not purport to be a matter pending in the Supreme Court and is not therefore in itself a matter in which the Supreme Court exercises or could exercise its civil jurisdiction. It came before a judge of this Court, in so far as it came properly before him at all, not by virtue of the jurisdiction conferred upon him by the Supreme Court Ordinance but by virtue of the rules of the West Indian Court of Appeal, 1920, as amended by the Rules of 1930. The appellant himself in his notice of motion describes the powers so conferred as a delegation of the judicial powers of the West Indian Court of Appeal. The powers, whatever their nature, are conferred by the Court of Appeal upon the Supreme Court or a Judge, but are nevertheless the powers of the Court of Appeal itself, which is authorized by Act of Parliament to make rules "regulating the practice or procedure of the Court of Appeal or any matters relating thereto." It is this enactment, section 5 of the Act, from which the Court of Appeal derives its rule making powers and nothing in the section authorises the making of rules which shall confer jurisdiction on or regulate the practice of the Supreme Court of any Colony. There is, moreover, nothing in the Supreme Court Ordinance nor in the Rules of the Supreme Court conferring on the Supreme Court as such or upon any judge thereof power to exercise jurisdiction in any matter before the Court of Appeal, nor any power to the Court of Appeal to confer any such jurisdiction upon the Supreme Court of this Colony. Without disrespect for the argument of Counsel for the appellant who appears to have been in a measure taken by surprise but to whom this Court gave opportunity to submit authority (if he should find any) for the bringing of this appeal, his submission that section 4 of Cap. 10 contemplates such last named power appears to have been based upon a misreading of the section.

It is our conclusion, therefore, that the order of the learned Judge was not made in exercise of the civil jurisdiction of the Supreme Court but was made, rightly or wrongly, in exercise of the jurisdiction of the West Indian Court of Appeal, In such case it does not fall within section 89 of the Supreme Court Ordinance and no appeal lies to the Full Court.

BOODHOO v. M. DIN.

We are fortified in this conclusion by the fact that while the existing rules or those amended thereby have been in force for over twenty years no such appeal appears ever to have been brought in so far as our own research and that of Counsel on both sides has led us.

On the other hand, when exception has been taken to an order so made other means of calling it in question have been adopted, as in the case of *Dupigny & Ors. v. Dupigny* (1931-37) L. R. B.G. p. 585, *Dhajoo v. Thom* (1939) L.R.B.G. p. 262 and *Jugmohunsingh v. Bhola* (1940) L.R.B.G. p. 153.

It is moreover gratifying that our conclusion as to the position in law is consonant with propriety and convenience. The possible impropriety and the certain inconvenience which might arise if an appeal such as this lay to this Court is only too clearly revealed in the present case in which are called in question the powers of the West Indian Court of Appeal and the jurisdiction of a judge upon whom that Court has conferred powers.

The preliminary objection having been well founded the appeal is dismissed with costs to be taxed.

Appeal dismissed.

Solicitors: *Carlos Gomes; V. C. Dias.*

CHIN SHING, CHIN LUN AND CHO CHU, Appellants,

v.

ALFRED CHOO KANG, Respondent.

[1942. No. 51.—DEMERARA].

BEFORE FULL COURT: VERITY, C.J., AND FRETZ, J.

1942. MARCH 20, 27.

Appeals—District licensing board—Ground of appeal—Extraneous matter taken into consideration—Specific instances to be given—Intoxicating Liquor Licensing Ordinance, cap. 107, s. 25.

Where the ground of appeal is, that a district licensing board took extraneous matter into consideration, specific instances of their having done so must be shown.

Appeal by the applicants from the decision of the District Licensing Board, Demerara, refusing to grant a certificate for the issue of a retail spirit shop licence.

E. G. Woolford, K.C., (L. A. Hopkinson with him), for appellants.

E. V. Luckhoo, for respondent.

Cur. adv. vult.

C. SHING & ORS. v. A. C. KANG.

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

This appeal is brought against the decision of a Licensing Board on the ground that the Board had taken extraneous matter into consideration. A preliminary objection was taken that the particulars set out in the grounds of appeal disclosed no such matter. It appeared from the document in question and from the argument that this Court is asked to say that because the conclusions arrived at by the Board are not such as might be drawn by this Court, or because they might disclose a misconception of the effect of the evidence, the Board must have taken into consideration some extraneous matter the nature of which is not indicated.

The grounds of appeal allowed by the Ordinance (Cap. 107, sec 25) are strictly limited. On the merit of these restrictions we would express no opinion. It is the duty of this Court to see that they are observed. The particular sub-section dealing with the ground alleged in the present appeal couples it with corrupt and malicious action on the part of the Board which would appear to indicate that the evil aimed at is the impropriety of a quasi-judicial body going outside the matters before it and taking into consideration extraneous matter. Before this Court will find that a Board has been guilty of this impropriety specific instances of their having done so must be shown. It is possible that there might be a case in which the reasons given by the Board in themselves indicated that it had taken into consideration extraneous matter, but it is not so in the present case, and what in effect this Court is being asked to do is to interfere with the Board's findings of fact on the evidence before it and with the conclusions it has drawn therefrom. This the Court is not prepared to do. The particular ground in the grounds of appeal does not state what is the extraneous matter complained of nor does the record disclose that some such matter must have been taken into consideration. The appellant does not therefore rely upon any ground furnished by section 25 of the Ordinance and the preliminary objection must be sustained.

The appeal is therefore dismissed with costs to be taxed.

Appeal dismissed.

Solicitors: *Carlos Gomes; F. Dias*, O.B.E.

A. E. GLASGOW v. S. DEYGOO.

ALEXANDER EMANUEL GLASGOW, Appellant (Defendant),
 v.
 SAMUEL DEYGOO, Sgt. of Police No. 3720, Respondent (Complainant).

[1941. No. 295.—DEMERARA].

BEFORE FULL COURT: VERITY, C. J., FRETZ, J. AND LUCKHOO, J.
 (Ag).

1942. MARCH 20, 27.

Evidence—Claim licence—Ownership of—Proof of—Publication in Gazette of list of claim licences in existence—Extract from Gazette—Inadmissible in evidence.

Evidence—Ownership—Need not always be strictly proved—Possession—Evidence of ownership.

Criminal law and procedure—Larceny at common law—Things attached to soil—Abandonment after severance from realty—Common law doctrine as to—Not applicable to statutory thefts—Summary Jurisdiction (Offences) Ordinances, cap. 13, s 80.

Appeal—Appellant properly convicted—Wrong subsection—Quoted in charge and conviction—Conviction amended—By Appeal Court—Summary Jurisdiction (Offences) Ordinance, cap. 13, ss. 80 (1) (a), 80 (2).

Ownership of a claim licence is not provable by the production of an extract from the Gazette showing claim licences in existence.

Ownership or title need not generally be strictly proved by production of documents of title. Possession is evidence of ownership.

The common law doctrine, in cases of larceny of things attached to the soil, as to abandonment after severance from the realty, does not apply to statutory thefts, such as offences against section 80 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13.

A defendant was charged, and was properly convicted, for entering upon land with intent to steal raw gold. This offence is created by section 80 (2) of the Summary Jurisdiction (Offences) Ordinance, Cap. 13. In the complaint and in the conviction, however, section 80 (1) (a), and not section 80 (2) was quoted.

On appeal, *held* that the conviction must be amended to read section 80 (2) instead of section 80 (1) (a).

Appeal by the defendant from a Magistrate's decision convicting him of entering upon land with intent to steal raw gold, and sentencing him to six months' imprisonment.

L. M. F. Cabral, for appellant.

S. E. Gomes, Assistant Attorney-General, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by Luckhoo, J. (Ag.) as follows:—

The appellant Glasgow was charged before the Magistrate of the North West Judicial District with the offence of entering upon land, to wit. Licence Claim XLCR No. 2 at Kaituma, in No. 5 Mining District on the 16th day of July, 1941, with intent to steal raw gold and was convicted for the said offence. In the complaint before the Magistrate the offence is laid as being contrary to section 80 (1) (a) of the Summary Jurisdiction (Offences)

A. E. GLASGOW v. S. DEYGOO

Ordinance, Chapter 13 instead of section 80 (2) which creates the offence charged.

From this conviction and sentence of 6 months' imprisonment the appellant brings this appeal and Counsel on his behalf challenges the said conviction for several reasons which can be crystallised under the following heads:—

(1) The admission of inadmissible evidence, to wit, an extract from the *Official Gazette* showing P. Tilbury to be the holder of Claim Licence No. C. 6659 for Claim XLCR No. 2, situate at Kaituma.

(2) Failure of proof of ownership in P. Tilbury of Claim XLCR No. 2, situate at Kaituma.

(3) No evidence of abandonment by the appellant after severance from the Claim of gold bearing quartz in order to establish larceny.

(4) The weight of evidence was against the finding of the Magistrate.

The facts of the case are shortly as follows:—

One Philbert Tilbury deposed that he was a miner and owner of Claim XLCR No. 2 Licence No. C6659 as shown in the extract from the *Official Gazette* dated the 22nd day of February, 1941, and on the 10th day of July he discovered gold on the said claim from which on the 12th day of July he obtained from one bailer of gravel 7 ozs. of gold. On that said day he covered with slabs the entrance to the shaft which he had made in the claim to prevent anyone from getting in. He then placed three men to watch the claim and left for his camp, apparently some distance away.

On the following day, consequent on a report made to him he returned with one Pierre to his claim and discovered that someone *had removed some gold bearing quartz* from the shaft where he had previously worked. This shaft, and the only one on Tilbury's claim, is 33 feet away from the shaft on David and Pierre's claim. One Charles James who was then working with Tilbury stated that on the 16th day of July, 1941, he saw the appellant whose work place is 25 feet away from Tilbury's shaft coming out of Tilbury's shaft with a flour bag full of something, placed it on a tacouba near his (defendant's) work place and shortly after he saw him going with the flour bag to a pond where he washed the contents of the same.

This witness then went to where the defendant was and saw gold being taken from a battel in which the bag was placed. He estimated the quantity at 36 ozs.

When the defendant realised that he had been seen by James he offered to him a \$5 note for the purpose of "holding his peace." He James then reported what he had seen to Tilbury who in company with James reported the matter to Sergt. Deygoo and handed over the \$5 note.

The evidence of James as to the defendant's exit with a bag

A. E. GLASGOW v. S. DEYGOO.

containing something from Tilbury's shaft is corroborated by two witnesses called on behalf of the respondent, Bernard Gungadeen and Ivan Hutson. The two young men 16 and 19 years of age respectively were then in the employ of the defendant and it would appear from the evidence of Gungadeen that the defendant made two visits to Tilbury's shaft that day. He also noticed the defendant after his second visit going down hill with the flour bag and a battel.

The defendant gave evidence that he was a tributor on David and Pierre's claim at Kaituma and that he took charge of the sinking of a shaft alongside the boundary of Tilbury's claim. He admitted that the witnesses Gungadeen and Hutson were in his employ and that on the 15th day of July, 1941, Tilbury took him into his (Tilbury's) shaft for a spade. He denied having entered Tilbury's shaft or having removed any stuff in a flour bag as deposed to by the witnesses called on behalf of the complainant.

He admitted he handed James the sum of \$5 on the 17th July but as a loan and not as "hush money" and in so far as the shaft on David and Pierre's claim was concerned no gold was yet obtained from the same.

Frederick Pierre, a witness called by the defendant, told the Court that on the 16th day of July defendant who was then a tributor on the claim of David and himself sold him some gold. It amounted to 4 ozs., and that on the 17th day of July in David's Shop at Kaituma defendant called James aside, had a confidential talk and handed James \$5.

It is substantially upon the above facts that the Magistrate came to the conclusion that the defendant did enter Tilbury's shaft with intent to steal raw gold.

We agree with the contention of the learned counsel for the appellant that the extract from the *Official Gazette* dated the 22nd of February, 1941, tendered as proof of the fact that the witness Tilbury was the owner of the claim was inadmissible, but we do not agree that apart from such evidence there is not sufficient evidence on which the Magistrate could have found that Tilbury's rights or property in and to the gold bearing quartz had been established. The evidence on that point set out above including the admission of the defendant is ample in our opinion to satisfy the requirements of the law even if property in the things removed was a necessary ingredient of proof in order to establish the commission of the offence.

It is the violation of the person's possession of the thing which matters. A person who is in apparent possession has as against a mere stranger and wrong-doer the same remedies as if he had the right to possession and can maintain trespass or theft, and the stranger who violates his possession cannot justify the violation by showing the possession was without title unless he can show not only that a third person was entitled to possession, but that he acted with the authority of the third person.

A. E. GLASGOW v. S. DEYGOO

As was observed in the case of *Robertson v. French* (1803) 4 East reports 130, possession of property, and land or goods and chattels, and acts of ownership thereof, are evidence of ownership. Ownership or title need not generally be strictly proved by production of documents of title. But on reference to the section dealing with the offence charged it seems to us that anyone could lay a complaint against any person who enters upon the terrain in which the various minerals or substances are to be found with the intent to steal the same. See Section 6 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 14.

It would be then open to the defendant by way of defence to establish his rights to such entry.

We would have agreed with learned counsel's contention, had there been a dispute as to the respective rights of the parties in and to the land or the produce thereof, that proof of ownership by the production of the Claim Licence or proper evidence of its existence could not have been dispensed with.

Mr. Cabral under the third head submitted that before larceny of things attached to the soil could be committed there must be some evidence of abandonment after severance therefrom. This contention would have been sound if the appellant had been charged with simple larceny, but entering upon land with the intent to steal raw gold, or stealing raw gold which includes any substance or thing containing gold, or of which gold forms a part whether it had been smelted or not, is a statutory theft, and the abandonment of possession after severance which might evidence intention is a common law doctrine and inapplicable to the charge against the appellant.

Lastly, we find that there was abundant evidence set out above on which the Magistrate could have reasonably made the finding he did. The conviction in our view should be amended to read contrary to Section 80 (2) instead of section 80 (1) (a) and we accordingly make the amendment.

Counsel for the appellant has asked us to modify the sentence imposed by the Magistrate by the infliction of a fine instead. We regret we cannot accede to this request. As was pointed out by the Assistant Attorney-General claim raiding is a serious offence and difficult to establish by reason of the distance in many cases of claims from police supervision.

We can find no mitigating circumstances in this case and the appeal will therefore be dismissed with costs to be taxed.

Appeal dismissed.

DEM STORAGE Co. v. DEM. WHARF & STORAGE Co.

DEMERARA STORAGE CO., LTD., Plaintiff,

v.

DEMERARA WHARF AND STORAGE CO., LTD., Defendants.

[1941. No. 136.—DEMERARA.]

BEFORE STAFFORD, J. (Acting).

1941. DECEMBER 18, 19, 22, 23, 30; 1942. JANUARY 2, 5, 6, 7, 8, 9, 16, 20, 21, 22, 23, 27, 28; APRIL 1.

Specific performance—Action for—By purchaser—Mortgagee not a necessary party thereto.

Practice—Joinder of parties—Action by purchaser for specific performance—Claim by vendor against mortgagee for accounts—Application by defendant to join mortgagee as defendant—Purchaser not concerned with vendor's claim against mortgagee—Application refused.

Practice—Trial of action—Rulings made during—Application to trial judge, before determination of action, for leave to appeal against—Cannot be entertained—Application to trial judge for adjournment of hearing pending determination of motion to Full Court for leave to appeal—Cannot be entertained.

Practice—Defence—Application to strike out—Granted where paragraphs constitute no defence to action—Refused where a point of law, which may or may not be substantial, is raised.

Practice—Trial of action—No oral evidence led by defence—Documents produced while cross-examining witnesses for plaintiff—Evidence adduced by defendant—No right of reply in defendant.

Money-lending—Business of—Investment of capital in mortgages—Whether money-lending—System, repetition or continuity of money-lending transactions—Evidence of.

Mortgage—Amount acknowledged in mortgage bond as due to mortgagee—Willing and voluntary condemnation therefor—Whether judgment by consent—Whether res judicata until revoked, rescinded, set aside or annulled.

In 1917 the defendant, a limited liability company, mortgaged, its immovable property to J.N.P. for \$60,000, and in 1926, for \$15,000. The interest payable in respect of each mortgage was at the rate of 7 per centum per annum.

J.N.P. died on September 3, 1939, and, at that time, the defendant owed him, exclusive of interest, the sum of \$54,650 on the first mortgage, and the sum of \$14,650 on the second mortgage.

On April 8, 1940, the defendant (the executors of J.N.P. consenting) agreed to sell for the sum of \$50,000 its whole undertaking to the plaintiff. According to the agreement of sale, the sum of \$1,500 was to be paid to P.C.W. who negotiated the sale, and the sum of \$48,500 was to be paid to the executors of J.N.P. in full satisfaction of the principal and interest due on the two mortgages.

The defendant placed the plaintiff in possession of its property, and advertised transport of its immovable property in favour of the plaintiff.

The sum of \$1,500 was paid to P.C.W. by the executors of J.N.P. The plaintiff paid the sum of \$50,000 to the defendant who thereupon paid to the executors the sum of \$50,000 (\$1,500 of which was in re-imbusement of the sum paid by them to P.C.W., and \$48,500 the amount required to be paid to them to satisfy the two mortgages in full).

The defendant failed to pass transport in favour of the plaintiff, and the plaintiff issued a writ claiming specific performance.

The defendant company pleaded, *inter alia*,—

- (1) that J.N.P. was an unregistered money-lender when he made the loans to it, that the loan transactions were therefore illegal and

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

void, and consequently the mortgage deeds securing the loans were null and void; and that the agreement sought to be specifically performed was void as it had amongst its objects the repayment of the mortgage debts;

(2) that they had a cause of action against the executors of J.N.P. for accounts in respect of a period of time when he was in possession.

On the action coming on for hearing, the defendant company applied that the executors of J.N.P. be joined as defendants.

Held, that a mortgagee is not a necessary party to an action by a purchaser for specific performance, that the plaintiff company was not concerned with the issue between the mortgagee and the defendant company as to accounts, and that the application must be refused.

The defendant company applied for leave to appeal from the above decision.

Held 1) that no leave can be granted to appeal from rulings made during the course of a trial; and

(2) that the Court is precluded from adjourning the hearing of an action until the decision of a motion made to the Full Court for leave to appeal from a ruling of the trial judge made during the course of a trial.

The plaintiffs applied to strike out the portions of the defence hereinbefore referred to, relating to the issue as to money-lending and to the issue as to accounts.

Held, (1) that with reference to the money-lending issue, the application must be refused, as there was raised a point of law, the question of the illegality of a contract, which may or may not prove substantial, and it was not for the Court, at that stage of the proceedings, to decide upon the validity of such point, or whether, after evidence led, it may or may not be applicable in the case; and

(2) that, with reference to the issue as to accounts, the application must be granted, as it did not constitute a defence to the action for specific performance.

During the course of the trial the defendant company produced documents while cross-examining witnesses for the plaintiff.

Held, that the defendant company had adduced evidence, and therefore had no right of reply.

J.N.P. was accustomed to invest his accumulated profits from J.N.P., Ltd., (in which he held 98 per cent, of the shares) in Government bonds, Town Council bonds, mortgages and special deposits at the local banks, these last bearing interest at 1½ per cent, per annum and later at 1 per cent., per annum.

At the time of his death he had no bonds, but he had \$18,187 in local scrip; \$371,000 lying on special deposit at the banks and \$179,000 owing to him as principal and interest on about 18 mortgages of immovable property.

During the period 1910 to 1939, both years inclusive, J.N.P. had taken 61 mortgages on immovable property in his favour, with an average loan value of \$11,523.77 per mortgage. He had also taken a transfer of one other mortgage from the original mortgagee. He had made 3 loans on promissory notes in his favour on various occasions.

In some years J.N.P. made no loans and took no mortgages, while in other years he took several mortgages. The 61 mortgages were granted by 42 mortgagors, one mortgagor borrowing on no less than 5 several mortgages. Only 2 mortgages were for less than \$1,000, and only 2 for as little as \$1,000. While, at the other end of the scale, there were 2 for \$45,000, one for \$58,000 and 2 for \$6,000. Ninety-nine of the mortgages were for \$5,000 or over.

Nearly all the mortgagees were persons well-known in the commercial community and 15 of them (nearly all those granting small mortgages) were customers of J.N.P., Ltd.

J.N.P. never sought mortgage business nor offered to make loans. He never advertised nor announced himself nor held himself out in any way as carrying on the business of a money-lender, nor as being ready to lend money to any one.

Every loan made by J.N.P. (except in respect of the 3 promissory notes and certain advances made to the defendant company) was on the security of mortgage on immovable property, his money being paid over only on the passing of the mortgage.

All the mortgages taken by J.N.P. bore interest at rates varying between

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

5 per cent., and 7 per cent., per annum as compared with the current rates of 6 per cent., to 8 per cent., on mortgages taken by the local investing companies.

All the mortgages were on the 5-year term usual with investing companies: he never took short term mortgages. Nearly all his mortgages were for large amounts. J.N.P. was a difficult person to get a mortgage from, not lending to any and everybody, and often refusing perfectly good security. In fact, all his mortgages were taken from friends, customers of J.N.P., Ltd., or business acquaintances with whose business ability he was acquainted.

There was no evidence that J.N.P. used to press for the repayment of the principal of any of his mortgages; rather his course of dealing indicated that a mortgage might go on for ever so long as the interest (which was neither harsh nor excessive) was paid with reasonable regularity.

After losing on a mortgage to the extent of \$8,000, and after it became evident that there would be a loss also in respect of 2 other mortgages, J.N.P. became less inclined to take mortgages, and eventually stopped taking them, refusing applications in 1937, 1938 and 1939.

Held, (1) that there was no system or repetition or continuity in the conduct of J.N.P., nor even any desire on his part to lend money on interest such as would be expected of a person engaged in the business of money-lending;

(2) that J.N.P., far from being engaged in the business of turning over his surplus money on loans with a view to immediate gain, was very effectively withdrawing his accumulated profits, and only his profits, from active circulation, and placing them on mortgage to be regarded hereafter as invested capital, only reproducing itself by the safe and slow process of bearing interest; and

(3) that J.N.P. was not carrying on the business of a money-lender.

Semble, that a willing and voluntary condemnation in a mortgage is a judgment by consent, and that until that judgment is revoked or rescinded or set aside or annulled, it is *res judicata*.

Action by Demerara Storage Company, Limited, against Demerara Wharf and Storage Company, Limited, for specific performance.

1941. December 18, 19, 22.

C. V. Wight, for defendants, applied to join the executors of J. N. Pereira, deceased as defendants, J. N. Pereira being the mortgagee of the property, the subject matter of the action.

H. C. Humphrys, K.C., (*W. J. Gilchrist* with him), for plaintiffs, opposed.

Cur. adv. vult.

1941. December 23.

STAFFORD, J. (Acting): On this action for specific performance coming on for hearing, the defendants applied summarily to join certain persons as added defendants. The application was argued at length and occupied over two days' sitting. It was based on O. XIV., r. 13 of the Rules of Court, 1900, which is the local equivalent of the English Rule O. XVI., r. 11, and notice was given by letter by the defendants, prior to hearing, that the application would be made.

The application being a summary one, the Court is bound, as both counsel agreed, by the pleadings in considering the merits of it.

By their Statement of Claim filed on 14th July, 1941, the plaintiffs averred an agreement of the 8th April, 1940, between

DEM. STORAGE Co., v. DEM. WHARF & STORAGE Co.

the defendants of the one part, one Cyril Pereira as agent of the plaintiff company (then about to be incorporated with the object hereinafter mentioned) of the second part, and the said Cyril Pereira for himself and the other executors under the will of Jose Norberto Pereira, deceased, mortgagees to the defendants, of the third part. By this agreement the defendants purported to sell their entire business with all its movable and immovable property to the plaintiff company, which was about to be formed with the object and for the purpose, *inter alia*, of carrying on the said business of the defendants. The statement of claim further averred that the plaintiff company after incorporation adopted and ratified the act of its agent, and on or about the 23rd June, 1940, paid the full purchase price \$50,000 to the respective nominees of the defendants, to wit, Percy Claude Wight, \$1,500 and to the Executors of J. N. Pereira, deceased, \$48,500, which sum the said mortgagees had agreed to accept in full satisfaction of all sums due upon the mortgages they held. The plaintiffs also averred that the agreements had been further implemented by the defendants giving the plaintiffs possession of the immovable property and most of the movable property comprised in the said agreement of the 8th April and had duly advertised transport of the immovables but had there stopped short.

The Defence consisted of denials or non-admissions of nearly all of the allegations in the Statement of Claim, and set-up that (1) the agreement of the 8th April was invalid; (2) the defendants' mortgagee the late J. N. Pereira, was an unregistered money-lender at the dates of the mortgages, and that such mortgages were void therefor, and that payment to the said mortgagee's executors in terms of the said agreement was, if effected, null and void; (3) further, that the said mortgagee, and his executors after him, had carried on the business of the defendants (presumably as having taken possession for the purpose of realising the debt, although there is no actual averment of this), and that consequently, the said mortgagees were trustees and liable to account to the defendants for their dealings and intrusions with the defendants' property. The defendants went on to say that the executors had rendered no account of their said dealings, and that, in consequence, it was not competent or legal for the plaintiffs, who, the defendants said, knew this, to pay the executors the sum the defendants had authorised them so to pay. It is to be noted that the Defence makes no allegation of any *failure* by the executors to account, or even of any demand by the defendants themselves for such accounts.

In this state of the pleadings, the defendants asked that the executors of J. N. Pereira, deceased, be joined as co-defendants, (*a*) to enable the defendants' alleged claim against these executors as to money-lending and for trust accounts to be investigated, and (*b*) so that the said executors might be subjected to any

ultimate order for specific performance and be compelled to cancel their mortgages and so enable the defendants to give a clean title in the event of the plaintiffs succeeding.

Plaintiffs' counsel opposed the application. He objected to the joinder in so far as it was designed to an enquiry as to the alleged trust on the ground that this meant the trial of a new action in which the plaintiffs had no interest either as claimants or defendants; in so far as it was designed towards compelling the executors to execute cancelments of their mortgages, he affirmed that the plaintiffs for good reasons of their own, sought no relief or remedy against the executors, could protect themselves without the help of the defendants, and were content to accept from the defendants specific performance of such acts as the defendants could perform by themselves.

The authorities cited by learned counsel for the respective parties are to the effect that the English O. XVI, r. 11—and therefore our O. XIV, r. 13—,was designed primarily to dispose of the former plea in abatement, where a defendant raised the objection that a necessary party was not on the record and that therefore the action could not proceed, or that the proposed defendants were necessary parties to enable the Court to adjudicate finally upon the action before it.

Three principles as regards the adding of defendants seem to emerge from the authorities cited: *Firstly*, that a plaintiff may apply for the joinder of a defendant against whom he discovers that he has a remedy or relief jointly, or in the alternative, with that sought by him against the original defendant, or he may apply to join any person as defendant who may have the original defendant's property in his hands as trustee, *vide Ideal Films, Ltd. v. Richards et al* (1927) 1 K.B. 374: *secondly*, that the defendants may apply whether the plaintiffs consent or not, for the joinder of co-defendants, on the ground that the issue in the action, being in truth a cause against themselves and their co-contractors, cannot be finally determined without the presence of those co-contractors, and that in such case, if the joinder be effected, both defendants might counterclaim, as happened in *Norbury, Natzio & Co., Ltd. v. Griffiths* (1918) 2 K.B. 378; *thirdly*, that the defendants may apply on the ground that by reason of the mutuality of interest between the defendants and the proposed co-defendants, the trial of the action will in fact conveniently determine the interests, not only of the plaintiffs and defendants, but also those of the plaintiffs and the proposed co-defendants, who, therefore, themselves consenting, ought to be joined, not only for the purpose of defending but also for the purpose of pursuing their claims, arising against the plaintiff out of and only by virtue of the same transactions: *vide Montgomery v. Foy* (1895) 2 Q.B. 321, C.A.

The second principle abovementioned is merely a variation of the old plea in abatement, as one discovers on reading the judg-

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

ments in *Wilson v. Balcarres Brook S.S. Co.* (1893) 1 Q.B, where at p. 427 Lord Esher says that where there are two joint contractors, both resident within the jurisdiction, *prima facie*, if one be sued, he has the right to ask that the other be joined. But even in such cases, his Lordship took care to state, the Court has a discretion; he further said that in some cases there might be circumstances under which the Court would refuse to insist on all joint contractors being joined. The case is also of interest as showing that by the term “joint contractors” are meant not merely parties to the same contract, but parties having the same joint obligation towards the plaintiff, so that all such co-contractors are, in effect, one person *vis-a-vis* the plaintiff.

The third principle seems to be an exception to the usual application of the rule, and a development by reason of the apparent width and scope of its terms, and it is only brought into operation with extreme caution. But it would seem that in applying all three principles there is one thing in common: “The main evidence, and the main inquiry, must be the same”—, as Lord Esher M.R. indicates in *Byrne v. Brown* (1889) 22 Q.B.D., at p. 666.

In the case now before the Court, the defendants really allege as the first reason for their application a separate and distinct cause of action against the executors of J. N. Pereira, deceased, and in the opinion of this Court, their application is fully answered on this ground by the dictum of Lord Coleridge in *Norris v. Beazley* (1877) 2 C.P.D. at page 84 where he said in referring to O. 16, r. 13 (now r. 11) “it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any it was not intended that patties in the position of this Company should be added as defendants merely for the convenience of another defendant between whom and the Company there may be questions which will afterwards have to be settled.” If one substituted the word “executors” for the word “Company” one will see how aptly his Lordship’s remarks may be applied to the present case. In the same action, Denman, C.J., said: “it was not right to hamper plaintiffs by forcing them to proceed against other defendants whom they do not desire to join”. On their first ground of application the defendants therefore fail.

With regard to the second ground, that the executors of J. N. Pereira, deceased, should be joined so as to enable the Court to compel them to cancel their mortgages and so assist the defendants in carrying out the contract the performance of which the defendants are seeking to avoid, the plaintiffs are “not proceeding against them” in the words of Denman, C.J., above quoted: and if the plaintiffs are content with such performance as the defendants can make, it does not lie in the mouths of the defendants to deny it: *vide Gonsalves v. Landry* (1930) L.R.B.G.,

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

W.I.C.A. p. 35; further the form of Order set forth in *Seton*, 7th Edition, Vol. 3, p. 2,212, shows that a mortgagee need not be made a party to an action for specific performance of an agreement for the sale of the mortgaged property by his mortgagor; and if this be so in England, where the mortgagee is vested with the legal ownership, it must be still more so in British Guiana, where he has merely an encumbrance upon the property, and where, on his refusal to cancel, the Court may order the payment into Court of the principal and interest due upon the mortgage, and the cancellation thereafter by the Registrar.

For the reasons abovementioned, the Court declines to order that the executors of the late J. N. Pereira be joined as defendants.

Counsel for the defendants further asked the Court, in the event of an adverse ruling on the application abovementioned, to grant the defendants leave to issue a third party notice under Rules of Court, 1900, O. XIV., r. 16, against the said executors. Our local rule O. XIV, r. 16, is similar to the former English Rule O. XVI, r. 48 of which the present equivalent is O. XVI A, r. 1 (1) (a). By those rules, as is stated at p. 299 of the Annual Practice, 1941, "a third party notice could only be issued by a defendant entitled to contribution or indemnity, and these words were construed in their strict legal significance." The present defendants do not seek contribution or indemnity, from the executors, but seek, as against those executors, to pursue distinct causes of action of their own. This application must also, therefore fail.

The costs occasioned by the abortive application will be dealt with as items of costs in the cause and allowed or disallowed by the Registrar in the usual exercise of his powers on taxation according as the plaintiffs or the defendants, respectively, be successful in the action.

C. V. Wight, for the defendants, applied for leave to appeal.

STAFFORD, J. (Acting): I do not wish to hear counsel for the plaintiffs on this application. The Court is unaware of any precedent for interrupting a hearing to permit of an appeal against a ruling made during the course of such trial. Application for leave to appeal at this stage refused without prejudice to any right of appeal defendants may have, at the end of the trial, against the above ruling.

On the 27th day of December, 1941, the defendants filed a motion (No. 368 of 1941) to the Full Court applying for leave to appeal.

1942. January 2.

C. V. Wight, for the defendants, applied for a stay of proceedings in the action pending the hearing and determination of the motion to the Full Court for leave to appeal.

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

DEM. STORAGE Co. v. DEM WHARF & STORAGE Co.

STAFFORD, J. (Acting): On the authority of *In re Moynihan* (1930) 2 Ch. 356, and of *In re Palmer* (1882) 22 Ch. D. 88, the Court is precluded from adjourning the hearing until the decision of the motion to the Full Court for leave to appeal, and the hearing must therefore proceed.

1942. January 2, 5, 6.

H. C. Humphrys, K.C., for the plaintiffs, applied that paragraphs 8, 9, 10, 11, 12 and 13 of the defence should be struck out.

C. V. Wight, for the defendants, opposed.

Paragraphs 8, 9, 10, 11, 12 and 13 of the defence were as follows:

8. The defendants say that at all material and/or relevant times the said Jose Norberto Pereira, deceased, represented by his executors at the time of the execution of the agreement set out in paragraph 4 of the Statement of Claim was a money-lender as defined under the provisions of the Money-Lenders' Ordinance, Chapter 68, and was unregistered, and any security held by him from the defendants was void, illegal and unenforceable.

9. The plaintiffs with full knowledge of such fact purported to enter into the said alleged agreement one of the terms of which is as follows:—

“The purchase shall be completed on the 29th day of April, 1940, or so soon thereafter as title can be given, when possession of the premises shall be given to the Company and the consideration aforesaid shall be paid and satisfied by payment to the vendors' nominees, namely, to Percy Claude Wight, the sum of \$1,500 part thereof, and the balance thereof, namely, \$48,500 to Cyril Pereira, Cecil Claude Pereira, and Carl Ignatius Pereira, as Executors of the estate of Jose Norberto Pereira, deceased, the mortgagees of the two mortgages passed on the said hereditaments, by the vendors on the 22nd August, 1917, and on the 21st day of September, 1926, in full payment and satisfaction of the said mortgages subject to the provisions of this agreement, and thereupon the vendors and all necessary parties, if any, shall execute and do all such assurances and things for vesting the said hereditaments and premises in the Company, and giving to it the full benefit of this agreement as shall be reasonably required.”

10. The defendants will contend at the hearing that the alleged consideration for the said agreement of sale being illegal the said agreement is void, of no effect and unenforceable, and that the agreement of the 29th day of May, 1940, purporting to adopt the alleged transaction contained in the agreement of the 8th day of April, 1940, is of no legal effect.

11. The defendants say that at all material and/or relevant times the said Jose Norberto Pereira and after his death his executors, parties to the alleged agreement of the 8th of April, 1940, was and were trustees of the defendants, he and they for many years having carried on the business of the defendants, but up to the present they have not rendered or delivered any or full or correct accounts of their administration thereof and were not entitled to receive, and it was not competent or legal for the plaintiffs with full knowledge of those facts to pay to the executors of the said Jose Norberto Pereira, deceased, as alleged in paragraph 7 of the Statement of Claim the sum of \$48,500.

12. Alternatively, for many years the said Jose Norberto Pereira deceased, in his lifetime and after his death his executors acted or purported to act as trustees for the defendants in carrying on of their (defendants') business as warehousemen, wharfingers and real estate owners, alternatively, managed and controlled the said business for them and have not up to the present rendered or delivered any or full or correct accounts of their trusteeship or management, and the plaintiffs with full knowledge of these facts were not entitled and it was not competent or legal for them to pay to the said executors the amount alleged in paragraph 7 of the Statement of Claim and as aforesaid.

13. The defendants say that the plaintiffs at the time of the institution of this action were and still are the executors alternatively the heirs of the estate of the said Jose Norberto Pereira, deceased, and cannot in the circum-

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

stances above narrated ask the Court to grant them specific performance of the alleged contract or contracts above referred to and/or to any one of the orders or relief asked for in the Statement of Claim.

STAFFORD, J. (Acting): A point of law, the question of the illegality of a contract, which may or may not prove substantial, is raised by paragraphs 8, 9 and 10 of the defence, and it is not for the Court at this stage to decide upon the validity of such point, or whether, after evidence led, it may or may not be applicable in the case. Those paragraphs will therefore remain.

As to paragraphs 11, 12 and 13, the allegations therein raise no proposition of fact or law known to the Court as affording a defence in an action such as this one. They are therefore struck out.

C. V. Wight, for the defendants, applied for leave to appeal.

STAFFORD, J. (Acting): Leave to appeal refused on the authority of *In re Moynihan* (1930) 2 Ch. 356.

Evidence was led on behalf of the plaintiffs on the 6th, 7th, 8th, 9th, 16th 20th, 21st, and 22nd days of January, 1942.

1942. January 23.

C. V. Wight, for the defendants, renewed his application for joinder of the executors of J. N. Pereira, deceased, as co-defendants on the ground of the evidence already adduced.

STAFFORD, J. (Acting): The application is refused as the evidence adduced up to the present in no way indicated any necessity for the joinder of the executors as parties.

Further evidence was led on behalf of the plaintiffs on the 23rd day of January, 1942, and on the 27th day of January, 1942, when the case for the plaintiff was closed. The defendants called no witnesses.

C. V. Wight, for the defendants, claimed the right of reply.

H. C. Humphrys, K.C., for the plaintiffs, objected, and submitted that the plaintiffs had the right of reply as the defendants had adduced evidence by producing documents during the course of the plaintiffs' case. Some of the plaintiffs' witnesses had been subpoenaed by defendants to produce documents, and those documents were called for during cross-examination, produced by the witnesses and tendered by the defendants.

STAFFORD, J. (Acting): On the authority of *Ryner v. Cook* (1827) 1 Moody and Malkin 86 and the statement of the practice in the Yearly Practice 1940, p. 617 under "Defendant Adducing Evidence" and in Odgers' "Pleading and Practice", 10th edition, p. 323, the defendants have adduced evidence by producing, *inter alia*, Exhibits H and X and putting these in evidence during the course of the plaintiffs' case, by means of witnesses under cross-examination. The Court therefore rules that the defendants have lost their right of reply, and calls upon counsel for the defendants to address the Court if be so desire.

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

The Court reserved judgment on the 28th day of January, 1942. The application to the Full Court for leave to appeal was withdrawn on the 6th day of March, 1942.

STAFFORD, J. (Acting): The pleadings in this action have been discussed already in the Court's ruling of the 23rd December last, and it suffices to repeat that the plaintiff company is seeking to obtain specific performance by the defendant company of the unperformed obligations of a partly performed contract, dated the 8th April, 1940, which was later adopted and ratified by a further contract dated the 29th May, 1940. By the former contract the defendant company agreed to sell its entire undertaking to the plaintiff company for the sum of \$50,000.

At the hearing which was lengthy, witnesses were called by the plaintiffs only, the defendants contenting themselves with producing documents through those witnesses and declining to lead any further evidence at the close of the plaintiffs' case. The evidence adduced disclosed that the contracts abovementioned were entered into under the circumstances hereinafter narrated.

One Mr. Jose Norberto Pereira carried on a mercantile business in Water Street, Georgetown, and in or about 1910 had turned his business into a limited liability company, J. N. Pereira, Limited, in which he held all the shares except two. The accumulated profits from his business he was accustomed to bank from time to time on deposit slips bearing interest; or he might with these profits buy bonds or make loans on mortgage as hereinafter mentioned, the mortgages all save two being taken in his own name and not in favour of J. N. Pereira, Limited.

The defendants were incorporated and registered as a company in this Colony on the 17th July, 1917, and one month after their incorporation, on the 22nd August, 1917, took by transport No. 618 conveyance of six parcels of land pertaining to Mud-lots A and B, Cumingsburg, Georgetown, from the company of Sprostons, Limited, and paid \$114,000 therefor. On the same day that they obtained transport, the defendants passed in favour of the abovenamed J. N. Pereira, in security for a loan of \$60,000 from him, a first mortgage on the six parcels of land transported to them as aforesaid—save and except a portion in the south eastern corner thereof as described in a plan of J. T. Seymour, Sworn Land Surveyor, with the buildings and erections on the said portion. Later in 1917, and again in 1920, the defendant company acquired by transport title to further parcels of land adjoining the six parcels abovementioned.

In 1926 the defendants, who had not yet paid off the mortgage of 1917, although the time for payment of the capital sum borrowed had long elapsed, were again in need of money and were able to borrow a further sum of \$15,000 at 7 per cent, from Mr. Pereira on a mortgage the deed of which recites a first mortgage of the later acquired properties of the defendants and a second mort-

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

gage on the six parcels already mortgaged, with the buildings and erections thereon.

Early in 1932 the defendants were once more in difficulties and could not pay their Town Taxes, or even obtain an extension of time for payment. In that exigency the defendants held a meeting of their directors on the 23rd March and invited Mr. Pereira, and his son Mr. Cyril Pereira who was then actively engaged in his father's business, to attend. At the meeting the defendant's difficulties were discussed, and eventually Mr. J. N. Pereira agreed to advance further money to the defendants and relieve their embarrassment on the condition that Mr. Cyril Pereira should be made a director of the defendant company and should be a signatory to all cheques for payments made thereafter by the said company to anyone. From that date Mr. Cyril Pereira was a director of the defendant company at all material times.

Shortly after the above meeting Mr. W. S. Jones, the defendants' secretary, left them to join the staff of another company. In consequence the defendants lost a great deal of remunerative business which Mr. Jones had been instrumental in bringing to them, and their affairs became much worse. In addition their premises had deteriorated and had fallen into bad repair. From 1932 to 1938 it can be said that their business languished. Eventually on the 9th November, 1938, at a meeting of their directors Mr. J. N. Pereira their mortgagee being present and agreeing, it was decided to sell the land and buildings of the company for \$50,000 and private offers for the purchase were sought thereafter. This search was unsuccessful down to the time of Mr. J. N. Pereira's death.

Mr. Pereira died on the 3rd September, 1939. After obtaining probate of his will his executors amongst whom was his son, Mr. Cyril Pereira, proceeded to realise his estate and to call in certain outstanding mortgages in the deceased's favour, among them the defendant company's. Accordingly, Mr. Carlos Gomes, solicitor to the executors, wrote the defendant company on the 1st February, 1940, a formal letter demanding payment of \$69,300 being as to \$54,650, balance of principal on one mortgage, and as to \$14,650 balance of principal owing on the other mortgage; and also demanding such interest as had accrued to date thereon. In his letter the executors' solicitor stated that the executors considered that there was no possibility of the mortgages being paid in full, and gave the company until the next day to comply with the demand stating that otherwise "foreclosure" proceedings would be instituted. There was no payment, and a writ was issued in respect of the first mortgage.

Soon after receipt of the writ by the defendant company Mr. Percy Claude Wight, one of the directors of the said company asked Mr. Cyril Pereira to have the writ withdrawn. After this request had been repeated several times unsuccessfully, Mr.

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

Wight informed Mr. Pereira that the defendant company would defend the "foreclosure" action on the ground of "money lending." Thereafter, on the 8th February, 1940, a meeting of the directors of the defendant company was held, Mr. Cyril Pereira being amongst the directors present. At that meeting "it was decided on the suggestion of Mr. Cyril Pereira that the writ be withdrawn in order to give satisfaction to the shareholders and that the best price be obtained for the property of the company by putting it up for sale by public auction at a reserve to be fixed by the heirs of the deceased mortgagee."

The executors' writ was thereafter withdrawn, and in the *Argosy* newspaper of the 16th February, 1940, a copy of which was put in evidence, it can be seen how the immovable property of the defendant company was advertised for sale on the 27th February, 1940, by Mr. Percy C. Wight, the aforementioned director of the defendant company who was to be the auctioneer. This procedure was considered at an Extraordinary General Meeting of the shareholders of the defendant company on the 22nd February, 1940, when it was moved by Mr. Cecil Claude Pereira, and seconded by the Chairman, Mr. R. E. Brassington: "That the property movable and immovable, as a going concern be put up at auction at a reserve (*sic*) price to be fixed by the mortgagees and that in the event of the reserve price not being reached at the sale at auction, the property to be sold by private treaty at such price as the mortgagees may agree." The secretary has made no minute on that day as to the result of the motion, but in the minutes of an extraordinary general meeting of March 20, 1940, it is referred to as having been passed unanimously, and at that latter meeting it was confirmed as a Special Resolution.

Meanwhile, on the 27th February, the auction had been held, but no sale took place because the highest bid by Mr. A. M. S. Barcellos on behalf of one Mr. John de Freitas, of \$47,000, was not accepted, it being below the reserve of \$55,000, or thereabouts, fixed by the mortgagees. Immediately after the abortive sale, the executors acting on a suggestion of Mr. Wight to Mr. Cyril Pereira, decided to purchase the undertaking of the defendant company, and apparently negotiated with Mr. Percy C. Wight as broker for this sale, thus enabling Mr. Wight to secure his proper commission of 3 per cent., on the purchase price agreed upon. This is supported by Mr. Wight, after the sale, telling Mr. Carlos Gomes, the executors' solicitor, that the executors had treated him very well, and his even asking Mr. Gomes why, instead of "forming a company," the executors did not acquire the defendant company's concern by taking over the shares in the defendant company. This suggestion Mr. Gomes duly communicated to his clients, the executors; but they, after consideration of it, decided to proceed with their original project—to form a company.

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

In accordance with the arrangement between the executors and the defendant company's agent and director, Mr. Percy C. Wight, the executors' solicitor, Mr. Gomes, prepared a clean copy of an agreement of purchase and sale which it was proposed to have executed by the defendant company as vendors, Mr. Cyril Pereira as acting on behalf of the company to be formed, and the mortgagee executors as consenting to the sale. This agreement, Exhibit D, called the Original Agreement in the pleadings, was read at a meeting of the defendant company's directors on the 8th April, 1940, as appears in the minutes of that meeting which minutes were confirmed on the 19th April. The agreement was thereupon duly executed by the defendant company, by the executors, and by Mr. Cyril Pereira on behalf of the proposed new company—"The Demerara Storage Company, Ltd. This Original Agreement is the basis of the present action.

The agreement recited that the new company was about to be formed for the purpose, *inter alia*, of acquiring and working the defendant company's business; that the Memorandum and Articles of Association of the new company had, with the privity of the defendant company, already been prepared; that by these articles it had been provided that the new company should adopt the Original Agreement.

By clause one of the agreement it was provided, in effect, that the new company should acquire all the property, movable and immovable of the defendant company, including all policies of insurance to which the defendant company was entitled in connection with its business, and all its business as a going concern, and by clause 5 fixed the 29th day of April, 1940, or "so soon thereafter as title can be given" for the completion of the purchase, "when possession of the premises shall be given to the company, and the consideration aforesaid shall be paid and satisfied by payment to the vendors' nominees, namely to Percy Claude Wight, the sum of \$1,500, part thereof, and the balance thereof, namely \$48,500, to Cyril Pereira. Cecil Claude Pereira, and Carl Ignatius Pereira, as executors of the Estate of Jose Norberto Pereira, deceased, the mortgagees of the two mortgages passed on the said hereditaments by the vendors on the 22nd August, 1917, and on the 21st day of September, 1926, in full payment and satisfaction of the said mortgages subject to the provisions of this agreement, and thereupon the vendors and all necessary parties, if any, shall execute and do all such assurances and things for vesting the said hereditaments and premises in the company, and giving to it the full benefit of this agreement as shall be reasonably required."

It further provided by clause 8 that the new company should, subject to the consent of the insurance office and to the completion of the purchase, be entitled to the benefit of the current insurance of the premises.

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

Oral evidence was led by means of the witnesses Mr. Cyril Pereira and Mr. Carlos Gomes, solicitor, which evidence the defendant company has not sought to contradict, that the sum of \$1,500 to which Mr. Percy C. Wight was nominated payee really represented his commission of 3 per cent, on the sale price of \$50,000 which commission was payable to him by the defendant company.

The next event that took place after the execution of the Original Agreement was that Mr. Percy C. Wight was able to anticipate payment of his \$1,500 commission abovementioned. This money was advanced as to \$1,000 on the 16th and as to \$500 on the 23rd day of April, 1940, by the executors of the estate of J. N. Pereira, deceased, at the request of Mr. Percy C. Wight by his son and agent Mr. "Bobbie" Wight, On the earlier of these dates the new company had not yet been registered or incorporated, and according to the evidence, the defendant company, the persons really indebted, had no money,

On the 19th April, 1940, the directors of the defendant company duly authorised their secretary to swear to the necessary affidavit of title to lead transport of their immovable property to the proposed new company: to affix their seal to the said transport and to pass the same and to affix their seal to an agreement adopting the Original Agreement of the 8th April, 1940. On the 22nd April, the new company, the Demerara Storage Company, Limited, the plaintiffs in this action, were duly registered and incorporated. Meanwhile, on the 17th April, the clean copy of the Adopting Agreement was approved by Mr. A. G. King, solicitor, to whom at the request of Mr. Percy C. Wight, it had been submitted by Mr. Carlos Gomes, solicitor for the executors and for the proposed new company.

The said Adopting Agreement was thereafter duly executed by the defendant company, and later, on the 29th May, 1940, by the plaintiff company. It is referred to in the pleadings as bearing this latter date. The directors of the defendant company, further, on the 16th May, on a motion by Mr. Percy C. Wight, who reported that he had received a deposit of \$1,500 which I have found to be his commission (aforementioned) from the new company, authorised the payment of their half of the Registrar's fees—fees \$210 and duty \$500—and half of the solicitor's fees, in respect of the said transport. In actual fact the defendant company's cheque for \$710 for transport fees had been issued since the 25th April. At the same meeting, payment of the sum of \$102 to Mr. Percy C. Wight for advertising the aforementioned abortive sales was also noted.

Transport by the defendant company to the plaintiff company was advertised during the latter part of May, and on the 1st June, after the date suggested by the Original Agreement for completion of the purchase was already past. It would appear that, pending the transport becoming ripe for passing, the defendant

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

company delivered all their books and other tangible movable property to the plaintiffs in pursuance of the Original Agreement, and also put the plaintiff company in possession of their properties sold under that agreement. There remained only the conveyance of title by transport of the said immovable properties, whereupon the assignment of the fire insurance policies on the buildings and erections on those properties could take place, and performance of the Original Agreement on the part of the defendant company would be complete.

The evidence led established further that the proposed transport became ripe for passing on June 3, 1940, when the sole opposition entered against it, by the company of deFreitas, Ltd., was removed by payment of the said company's debt of \$112.07 by Mr. Cyril Pereira on behalf of the plaintiff company. I find that on this payment being made, there was nothing to prevent the Registrar immediately certifying the transport with its accompanying cancelments of mortgage as fit for passing: nor to prevent him passing the said cancelments and transport on the said day. On that same day one Mr. A. M. S. Barcellos, auditor of the defendant company and who had also been employed by the executors solicitor to prepare the necessary statements of account of the deceased J. N. Pereira's affairs for estate duty purposes and who is now secretary of the plaintiff company, wrote out twelve cheques on the instructions of Mr. Cyril Pereira.

Ten of these cheques for \$5,000 each in the executors' cheque book were designed to be and were drawn by the executors, one in favour of each of the ten heirs of J. N. Pereira, deceased, to enable each of the said heirs to pay his or her share subscription in the plaintiff company. Another cheque was intended to be and was duly executed by the plaintiff company in favour of the defendant company for \$50,000 to pay the full purchase price mentioned in the Original Agreement. The last cheque was designed to be executed by the defendant company in favour of the mortgagee executors for the sum of \$50,000 and would have had the effect on negotiation of satisfying the sum of \$48,500 agreed by the mortgagees to be taken in full satisfaction of their mortgage debts and of repaying to the executors the sum of \$1,500 advanced by them to Mr. Percy C. Wight as his commission which had been payable to him by his clients, the defendant company.

This cheque for \$50,000 was one of three which had been signed in blank by the defendant company's secretary, one Mr. Patterson. Of the other two, one for \$40 was intended for a Mr. Parker, a Sworn Land Surveyor, in payment of his fees for making certain surveys for the defendant company, and the other for \$416.56 was intended to close the account of the defendant company with their bankers, and to be drawn by the plaintiff company, to whom all cash in the bank would belong at the completion of the purchase, according to the terms of the Original Agreement. This

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

last amount of \$416.56 was, however, erroneous, and the cashing of that cheque resulted in an overdraft, which, however, does not, affect the case.

It was emphasised by counsel for the defendant company that only the executors were in possession of sufficient funds to implement the sale, the plaintiff company having none in hand, but it will be realized that the simultaneous negotiation of all the cheques would result in all the relevant obligations of the Original Agreement being carried out by the respective parties thereto.

The evidence further discloses that on that same day, the 3rd June, 1940, all individuals—save and except Mr. R. E. Brassington, the Chairman of the defendant company—required to be present for the passing of transport by the defendant company to the plaintiff company and for the cancelment of the mortgages on the property of the defendant company, attended in the Transport Court for the purpose of effecting the above objects.

In consequence of Mr. Brassington being absent, the transport was not passed. After leaving the Transport Court, Mr. Cyril Pereira sent the twelfth cheque aforementioned, which then bore only his own signature and that of the Secretary, Mr. Patterson, to Mr. Percy C. Wight for him to affix his signature thereto as a director of the defendant company. This Mr. Percy C. Wight did, and the cheque then became fit for negotiation.

Although the executors-mortgagees and the officers of the plaintiff company attended the subsequent Transport Courts on the 10th, 17th and 24th days of June, 1940, on each occasion one or another necessary officer of the defendant company failed to attend; and this even though Mr. Carlos Gomes, solicitor to the plaintiff company, had written the defendant company on the 18th June demanding that they pass transport on the 21st. In the meanwhile, on the 22nd June all the twelve cheques aforementioned had been negotiated in pursuance of their respective objects hereinbefore set out, and although the agreed mode of payment was departed from, in that part of the purchase price was paid to the defendant company instead of to its nominees the executors, these latter were themselves paid by the defendant company's cheque, so that all the designated payees under the Original Agreement were in fact paid and paid with money provided by the plaintiff company, which had thereby performed its part of the bargain.

The last recorded minutes in the Minute Book (Ex. B) of the defendant company are those of a directors' meeting of May 16, 1940; but these were signed by the Chairman on the 14th June. This corroborates the evidence of Mr. Carlos Gomes and Mr. Barcellos that a meeting was held on the latter date. These witnesses have deposed that at such a meeting Mr. Teixeira was appointed secretary in succession to Mr. Patterson who had resigned; and that on the understanding that Mr. Percy C. Wight would look after the passing of the transport by the

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

defendant company to the plaintiff company, that the defendant company would be without assets or business of any kind after the passing of that transport, and that shares in the company were therefore valueless. Mr. Brassington, and after some discussion Mr. Manoel Vieira, at the request of Mr. Percy C. Wight transferred their shares to Mr. Wight for the purpose of enabling him to incorporate his own business into a limited liability company and to apply to the Governor in Council to change the name of the company to "P. C. Wight, Ltd.," and so save him the expense of registering and incorporating a new company. I accept the evidence of Mr. Gomes and Mr. Barcellos. Despite the above arrangement, no transport was passed by the defendant company.

Perusal of the plaintiff company's Minute Book (Ex. J.) produced by the plaintiffs at the request of and put in evidence by counsel for the defendant company during his cross-examination of Mr. Cyril Pereira discloses that at the statutory meeting of the shareholders of the plaintiff company on the 9th July, 1940, Mr. S. S. Khouri was deputed to "see Mr. Percy C. Wight and ascertain why he would not pass the transport." It was also agreed and recorded at that meeting that Mr. Wight might have the properties of the Demerara Wharf and Storage Company, Ltd., purchased by the plaintiffs, for \$74,000 if he so desired, The meeting was adjourned and resumed on the 15th July, when Mr. Khouri reported that Mr. Wight was annoyed by the conduct of the executors in calling for "the furniture account" through solicitors, and that he would not say what he desired.

During the months of October, November and December, 1940, certain fire insurance premiums in respect of policies on the premises of the defendant company fell due. The plaintiff company had no notice of these premiums from the insurance companies and did not pay the premiums. Mr. Cyril Pereira said he knew that Mr. Wight had paid about \$500 in premiums, but no evidence has been offered to identify this payment with the premiums for the three months abovementioned nor to show on what authority or by whose request the payment was made.

The next glimpse at what was taking place is given by Ex J. The minutes of a general meeting of shareholders on the 20th January, 1941, record that the meeting was called in order to notify the shareholders of a claim by Mr. Percy C. Wight, as chairman of the defendant company, who refused to allow transport of the defendant company's properties to be passed to the plaintiff company or to complete the agreement of safe of the 8th April, 1940. At that meeting, it is recorded the Hon. Francis Dias attended as solicitor for the Hon. Percy C. Wight and made certain proposals verbally with a view to settling the "claim" Mr. Wight, for the defendant company was making against the plaintiff company: "1, that transport for N½ lot 13" (this seems a mistake for B) "South Cummingsburg to low water mark should

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

remain the property of the defendant company. Mr. Wight to give lease of 99 years of mudflat or portion the bond is on at \$50 per annum rent to Georgetown Storage Company, Limited, and Demerara Storage Company, Limited, pay proportion rates and taxes. Enough land to be given Percy C. Wight behind front building with right to Pereira's erecting a stelling if they desire; or 2. Demerara Storage Company, Limited, to transport to Demerara Wharf and Storage Company, Limited, North half lot 13, (B?), South Cummingsburg without mudflat and bond and pay Wight \$5,000 in cash; or 3. Pay Wight \$15,000."

After Mr. Dias had stated the above alternative offers Mr. Carl Pereira, Chairman of the plaintiff company, told the meeting that the proposals were to settle two contentions put forward by Mr. Wight as chairman of the defendant company: (1) That the mortgage held by the late Mr. J. N. Pereira on the defendant company's premises was void, as Mr. Pereira carried on the business of money-lending without a licence. (2) that the late Mr. Pereira was in control of all the business of the defendant company through his agent Mr. Cyril Pereira, as trustee for the defendant company since his appointment on the Board of the defendant company, and the defendant company was calling on the estate of J. N. Pereira, deceased, to render accounts for this period. The minutes record that after discussion the shareholders unanimously rejected the proposals.

On the 13th May, 1941, the plaintiff company filed their writ in the present action.

On the 14th August, 1941, as appears from the minutes of a directors' meeting of the plaintiff company, Ex. J., again, Mr. John de Freitas became a shareholder and was elected a director and chairman of the company. On the 12th September following, further negotiations took place between Mr. Percy C. Wight and Mr. John de Freitas acting for their respective companies, and they visited the *locus in quo* together with Mr. Barcellos then secretary of the plaintiff company. These negotiations were abortive.

During the course of the trial counsel for the defendants tendered through Mr. Earl of the Deeds Registry, whom he was cross-examining, a list compiled from the records of mortgages in the Deeds Registry, which list disclosed that the late Mr. J. N. Pereira during the period 1910 to 1939, both years inclusive, had taken 61 mortgages in his favour. Counsel also put in evidence a certified copy of the Inventory of Property filed amongst the Estate Duty papers of the deceased, showing that the deceased had also taken transfer of one other mortgage from its original mortgagee. Evidence was further elicited from the plaintiffs' witnesses of the deceased having made three loans on promissory notes in his favour on various occasions. Counsel for the defendant company asked me to examine the evidence of the above loans, and submitted (a) that

such examination would disclose that the deceased was an unregistered money-lender at the dates when he made the loans to the defendant company on the two mortgages aforementioned; (b) that the said two loan transactions with the defendant company were illegal and void, and that consequently the mortgages recording them were null and void; (c) that the Original Agreement, having amongst its objects the repayment of such mortgage debts, was one having for its object an illegal purpose and was void, and that in consequence no action for specific performance thereof would lie.

Counsel for the plaintiffs in reply submitted that it was not enough for the defendants merely to produce a list of mortgages and ask the Court to draw the inference of money-lending from that, that the burden was upon the defendants to offer evidence of the circumstances of each loan or of the majority of loans and then ask the Court to draw its inferences from such circumstances: that the evidence presently before the Court did not establish “money-lending,” that a mortgage in British Guiana was a judgment and its effect could not be avoided by the defendants in the manner they now sought to do; lastly, that even in the case of money-lenders it was quite legal for any of their debtors to authorise a third party to make payment on his behalf and such authority, if obeyed, created a valid obligation upon the debtor to repay the party authorised or give him such other satisfaction as might have been agreed upon between them.

I now consider the above submissions in the light of the evidence adduced and of the authorities I believe to be pertinent thereto.

By section 2 of the Money-Lenders Ordinance (16 of 1907), cap. 68, a “money-lender” in the Ordinance “includes every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business.” Then follows a proviso that the term does not include certain persons belonging to five designated classes, with which this enquiry is not concerned. The substantive part of the above enactment is identical in its language with section 6 of the English Money-lenders Act, 1900. Section 4 (1) of cap. 68 further requires a money-lender to register himself as such in accordance with regulations under the Ordinance, and section 4 (2) makes it an offence punishable on summary conviction if the “money-lender” fail to register or if he carry on business elsewhere than at his registered address—again terms similar to sections 2 (1) and 2 (2) of the Act of 1900. It has been held in England that the effect of the above sections of the Act is that the whole loan transaction by an unregistered moneylender is illegal and void, and no rights of any kind arise therefrom in his favour: *vide Bonnard v. Dott* (1906) 1 Ch. 744 and *Cohen v. Lester, Ltd.*, (1938) 4 All. E.R. 188. That principle

DEM. STORAGE Co v. DEM. WHARF & STORAGE Co.

must be applied to acts done in the Colony in contravention of sections 2 and 4 of cap. 68.

Now the evidence of Mr. Cyril Pereira which stands uncontradicted, is to the effect that his father had never advertised or announced himself or held himself out in any way as carrying on the business of a money-lender, or as being ready to lend money to anyone. This leaves the sole question: "Was his business that of money-lending?"—bearing in mind that a man may have more than one business and that even a legitimate business may be a cloak for money-lending, *vide Edgelow v. McElwee* (1918) 118 L.T. 177. The several different criteria of "money-lending" given by McCordie, J., in his judgment in that case must be noted: "A man does not become a money-lender by reason of occasional loans to relations, friends or acquaintances, whether interest be charged or not. Charity and kindness are not the basis of usury. Nor does a man become a money-lender merely because he may upon one or several isolated occasions lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of money-lending and the word "business" imports the notion of system, repetition and continuity . . . The line of demarcation cannot be defined with closeness, or indicated with any specific formula. Each case must depend upon its own peculiar features. It is ever a question of degree. But if it appears that the transactions are sufficiently numerous to require the inference that a system and business of money-lending is carried on, then the requirements of the definition . . . are fulfilled." But in the present case sixty-one of the sixty-four loans proved to have been made by the late Mr. Pereira over a period of thirty years, are loans on mortgage of immovable property, and one has also in respect of these sixty-one to remember that such mortgages may well be investments. They are capable of being so regarded, and are authorised as such by the English Trustee Act of 1893, (56 and 57 Vict., cap. 53), the whole of which Act has been made part of the law of the Colony by section 13 of the Civil Law of British Guiana Ordinance, cap. 7. Even before the passing of that Ordinance the deSaffon Trust Ordinance, 1904, cap. 246, had recognised first mortgages (within half of the appraised value) of immovable property as trust investments. Can one say, then, having regard to the nature and number of the transactions, and the circumstances surrounding them, whereby Mr. Pereira utilised part of the accumulated profits from his company of J. N. Pereira, Ltd., in giving in his own name loans on mortgage, that his method of utilization constituted a business in itself and that that business was the business of money-lending?

The evidence pertinent to this enquiry and available to the Court consisted of the oral evidence of Mr. Cyril Pereira, Mr. Anthony Barcellos and Mr. Carlos Gomes, solicitor, and the document Exhibit X, a list of mortgages granted to Mr. Pereira,

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

which list was tendered through Mr. Earl. The combined effect of the oral evidence is as follows: Outside of the business of J. N. Pereira, Ltd., Mr. Pereira had no other ostensible business. He was a very wealthy man as our standards go, and at his death his estate was worth over \$600,000. Save for three promissory notes and the advances in 1932 to the defendant company as hereinbefore mentioned, according to the evidence every loan he ever made was on the security of a mortgage of immovable property, his money being paid over only on the passing of the mortgage. He was accustomed to invest his accumulated profits from his business of J. N. Pereira, Ltd., in Government bonds, in Town Council bonds, in mortgages as aforementioned and in special deposits at the local Banks, these last bearing interest at 1½ per cent., and later at 1 per cent., per annum. There is no evidence of his having bonds at his death but he had \$18,187 in local scrip, \$371,000 lying on special deposit at the banks, and \$179,000 owing to him as principal and interest on about eighteen mortgages of immovable property. All the mortgages taken by him bore interest at rates varying between 5 per cent., and 7 per cent, as compared with the current rates of 6 per cent., to 8 per cent., on such mortgages taken by the local investing companies. All his mortgages were on the five-year term usual with investing companies; he never took short term mortgages. Nearly all his mortgages were for large amounts. He was a difficult person to get a mortgage from, not lending to any, and every-body, and often refusing perfectly good security. In fact, all his mortgages were taken from friends, customers of his store of J. N. Pereira, Ltd., or business acquaintances with whose business ability, as his son puts it, he was acquainted. After losing to the extent of \$8,000 odd on a mortgage by Plantation Cove and John, and after it became evident that there would be a loss also in respect of the mortgages by the defendant company, he became less inclined to take mortgages, and eventually stopped taking them, refusing applications in 1937, 1938, and 1939.

The list, Exhibit X, discloses that during the period 1910 to 1939, both years inclusive, the last thirty years of his life, the late Mr. Pereira took sixty-one mortgages, with an average loan \$11,523.77 per mortgage. If three promissory notes be added to make sixty-four loans, one gets an average of 2.13 loans per annum over the period of thirty years, which hardly looks like the business of money-lending. Again, one finds that no system seems to have been followed, for in some years he made no loans and took no mortgages, while in others he took several. The sixty-one mortgages were granted by forty-two mortgagors, one mortgagor borrowing on no less than five several mortgages. As to the amounts loaned, only two mortgages are for less than \$1,000, and only two for as little as \$1,000 while at the other end of the scale, there are two for \$45,000, one for \$58,000, and two for \$60,000. Thirty-nine of the mortgages are for

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

\$5,000 or over, substantial sums. Nearly all the persons on the list are well known in the commercial community, and fifteen of them (nearly all those granting small mortgages), were customers of J. N. Pereira, Ltd., as appears from their accounts in the ledger of that company, Exhibit N. This rather tends to bring these fifteen within the class of borrowers excepted by section 2 (*d*) from the definition in chap. 68. Added to all of the above is the fact of their being no evidence of the deceased ever having sought mortgage business or offered loans.

Having considered all the above facts *pro et contra*, I can find no system or repetition or continuity in the deceased's conduct, nor even any desire on his part to lend money on interest such as I would expect of a person engaged in the business of money-lending. The numerical strength of the list is only acquired by reason of the number of years it covers. The idea of money-lending becomes still more attenuated when the defendant's mortgages are examined; for their first mortgage is only the thirteenth in seven years and the only loan made in 1917, while there is a total lack of evidence of the motives actuating Mr. Pereira to make a further loan to the defendants in 1926. Lastly, there is no evidence of Mr. Pereira ever having pressed for repayment of the principal of any of his mortgages, rather his course of dealing with the defendant company indicates that a mortgage might go on for ever so long as the interest which was not harsh or excessive were paid with reasonable regularity. All the above considerations force me to the conclusion that Mr. Pereira, far from being engaged in the business of turning-over his surplus money on loans with a view to immediate gain, was very effectively withdrawing his accumulated profits, and only his profits, from active circulation and placing them on mortgage to be regarded thereafter as invested capital only reproducing itself by the safe but slow process of bearing interest. For these reasons I am unable to find that he was carrying on the business of money-lending either at the respective dates of the mortgages by the defendant company, or at any other time during the last thirty years of his life. I now deal with the question raised on the submissions of both counsel: what is the status of a mortgage of immovable property in British Guiana? While the mortgage exists can the mortgagor resist its legal consequences by impeaching the original transactions on which it was based?

A special conventional mortgage of immovable property in this Colony, like a similar mortgage in Holland in the days of the Republic, and before that had always to be passed before a competent Court. The earliest statutory enactment that I have been able to find relating to the procedure to be followed, is contained in the Regulations for the Administration of Justice... in the Rivers Essequibo and Demerara, 1774 (*vide* Jabez Henry's translation Appendix B of the Second Report of the Commission

into the Administration of Justice in the West Indian and South American Colonies, 1828). Section IV reads:—"Also before the Commissioners of the Court all deeds of mortgage shall be passed, and all voluntary condemnations, with all contracts in which the parties shall suffer voluntary condemnations, unless the Commissioners perceive any difficulty in the case, and then it shall be brought to a hearing before the whole Court, at their next sitting." These words lead me to the opinion that even at that early date the passing of a mortgage or of a contract of the nature mentioned was looked upon as a judicial and not a ministerial act. These powers of the Court to pass mortgages and include voluntary condemnations therein where the parties so wished were provided for again in the Manner of Proceeding Ordinance, No. 26 of 1895, section 213 (McDermot's edition. In the Carrington edition of 1855, the Ordinance is erroneously numbered 5 of 1855, and the section is 220). Although Ordinance 26 of 1855 has long ago been superseded by other Ordinances, and changes in procedure have been legislated, the powers afore-mentioned have never changed their character and even the latest amending enactment, Ordinance 2 of 1931, whereby the Registrar was enabled to exercise the same powers as a judge to pass transports, mortgages, leases, etc., specifically recognised that it was clothing him with a jurisdiction, and once more gave to persons who might be aggrieved by a refusal to pass any such deed, a right of appeal.

[Both the mortgages by the defendants in favour of the late Mr. Pereira contain a voluntary condemnation. Commenting on a similar mortgage Atkinson, Acting C.J., delivering the judgment of the Full Court in *B.G. Electric Lighting and Power Co., Ltd., v. Conrad et al* (1897) L.R.B.G. 115, 117, said:—"In this document there are two distinct parts, the mortgage and the willing and voluntary condemnation as it is called. The latter part by its very terms is a sentence The mortgage might have been passed without the willing and voluntary condemnation in which case as stated by *van der Linden* the creditor would have to sue the debtor for payment But where there is the sentence of willing and voluntary condemnation the creditor lays that sentence before the Court and applies to the Court in the prescribed form for leave to proceed to execution." His Honour further said (p. 120): "The sentence remains on the records of the Court It has never been revoked or rescinded or set aside or annulled. The debt dealt with by it is therefore *res judicata*." The above judgment was followed in *re Demerara Turf Club, Ltd., B.G. Mutual Fire Insurance Co., Ltd. v. The Demerara Turf Club, Ltd.* (1915) L.R.B.G. 191; in *Tinne et al v. Tebbutt* (1921) L.R.B.G., 84, and in *Sewdin v. Ferreira* (1928) L.R.B.G., 40. So far as I am aware its correctness has never been questioned. The principle enunciated in the last sentences quoted, corresponds with the principle

DEM. STORAGE Co. v. DEM. WHARF & STORAGE Co.

of English law applicable to judgments by consent, (*vide Kinch v. Walcott* (1929) A.C. 482). In Roman-Dutch law a sentence of willing and voluntary condemnation could only be set aside for fraud, according to *van Leeuwen*. Under the modern English practice adopted in this Colony, the principles governing the setting aside of such a sentence or judgment are wider in their scope, and such judgment can now be set aside on any ground on which an agreement in like terms could be set aside, but the setting aside necessitates a fresh action for that purpose, *vide Ainsworth v. Wilding* (1896) 1 Ch. 673, and the judgment is valid and binding until so set aside, *Kinch v. Walcott*, *supra*. In *Wilding v. Sanderson*. (1897) 66 L.J. Ch. Byrne, J. (at p. 469) said that a party bound by a consent order “must when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose.” The defendants then, being under a duty imposed by their mortgage judgments to repay the executors of the late Mr. J. N. Pereira, and having founded a contract with the plaintiff company with the objects and on the consideration of the plaintiff company fulfilling that presently valid obligation on their behalf and making a further valid payment to Mr. Percy C. Wight also on their behalf, are not in a position as against the plaintiff to impeach the legality of the objects or the validity of the consideration, which has already been given. On this latter ground, therefore, the defendants would also fail, even if they had been successful in proving that the late Mr. Pereira was carrying on the business of money-lending at the respective dates of the mortgages by them.

In view of my finding as to the nature of the mortgages by the defendants, the third submission of their counsel does not engage my attention.

The plaintiffs having fulfilled their part of the agreements, and the defendants not having succeeded in their defence whereby they sought to avoid those agreements the plaintiffs are entitled to the decrees prayed. There will be judgment in favour of the plaintiffs for specific performance of the contract of the 8th April, 1940, with the costs of this action; and the consequential order will provide (a) that the defendant company do within 14 days from the date of the entering of the order take all necessary steps to re-advertise transport, and do within 8 days of the last advertisement cause transport to be passed to the plaintiff company of the immovable property mentioned in the said agreement; (b) that if the defendant company fail to take any of the steps aforesaid within the periods respectively prescribed, the Registrar be empowered to take all such steps and perform all necessary acts in pursuance of the objects aforesaid in the place and stead of the defendant company or its officers or any of them; (c) that the defendant company do deliver, transfer and make over to the plaintiff company all other property, including their insurance policies if the insuring companies permit, as has

DEM. STORAGE Co., v. DEM. WHARF & STORAGE Co.

not yet been delivered, transferred and made over to the plaintiff company; (d) that it be declared that the plaintiff company is entitled to all cash profits falling due and payable after the 3rd June, 1940, in respect of the policies of insurance of the defendant company, and that the defendant company, its officers, servants and agents be restrained from drawing or receiving or in any other wise interfering with the said profits or any part thereof, (e) that the defendants bear all costs and expenses entailed by the carrying out of the orders aforesaid, (f) that the defendant company pay to the plaintiff company their costs of this action to be taxed.

Judgment for Plaintiffs.

Solicitors: *J. Edward de Freitas; F. Dias. O.B.E.*

REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1942

AND IN

THE WEST INDIAN COURT OF APPEAL

[1942]

EDITED BY

E. MORTIMER DUKE, LL.B., (Lond.),
Barrister-at-law, Middle Temple; Acting Puisne Judge,
British Guiana.

GEORGETOWN, DEMERARA:

“THE ARGOSY” COMPANY, LIMITED, PRINTERS TO THE GOVERNMENT OF
BRITISH GUIANA.

1943.

JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1942.

JOHN VERITY (<i>a</i>) (<i>b</i>)	...Chief Justice.
WILMOT THEODORE STUART FRETZ	...First Puisne Judge. Acted as Chief Justice from January 1 to February 24. On leave from July 1 to De- cember 31.
WILLIAM HEMMING STUART	...Second Puisne Judge. On leave for whole year.
JOSEPH ALEXANDER LUCKHOO, K.C.	...Acting Puisne Judge. (From January 1 to April 30).
SIDNEY LYONS VAN BATENBURG STAF FORD, K. C.	...Acting Puisne Judge, (From January 1 to February 20).
EDGAR MORTIMER DUKE	...Acting Puisne Judge. (From May 1 to December 31).

(*a*) Knight Bachelor, January 1, 1943.

(*b*) Appointed from October 11, 1941. Assumed duty on February 25, 1942.

WEST INDIAN COURT OF APPEAL.

As, at present, no reports of decisions in the West Indian Court of Appeal are published separately, the decisions in that Court are included in the British Guiana Law Reports.

METHOD OF CITATION.

These Reports will be cited as (1942) L.R.B.G.

TABLE OF CASES REPORTED.

	PAGE.
A.	
Ali v. Sam	156
Antar v. Valverde	442
Argosy Co., Ltd., Parkes v	143
B.	
Bagado v. Welcome	293
Barrak-Odi v. Barrak-Odi	121
Bedford v. Daily Chronicle, Ltd. <i>et al.</i>	118
B.C. Nurses Assn., Rose v	7
Bhagwandin v. Fernandes	402
Blackett v. Edghill.....	338
Blackett v. Jeboo	392
Blackett v. Pollard & Hinds	62
Blenman, Nascimento v	205
Boodhoo & Tetry v. Mohamed Din	74
Boodhoo & Tetry, Mohamed Din v	425
Booker Bros. McConnell & Co., Ltd. v. Chung Tiam Fook	246
Booker Bros. McConnell & Co., Ltd. v. L.Slater.....	354
Branker v. Branker	365
C.	
Calica, Hardyah v	140
Carvalho v. "Prinz Andre"	1
Chapman, Rahaman <i>et al</i> v	397
Chin Shing <i>et al</i> v. Choo Kang	76
Choo Kang, Chin Shing <i>et al</i> v	76
Chung Tiam Fook, Booker Bros. McConnell & Co., Ltd. v	246
Chung Tiam Fook v. Hussain & Choong	296
Chung Tiam Fook v. Hussain & Choong	404
Chung Tiam Fook, Hussain & Choong v	172
Chung Tiam Fook, J. P. Santos & Co., Ltd. v	228
Chung Tiam Fook v. Slater	415

Chung Tiam Fook, Sookea v	163
Clarke, Waldron v	111
Correia v. Jacobs	342

D.

Daily Chronicle, Ltd. <i>et al</i> , Bedford v	118
D'Andrade, Derek v	319
da Silva v. Sukhraj	43
da Silva v. Sukhraj	158
Dem., Co., Ltd. v. Douglas.....	426
Dem., Storage Co., Ltd. v. Dem., Wharf & Storage Co., Ltd.....	82
Dem., Storage Co., Ltd. v. Dem., Wharf & storage Co., Ltd	306
Dem., Wharf & Storage Co., Ltd., Dem., Storage Co., Ltd. v.....	82
Dem., Wharf & Storage Co., Ltd., Dem., Storage Co., Ltd. v.....	306
Derek v. D'Andrade	319
de Souza v. Ewing.....	257
Deygoo, Glasgow v	78
Dhunawo, deceased, <i>Re</i>	273
Dias, Munroe v	428
Doobay v. Moulai.....	411
Dookwah, Martin v	303
Douglas, Dem., Co., Ltd. v.....	426

E.

Edghill, Blackett v.....	338
Edun <i>et al</i> , Sewdin & Barron v	400
Ewing, de Souza v.....	257

F.

Fausett & Ross, Mark v.....	320
Fernandes, Bhagwandin v	402
Fernandes, Heirs of de Freitas, Ltd. v	31
Ferroze v. James.....	72
Fisher v. Fraser.....	114
Forbes, Harris v.....	106
Fraser, Fisher v.....	114

G.

Garnett & Co. Ltd. v. Slater	354
Gaurisankar & Lachu, Sooklall v.	56
Glasgow v. Deygoo.....	78
Graham v. The King.....	430

H.

Haniff, <i>ex parte</i>	273
Hardyah v. Calica.....	140
Harris v. Forbes.....	106
Heirs of De Freitas, Ltd. v. Fernandes	31
Ho & Luck v. Octive.....	384
Hookumchand v. Hookumchand	134
Hussain & Choong v. Chung Tiam Fook.....	172
Hussain & Choong, Chung Tiam Fook v	296
Hussain & Choong, Chung Tiam Fook v	404

J.

Jacobs, Correia v	342
James, Ferroze v.....	72
Jaundoo, Singh v	221
Jeboo, Blackett v	392

K

King (The), Graham v	430
Kingston, Kissoon v.....	253
Kissoon v. Kingston.....	253

L.

Langford v. Langford.....	194
Leandro, Wong v.....	217
Lovell v. Marcus	166
Luke v. Luke	198
Luke v. Luke	280

M.

Maharaj <i>et al</i> , Mahastesingh v	435
Mahastesingh v. Maharaj <i>et al</i>	435

Marcus, Lovell v	166
Mark v. Fausett & Ross.....	320
Martin v. Dookwah	303
Mittelholzer v. Mittelholzer	138
Mohamed Din v. Boodhoo & Tetry	425
Mohamed Din, Boodhoo & Tetry v	74
Motor Union Insurance Co. Ltd., Rahaman v	125
Moulai, Doobay v.....	411
Mourat v. Tahal.....	215
Munroe v. Dias.....	428

N.

Nascimento v. Blenman	205
-----------------------------	-----

O.

Octive, Ho & Luck v	384
---------------------------	-----

P.

Parkes v. Argosy Co., Ltd. <i>et al</i>	143
Pereira v. Weekes.....	388
Plantation Maryville Ests., Ltd., <i>Re</i>	226
Pollard & Hind's, Blackett v	62
"Prinz Andre," Carvalho v	1

R.

Rahaman <i>et al</i> v. Chapman	397
Rahaman v. Motor Union Insurance Co., Ltd	125
Ramdeya & Sarju, Surejpaul v.....	309
Resaul Maraj & Co., Ltd. v. Slater.....	362
Roberts v. Roberts.....	289
Rose v. B.G. Nurses Association	7

S.

Sam, Ali v	156
Santos & Co., Ltd. (J.P.) v. Chung Tiam Fook	228
Santos & Co., Ltd. (J.P.) v. Slater	359
Sattaur v. Schroeder	299
Schroeder, Sattaur v	299

Sewdin & Barron v. Edun <i>et al</i>	400
Singh v. Jaundoo	221
Slater, Booker Bros. McConnell & Co., Ltd. v	354
Slater, Chung Tiam Fook v	415
Slater, Garnett & Co. Ltd. v	354
Slater, Resaul Maraj & Co., Ltd. v	362
Slater, J. P. Santos, & Co., Ltd. v	359
Slater v. Wieting & Richter, Ltd	420
Slater, Wieting & Richter, Ltd. v	354
Sookea v. Chung Tiam Fook.....	163
Sooklall v. Gaurisankar & Lachu	56
Sooknannan v. Sunichery	260
Sukhraj, da Silva v	158
Sukhraj, da Silva v	43
Sunichery, Sooknannan v	260
Surejpaul v. Ramdeya & Sarju	309

T.

Tahal, Mourat v	215
-----------------------	-----

V

Valverde, Antar v	442
-------------------------	-----

W.

Waldron v. Clarke	111
Weekes, Pereira v	388
Welcome, Bagado v	293
Wieting & Richter, Ltd. v. Slater	354
Wieting & Richter, Ltd., Slater v	420
Wolfe, Young v	337
Wong v. Leandro.....	217

Y.

Young v. Wolfe.....	337
---------------------	-----